MOOKKIAH

v.

STATE, REP. BY THE INSPECTOR OF POLICE, TAMIL NADU

(Criminal Appeal No. 2085 of 2008)

JANUARY 04, 2013

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Penal Code, 1860 - s. 302/34 - Prosecution under - Acquittal by trial court - Conviction by High Court - Held: The evidence of the eye-witnesses and medical evidence support the prosecution case - There was no delay in lodging FIR or dispatching the same to Magistrate Court - FSL report not doubtful - High Court rightly reversed the order of acquittal and convicted the accused.

Code of Criminal Procedure, 1973 - s. 378 - Appeal against acquittal - Interference with - Power of High Court - Scope of - Held: High Court, as an appellate court, even while dealing with an appeal against acquittal, entitled to re-appreciate the entire evidence - Appeal.

Witness - Related witness - Evidentiary value - Held: Merely because a witness is related, his evidence cannot be eschewed - However, it is duty of the court to analyze the same cautiously and scrutinize it with other corroborative evidence.

The appellants - A1 and A2 were prosecuted for having caused death of one person. The prosecution case was that A-2 harboured enemity against the deceased on account that the deceased had solicited his wife to have illicit intercourse with him. A-1 also had previous enemity with the deceased. Both the accused, in furtherance of their common intention to kill the deceased, attacked him and the deceased died on the

spot. PWs 1, 4 and 5 were the eye-witnesses to the incident. PW-1 lodged the complaint. Trial Court acquitted both the accused. High Court reversed the acquittal order and convicted them u/s. 302/34 IPC.

Dismissing the appeal, the Court

HELD: 1.1 The trial court failed to take note of relevant aspects and committed a grave error in rejecting the reliable materials placed by the prosecution. The High Court as appellate court, analyzed the evidence as provided in s. 378 Cr.P.C. and rightly reversed the order of acquittal and found A-1 and A-2 guilty of offence u/s. 302 r/w. s. 34 IPC for murdering the deceased in pursuance of their common intention. [Para 20] [898-A-C]

1.2 There is no reason to disbelieve the version of PW1-complainant, who was the eye-witness. The trial court rejected his evidence because of his relationship. Merely because a witness is related, his evidence cannot be eschewed. On the other hand, it is the duty of the court to analyze his evidence cautiously and scrutinize the same with other corroborative evidence. The High Court has rightly relied on his evidence. [Para 12] [893-B-C]

1.3 Though PW-4 turned hostile at one stage, there is no reason to reject his entire evidence as unacceptable. It was he who accompanied PW-1 and noticed that the accused were attacking the deceased by use of bill hooks. Even though he did not support the prosecution case in its entirety, his version strengthens the evidence of PW-1 and PW-5. [Para 13] [893-D-E]

1.4 The evidence of PW-5 corroborates the statement made by PW-1 in all aspects. It shows that PWs 1, 4 and 5 noticed the accused causing fatal injuries on the deceased by use of aruvals (billhooks). It also shows that

all of them went to the Police Station and PW-1 made a complaint and other two attested the contents thereof. The High Court has rightly relied on the evidence of PWs 1 and 5. [Para 15] [894-D-E]

1.5 The injuries observed by the doctor (PW2), who conducted post-mortem of the body of the deceased, tally with the narration given by PW-1 in the complaint as well as in his evidence and the evidence of PW-5. The doctor's opinion that the death of the deceased might have occurred 28-30 hours prior to the post mortem also tallies with the prosecution version. The evidence of PWs 1 and 5 coupled with the version in the complaint (Exh.P-1) would state that the occurrence took place at 5.30 a.m. as such, the timings mentioned by the doctor, and other witnesses tally with the narration. [Para 17] [896-F-H]

1.6 As regards the plea of dealy in filing the FIR, on perusal of the details placed by the prosecution, the High Court rightly observed that it cannot be presumed that there was inordinate delay in reaching the FIR to the Magistrate Court. Also in view of the version of the Police Constable (PW-9), there is no delay at all in either registering the FIR or dispatching the same to the Magistrate Court. [Para 18] [897-B-C, E-F]

1.7 In absence of blood stains on the M.Os I, II and III, namely, aruvals (bill hooks) and dress, in the FSL report, the same cannot be doubted when they were duly recovered in the presence of witnesses. It was explained that since these objects were lying on the earth and by efflux of time, no blood was found by the laboratory. [Para 19] [897-G-H]

2. The High Court, as the first appellate court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be, re-appreciate the entire evidence, though while

choosing to interfere, only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because one was against conviction or the other against an acquittal. [Para 4] [887-F-H; 888-A]

State of Rajasthan vs. Sohan Lal and Ors. **(2004) 5 SCC 573: 2004 (1) Suppl. SCR 480;** *State of Madhya Pradesh vs. Ramesh and Anr.* **(2011) 4 SCC 786: 2011 (5) SCR 1;** *Mrinal Das and Ors. vs. State of Tripura* **(2011) 9 SCC 479: 2011 (14) SCR 411;** *Rohtash vs. Stateof Haryana* **(2012) 6 SCC 589: 2012 (6) SCR 62 ;** *Murugesan and Ors. vs. State Through Inspector of Police* **2012 (10) SCC 383;** *Sheo Swarup vs. King Emperor* **AIR 1934 PC 227 (2);** *Chandrappa and Ors. vs. State of Karnataka* **(2007) 4 SCC 415: 2007 (2) SCR 630 - relied on.**

Case Law Reference:

2004 (1) Suppl. SCR 480	**Relied on**	**Para 4**
2011 (5) SCR 1	**Relied on**	**Para 5**
2011 (14) SCR 411	**Relied on**	**Para 6**
2012 (6) SCR 62	**Relied on**	**Para 7**
2012 (10) SCC 383	**Relied on**	**Para 8**
AIR 1934 PC 227 (2)	**Relied on**	**Para 8**
2007 (2) SCR 630	**Relied on**	**Para 8**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2085 of 2008.

From the Judgment & Order dated 25.01.2007 of the High Court of Madras, Madurai Bench in Criminal Appeal No. 1137 of 1998.

S. Nanda Kumar, R. Satish Kumar, Parivesh Singh, Anjali Chauhan, V.N. Raghupathy for the Appellants.

S. Guru Krishna Kumar, AAG State of TN, M. Yogesh Kanna, A. Prasanna Venkat for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal has been preferred against the final judgment and order dated 25.01.2007 passed by the Madurai Bench of the Madras High Court in Criminal Appeal No. 1137 of 1998 whereby the Division Bench of the High Court allowed the appeal filed by the State and set aside the order of acquittal of appellants herein dated 24.08.1998 passed by the IInd Additional Sessions Court, Tirunelveli in Sessions Case No. 264 of 1996.

2. The facts and circumstances giving rise to this appeal are as under:

(a) Uluppadi Parai is a small village in Ambasamudhram Taluk within Kallidaikurichi Police Station. The appellants herein (A-1) and (A-2) and the deceased were all the residents of the same hamlet situated in the aforesaid village. The residents of that hamlet had a nearby place as open air latrine which was situated near a water body.

(b) The deceased Ramaiah, in this case, was the son-in-law of Ramaiah (PW-1), who also had the same name as that of the deceased. Parvathi-daughter of PW-1, was married to the deceased-Ramaiah. 25 days prior to the incident, when she was staying at the residence of PW-1, the deceased-Ramaiah solicited the wife of Subbiah (A-2) to have illicit intercourse with him and A-2, after coming to know of such fact, harboured enmity in his heart against the deceased. The deceased was also having previous enmity with Mookkiah (A-1), who was residing in the same village.

(c) On 12.05.1992, at about 5.30 a.m., when the deceased Ramaiah went to the said open air latrine to attend to the calls of the nature, A-1 and A-2, in furtherance of their common intention to murder Ramaiah, dealt blows on him using aruval (billhooks), thereby killed him on the spot itself and fled away from the scene. However, on the very same day, at about 05:30 hours, when Ramaiah (PW-1), the father-in-law of the deceased, Sudalaimuthu (PW-5) and Shanmugam (PW-4) were returning after pouring water into their field, they heard the cries of Ramaiah, son-in-law of PW-1, shouting "Don't attack, Don't attack". They immediately rushed to the spot and saw that the accused were attacking the deceased-Ramaiah on his head, neck, shoulder and back with their aruval and on seeing them, they fled away. Ramaiah (PW-1) and Sudalaimuthu (PW-5) both witnessed the ghastly crime and despite they shouted at the assailants not to perpetrate the gruesome act, the accused accomplished their task of murdering the accused.

(d) Thereupon, PW-1, PW-4, PW-5 and one Kanaka Raj, went to the Kallidaikurichi P.S. and PW-1 lodged a complaint against both the accused persons which was registered as Crime No. 173 of 1992 under Section 302 of the Indian Penal Code, 1860 (in short 'IPC').

(e) After investigation, both the accused persons were arrested and charges were framed against them under Section 302 read with Section 34 of IPC and the case was committed to the Court of Session which was numbered as Sessions Case No. 264 of 1996.

(f) By order dated 24.08.1998, the trial Court, after giving the benefit of doubt, acquitted both the accused of the offences with which they were charged. Being aggrieved by the judgment of acquittal, the State preferred an appeal being Criminal Appeal No. 1137 of 1998 before the Madurai Bench of the Madras High Court.

(g) The High Court, after examining all the materials, by

order dated 25.01.2007, reversed the judgment of acquittal and found A-1 and A-2 guilty of the offence under Section 302 read with Section 34 of IPC and sentenced them to suffer rigorous imprisonment (RI) for life alongwith a fine of Rs. 5,000/- each, in default, to further undergo RI for 6 months.

(h) Being aggrieved by the impugned judgment of the High Court, A-1 and A-2 (appellants herein) preferred an appeal before this Court under Article 136 of the Constitution of India.

3. Heard Mr. S. Nanda Kumar, learned counsel for the appellants-accused and Mr. S. Gurukrishna Kumar, learned senior counsel and AAG for the respondent-State.

Interference in Appeal against Acquittal:

4. It is not in dispute that the trial Court, on appreciation of oral and documentary evidence led in by the prosecution and defence, acquitted the accused in respect of the charges leveled against them. On appeal by the State, the High Court, by impugned order, reversed the said decision and convicted the accused under Section 302 read with Section 34 of IPC and awarded RI for life. Since counsel for the appellants very much emphasized that the High Court has exceeded its jurisdiction in upsetting the order of acquittal into conviction, let us analyze the scope and power of the High Court in an appeal filed against the order of acquittal This Court in a series of decisions has repeatedly laid down that as the first appellate court the High Court, even while dealing with an appeal against acquittal, was also entitled, and obliged as well, to scan through and if need be re-appreciate the entire evidence, though while choosing to interfere only the court should find an absolute assurance of the guilt on the basis of the evidence on record and not merely because the High Court could take one more possible or a different view only. Except the above, where the matter of the extent and depth of consideration of the appeal is concerned, no distinctions or differences in approach are envisaged in dealing with an appeal as such merely because

one was against conviction or the other against an acquittal. [Vide *State of Rajasthan vs. Sohan Lal and Others,* (2004) 5 SCC 573]

5. In *State of Madhya Pradesh vs. Ramesh and Another,* (2011) 4 SCC 786, this Court, while considering the scope and interference in appeal against acquittal held:

> "15. We are fully alive of the fact that we are dealing with an appeal against acquittal and in the absence of perversity in the said judgment and order, interference by this Court exercising its extraordinary jurisdiction, is not warranted. It is settled proposition of law that the appellate court being the final court of fact is fully competent to reappreciate, reconsider and review the evidence and take its own decision. Law does not prescribe any limitation, restriction or condition on exercise of such power and the appellate court is free to arrive at its own conclusion keeping in mind that acquittal provides for presumption in favour of the accused. The presumption of innocence is available to the person and in criminal jurisprudence every person is presumed to be innocent unless he is proved guilty by the competent court and there can be no quarrel to the said legal proposition that if two reasonable views are possible on the basis of the evidence on record, the appellate court should not disturb the findings of acquittal."

6. In *Minal Das and Others vs. State of Tripura,* (2011) 9 SCC 479, while reiterating the very same position, one of us, P. Sathasivam, J. held:

> "14. There is no limitation on the part of the appellate court to review the evidence upon which the order of acquittal is found and to come to its own conclusion. The appellate court can also review the conclusion arrived at by the trial court with respect to both facts and law. While dealing with the appeal against acquittal preferred by the State, it is the duty of the appellate court to marshal the entire evidence

on record and only by giving cogent and adequate reasons set aside the judgment of acquittal. An order of acquittal is to be interfered with only when there are "compelling and substantial reasons" for doing so. If the order is "clearly unreasonable", it is a compelling reason for interference. When the trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declaration/report of ballistic experts, etc. the appellate court is competent to reverse the decision of the trial court depending on the materials placed."

7. In *Rohtash vs. State of Haryana,* (2012) 6 SCC 589, this Court held:

"27. The High Court interfered with the order of acquittal recorded by the trial court. The law of interfering with the judgment of acquittal is well settled. It is to the effect that only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of the acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial court's acquittal bolsters the presumption of innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference. (Vide *State of Rajasthan v. Talevar,* (2011) 11 SCC 666 and *Govindaraju v. State,* (2012) 4 SCC 722)"

8. In a recent decision in *Murugesan & Ors. vs. State Through Inspector of Police,* 2012 (10) SCC 383, one of us Ranjan Gogoi, J. elaborately considered the broad principles of law governing the power of the High Court under Section 378 of the Code of Criminal Procedure while hearing the appeal against an order of acquittal passed by the trial Judge. After adverting to the principles of law laid down in *Sheo Swarup vs. King Emperor,* AIR 1934 PC 227 (2) and series of subsequent pronouncements in para 21 summarized various principles as

found in para 42 of *Chandrappa & Ors. vs. State of Karnataka,* (2007) 4 SCC 415 as under:

"21. A concise statement of the law on the issue that had emerged after over half a century of evolution since Sheo Swarup1 is to be found in para 42 of the Report in *Chandrappa v. State of Karnataka*. The same may, therefore, be usefully noticed below: (SCC p. 432)

"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, reappreciate 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)

9. With the above principles, let us analyze the reasoning and ultimate conclusion of the High Court in interfering with the order of acquittal and awarding imprisonment for life.

10. Among the materials placed and relied on by the prosecution, complaint Exh.P-1, evidence of PWs 1, 2, 4 and 5 are relevant.

Complaint (Exh.P-1):

11. The complaint Exh. P-1 dated 12.05.1992 was made by Ramaiah (PW-1). In the complaint, it was stated that as his daughter-Parvathi was pregnant, she was brought to his house for delivery and a female child was born to her 25 days back. After delivery, her daughter stayed in his house with her child and his son-in-law Ramaiah stayed with his parents. It was further stated that on 12.05.1992, in the early morning, about 05.30 hours, when he was returning alongwith Sudalaimuthu and Shanmugam after pouring water to the plantation, at that time, they heard the shouting of his son-in-law "Don't kill me". On hearing the same, they rushed towards the spot and noticed that Subbiah (A-2) was having a big aruval (bill hook) in his

hand and Mookkiah (A-1) was holding a small aruval and were attacking on the face and back of Ramaiah-the deceased. When all the three went there shouting "Don't cut, Don't cut", at that time, Subbiah (A-2) and Mookkiah (A-1) ran towards eastern direction. They noticed cut injuries on neck, shoulder back and head of his son-in-law and blood was oozing from the cut wounds. They also noticed that he was dead. Thereafter, all the three persons informed Alagamuthu, father of Ramaiah and the Village Headman about the same and later they along with others saw the dead body of Ramaiah. It was further stated that approx. one week before, Subbiah (A-2) met him and warned that his son-in-law Ramaiah called his (Subbiah's) wife Mukkammal for sex and he threatened that he won't spare him and as per the say, Subbiah and Mookkiah murdered his son-in-law Ramaiah. Thereafter, he along with Sudalaimuthu, Shanmugam, Kanaka Raj came to Kallidaikurichi P.S. at about 08.00 hours and informed the same which was recorded on 12.05.1992 at 08.06 hours and registered as Crime No. 173/1992 under Section 302 IPC. A perusal of Exh. P-1 complaint discloses the full narration of the incident by PW-1 and the persons accompanied him and motive for murdering the deceased.

Evidence of PW-1:

12. Ramaiah (PW-1), who is none else than the father-in-law of the deceased, even in his evidence has narrated before the court what he had stated in the complaint (Exh. P-1). He also identified M.O. I and M.O.II Aruvals (billhooks). He further stated that with M.O. I small aruval, the accused Mookkiah was attacking and M.O. II-big aruval was used by accused Subbiah. He also noticed a pair of chappals (M.O. III), underwear (M.O. IV) near the corpse of his son-in-law. He also stated that it was he who preferred complaint to the police. The same was recorded by the Police Officer and attested by Kanaka Raj, Sudalaimuthu and Shanmugam. He also explained the statement made by Subbiah (A-2) one week prior to the

incident warning him that his son-in-law called his wife for sex and he won't spare him for this. Even in lengthy cross-examination, he withstood his stand and reiterated that he along with two others saw the accused murdering his son-in-law. There is no reason to disbelieve his version. Though the trial Court has rejected his evidence because of his relationship, we are of the view that merely because a witness is related, his evidence cannot be eschewed. On the other hand, it is the duty of the Court to analyze his evidence cautiously and scrutinize the same with other corroborative evidence. The High Court has rightly relied on his evidence and we fully agree with the course adopted by the High Court in relying upon his evidence.

Evidence of PW-4:

13. Though Shanmugam (PW-4) turned hostile at one stage, there is no reason to reject his entire evidence as unacceptable. It was he who accompanied PW-1 at the early hours and noticed that the accused were attacking the deceased by use of bill hooks. Similar to PW-1 and PW-5, PW-4 reiterated that he accompanied them after pouring water to their banana fields. Even though he did not support the prosecution case in its entirety, his version strengthen the evidence of PW-1 and PW-5.

Evidence of PW-5:

14. Sudalaimuthu (PW-5) is a resident of Ulappadi Parai. In his evidence, he has stated that 6 years back, on Chithirai month night, at about 8.00 p.m., when he was proceeding to banana thope to pass water, he noticed Ramaiah (PW-1) and Shanmugam (PW-4) were also passing water. After completing the work at the early morning, roughly 05.30 hours, while returning back along with PW-1 and PW-4, he heard a noise from the Southern side Ridge, namely, "Don't cut, Don't cut". On hearing the sound, all the three rushed to that place and noticed that Subbiah (A-2) and Mookkiah (A-1) were cutting

the deceased Ramaiah. He further stated that on seeing them the accused ran away from the spot and they found that Ramaiah was done to death. They reported the incident to Nattammai Kanak Raj in the village and, thereafter, went to the P.S. around 08.00 o'clock and Ramaiah (PW-1) gave a statement to the police. In the said statement, viz., Exh. P-1, he also signed as a witness. He identified his signature in Ex.P-1. He was also present when the police inspected the scene of occurrence and during the course of inquest. In the cross-examination, he reiterated what he had stated in the Chief-Examination.

15. A perusal of the evidence of PW-5 clearly shows that it corroborates with the statement made by PW-1 in all aspects. It also shows that PWs 1, 4 and 5 went to their banana fields to pour water during the said night and while returning back after finishing the work at around 5.30 a.m., they noticed the accused causing fatal injuries on the deceased by use of aruvals (billhooks). It also shows that all of them went to the P.S. and PW-1 made a complaint and other two attested the contents of Exh.P-1. The High Court has rightly relied on the evidence of PWs 1 and 5 and on going through their entire statement, we fully agree with the course adopted by the High Court.

Evidence of PW-2:

16. Dr. Tmt. Bhanumathi, (PW-2) who conducted post mortem on the dead body of the deceased Ramaiah was examined as PW-2. The post mortem report has been marked as Exh. P-3. In Exh.P-3, the doctor has noted the following injuries:

"Injuries:

(1) An incised wound extending from lower part of right cheek, above mandible, directed downwards to the middle of back of neck; obliquely placed and of sixe 14X6X6

cms. Blood vessels, muscles, C3, C4, vertebra cut, head partially hanging and blood clots present.

(2) An incised wound on centre of forehead close to midline extending to middle of scalp vertical in direction directed upwards and backwards size 14X4X6 cms. Underlying bone cut and brain matter coming out through the wound.

(3) An incised wound extending from middle of right side of back to right side of shoulder of size 20X6X6 cms. Oblique in direction, overlapping cut injuries on inferur border of wound, muscles, blood vessels cut, blood clots present. Right scapula injured and dislocated.

(4) An incised wound on right side of lower part of back below injury no.3, oblique in direction 12X4X2 cms. Blood vessels, muscles cut and blood clots present.

(5) An incised wound horizontal in direction 18X6X8 cms. Extending from left lower part of back of left waist fort side.

(6) An incised wound above injury no.5 oblique in direction on left side of lower part of back to right side crossing spine 12X6X4 cms. Blood vessels, muscles cut in the same direction.

(7) An incised wound on upper third of upper arm right, on lateral side extending to back of 12 X 4 shoulder, oblique in direction, blood vessels, muscles cut.

(8) An incised would on right upper arm, upper third on medical aspect, skin depth 5 X 2 cms. obliquely placed."

17. As rightly pointed out by the State counsel, the cut injuries observed by the doctor tally with the narration given by PW-1 in Exh.P-1 as well as in his evidence and the evidence of PW-5. The doctor also opined that the death of the deceased might have occurred 28-30 hours prior to the post mortem. It is not in dispute that the doctor commenced the post

mortem on 13.05.1992 at 10.30 hours and as per the prosecution case, the death of the deceased occurred at 05.30 a.m. on 12.05.1992. A perusal of these details clearly show that the opinion given by the doctor tallies with the prosecution version that the death might have occurred 28-30 hours prior to the post mortem. The trial Court, taking note of the evidence of PW-2 that there were around 300 grams semi digested food particles (rice) in the stomach of the deceased, disbelieved the time of occurrence as projected by the prosecution. It is true that PW-2, while deposing before the Court, answered in the cross-examination that the death might have occurred 34 hours prior to her performing the post mortem and the partly undigested rice would show that rice might have been consumed by the deceased 2-3 hours before his death. However, the Investigation Officer (PW-11), during the cross-examination, highlighted that during the course of his investigation, he ascertained from the father of the deceased that the deceased consumed food at 11.00 p.m. during the said intervening night. As rightly observed by the High court, since the parties are hailing from a remote village, the villagers might take food even at odd hours after finishing certain work in their fields and it cannot be precisely predict based on the undigested food particles alone. The High Court has adverted to Modi's Medical Jurisprudence and Toxicology, 22nd Edition and after noting all the relevant details has rightly concluded that the observation of the doctor relating to the injuries and her general opinion at the time of death which occurred 28-30 hours tally with the narration of eye-witnesses and concluded that in such a case mere inference of the doctor with reference to undigested food particles could not threw the prosecution case. We fully agree with the discussion and the ultimate conclusion on this aspect by the High Court. The evidence of PWs 1 and 5 coupled with the version in Exh.P-1 would state that the occurrence took place at 5.30 a.m. while the deceased was passing stool, as such, the timings mentioned by the doctor, occurrence and other witnesses tally with the narration. Accordingly, we reject the contention raised by the counsel for

the appellants with reference to existence of undigested particles n the post mortem by PW-2.

Other objections:

18. Though an argument was advanced that there was delay in filing the FIR in the Court of the Magistrate, a perusal of the details placed by the prosecution show that the occurrence took place at 05.30 a.m. on 12.05.1992 and the FIR was registered on the same day at 08.00 hrs. and the Magistrate received the FIR on the same day at 02.00 p.m. As rightly observed by the High Court, it cannot be presumed that there was inordinate delay in reaching the FIR to the Magistrate Court. Further, it has come in evidence that Kallidaikurichi P.S. is situated at a distance which could be covered by cycle in 45 minutes and Abdul Rahman (PW-9), Police Constable Grade-I, who was attached with Kallidaikurichi P.S. at the relevant time has explained in his evidence that he took the complaint (Exh.P-1) and the FIR to the Magistrate Court and reached at around 10.00 or 10.15 a.m. but by that time Magistrate Court's sitting was commenced. PW-9 further explained that when he approached the Head Clerk, he informed PW-9 to hand it over to the Magistrate after the sitting hour was over as it happened to be an express FIR. There is no reason to disbelieve the version of the Police Constable (PW-9) and we hold that absolutely, there is no delay at all in either registering the FIR or dispatching the same to the Magistrate Court.

19. We have already noticed the motive as spoken to by PW-1 both in his evidence as well as in Exh.P-1. It was pointed out that no blood stains were noticed in the M.Os I, II and III, namely, aruvals (bill hooks) and dress in the FSL report. It was explained that since these objects were lying on the earth and by efflux of time, no blood was found by the laboratory because of which the same cannot be doubted when the same were duly recovered in the presence of witnesses.

20. In the light of the above discussion, we are satisfied that the trial Court failed to take note of relevant aspects and committed a grave error in rejecting the reliable materials placed by the prosecution. The High Court as appellate court, analyzed the evidence as provided in Section 378 of the Code and rightly reversed the order of acquittal and found A-1 and A-2 guilty of offence under Section 302 read with Section 34 IPC for murdering Ramaiah in pursuance of their common intention and awarded sentence of life imprisonment. We fully agree with the said conclusion.

21. Consequently, the appeal fails and the same is dismissed.

K.K.T. Appeal dismissed.

THANA SINGH
v.
CENTRAL BUREAU OF NARCOTICS
(Criminal Appeal No. 1640 of 2010)

JANUARY 23, 2013

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

Constitution of India, 1950 - Articles 32, 21 and 141 - Appeal of accused for an offence under Narcotic Drugs and Psychotropic Substances Act (NDPS Act) - Seeking bail - Accused denied bail and was languishing in jail for 12 years awaiting commencement of trial - Supreme Court granted bail - Also issued notice to all the Sates taking cognizance of status quo and gain a first-hand account about the state of trials in cases under NDPS Act pending in all the States - Directions and guidelines issued - The practice of granting adjournments lavishly to be abolished - Fourth proviso to s. 309 (2) Cr.P.C. (inserted by s. 21(b) of Act 5 of 2009), which awaits notification, deserves immediate notification - Till the statutory provisions are in place, the Court directed that no NDPS court to grant adjournment at the request of the party except where circumstances beyond control of the party and where hearing date fixed as per convenience of the counsel, no adjournment to be granted without exception - A provision analogous to s. 22(c) of Prevention of Corruption Act should be legislated for trials under NDPS Act - Courts directed to adopt method of 'sessions trial' and conduct examination and cross-examination of a witness on consecutive dates over a block period of three to four days - The courts to take evidence of official witnesses in the form of affidavit as per s. 293 Cr.P.C - States are directed to establish Special Courts to deal exclusively with offences under NDPS Act - The number of these Courts must be proportionate to and sufficient for handling the volume of pending cases - Till the establishment

of exclusive NDPS Court, the NDPS cases would be prioritized over all other matters - More number of Central Forensic Science Laboratories (CFSL) must be established, so as to cater to the needs from different parts of the country- Each State directed to establish State level and regional level forensic science laboratories - Directorate of Forensic Science Services directed to take special steps to ensure standardization of equipments and to address the problem of shortage of staff in the existing laboratories - Request as to re-testing/re-sampling not to be entertained under NDPS Act, as a matter of course - Nodal Officers (equivalent or superior to the rank of Superintendent of Police) to be appointed in all the departments dealing with NDPS cases for monitoring the progress of investigation and trial - There must be one 'Pairvi Offier' or other such officers for each court who shall report the days's proceedings to the Nodal Officer - Appointment of Special Public Prosecutors for the Central Bureau of Narcotics should be in line with the procedure followed as mandated u/s. 24 Cr.P.C - For simplification of procedure u/s. 207 Cr.P.C, directed that filing of charge-sheet and supply of other documents to be in electronic form - Narcotic Drugs and Psychotropic Substances Act, 1985 - Code of Criminal Procedure, 1973 - s. 309(2) Proviso 4 (as inserted by s. 21(b) of Act 5 of 2009); ss. 293, 207 and 24 - Prevention of Corruption Act, 1988 - s. 22(c).

Supreme Court Legal Aid Committee Representing UndertrialPrisoners vs. Union of India and Ors. **(1994) 6 SCC 731: 1994 (4) Suppl. SCR 386;** *Achint Navinbhai Patel vs. State of Gujarat and Anr.* **(2002) 10 SCC 529;** *Hussainara Khatoon and Ors. vs. Home Secretary, State of Bihar* **(1980) 1 SCC 81: 1979 (3) SCR 169 - relied on.**

State of Kerala vs. Deepak. P. Shah **2001 CriLJ 2690;** *Nihal Khan vs. The State (Govt. of NCT Delhi)* **2007 CriLJ 2074 - referred to.**

Antonio Richard Rochin vs. People of the State of California **96 L. Ed. 183 (1951) - referred to.**

Case Law Reference:

1994 (4) Suppl. SCR 386	**Relied on**	**Para 1**
(2002) 10 SCC 529	**Relied on**	**Para 1**
96 L. Ed. 183 (1951)	**Referred to**	**Para 2**
1979 (3) SCR 169	**Relied on**	**Para 8**
2001 CriLJ 2690	**Referred to**	**Para 23**
2007 CriLJ 2074	**Referred to**	**Para 23**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1640 of 2010.

From the Judgment & Order dated 07.10.2009 of the High Court of Madhya Pradesh Bench at Indore in Misc. Criminal Case No. 6036 of 2009.

P.P. Malhotra, ASG, A. Mariarputham, AG, J.S. Attri, Dr. Manish Singhvi, Ajay Bansal, Manjit Singh, AAG, Sunil Verma, G.B. Singh, Pradeep Kumar Kaushik, Prasoon Kumar Mishra, Sanjay Sharawat, Anitha Shenoy (A.C.), Yasif Rauf, Priyanka Bharihoke, R.K. Rathore, Rashmi Malhotra, M. Khairati, D.S. Mahra, B.K. Prasad, Shreekant N. Terdal, Anil Katiyar, Amit Lubhaya, Irshad Ahmad, Sunil K. Jain, Sachin Sharma, Devendra Singh, Kuldip Singh, Pardaman Singh, Dheeraj Gupta, Rajiv Kumar, Gaurav Yadav, Gunnam Venkateswara Rao, Ashok K. Srivastava, A.D.N. Rao, Neelam Jain, C.D. Singh, Ashok Mathur, Atul Jha, Sandeep Jha, D.K. Sinha, S. Gowthaman, P.I. Jose, Gopal Singh, Manish Kumar, Chandan Kumar, Gopal Prasad, Ritu Raj Biswas (for Hemantika Wahi), Pinky, Ena Tolani Shubhada Deshpande, Naresh K. Sharma, Ranjan Mukherjee, Khwairakpam Nobin Singh, Anil Srivastav, Vartika Sahay Walia (for Corporate Law Group), Dr. Abhishek

Atrey, Ashootosh Sharma, Brijesh Panchal, Aishverya Shandilya, Jatinder Kumar Bhatia, Yogesh Kanna, Asha G. Nair, Vibha Datta Makhija, Archi Agnihotri, Pragyan P. Sharma, Mankakini Sharma, P.V. Yogeshwaran, Suresh Ch. Tripathy, G.S. Chatterjee, K. Enatoli Sema, Balaji Srinivasan, V.G. Pragasam, Aruna Mathur, Yusuf Khan (for Arputham Aruna & Co.), Tarjit Singh Chikkara, Kamal Mohan Gupta, Siddharth Bhatnagar, Pawan Kumar Bansal, T. Mahipal, D. Mahesh Babu, Mayur R. Shah, Amit K. Nain, Amjid Maqbool, T.V. Ratnam, Sunil Fernandes, Astha Sharma, Vernika Tomar, Insha Mir, Bina Madhavan, T.G.N. Nair, K.N. Madhusoodhanan, Avijit Bhattacharjee, Anip Sachthey, Mohit Paul, Shagun Matta, Saakar Sardana, A. Subhashini, Aniruddha P. Mayee, Rucha A. Mayee for the appearing parties.

The following order of the Court was delivered by

O R D E R

1. This order, and its accompanying directions, are an outcome of the bail matter in *Thana Singh Vs. Central Bureau of Narcotics* listed before this bench, wherein an accused, who had been languishing in prison for more than twelve years, awaiting the commencement of his trial for an offence under the Narcotics Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the "NDPS Act"), was consistently denied bail, even by the High Court. Significantly, the maximum punishment for the offence the accused was incarcerated for, is twenty years; hence, the undertrial had remained in detention for a period exceeding one-half of the maximum period of imprisonment. An express pronouncement of this Court in the case of Supreme Court *Legal Aid Committee Representing Undertrial Prisoners Vs. Union of India & Ors.*[1], which held that "where the undertrial accused is charged with an offence(s) under the Act punishable with minimum imprisonment of ten years and a minimum fine of rupees one lakh, such an undertrial

1. (1994) 6 SCC 731.

shall be released on bail if he has been in jail for not less than five years provided he furnishes bail in the sum of rupees one lakh with two sureties for like amount", finds constrained applicability in respect of cases under the NDPS Act, in light of Section 37 of the Act. Therefore, this Court in *Achint Navinbhai Patel Vs. State of Gujarat & Anr.*[2] observed that "it has been repeatedly stressed that NDPS cases should be tried as early as possible because in such cases normally accused are not released on bail."

2. We are reminded of Justice Felix Frankfurter's immortal words *in Antonio Richard Rochin Vs. People of the State of California*[3], coincidentally a case pertaining to narcotics, wherein he described some types of conduct by state agents, although not specifically prohibited by explicit language in the Constitution, as those that "shock the conscience" in that they offend "those canons of decency and fairness which express the notions of justice." Due process of law requires the state to observe those principles that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." The general state of affairs pertaining to trials of offences under the NDPS Act deserves a similar description.

3. The laxity with which we throw citizens into prison reflects our lack of appreciation for the tribulations of incarceration; the callousness with which we leave them there reflects our lack of deference for humanity. It also reflects our imprudence when our prisons are bursting at their seams. For the prisoner himself, imprisonment for the purposes of trial is as ignoble as imprisonment on conviction for an offence, since the damning finger and opprobrious eyes of society draw no difference between the two. The plight of the undertrial seems to gain focus only on a solicitous inquiry by this Court, and soon after, quickly fades into the backdrop.

2. (2002) 10 SCC 529.

3. 96 L.Ed. 183 (1951)

4. Therefore, bearing in mind the aforesaid imperatives, after granting the deserved bail in that case, we decided to take cognizance of status quo and gain a first-hand account about the state of trials in such like cases pending in all the states. Accordingly, vide order dated 30.08.2010, we issued notice to all states through their Chief Secretaries to file affidavits furnishing information of all cases under the NDPS Act where the undertrial has been incarcerated for a period exceeding five years. In pursuance of the same, we received the valuable assistance of the Additional Solicitor General of India, Mr. P. P. Malhotra, learned amicus curiae, Ms. Anita Shenoy; Mr. R. K. Gauba, District and Sessions Judge (South), Saket, New Delhi; Registrar Generals of High Courts; Director General, Narcotics Control Bureau, Ministry of Home Affairs, senior-most Officer-in-Charge of Investigations and Prosecution for offences under the NDPS Act; representatives of the Directorate of Revenue Intelligence (DRI), Customs and Excise Departments and Police of the States concerned.

5. We lay down the directions and guidelines specified hereinafter for due observance by all concerned as the law declared by this Court under Article 141 of the Constitution of India. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of fundamental rights, especially the cluster of fundamental rights incorporated under Article 21, which stand flagrantly violated due to the state of affairs of trials under the NDPS Act. We would like to clarify that these directions are restricted only to the proceedings under the NDPS Act.

DIRECTIONS

A. Adjournments

6. The lavishness with which adjournments are granted is not an ailment exclusive to narcotics trials; courts at every level suffer from this predicament. The institutionalization of generous dispensation of adjournments is exploited to prolong trials for

varied considerations.

7. Such a practice deserves complete abolishment. The legislature enacted a crucial amendment in the form of a fourth proviso to Section 309(2) of the Code of Criminal Procedure, 1973 (through Section 21 (b) of Act 5 of 2009) to tackle the problem, but the same awaits notification. Once notified, Section 309 will read as follows: -

"309. Power to postpone or adjourn proceedings.

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

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

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

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

Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show

cause against the sentence proposed to be imposed on him

Provided also that-

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

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

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

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

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

[Emphasis supplied]

8. The fourth proviso deserves immediate notification. In lieu of the lacuna created by its conspicuous absence, which is interfering with the fundamental right of speedy trial [See: *Hussainara Khatoon and Ors. Vs. Home Secretary, State of Bihar*[4]], something this Court is duty- bound to protect and

4. (1980) 1 SCC 81.

uphold, and till the statutory provisions are in place, we direct that no NDPS court would grant adjournments at the request of a party except where the circumstances are beyond the control of the party. This exception must be treated as an exception, and must not be allowed to swallow the generic rule against grant of adjournments. Further, where the date for hearing has been fixed as per the convenience of the counsel, no adjournment shall be granted without exception. Adherence to this principle would go a long way in cutting short that queue to the doors of justice.

9. Perhaps, a provision analogous to Section 22(c) of the Prevention of Corruption Act, 1988 may be seriously considered by the legislature for trials under the NDPS Act. It reads as follow:

> "22. The Code of Criminal Procedure, 1973 , to apply subject to certain modifications.- The provisions of the Code of Criminal Procedure, 1973 (2 of 1974 .), shall in their application to any proceeding in relation to an offence punishable under this Act have effect as if,--
>
> XXX XXX XXX
>
> (c) after sub- section (2) of section 317, the following sub-section had been inserted, namely:-
>
> '(3) Notwithstanding anything contained in sub- section (1) or sub-section (2), the Judge may, if he thinks fit and for reasons to be recorded by him, proceed with inquiry or trial in the absence of the accused or his pleader and record the evidence of any witness subject to the right of the accused to recall the witness for cross- examination."

B. <u>Examination of Witnesses</u>

10. Between harmonizing the rights and duties of the accused and the victim, the witness is often forgotten. No legal system can render justice if it is not accompanied with a

conducive environment that encourages and invites witnesses to give testimony. The web of antagonistic litigation with its entangled threads of investigation, cross-examination, dealings with the police etc., as it is, lacks the ability to attract witnesses to participate in a process of justice; it is baffling that nonetheless, systems of examination that sprout more disincentives for a witness to take the stand are established. Often, conclusion of examination alone, keeping aside cross-examination of witnesses, takes more than a day. Yet, they are not examined on consecutive days, but on different dates spread out over months. This practice serves as a huge inconvenience to a witness since he is repeatedly required to incur expenditure on travel and logistics for appearance in hearings over a significant period of time. Besides, it often causes unnecessary repetition in terms of questioning and answering, and also places greater reliance on one's ever-fading memory, than necessary. All these factors together cause lengthier examinations that compound the duration of trials.

11. It would be prudent to return to the erstwhile method of holding "session's trials" i.e. conducting examination and cross-examination of a witness on consecutive days over a block period of three to four days. This permits a witness to take the stand after making one-time arrangements for travel and accommodation, after which, he is liberated from his civil duties qua a particular case. Therefore, this Court directs the concerned courts to adopt the method of "session's trials" and assign block dates for examination of witnesses.

12. The Narcotics Control Board also pointed out that since operations for prevention of crimes related to narcotic drugs and substances demands coordination of several different agencies viz. Central Bureau of Narcotics (CBN), Narcotics Control Bureau (NCB), Department of Revenue Intelligence (DRI), Department of Custom and Central Excise, State Law Enforcement Agency, State Excise Agency to name a few,

procuring attendance of different officers of these agencies becomes difficult. On the completion of investigation for instance, investigating officers return to their parent organizations and are thus, often unavailable as prosecution witnesses. In light of the recording of such official evidence, we direct the concerned courts to make most of Section 293 of the Code of Criminal Procedure, 1973 and save time by taking evidence from official witnesses in the form of affidavits. The relevant section reads as follows:-

"293. Reports of certain Government scientific experts.

(1) Any document purporting to be a report under the hand of a Government scientific expert to whom this section applies, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

(2) The Court may, if it thinks fit, summon and examine any such expert as to the subject- matter of his report.

(3) Where any such expert is summoned by a Court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily depose in Court on his behalf.

(4) This section applies to the following Government scientific experts, namely:-

(a) any Chemical Examiner or Assistant Chemical Examiner to Government;

(b) the Chief Controller of Explosives;

(c) the Director of the Finger Print Bureau;

(d) the Director, Haffkeine Institute, Bombay;

(e) the Director, Deputy Director or Assistant Director of a Central Forensic Science Laboratory or a State Forensic Science Laboratory;

(f) the Serologist to the Government."

(g) any other Government scientific expert specified, by notification, by the Central Government for this purpose.

C. <u>Workload</u>

13. The courts are unduly overburdened, an outcome of the diverse repertoire of cases they are expected to handle. We are informed by the Narcotics Control Board that significant time of the NDPS Court is expended in dealing with bail and other criminal matters. Besides, many states do not even have the necessary NDPS courts to deal with the volume of NDPS cases.

14. Therefore, we issue the following directions in this regard:

(i) Each state, in consultation with the High Court, particularly the states of Uttar Pradesh, West Bengal and Jammu & Kashmir (where the pendency of cases over five years is stated to be high), is directed to establish Special Courts which would deal exclusively with offences under the NDPS Act.

(ii) The number of these courts must be proportionate to, and sufficient for, handling the volume of pending cases in the State.

(iii) Till exclusive courts for the purpose of disposing of NDPS cases under the NDPS Act are established, these cases will be prioritized over all other matters; after the setting up of the special courts for NDPS cases, only after the clearance of matters under the

NDPS Act will an NDPS court be permitted to take up any other matter.

D. Narcotics Labs

15. Narcotics laboratories at the national level identify drugs for abuse and their accompanying substances in suspected samples, determine the purity and the possible origin of illicit drugs, carry out drug-related research, particularly on new sources of drugs liable to abuse, and, when required by the police or courts of law, provide supportive expertise in drug trafficking cases. Their role in the effective implementation of the mandate of the NDPS Act is indispensible which is why every state or region must have proximate access to these laboratories so that samples collected for the purposes of the Act may be sent on a timely basis to them for scrutiny. These samples often form primary and clinching evidence for both the prosecution and the defence, making their evaluation by narcotics laboratories a crucial exercise.

16. The numbers of these laboratories speak for themselves and are reproduced here. The numbers for Central Forensic Science Laboratories (CFSL) are as follows: -

S. No	CFSL Location	Status
1.	Chandigarh	In operation
2.	Hyderabad	In operation
3.	Kolkata	In operation
4.	Delhi (Under Central Bureau of Investigation)	In operation
5.	Bhopal	Being established
6.	Pune	Being established
7.	Guwahati	Being established

17. Similarly, numbers for the state and regional Forensic Science Laboratories (FSL) are as follows:-

S. No.	Name of State	Existing State Facilities Main State FSL	Regional FSL
1.	Andhra Pradesh	1	9
2.	Arunachal Pradesh	1	0
3.	Assam	1	0
4.	Bihar	1	1
5.	Chattisgarh	1	2
6.	Goa	Being established	0
7.	Gujarat	1	5
8.	Haryana	1	2
9.	Himachal Pradesh	1	0
10.	Jammu & Kashmir	1	1
11.	Jharkhand	1	0
12.	Karnataka	1	4
13.	Kerala	1	2
14.	Madhya Pradesh	1	3
15.	Maharashtra	1	4
16.	Manipur	1	0
17.	Meghalaya	1	0
18.	Mizoram	1	0
19.	Nagaland	1	0
20.	Orissa	1	2

21.	Punjab	1	0
22.	Rajasthan	1	3
23.	Sikkim	0	1
24.	Tamil Nadu	1	9
25.	Tripura	1	0
26.	Uttar Pradesh	1	2
27.	Uttarakhand	1	0
28.	West Bengal	1	2
UNION TERRITORIES			
1.	Andaman and Nicobar Islands	1	0
2.	Chandigarh	0	0
3.	Dadra & Nagar Haveli	0	0
4.	Daman & Diu	0	0
5.	Lakshadweep	0	0
6.	NCT of Delhi	1	0
7.	Puducherry	0	0
	TOTAL	**28**	**52**

18. A qualitative and quantitative overhaul of these laboratories is necessary for ameliorating the present state of affairs, for which, we are issuing the following directions:

(i) The Centre must ensure equal access to CFSL's from different parts of the country. The current four CFSL's only cater to the needs of northern and some areas of western and eastern parts of the country. Therefore, besides the three in the pipeline, more CFSL's must be established, especially to cater to the needs of southern and eastern parts of the country.

(ii) Analogous directions are issued to the states. Several states do not possess any existing infrastructure to facilitate analysis of samples and are hence, compelled to send them to laboratories in other parts of the country for scrutiny. Therefore, each state is required to establish state level and regional level forensic science laboratories. However, the decision as to the numbers of such laboratories would depend on the backlog of cases in the state.

19. The above mentioned authorities must ensure adequate employment of technical staff and provision of facilities and resources for the purposes of proper, smooth and efficient running of the facilities of Forensic Science Laboratories under them and the Laboratories should furnish their reports expeditiously to the concerned agencies.

20. The Directorate of Forensic Science Services, Ministry of Home Affairs, must take special steps to ensure standardization of equipment across the various forensic laboratories to prevent vacillating results and disallow a litigant an opportunity to challenge test results on that basis.

E. Personnel

21. We have also been apprised of the following vacancies at three CFSLs, namely Chandigarh, Kolkata and Hyderabad.

Posts	Sanctioned	Filled	Vacant
Scientific	99	64	35
Technical	45	40	05

Shortage of staff is bound to hamper with the smooth functioning of these laboratories, and hence, we direct the Directorate of Forensic Science Services, Ministry of Home Affairs to address the same on an urgent basis.

22. Further, steps must be taken by the concerned departments to improve the quality and expertise of the technical staff, equipment and testing laboratories.

E. Re-testing Provisions

23. The NDPS Act itself does not permit re-sampling or re-testing of samples. Yet, there has been a trend to the contrary; NDPS courts have been consistently obliging to applications for re-testing and re- sampling. These applications add to delays as they are often received at advanced stages of trials after significant elapse of time. NDPS courts seem to be permitting re-testing nonetheless by taking resort to either some High Court judgments [See: *State of Kerala Vs. Deepak. P. Shah*[5]; *Nihal Khan Vs. The State (Govt. of NCT Delhi)*[6]] or perhaps to Sections 79 and 80 of the NDPS Act which permit application of the Customs Act, 1962 and the Drugs and Cosmetics Act, 1940. While re-testing may be an important right of an accused, the haphazard manner in which the right is imported from other legislations without its accompanying restrictions, however, is impermissible. Under the NDPS Act, re-testing and re-sampling is rampant at every stage of the trial contrary to other legislations which define a specific time-frame within which the right may be available. Besides, reverence must also be given to the wisdom of the Legislature when it expressly omits a provision, which otherwise appears as a standard one in other legislations. The Legislature, unlike for the NDPS Act, enacted Section 25(4) of the Drugs and Cosmetics Act, 1940, Section 13(2) of the Prevention of Food Adulteration Act, 1954 and Rule 56 of the Central Excise Rules, 1944, permitting a time period of thirty, ten and twenty days

5. 2001 CriLJ 2690.

6. 2007 CriLJj 2074.

respectively for filing an application for re- testing

24. Hence, it is imperative to define re-testing rights, if at all, as an amalgamation of the above- stated factors. Further, in light of Section 52A of the NDPS Act, which permits swift disposal of some hazardous substances, the time frame within which any application for re-testing may be permitted ought to be strictly defined. Section 52A of the NDPS Act reads as follows: -

"52A. Disposal of seized narcotic drugs and psychotropic substances

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure herein- after specified.

(2) Where any narcotic drug or psychotropic substance has been seized and forwarded to the officer- in- charge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub- section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub- section (1) may consider relevant to the identity of the narcotic drugs or psychotropic

substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of-

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub- section (2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub- section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

25. Therefore, keeping in mind the array of factors discussed above, we direct that, after the completion of necessary tests by the concerned laboratories, results of the same must be furnished to all parties concerned with the matter. Any requests as to re-testing/re-sampling shall not be entertained under the NDPS Act as a matter of course. These may, however, be permitted, in extremely exceptional circumstances, for cogent reasons to be recorded by the Presiding Judge. An application in such rare cases must be made within a period of fifteen days of the receipt of the test report; no applications for re-testing/re-sampling shall be entertained thereafter. However, in the absence of any

compelling circumstances, any form of re-testing/re-sampling is strictly prohibited under the NDPS Act.

G. Monitoring

26. A monitoring agency is pivotal for the effective management of these recommendations and for the general amelioration of the state of affairs. Therefore, it is directed that nodal officers be appointed in all the departments dealing with the NDPS cases, for monitoring the progress of investigation and trial. This nodal officer must be equivalent or superior to the rank of Superintendent of Police, who shall ensure that the trial is not delayed on account of non-supply of documents, non-availability of the witnesses, or for any other reason.

27. We have also learnt from the Narcotics Control Bureau that some form of informational asymmetry is prevalent with respect to the communication of the progress of cases between courts and the department. Therefore, there must be one Pairvi Officer or other such officer for each court who shall report the day's proceedings to the nodal officer assigned for that court.

H. Public Prosecutors

28. Public prosecutors play the most important role in the administration of justice. Their quality is thus of profound importance to the speed and outcome of trials. We have been informed that Special Public Prosecutors for the Central Bureau of Narcotics are appointed by the Ministry of Home Affairs after scrutiny by the Ministry of Law and Justice, on the recommendation of the District and Sessions Judge concerned. We suggest that the procedure of appointment, placed before us, be brought in line with that generally followed for the appointment of public prosecutors, as mandated under Section 24 of the Code of Criminal Procedure, 1973. However, for the present, we direct that the District and Sessions Judge shall make recommendations for such appointments in consultation with the Administrative Judge/Portfolio Judge/

Inspecting Judge, incharge of looking after the administration of the concerned Sessions Division.

I. Other Recommendations.

29. Delays are caused due to demands of compliance with Section 207 of the Code of Criminal Procedure, 1973 which reads as follows:-

> **"207. Supply to the accused of copy of police report and other documents.** In any case where the proceeding has been instituted on a police report, the Magistrate shall without delay furnish to the accused, free of cost, a copy of each of the following:-
>
> (i) the police report;
>
> (ii) the first information report recorded under section 154;
>
> (iii) the statements recorded under sub- section (3) of section 161 of all persons whom the prosecution proposes to examine as its witnesses, excluding therefrom any part in regard to which a request for such exclusion has been made by the police officer under sub- section (6) of section 173;
>
> (iv) the confessions and statements, if any, recorded under section 164;
>
> (v) any other document or relevant extract thereof forwarded to the Magistrate with the police report under sub- section (5) of section 173:
>
> Provided that the Magistrate may, after perusing any such part of a statement as is referred to in clause (iii) and considering the reasons given by the police officer for the request, direct that a copy of that part of the statement or of such portion thereof as the Magistrate thinks proper, shall be furnished to the accused:

> Provided further that if the Magistrate is satisfied that any document referred to in clause (v) is voluminous, he shall, instead of furnishing the accused with a copy thereof, direct that he will only be allowed to inspect it either personally or through pleader in Court."

For the simplification of the above detailed process, we direct that the filing of the charge- sheet and supply of other documents must also be provided in electronic form. However, this direction must not be treated as a substitute for hard copies of the same which are indispensable for court proceedings.

30. We expect and hope that the aforesaid directions shall be complied with by the Central Government, State Governments and the Union Territories, as the case may be, expeditiously and in the spirit that these have been made.

31. Before parting, we place on record our deep appreciation for the able assistance rendered to us by the learned Additional Solicitor General; amicus curiae; Mr. Utkarsh Saxena, Law Clerk-cum-Research Assistant and all the officers who were requested to participate in the deliberations.

32. The matter stands closed.

K.K.T. Appeal disposed of.

JITENDRA RAGHUVANSHI & ORS.
v.
BABITA RAGHUVANSHI & ANR.
(Criminal Appeal No. 447 of 2013)

MARCH 15, 2013

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

Code of Criminal Procedure, 1973 - ss.482 and 320 - Quashing of criminal proceedings in non-compoundable offences relating to matrimonial disputes - Ambit and scope of the inherent powers of the High Courts u/s.482 CrPC - Duty of the courts to encourage genuine settlements of matrimonial disputes - Held: High Court in exercise of its inherent powers can quash criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice - s.320 CrPC does not limit or affect the powers of the High Court u/s.482 CrPC.

Question relating to the ambit and scope of the inherent powers of the High Courts under Section 482 CrPC in quashing of the criminal proceedings in non-compoundable offences relating to matrimonial disputes arose for consideration in the present appeal.

Allowing the appeal, the Court

HELD: 1.1. It is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, for the purpose of securing ends of justice, Section 320 CrPC would not be a bar to the exercise of

power of quashing of FIR, complaint or the subsequent criminal proceedings. [Para 12] [929-B-D]

1.2. There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 CrPC should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. Also exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 CrPC enables the High Court and Article 142 of the Constitution enables this Court to pass such orders. [Para 13] [929-D-H; 930-A]

1.3. The High Court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice and Section 320 CrPC does not limit or affect the powers of the High Court under Section 482 CrPC. [Para 14] [930-B-C]

2. In the instant case, it is not in dispute that after filing of a complaint in respect of the offences punishable under Sections 498A and 406 of IPC, the parties arrived at a mutual settlement and the complainant-wife also has sworn an affidavit supporting the stand of the appellants (husband and his relatives). That was the position before the trial Court as well as before the High Court in a petition filed under Section 482 CrPC. A perusal of the impugned order of the High Court shows that because the mutual settlement arrived at between the parties relate to non-compoundable offence, the court proceeded on a wrong premise that it cannot be compounded and dismissed the petition filed under Section 482 CrPC. A perusal of the petition before the High Court shows that the application filed by the appellants was not for compounding of non-compoundable offences but for the purpose of quashing the criminal proceedings. [Para 10] [928-D-G]

3. The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In B.S. Joshi case, this Court has upheld the powers of the High Court under Section 482 CrPC to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. The said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at. The impugned judgment of the High Court is set aside and the proceedings in the Criminal Case pending on the file of Judicial Magistrate are quashed. [Paras 11, 14] [928-H; 929-A-B; 930-C]

B.S. Joshi and Others vs. State of Haryana and Another **(2003) 4 SCC 675: 2003 (2) SCR 1104 - held applicable.**

State of Haryana vs. Bhajan Lal **1992 Supp (1) SCC 335: 1990 (3) Suppl. SCR 259;** *Madhu Limaye vs. State of Maharashtra* **(1977) 4 SCC 551: 1978 (1) SCR 749;** *Surendra Nath Mohanty & Anr. vs. State of Orissa* **(1999) 5 SCC 238: 1999 (2) SCR 1005;** *Pepsi Foods Ltd. & Anr. vs. Special Judicial Magistrate & Ors.* **(1998) 5 SCC 749: 1997 (5) Suppl. SCR 12 - referred to.**

Case Law Reference:

2003 (2) SCR 1104	**held applicable**	**Paras 9, 11**
1990 (3) Suppl. SCR 259	**referred to**	**Para 9**
1978 (1) SCR 749	**referred to**	**Para 9**
1999 (2) SCR 1005	**referred to**	**Para 9**
1997 (5) Suppl. SCR 12	**referred to**	**Para 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 447 of 2013.

From the Judgment & Order dated 04.07.2012 of the High Court of Madhya Pradesh, Bench Indore in M. Cr. C. No. 2877 of 2012.

Preetika Dwivedi, Abhishek Chaudhary for the Appellants.

S.K. Dueby, B.P. Singh, Abhimanyu Singh, Sumit Gaur, Mohit K., Yogesh Tiwari, C.D. Singh, Rahul, Mukti Chaudhary for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. The important question that falls for determination in the instant appeal is about the ambit and scope of the inherent powers of the High Courts under Section 482 of the Code of Criminal Procedure, 1973 (in short "the Code") in quashing of the criminal proceedings in non-compoundable offences relating to matrimonial disputes.

3. This appeal is directed against the final judgment and order dated 04.07.2012 passed by the High Court of Madhya Pradesh, Bench at Indore in M.CR.C. No. 2877 of 2012, whereby the High Court dismissed the petition filed by the appellants herein under Section 482 of the Code for quashing of proceedings in Criminal Case No. 4166 of 2011 pending in the Court of Judicial Magistrate Class I, Indore.

4. **Brief facts:**

a) The marriage of Jitendra Raghuvanshi (Appellant No. 1 herein) and Babita Raghuvanshi, respondent-wife, was solemnized on 22.02.2002 as per Hindu rites and rituals. After the marriage, the parties were residing together as husband and wife at District Baitul, M.P. On 05.03.2003, an FIR being No. 172 of 2003 was registered at P.S. Sarni, Dist. Baitul for the offences punishable under Sections 498A, 406 read with Section 34 of the Indian Penal Code, 1860 (in short 'the IPC') at the instance of Babita Raghuvanshi - respondent-wife owing to the harassment and torture meted out to her in the matrimonial home by her husband and his relatives. A Criminal Case being No. 4166 of 2011 was also registered against the appellants herein for the offences punishable under Sections 498A and 406 of the IPC and Sections 3 and 4 of the Dowry Prohibition Act, 1961.

b) During the pendency of the criminal proceedings, in the year 2012, with the help and intervention of family members, friends and well-wishers, the parties amicably settled their differences by way of mutual settlement. Pursuant to the same, on 03.04.2012, a compromise/settlement application was filed for dropping of the criminal proceedings in Criminal Case No. 4166 of 2011 and FIR No. 172 of 2003 dated 05.03.2003 before the trial Court. Respondent-wife also filed an affidavit stating that she did not wish to pursue the criminal proceedings against the appellants. However, by order dated 03.04.2012, learned trial Judge rejected the said application.

c) Being aggrieved by the order dated 03.04.2012, on 09.04.2012, the appellants herein filed an application being M.CR.C. No. 2877 of 2012 before the High Court invoking its inherent powers under Section 482 of the Code to quash the criminal proceedings launched against them. The High Court, by impugned order dated 04.07.2012, dismissed the application filed by the appellants herein stating that the court has no power to quash the criminal proceedings in respect of offences under Sections 498A and 406 of IPC since both are non-compoundable.

d) Aggrieved by the said order, the appellants have filed the present appeal by way of special leave.

5. Heard Ms. Preetika Dwivedi, learned counsel for the appellants and Mr. S.K. Dubey, learned senior counsel for Respondent No. 2 and Mr. Rahul, learned counsel for Respondent No.1.

6. The scope and ambit of power under Section 482 of the Code has been examined by this Court in a catena of earlier decisions. In the present case, we are concerned about interference by the High Court exercising jurisdiction under Section 482 in relation to matrimonial disputes.

7. It is not in dispute that matrimonial disputes have been on considerable increase in recent times resulting in filing of complaints under Sections 498A and 406 of IPC not only against the husband but also against the relatives of the husband. The question is when such matters are resolved either by the wife agreeing to rejoin the matrimonial home or by mutual settlement of other pending disputes for which both the sides approached the High Court and jointly prayed for quashing of the criminal proceedings or the FIR or complaint by the wife under Sections 498A and 406 of IPC, whether the prayer can be declined on the sole ground that since the offences are non-compoundable under Section 320 of the

Code, it would be impermissible for the Court to quash the criminal proceedings or FIR or complaint.

8. It is not in dispute that in the case on hand subsequent to the filing of the criminal complaint under Sections 498A and 406 of IPC and Sections 3 and 4 of the Dowry Prohibition Act, 1961, with the help and intervention of family members, friends and well-wishers, the parties concerned have amicably settled their differences and executed a compromise/settlement. Pursuant thereto, the appellants filed the said compromise before the trial Court with a request to place the same on record and to drop the criminal proceedings against the appellants herein. It is also not in dispute that in addition to the mutual settlement arrived at by the parties, respondent-wife has also filed an affidavit stating that she did not wish to pursue the criminal proceedings against the appellants and fully supported the contents of the settlement deed. It is the grievance of the appellants that not only the trial Court rejected such prayer of the parties but also the High Court failed to exercise its jurisdiction under Section 482 of the Code only on the ground that the criminal proceedings relate to the offences punishable under Sections 498A and 406 of IPC which are non-compoundable in nature.

9. Learned counsel for the parties, by drawing our attention to the decision of this Court in *B.S. Joshi and Others vs. State of Haryana and Another,* (2003) 4 SCC 675, submitted that in an identical circumstance, this Court held that the High Court in exercise of its inherent powers under Section 482 can quash criminal proceedings in matrimonial disputes where the dispute is entirely private and the parties are willing to settle their disputes amicably. It is not in dispute that the facts in *B.S. Joshi* (supra) are identical and the nature of the offence and the question of law involved are almost similar to the one in hand. After considering the law laid down in *State of Haryana vs. Bhajan Lal,* 1992 Supp (1) SCC 335 and explaining the decisions rendered in *Madhu Limaye vs. State of*

Maharashtra, (1977) 4 SCC 551, *Surendra Nath Mohanty & Anr. vs. State of Orissa,* (1999) 5 SCC 238 and *Pepsi Foods Ltd. & Anr. vs. Special Judicial Magistrate & Ors.,* (1998) 5 SCC 749, this Court held:

> "8. … …. We are, therefore, of the view that if for the purpose of securing the ends of justice, quashing of FIR becomes necessary, Section 320 would not be a bar to the exercise of power of quashing. It is, however, a different matter depending upon the facts and circumstances of each case whether to exercise or not such a power."

Considering matrimonial matters, this Court also held:

> "12. The special features in such matrimonial matters are evident. It becomes the duty of the court to encourage genuine settlements of matrimonial disputes."

10. As stated earlier, it is not in dispute that after filing of a complaint in respect of the offences punishable under Sections 498A and 406 of IPC, the parties, in the instant case, arrived at a mutual settlement and the complainant also has sworn an affidavit supporting the stand of the appellants. That was the position before the trial Court as well as before the High Court in a petition filed under Section 482 of the Code. A perusal of the impugned order of the High Court shows that because the mutual settlement arrived at between the parties relate to non-compoundable offence, the court proceeded on a wrong premise that it cannot be compounded and dismissed the petition filed under Section 482. A perusal of the petition before the High Court shows that the application filed by the appellants was not for compounding of non-compoundable offences but for the purpose of quashing the criminal proceedings.

11. The inherent powers of the High Court under Section 482 of the Code are wide and unfettered. In *B.S. Joshi* (supra),

this Court has upheld the powers of the High Court under Section 482 to quash criminal proceedings where dispute is of a private nature and a compromise is entered into between the parties who are willing to settle their differences amicably. We are satisfied that the said decision is directly applicable to the case on hand and the High Court ought to have quashed the criminal proceedings by accepting the settlement arrived at.

12. In our view, it is the duty of the courts to encourage genuine settlements of matrimonial disputes, particularly, when the same are on considerable increase. Even if the offences are non-compoundable, if they relate to matrimonial disputes and the court is satisfied that the parties have settled the same amicably and without any pressure, we hold that for the purpose of securing ends of justice, Section 320 of the Code would not be a bar to the exercise of power of quashing of FIR, complaint or the subsequent criminal proceedings.

13. There has been an outburst of matrimonial disputes in recent times. The institution of marriage occupies an important place and it has an important role to play in the society. Therefore, every effort should be made in the interest of the individuals in order to enable them to settle down in life and live peacefully. If the parties ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law, in order to do complete justice in the matrimonial matters, the courts should be less hesitant in exercising its extraordinary jurisdiction. It is trite to state that the power under Section 482 should be exercised sparingly and with circumspection only when the court is convinced, on the basis of material on record, that allowing the proceedings to continue would be an abuse of the process of the court or that the ends of justice require that the proceedings ought to be quashed. We also make it clear that exercise of such power would depend upon the facts and circumstances of each case and it has to be exercised in appropriate cases in order to do

real and substantial justice for the administration of which alone the courts exist. It is the duty of the courts to encourage genuine settlements of matrimonial disputes and Section 482 of the Code enables the High Court and Article 142 of the Constitution enables this Court to pass such orders.

14. In the light of the above discussion, we hold that the High Court in exercise of its inherent powers can quash the criminal proceedings or FIR or complaint in appropriate cases in order to meet the ends of justice and Section 320 of the Code does not limit or affect the powers of the High Court under Section 482 of the Code. Under these circumstances, we set aside the impugned judgment of the High Court dated 04.07.2012 passed in M.CR.C. No. 2877 of 2012 and quash the proceedings in Criminal Case No. 4166 of 2011 pending on the file of Judicial Magistrate Class-I, Indore.

15. The appeal is allowed.

B.B.B. Appeal allowed.

INDRAJIT SURESHPRASAD BIND & ORS.
v.
STATE OF GUJARAT
(Criminal Appeal No. 613 of 2007)

MARCH 18, 2013

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

Penal Code, 1860 - ss.304B, 498A and 306 - Suicide by married woman -Conviction of appellants (husband and in-laws) - Justification - Held: Not justified - Letter allegedly written by victim to her brother (PW3) was the only evidence produced by the prosecution to prove that the appellants had subjected the victim to harassment and cruelty in connection with demand for dowry - But since there were grave doubts as to the whether the said letter was actually written by the victim or not, conviction of appellants only on the basis of the said letter would be unsafe - Prosecution unable to prove beyond reasonable doubt that the appellants subjected the victim to cruelty or harassment - Further, letter written by PW3 to the victim three weeks before the incident made it clear that PW3 was satisfied that the victim was living happily and was not being misbehaved with - No other material having come in evidence to establish that the appellants instigated the victim to commit suicide, it cannot be held that the appellants had in any way abetted the suicide by the victim.

The wife of appellant No.1 committed suicide by pouring kerosene on her body. She died out of burn injuries. It was alleged by the prosecution that appellant no.1 and his parents (appellant nos.2 and 3) had subjected the deceased to cruelty and harassment for dowry and had instigated her to commit suicide. The trial court convicted the appellants under Sections 304B,

498A and 306 IPC. The conviction was affirmed by the High Court and, therefore, the present appeal.

Allowing the appeal, the Court

HELD: 1. The letter dated 16-02-2004 allegedly written by the deceased (Ext. 49) to her brother (PW-3) from her matrimonial home at Ahmedabad is the only evidence produced by the prosecution to prove that the appellants had subjected the deceased to harassment and cruelty in connection with demand for dowry. But, this Court has grave doubts as to whether the said letter dated 16-02-2004 (Ext. 49) was at all written by the deceased to PW 3. The said letter dated 16-02-2004 is alleged to have been written by the deceased from Ahmedabad. However, PW3 has not stated in his evidence specifically that on 16-02-2004 the deceased was at Ahmedabad. Further, the evidence of DW1 supported by Ext. 44 makes it probable that the deceased was not at Ahmedabad but at Chaksiriya village in Bihar on 16-02-2004 when she is alleged to have written the letter (Ext. 49) alleging demand of dowry and ill-treatment by the appellants towards her. Moreover, from a reading of Ext. 49 which is in Hindi, it is found that at many places the author of the letter has used words in 'puling' instead of 'striling', which raises serious doubts as to whether the letter has been written by a woman or by a man. Since there are grave doubts as to whether the letter (Ext. 49) was actually written by the deceased or not, conviction of the appellants only on the basis of the said letter (Ext. 49) for the offences under Sections 304B, 498A and 306, IPC is unsafe. [Para 4] [935-H; 936-A-C, E-H]

2.1. Ext. 31, a letter dated 25-04-2004 is admitted by PW 3 to have been written by him from Chaksiria in Bihar to the deceased at Ahmedabad. From the contents of the letter dated 25-04-2004, it is clear that after talking to the deceased on telephone, PW3 was satisfied that the

deceased was living happily and was not being misbehaved with. This letter is dated 25-04-2004 and was most proximate to 18-05-2004 when the deceased committed suicide by pouring kerosene on her body and this letter is evidence of the fact that the deceased was happy and was not being misbehaved with by anybody. This being the evidence, there are reasonable doubts in the story of the prosecution that the appellants had subjected the deceased to cruelty or harassment soon before her death. [Para 5] [937-A, F-G]

2.2. On a reading of Ext. 31, it is difficult for the Court to record a definite finding that there was a demand of Rs.33,000/- or Rs.43,000/- towards dowry as alleged by the State. In any case, even if there was such demand of dowry of Rs.33,000/- or Rs.43,000/-, mere 'demand of dowry' without proof of 'cruelty' or 'harassment' caused to the deceased by the appellants cannot make the appellants liable for the offences under Sections 304B, 498A or 306, IPC. [Para 6] [938-B-C]

3. To establish the offence of dowry death under Section 304B, IPC the prosecution has to prove beyond reasonable doubt that the husband or his relative has subjected the deceased to cruelty or harassment in connection with demand of dowry soon before her death. Similarly, to establish the offence under Section 498A, IPC the prosecution has to prove beyond reasonable doubt that the husband or his relative has subjected the victim to cruelty as defined in Clauses (a) and (b) of the Explanation to Section 498A, IPC. In the present case, the prosecution has not been able to prove beyond reasonable doubt that the appellants have subjected the deceased to any cruelty or harassment. Further, it is noticed from Ext. 31 written by PW 3 to the deceased on 25-04-2004 that after talking to the deceased on telephone, he was satisfied that she was living happily and was not

being misbehaved with. No other material having come in evidence to establish that the appellants instigated the deceased to commit suicide, it is difficult to hold that the appellants had in any way abetted the suicide by the deceased on 18-05-2004. [Para 7] [938-D-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 613 of 2007.

From the Judgment & Order dated 04.12.2006 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 1822 of 2006 with Criminal Misc. Application No. 11771 of 2006.

Haresh Raichura, Saroj Raichura, Kalp Raichura, Ranvir Singh, Rajat Vats for the Appellants.

Hemantika Wahi, Pinky Behara, Shubhade Deshpande for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is an appeal against the judgment dated 04-12-2006 of the Gujarat High Court in Criminal Appeal No. 1822 of 2006.

2. The facts very briefly are that Anitha @ Rinkudevi got married to the appellant No. 1 in the year 2002. Appellant Nos. 2 and 3 are the father and mother respectively of appellant No. 1. On 18-05-2004, Rinkudevi poured kerosene over her body and died out of burns. Her brother Munnakumar lodged a complaint on 21-05-2004 before the Assistant Police Commissioner, 'J' Division, Ahmedabad City in which he alleged that Rinkudevi had written to him that the appellants were harassing her since two years after the marriage for not bringing dowry such as table, chair, sofa set, bed, scooter, colour T.V. and along with the complaint he produced xerox copy of a letter dated 16-02-2004 said to have been written by Rinkudevi. In the complaint, Munnakumar further alleged that the appellants were using slangs against Rinkudevi and used

to beat her and were giving physical and mental harassment to her for not bringing dowry and instigated her to commit suicide by sprinkling kerosene on her body. The complaint was registered as FIR and after investigation, a charge sheet was filed against the appellants under Sections 304B, 498A and 306 read with Section 114, IPC.

3. At the trial, amongst other witnesses, Munnakumar was examined as PW3 and he proved not only his complaint (Ext. 25) but also the letter dated 16-02-2004 (Ext. 49) said to have been written by the deceased to him from Ahmedabad. The appellants led defence evidence through DW 1 who is said to have written a letter dated 23-02-2004 (Ext. 44) and the defence of the appellants was that the deceased was in Chaksiriya village with her brother's family in Bihar and was not at Ahmedabad on 16-02-2004 from where the letter (Ext. 49) is said to have been written by her to PW 3. The further case of the appellants in defence was that the deceased was a minor when she got married to the appellant No. 1 and she committed suicide because she wanted to remain with her parents in Chaksiriya village and did not want to live with the appellants at Ahmedabad. The Trial Court disbelieved the defence evidence and convicted the appellants under Sections 304B, 498A and 306, IPC on the basis of the evidence of PW 3 and Ext. 49 written by the deceased to PW 3 and Ext. 31 written by PW 3 to the deceased. The appellants challenged the findings of the Trial Court in the High Court in the Criminal Appeal, but the High Court maintained conviction of the appellants.

4. After hearing Mr. Haresh Raichura, learned counsel for the appellants, and Ms. Pinky Behara, learned counsel for the State, at length, we find that besides Ext. 49, there is no other evidence of a prosecution witness to establish that the appellants had, in any way, subjected the deceased to cruelty or harassment. In other words, the letter dated 16-02-2004 alleged to have been written by the deceased (Ext. 49) to PW

3 is the only evidence produced by the prosecution to prove that the appellants had subjected the deceased to harassment and cruelty in connection with demand for dowry. But, we have grave doubts as to whether the said letter dated 16-02-2004 (Ext. 49) was at all written by the deceased to PW 3 for various reasons. The said letter dated 16-02-2004 is alleged to have been written by the deceased from Ahmedabad. PW 3 has not stated in his evidence specifically that on 16-02-2004 the deceased was at Ahmedabad. On the other hand, DW 1 has stated in his evidence that on 15-02-2004, his wife and he had gone to Chaksiriya village which was the home of his wife and they stayed at Chaksiriya up to 21-02-2004 and everyday they used to meet Munnakumar (PW 3) and the deceased and PW 3 wanted to send the deceased to Ahmedabad but the deceased was not willing to go to Ahmedabad and she used to say that if she is sent to Ahmedabad, she will commit suicide. DW 1 has further stated in his evidence that he had written an inland letter dated 23-02-2004 (Ext. 44) to appellant No. 2 and he has also stated that the handwritings and signature in the letter marked as Ext. 44 were his. We find that Ext. 44 is an inland letter and bears the postal stamp of not only the post office of 'dispatch' in Bihar but also the post office of 'receipt' in Ahmedabad. The evidence of DW 1 supported by Ext. 44 thus makes it probable that the deceased was not at Ahmedabad but at Chaksiriya village in Bihar on 16-02-2004 when she is alleged to have written the letter (Ext. 49) alleging demand of dowry and ill-treatment by the appellants towards her. Moreover, from a reading of Ext. 49 which is in Hindi, we find that at many places the author of the letter has used words in 'puling' instead of 'striling', which raises serious doubts as to whether the letter has been written by a woman or by a man. Since there are grave doubts as to whether the letter (Ext. 49) was actually written by the deceased or not, conviction of the appellants only on the basis of the said letter (Ext. 49) for the offences under Sections 304B, 498A and 306, IPC is unsafe.

5. Coming now to Ext.31, we find that the letter (Ext. 31)

is dated 25-04-2004 and is admitted by PW 3 to have been written by him from Chaksiria in Bihar to the deceased at Ahmedabad. Relevant portions from this letter (Ext. 31) are extracted hereinbelow:

> "... ... ...
>
> The main reason for writing this letter is that since when you have gone (sic) I have been waiting for your letter. But unfortunately, I have not received even a single letter. But after talking to you on telephone, I am satisfied that this time you are living happily and not being misbehaved.
>
> ... ...
>
> Further, I have to say that you have not to think anything about Rs.33,000/- as to from where your Bhaiya will manage the amount. Regarding it, I want to convey you that I have so much self confidence and high thinking that not to talk of Rs.33,000/-, I would have paid even Rs.43,000/- provided that you are alright. You should not face further problems. What more should I write. It is better to write less and understand more."

From the aforesaid contents of the letter dated 25-04-2004 of PW 3 to the deceased, it is clear that after talking to the deceased on telephone, PW 3 was satisfied that the deceased was living happily and was not being misbehaved with. This letter is dated 25-04-2004 and was most proximate to 18-05-2004 when the deceased committed suicide by pouring kerosene on her body and this letter is evidence of the fact that the deceased was happy and was not being misbehaved with by anybody. This being the evidence, there are reasonable doubts in the story of the prosecution that the appellants had subjected the deceased to cruelty or harassment soon before her death.

6. Learned counsel for the State, Ms. Pinky Behara, vehemently submitted that in Ext.31, there is also a mention that PW 3 will provide not just Rs.33,000/- but even Rs.43,000/-

provided the deceased was alright so that the deceased did not face any problems. She submitted that this would show that there was some demand of dowry on PW 3 in connection with the marriage of the deceased. On a reading of Ext. 31, it is difficult for the Court to record a definite finding that there was a demand of Rs.33,000/- or Rs.43,000/- towards dowry. In any case, even if there was such demand of dowry of Rs.33,000/- or Rs.43,000/-, mere 'demand of dowry' without proof of 'cruelty' or 'harassment' caused to the deceased by the appellants cannot make the appellants liable for the offences under Sections 304B, 498A or 306, IPC.

7. To establish the offence of dowry death under Section 304B, IPC the prosecution has to prove beyond reasonable doubt that the husband or his relative has subjected the deceased to cruelty or harassment in connection with demand of dowry soon before her death. Similarly, to establish the offence under Section 498A, IPC the prosecution has to prove beyond reasonable doubt that the husband or his relative has subjected the victim to cruelty as defined in Clauses (a) and (b) of the Explanation to Section 498A, IPC. In the present case, the prosecution has not been able to prove beyond reasonable doubt that the appellants have subjected the deceased to any cruelty or harassment. Further, we have noticed from Ext. 31 written by PW 3 to the deceased on 25-04-2004 that after talking to the deceased on telephone, he was satisfied that she was living happily and was not being misbehaved with. No other material having come in evidence to establish that the appellants instigated the deceased to commit suicide, it is difficult for the Court to hold that the appellants had in any way abetted the suicide by the deceased on 18-05-2004.

8. For the aforesaid reasons, we set aside the impugned judgment of the High Court as well as the judgment of the Trial Court and allow the appeal. The appellants are on bail and their bail bonds are discharged.

B.B.B. Appeal allowed.

RAJASTHAN STATE ROAD TRANSPORT CORPORATION AND ANOTHER

v.

SATYA PRAKASH

(Civil Appeal No. 4560 of 2008)

APRIL 9, 2013

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

INDUSTRIAL DISPUTES ACT, 1947:

s. 33-A read with s.33 - Complaint by a daily wager - bus conductor who had been dismissed from service after an inquiry - Industrial Tribunal holding the charge proved, but directing reinstatement of workman without back wages - Held: When respondent had indulged into a misconduct within a very short span of service which had been duly proved, there was no occasion to pass the award of reinstatement with continuity in service - Single Judge as well as the Division Bench of High Court have fallen in the same error in upholding the order of Tribunal - The complaint ought to have been dismissed - Judgments of High Court as also award of Tribunal, except as mentioned in the judgment, are set aside - Consequently the complaint shall stand dismissed.

ss.33 and 33-A - Nature and scope of Explained - Held: Once the Complaint u/s 33A is decided, there is no question of granting any liberty to apply u/s 33 of the Act.

The respondent, working as a bus conductor on daily wages, was found to have collected fare from passengers but had not issued tickets to some of them. A departmental inquiry was conducted against him wherein he did not participate. The charge was found proved and the respondent was dismissed from service. He filed a civil suit. The trial court recorded a finding

against him but dismissed the suit for want of territorial jurisdiction. Thereafter, the respondent filed a complaint before the Industrial Tribunal u/s s.33-A of the Industrial Disputes Act, 1947. The Tribunal also found the charge to have been proved, but held that provisions of s.33(2)(b) of the Act had not been complied with and directed reinstatement of the respondent, without back wages but with continuity of service. The single Judge of the High Court in writ petition as also the Division Bench in writ appeal declined to interfere.

Allowing the appeal, the Court

HELD: 1.1 Section 33A of the Industrial Disputes Act, 1947 was enacted to make a special provision for adjudication as to whether s.33 has been contravened. This section enables an employee aggrieved by such contravention to make a complaint in writing in the prescribed manner to the tribunal. Sub-s. (b) of s.33A clearly lays down that when such a complaint is made, the Tribunal shall adjudicate upon the complaint as if it were a dispute referred to it, in accordance with the provisions of the Act and shall submit the award to the appropriate Government, and the provisions of this Act shall apply accordingly. Thus, by this section the aggrieved employee is given a right to move the tribunal and to prove his case on merits, without having to take recourse to s.10 of the Act. [para 15-16] [952-G; 953-C-D]

1.2 In the instant case, the Tribunal while deciding the complaint has gone into the merits of the case as in a Reference, given full opportunity to the parties, and then held that the charge against the respondent was proved. This finding is not disturbed by the High Court. The civil court has also given the same finding which was not challenged by the respondent. Both these proceedings were initiated by the respondent/workman and resulted

into a decision against him on merits. The decision of the civil court was however not placed before the Industrial Tribunal either by the respondent or by the appellant.The respondent worked only for 5 months as a daily wager. The Tribunal accepted that during this very short span of service as a daily wager, the respondent had committed the misconduct which had been duly proved. Having held so, the Tribunal was expected to dismiss the complaint filed by the respondent. It could not have passed the order of reinstatement with continuity in service in favour of the respondent on the basis that initially the appellant had committed a breach of s.33 (2) (b) of the Act. The Single Judge as well as the Division Bench of the High Court have fallen in the same error in upholding the order of the Tribunal. It is made clear that once the complaint u/s 33A is decided, there is no question of granting any liberty to apply u/s 33 of the Act. [para 10, 19 and 20] [949-G-H; 950-A-B; 954-G-H; 955-A-B, D-E]

Punjab National Bank Ltd. vs. All India Punjab National Bank Employees Federation & Anr. **AIR 1960 SC 160 ;** *Delhi Cloth and General Mills Co. Ltd. vs. Rameshwar Dayal* **1961 SCR 590 = AIR 1961 SC 689;** *P.H. Kalyani vs. M/s. Air France Calcutta* **AIR 1964 SCR 104 =1963 SC 1756; and** *Lalla Ram vs. D.C.M. Chemicals Works Ltd.* **1978 (3) SCR 82 = 978 (3) SCC 1 - relied on.**

Karimbhai **1977(2) SCR 932= 1977 (2) SCC 350;** *United Bank of India vs. Sidhartha Chakraborty* **2007 (9) SCR 498 = 2007 (7) SCC 670;** *Jaipur Zila Sah. Bhoomi Vikas Bank Ltd. vs. Ram Gopal Sharma & Ors.* **2002 (1) SCR 284 = 2002(2) SCC 244;** *Bhavnagar Municipality vs. Alibhai Karimbhai* **1977(2) SCR 932; 1977 (2) SCC 350;** *United Bank of India vs. Sidhartha Chakraborty* **2007 (9) SCR 498 = 2007 (7) SCC 670;** *Straw Board Mfgc co. Ltd. Saharanpur vs. Govind* **1962 (3) Suppl. SCR 618 = 1962 AIR 1500;** *Tata*

Iron & Steel Co. Ltd. Tisco vs S.N. Modak **1965 (3) SCR 411= 1966 AIR 380;** *Punjab Beverages Pvt. Ltd. Chandigarh .Vs. Suresh Chand* **1978 (3) SCR 370 = 1978 (2) SCC 144 - referred to.**

1.3 It is true that the appellant had not applied for the necessary approval as required u/s 33. That is why complaint was filed by the respondent u/s 33A of the Act, which was adjudicated like a reference, as required by the statute, and the misconduct having been held to have been proved, thereafter there is no question to hold that the termination shall still continue to be void and inoperative. The de jure relationship of employer and employee would come to an end with effect from the date of the order of dismissal passed by the appellant. [para 19] [955-A-C]

1.4 In the instant case, the respondent was employed as a daily rated employee for a period of three months, and thereafter was continued for a few months more. There was no question of his being in service even for one continuous year, since he had obviously not completed 240 days of service. During this short span of service there were various allegations against him. The appellants could have discontinued him from service as it is, since he was a daily wager. However, since there was an allegation of misconduct, they afforded him an opportunity to explain, but he did not attend the inquiry. This led to his dismissal from service. When the respondent filed the complaint u/s 33A, the Industrial Tribunal also returned the finding that the appellant had proved the misconduct. This being the position, this finding will relate back and the employer employee relationship between the parties will be deemed to have ended from the date of dismissal order passed by the appellant. [para 21] [955-G-H; 956-A-B & C-D]

1.5 The judgments of the High Court as also the

judgment of the Industrial Tribunal, except as mentioned in the instant judgment, are set aside. Consequently, the complaint shall stand dismissed. [para 22] [956-E-F]

Case Law Reference:

2002 (1) SCR 284	**referred to**	**para 7**
1977(2) SCR 932	**referred to**	**para 8**
2007 (9) SCR 498	**referred to**	**para 8**
1962 (3) Suppl. SCR 618	**referred to**	**para 11**
1965 (3) SCR 411	**referred to**	**para 11**
1978 (3) SCR 370	**referred to**	**para 11**
AIR 1960 SC 160	**relied on**	**para 15**
1961 SCR 590	**relied on**	**para 17**
1964 SCR 104	**relied on**	**para 17**
1978 (3) SCR 82	**relied on**	**para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4560 of 2008.

From the Judgment and Order dated 21.10.2005 of the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur in D.B. Special Appeal (Writ) No. 1093 of 2005.

Puneet Jain, Anurag Gohil, Sushil Kumar Jain for the Appellants.

Shovan Mishra, Mukul Kumar for the Respondent.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. This appeal seeks to challenge the judgment and order dated 21.10.2005 rendered by a Division Bench of the Rajasthan High Court in D.B. Special Appeal

(Writ) No.1093 of 2005, dismissing the appeal filed by the appellants against the judgment and order dated 19th July, 2005, rendered by a learned Single Judge of that High Court in Civil Writ Petition No.3933 of 2009, by which judgment the award dated 3.12.2002 rendered by the Industrial Tribunal, Jaipur in Case No. I.T. No.41 of 1994 was upheld.

2. Mr. Puneet Jain, learned counsel has appeared in support of this appeal and Mr. Shovan Mishra, learned counsel for the respondent.

The facts leading to this appeal are as follows:-

3. The respondent was working as a bus conductor on daily wages under the appellant-Rajasthan State Road Transport Corporation ("S.T. Corporation" for short) from 8th May, 1987 with a daily wage of Rs.20/- per day. His appointment was for a period of three months only though it appears that it was continued for a little while more. It was alleged that during this short period also there were instances of his misbehaviour with the staff, of using abusive language, and coming to office in drunken state. An F.I.R. was also lodged against him. It so transpired that when he was on duty on 10th October, 1987, on the route from Sirohi to Jodhpur, his bus was checked by a flying squad led by the Judicial Magistrate, Transport. It was found that there were 20 passengers traveling in that bus. The respondent had collected the fare from all of them. However, three and half tickets were found to have been issued less. In view thereof a Departmental enquiry was conducted against him. The respondent did not appear therein despite notices. Appellant led the necessary evidence, and the inquiry officer held that the charge was proved. The respondent was, therefore, directed to be dismissed from service by the order passed by the Divisional Manager, Jodhpur with effect from 20th November, 1987.

4. The respondent felt aggrieved by his dismissal and filed a Civil Suit before the Additional Civil Judge, Junior Division,

Jaipur City being Civil Suit No.1572 of 1989. The first issue raised in that suit was whether the termination of the respondent was liable to be set aside for being bad in law for being and against the principles of natural justice. The Court noted that the respondent was issued notices to remain present in inquiry, first on 27.10.1987, and on 6.11.1987, but he chose not to remain present. The Court, therefore, held that it becomes clear that the respondent was given sufficient opportunity of being heard, but he himself did not remain present before the competent authority, and the inquiry officer had no other option except to proceed ex-parte. The Civil Court also noted that the respondent had accepted the fact in his statement that when the bus was checked on 10.10.1987, the flying squad had made necessary remark on the way-bill but he had refused to sign it. The Court observed that this conduct of the respondent proved that he did not want the truth of the incident to be brought on record. The Civil Court, therefore, decided the first issue in favour of the appellants. The second issue raised was with respect to the jurisdiction of the Civil Court. The appellant had contended in their written statement that since the concerned dispute was an industrial dispute, the Civil Suit was not maintainable. The issue was however not decided on that count. It was decided in favour of the appellants on another basis viz. that the Civil Court in Jaipur did not have the jurisdiction for the reason that the cause of action had arisen in Jodhpur since the order of the Divisional Manager was passed in Jodhpur. The suit, therefore, came to be dismissed by its judgment and order dated 24.11.1994.

5. At that time, another industrial dispute concerning the workmen of the appellant-S.T. Corporation was pending determination before the Labour Court/Tribunal being I.T. No.92 of 1986 concerning the demands of the workman. The respondent, therefore, filed a Complaint before the Industrial Tribunal of Rajasthan at Jaipur under Section 33A of the Industrial Disputes Act, 1947 ("I.D. Act" for short) which was numbered as case No. I.T. No.41 of 1994. The respondent

however did not disclose that he had filed a civil suit earlier which had come to be dismissed. The respondent took the plea that the appellant was expected to apply for approval of its action to the Tribunal/Labour Court concerned under Section 33 (2) (b) of the I.D. Act. The appellant had not done that, and therefore the termination of his services was bad in law.

6. (i) The learned Tribunal, which heard the Complaint, held that the S.T. Corporation had not held a departmental inquiry as contemplated under the standing orders. This was despite the evidence of the appellant in the Tribunal that the respondent did not remain present in the inquiry although notices of personal hearing were served on him. The Appellant was however given the opportunity to prove the misconduct in the Tribunal. The appellant filed the affidavit of the officers concerned and they were cross-examined. The respondent also produced his affidavit and was cross-examined. The Tribunal examined the material on record. It noted that the corporation witness Purshottam Das Purohit, a member of the checking squad stated that there were 20 passengers in the bus out of whom 3½ passengers were found to be without tickets. The respondent had already collected the amount of fare for all of them. Accordingly, Mr. Purohit had recorded his remarks on the way-bill. Signatures of two witnesses and also of the bus driver were taken thereon. He further stated that the respondent had refused to sign on the way-bill. The statement of one of the passengers without ticket viz. one Bhanwar Lal Goyal was recorded and his signature was taken. The statements of the 3½ passengers were also recorded at the site.

(ii) In paragraph 9 the Tribunal referred to the affidavit of the respondent. He accepted that he had no enmity with the inspecting team. He accepted that inspection of the bus had been done on that date. He however, denied that 3½ tickets were not issued. The Tribunal however, noted that he did not produce any specific evidence to prove his statement. Therefore, at the end of paragraph 9 of the award the Tribunal concluded in the following words:-

"Therefore from the evidence of the Corporation the charge of carrying 3 ½ passengers without ticket by the Applicant during the course of the inspection is certainly proved and from whom he had already recovered the fare amount."

7. Thus as seen from above, the Tribunal in terms held in paragraph 9 of its judgment that the charge of not issuing three and a half tickets, despite receiving the fare, was certainly proved. The Tribunal however held that the fact remained that at the same time the provisions of Section 33 (2) (b) of the Act had not been complied with, which had led to the filing of the Complaint. Therefore, by its award dated 3.12.2012, it directed reinstatement of the respondent though without backwages but with continuity of service. This was after referring to the law laid down by a Constitution Bench of this Court in *Jaipur Zila Sahkari Bhoomi Vikas Bank Ltd. vs. Ram Gopal Sharma* reported in 2002 (2) SCC 244, that non compliance with Section 33 (2) (b) will make the termination inoperative. This order has been left undisturbed by a learned Single Judge of the High Court, as well as by the Division Bench. Hence, this appeal. At this stage, we may note that neither in the Tribunal nor before the High Court did the appellant raise any submission based on the earlier decision of the Civil Court.

Submissions of the rival parties and their consideration:-

8. (i) The appellant is aggrieved by the relief granted to the respondent on account of the breach of Section 33 (2) (b) of the I.D. Act, since the Tribunal had otherwise held that the misconduct had been proved. Learned counsel for the appellant Mr. Puneet Jain, drew our attention to the judgment of this Court in the case of *The Bhavnagar Municipality vs. Alibhai Karimbhai and Ors.,* reported in 1977 (2) SCC 350, wherein this Court has held in paragraph 15 that when a Complaint under Section 33A is filed, after finding out whether there is a breach of the provision of Section 33, the Labour Court or Tribunal is supposed to treat the Complaint under Section 33A

in the same manner as in the case of a Reference under Section 10 of the Act. In the present matter also both the parties were allowed to lead evidence on the merits of the controversy before the Tribunal, and then the finding was arrived at as in a Reference. The submission is that thereafter the workman cannot be allowed to raise the plea of the initial breach of Section 33 (2) (b) of the Act.

(ii) Alternatively, it is submitted that it is essentially a case of technical breach of Section 33, and in another judgment in the case of *United Bank of India vs. Sidhartha Chakraborty,* reported in 2007 (7) SCC 670, this Court has granted liberty to the employer in the event of such a breach to take action in terms of Section 33 (2) (b) of the Act. Therefore, it is submitted that if the initial failure to apply for approval is yet to be held against the appellant, such a liberty be granted to the appellant in the present case also.

9. Learned counsel for the respondent Mr. Mishra, on the other hand submits that the fact remains that in the instant case the appellant had not complied with Section 33 (2) (b) of the Act and, therefore, the consequence has to follow, and that is the view taken by the Industrial Tribunal, which has been confirmed by the learned Single Judge as well as the Division Bench of the High Court, and that this Court should not interfere therewith. He submits that in case if any liberty is given to the appellant to apply under Section 33 (2) (b) at this stage, the respondent be also given opportunity to defend.

10. We have noted the submissions of both the counsel. In the instant case, the Tribunal while deciding the Complaint has gone into the merits of the case as in a Reference, given full opportunity to the parties, and then held in paragraphs 8 and 9 of its award dated 3.12.2002 that the charge of not issuing three and a half tickets, despite collecting the fare, was proved. This finding is not disturbed by the High Court. The Civil Court has also given the same finding by its earlier judgment and order dated 24.11.1994, which is not challenged by the respondent.

Both these proceedings were initiated by the respondent/ workman and resulted into a decision against him on merit. The decision of the Civil Court was however not placed before the Industrial Tribunal either by the respondent or by the appellant. The question which arises for our consideration on this background is as to whether the Tribunal was right in awarding reinstatement with continuity of service in the proceeding under Section 33A of the Act which arose out of the initial breach of Section 33 (2) (b) of the Act by the respondent.

11. In this behalf, we must note that in *Jaipur Zila Sahkari Bhoomi Vikas Bank Ltd.* (supra), the Constitution Bench was concerned with the interpretation of Section 33 (2) (b) of the Act in the context of a Reference arising out of conflicting judgments thereon. Two Benches of this Court consisting of three learned Judges in (1) *Strawboard mfg. Co. vs. Govind* (reported in AIR 1962 SC 1500) and (2) *Tata Iron & Steel Co. Ltd. vs. S.N. Modak* (reported in AIR 1966 SC 380) had taken the view that if the approval is not granted under Section 33 (2) (b) of the Act, the order of dismissal becomes ineffective from the date it was passed. Another Bench of three learned Judges in *Punjab Beverages (P) Ltd. vs. Suresh Chand* [reported in 1978 (2) SCC 144] had expressed a contrary view. The question referred for consideration of the Constitution Bench was as follows:-

> "If the approval is not granted under Section 33 (2)(b) of the Industrial disputes Act, 1947, whether the order of dismissal becomes ineffective from the date it was passed or from the date of non-approval of the order of dismissal and whether failure to make application under Section 33 (2)(b) would not render the order of dismissal inoperative.?"

12. While considering the issue, the Court noted in paragraph 6 of the judgment that the object behind enacting Section 33 as it stood prior to its amendment in 1956, was to allow continuance of industrial proceedings pending before any authority/court/tribunal prescribed by the Act in a peaceful

atmosphere undisturbed by any other industrial dispute. In course of time, it was felt that the un-amended Section 33 was too stringent, for it placed a total ban on the right of the employer to make any alteration in conditions of service or to make any order of discharge or dismissal even in cases where such alteration in conditions of service or passing of an order of dismissal or discharge, was not in any manner connected with the dispute pending before an industrial authority. Section 33 was, therefore, amended in 1956 to permit the employer to make changes in conditions of service, or to discharge or dismiss employees in relation to matters not connected with the pending industrial dispute. At the same time, it was also felt necessary that some safeguards must be simultaneously provided for the workmen, and therefore a provision was made that the employer must make an application for prior permission if the proposed change in the service conditions, or the proposed dismissal/discharge is in connection with a pending dispute. In other cases where there is no such connection, and where the workman is to be discharged or dismissed, (i) firstly there has to be an order of discharge or dismissal, and then it was laid down in the proviso to Section 33 (2) (b) that, (ii) the concerned workman has to be paid wages for one month, and (iii) an application is to be made to the authority concerned before which the earlier proceeding is pending, for approval of the action taken by the employer.

13. In paragraph 13 of the judgment this Court noted that the contravention of Section 33 invites a punishment under Section 31 (1) of the Act. Hence, the proviso to Section 33 (2) (b) cannot be diluted or disobeyed by an employer. It is a mandatory provision made to afford a protection to the workmen to safeguard their interest, and it is a shield against victimization and unfair labour practice by an employer during the pendency of an industrial dispute. Therefore, the order made without complying with the said proviso is void and inoperative.

14. Having noted this, what is observed by this Court in

paragraph 14 of the judgment is relevant for our purpose. The relevant part of this para reads as follows:-

> "14. Where an application is made under Section 33 (2) (b) proviso, the authority before which the proceeding is pending for approval of the action taken by the employer has to examine whether the order of dismissal or discharge is bona fide; whether it was by way of victimization or unfair labour practice; whether the conditions contained in the proviso were complied with or not etc. If the authority refuses to grant approval obviously it follows that the employee continues to be in service as if the order of discharge or dismissal never had been passed. **The order of dismissal or discharge passed invoking Section 33 (2) (b) dismissing or discharging an employee brings an end of relationship of the employer and employee from the date of his dismissal or discharge but that order remains incomplete and remains inchoate as it is subject to approval of the authority under the said provision. In other words, this relationship comes to an end de jure only when the authority grants approval……."**
>
> (emphasis supplied)

15. The same paragraph lays down that if a workman is aggrieved by the approval, his remedy is to file a Complaint under Section 33A of the Act. This section has a definite purpose to serve viz. to provide a direct access to the Tribunal and thereby a speedy relief, instead of seeking the time consuming procedure of seeking a Reference under Section 10 of the Act. In that complaint, however, the employee will succeed only if he establishes that the misconduct is not proved and not otherwise, and if he does succeed in so establishing, it will relate back to the date on which the dismissal order was passed by the employer as if it was inoperative. This remedy is independent of the penal consequences which the employer may have to face under Section 31 (1) of the Act if prosecuted

for the breach of Section 33. This Section 33A reads as follows:-

> **"33A. Special provision for adjudication as to whether conditions of service, etc., changed during pendency of proceeding.-** Where an employer contravenes the provisions of section 33 during the pendency of proceedings [before a conciliation officer, Board, an arbitrator, Labour Court, Tribunal or National Tribunal] any employee aggrieved by such contravention, may make a complaint in writing, [in the prescribed manner,-
>
> (a) to such conciliation officer or Board, and the conciliation officer or Board shall take such compliant into account in mediating in, and promoting the settlement of, such industrial dispute; and
>
> (b) to such arbitrator, Labour Court, Tribunal or National Tribunal and on receipt of such complaint, the **arbitrator, Labour Court, Tribunal or National Tribunal, as the case may be, shall adjudicate upon the complaint as if it were a dispute referred to or pending before it, in accordance with the provisions of this Act and shall submit his or its award to the appropriate Government and the provisions of this Act shall apply accordingly."**
>
> (emphasis supplied)

As can be seen, sub-section (b) of Section 33A clearly lays down that when such a Complaint is made, the Tribunal shall adjudicate upon the Complaint as if it were a dispute referred to it, and shall submit his or its award to the appropriate Government, and the provisions of this Act shall apply accordingly. Thus, in that complaint, the employee will have to prove his case on merits.

16. The purpose behind enacting Section 33A and the scope thereof was succinctly explained by Gajendrakar J (as

he then was), in a judgment by a bench of three judges in *Punjab National Bank Ltd. vs. All India Punjab National Bank Employees Federation & Anr.* reported in AIR 1960 SC 160. In paragraph 31 thereof the Court noted that the Trade Union movement in the country had complained that the remedy for asking for a reference under Section 10 involved delay, and left the redress of the grievance of the employees entirely in the discretion of the appropriate Government; because even in cases of contravention of Section 33 the appropriate Government was not bound to refer the dispute under Section 10. That is why Section 33A was enacted to make a special provision for adjudication as to whether Section 33 has been contravened. This section enables an employee aggrieved by such contravention to make a complaint in writing in the prescribed manner to the tribunal and it adds that on receipt of such complaint the tribunal shall adjudicate upon it as if it is a dispute referred to it in accordance with the provisions of the Act. Thus by this section the aggrieved employee is given a right to move the tribunal without having to take recourse to Section 10 of the Act.

17. Thereafter while dealing with the scope of the Section 33A, the court surveyed the judgments then holding the field, and held at the end of paragraph 33 in the following words:-

> **"33..... Thus there can be no doubt that in an enquiry under S. 33A the employee would not succeed in obtaining an order of reinstatement merely by proving contravention of S. 33 by the employer.** After such contravention is proved it would still be open to the employer to justify the impugned dismissal on the merits. That is a part of the dispute which the tribunal has to consider because the complaint made by the employee is treated as an industrial dispute and all the relevant aspects of the said dispute fall to be considered under S. 33A. **Therefore, we cannot accede to the argument that the enquiry under S. 33A is confined only to the determination of the question as to whether the alleged contravention by the employer of the provisions of S. 33 has been proved or not."**

(emphasis supplied)

This judgment has been referred to, and the proposition has been once again reiterated by a bench of three Judges in para 7 of *Delhi Cloth and General Mills Co. Ltd. vs. Rameshwar Dayal* reported in AIR 1961 SC 689.

18. This legal position has been reiterated in the judgment of the Constitution Bench in *P.H. Kalyani vs. M/s Air France Calcutta* reported in AIR 1963 SC 1756 which has been quoted with approval in paragraph 17 of *Jaipur Zila Sahkari Bhoomi Vikas Bank Ltd.* (supra). In that matter, the respondent employer had applied under Section 33 (2) (b), but the workman had also filed a Compliant under Section 33A which was heard like a Reference. Evidence was led therein by the parties, and on its own appraisal of the evidence the Labour Court had held that the dismissal was justified. This Court accepted that finding, and it was held that the approval when granted will relate back to the date when the order of dismissal was passed. On the other hand, if the employer fails to prove the misconduct, the order of dismissal will become ineffective from the date when the dismissal order was passed by the employee. This legal position has been reiterated from time to time [see for instance *Lalla Ram vs. D.C.M. Chemicals Works Ltd.* reported in 1978 (3) SCC 1]. In *Jaipur Zila Sahakari Bhoomi Vikas Bank* (supra) the Constitution Bench endorsed the view taken in *Strawboard* (supra) and *Tata Iron & Steel Co.* (supra) and held that the view expressed in Punjab Beverages (supra) was not correct.

19. In the present case, the Tribunal accepted that during this very short span of service as a daily wager the respondent had committed the misconduct which had been duly proved. Having held so, the Tribunal was expected to dismiss the Complaint filed by the respondent. It could not have passed the order of reinstatement with continuity in service in favour of the respondent on the basis that initially the appellant had

committed a breach of Section 33 (2) (b) of the Act. It is true that the appellant had not applied for the necessary approval as required under that section. That is why the Complaint was filed by the respondent under Section 33A of the Act. That Complaint having been filed, it was adjudicated like a reference as required by the statute. The same having been done, and the misconduct having been held to have been proved, now there is no question to hold that the termination shall still continue to be void and inoperative. The de jure relationship of employer and employee would come to an end with effect from the date of the order of dismissal passed by the appellant. In the facts of the present case, when the respondent had indulged into a misconduct within a very short span of service which had been duly proved, there was no occasion to pass the award of reinstatement with continuity in service. The learned Single Judge of the High Court as well as the Division Bench have fallen in the same error in upholding the order of the Tribunal.

20. Since the Complaint was decided like a reference, and since we are holding that it ought to have been dismissed, we are not required to go into the alternative submission that the appellant be given further liberty, to de novo apply under Section 33 (2) (b) on the lines of the judgment in *United Bank of India* (supra). However, we make it clear that once the Complaint under Section 33A is decided, there is no question of granting any such liberty. Besides, we would like to observe that such liberty was given in the case of *United Bank of India* (supra) "considering the background facts of the case" as stated in paragraph 11 of the said judgment.

21. In the instant case, the respondent was employed as a daily rated employee for a period of three months, and thereafter was continued for a few months more. There was no question of his being in service even for one continuous year, since he had obviously not completed 240 days of service. During this short span of service there were various allegations against him. The appellants could have discontinued him from service as it is, since he was a daily wager. However, since

there was an allegation of misconduct, they afforded him an opportunity to explain. At the time of the incident of checking of the bus, the respondent did not sign the way-bill, nor did he attend the inquiry, wherein, he was called to explain his conduct. This led to his dismissal from service. He chose to file a Civil Suit in a wrong Court at Jaipur. The Civil Court which heard the suit held that the misconduct had been proved, and the termination could not be faulted. However, the very Court held that it did not have the territorial jurisdiction to decide the suit. Therefore one may keep aside the finding of that Court concerning the misconduct. However, when the respondent filed the Complaint under Section 33A, the Industrial Tribunal also returned the same finding in paragraphs 8 and 9 of its award that the appellant had proved the misconduct. This being the position, this finding will relate back and the employer employee relationship between the parties will be deemed to have ended from the date of the dismissal order passed by the appellant.

22. For the reasons stated above, this Civil Appeal is allowed. We hereby set-aside the judgment and order rendered by the Division Bench of the Rajasthan High Court in D.B. Special Appeal (Writ) No.1093 of 2005, dismissing the appeal filed by the appellants against the judgment and order dated 19th July, 2005, rendered by a learned Single Judge of that High Court in Civil Writ Petition No. 3933 of 2009, confirming the award dated 3.12.2002 rendered by the Industrial Tribunal, Jaipur in Case No. I.T. No.41 of 1994. All the three judgments, except the finding in paragraph 8 and 9 of the Industrial Tribunal, Jaipur in Case No. I.T. No.41 of 1994 are hereby set-aside. Consequently, the said Complaint being case No. I.T. No.41 of 1994 shall stand dismissed requiring no order on the Civil Writ Petition No.3933 of 2009 and D.B. Special Appeal (Writ) No.1093 of 2005. Both of them will stand disposed of. In the facts of the present case however, we do not make any order as to costs.

R.P. Appeal allowed.

DILIP

v.

STATE OF MADHYA PRADESH

(Criminal Appeal No. 1156 of 2010)

APRIL 16, 2013

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

PENAL CODE, 1860:

ss. 376 and 450 - Rape of a minor girl - Acquittal by trial court holding that prosecutrix was not below 16 years of age and it was a case of consent- Conviction by High Court with 7 years RI - Held: Evidence of father of prosecutrix, doctor who medically examined and teacher of night school and school register clearly establish the age of prosecutrix to be 14 years at the time of occurrence - Besides, doctor found that prosecutrix had only 28 teeth, 14 in each jaw, which further indicates that she was 14 years of age - Therefore, question of consent becomes totally irrelevant- There is no reason to interfere with judgment of High Court - Sexual assault - Age of prosecutrix - Relevancy of number of teeth.

CRIMES AGAINST WOMEN:

Sexual assault cases - Sensitivity to be shown by prosecution and trial court - Directions given by Supreme Court in Delhi Domestic Working Women's Forum's case, reiterated - Further directions given - Director General of Police and Home Ministry of the State to issue proper guidelines and instructions to authorities as to how to deal with such cases and the kind of treatment to be given to prosecutrix.

Bishnudayal v. State of Bihar **AIR 1981 SC 39;** *Kailash*

@ Tanti Banjara v, State of M.P. **2013 (6) SCALE 1;** *State of H.P. v. Mange Ram,* **2000 (2) Suppl. SCR 626 = AIR 2000 SC 2798;** *Uday v. State of Karnataka,* **2003 (2) SCR 231 = AIR 2003 SC 1639;** *Pradeep Kumar Verma v. State of Bihar & Anr.,* **2007 (9) SCR 58 = AIR 2007 SC 3059;** *Delhi Domestic Working Women's Forum v. Union of India & Ors.,* **1994 (4) Suppl. SCR 528 = (1995) 1 SCC 14 - referred to.**

Case Law Reference:

AIR 1981 SC 39	**referred to**	**para 11**
2013 (6) SCALE 1	**referred to**	**para 11**
2000 (2) Suppl. SCR 626	**referred to**	**para 12**
2003 (2) SCR 231	**referred to**	**para 14**
2007 (9) SCR 58	**referred to**	**para 15**
1994 (4) Suppl. SCR 528	**referred to**	**para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1156 of 2010.

From the Judgment and Order dated 04.11.2006 of the High Court of M.P. at Jabalpur in Crl. Appeal No. 1228 of 1992.

B. Sridhar for the Appellant.

Vibha Datta Makhija, Ashok K. Mahajan for the Respondent.

The following order of the Court was delivered by

O R D E R

1. This appeal has been preferred against the impugned judgment and order dated 4.11.2006 in Criminal Appeal No.1228 of 1992 of the High Court of Madhya Pradesh at Jabalpur, by way of which it reversed the judgment and order of the Sessions Judge, Seoni, Madhya Pradesh dated

16.7.1992 in Sessions Trial No.82 of 1990, by which the appellant stood acquitted of the charges punishable under Sections 376 and 450 of the Indian Penal Code, 1860 (hereinafter referred to as 'IPC').

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

A. The appellant is younger brother of the brother-in-law of the prosecutrix-Diplesh. The appellant came to the house of the prosecutrix on 13.6.1990. Her parents and elder brother left for the market leaving the prosecutrix and her younger brother in the house. The appellant found the prosecutrix alone as her brother was merely a child and raped her. The prosecutrix fainted and on regaining her consciousness, the prosecutrix narrated the incident to her father who lodged the FIR with the police on the same day.

B. The appellant was arrested on 15.6.1990 and after investigation, the prosecution filed chargesheet against the appellant under Sections 376 and 450 IPC.

C. The Sessions Court in Sessions Trial No. 82 of 1990 acquitted the appellant vide judgment dated 16.7.1992, on the ground that the prosecution failed to prove that prosecutrix was below 16 years of age, and secondly that she had consented for having sexual intercourse with the appellant.

D. Aggrieved, the State preferred Criminal Appeal No.1228 of 1992, before the High Court. The High Court reversed the judgment of the Sessions Court, convicted the appellant for the said offences and awarded punishment of 7 years on both counts. The State appeal has been allowed.

Hence, this appeal.

3. Shri Ashok Mahajan and Shri B. Sridhar, learned Amicus Curiae have submitted that there is nothing on record

to show that at the relevant time, the prosecutrix was below 16 years of age. The trial Court had rightly came to conclusion that it was a case of consent and such a finding was based on evidence on record. There was no occasion for the High Court to reverse the said finding as there was no perversity in it. Hence, the appeal deserves to be allowed.

4. Per contra, Ms. Vibha Datta Makhija, learned Standing counsel for the State has submitted that the trial Court erred in understanding the meaning of consent and reached a wrong conclusion that the prosecutrix was not below 16 years of age. The High Court has considered the case in correct perspective and reached the correct conclusion that the prosecutrix was below 16 years of age. Thus, the consent, even if it was so, looses its significance. Thus, the appeal is liable to be dismissed.

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

6. Sawan Lal (PW-2), father of the prosecutrix while lodging an FIR stated that the prosecutrix was 15 years of age. The Investigating Officer inspected the place of occurrence and found bangles and also recovered blood stained underwear, saree and petikot of the prosecutrix and also the blood stained earth and plain earth. Dr. Kiran Katre (PW-8) examined the prosecutrix medically and opined that the prosecutrix was about 14-15 years of age. According to Dr. Katre, it was difficult even to put the little finger in the vagina of the prosecutrix. She was referred to the Radiologist, however, no such report was made available. The prosecutrix was examined in the Court on 12.11.1991 as PW-1 and the learned Sessions Judge assessed her age on the basis of her appearance as about 14 years. In addition thereto, one Kabir Das (PW-4) who was a Teacher in the night school where the prosecutrix was studying, deposed that according to the school register, her date of birth was 7.3.1975 and thus, her age was about 14 years. The said date of birth had been recorded several years

prior to the incident. It was in view thereof that Kabir Das (PW-4) had issued a Certificate, Exh.P/5, and he proved the said Certificate in the Court.

7. The trial Court came to the conclusion that the prosecutrix was not less than 16 years at the relevant time, on the ground that Dr. Katre (PW-8) had referred her for Radiologist test and she had not been examined by the Radiologist. Withholding such an evidence would give rise to draw an adverse inference against the prosecution. Secondly, the school certificate could not be relied upon as it was not a strong and material evidence. More so, such an entry had been made in the school register on the basis of the information furnished by Sawan Lal (PW-2), father of the prosecutrix who deposed in the court that such an entry was based on an entry made in her horoscope which stood destroyed in the fire.

8. In view of the above, the trial Court examined the second issue in respect of consent. The court found certain discrepancies and contradictions in the statement of the prosecutrix made under Section 161 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'), and her deposition recorded in court. In her statement before the police she had told that the appellant had threatened to kill her if she shouted. In court, she deposed that the appellant had filled the cloth in her mouth, thus, it was not possible for her to shout. The trial Court further observed that when her saree, petikot and even her panty were removed, she did not resist with full force as it was not possible for the accused to remove her panty unless she extended her cooperation. In case she had not given the consent she could have resisted the same with her full power. But, she has not deposed in court that she resisted with full power when her panty was being removed. The prosecutrix was supposed to attack the appellant like a wild animal, but she did not even resist. Thus, her conduct suggested only and only, her consent and will. The court further held that as per the medical evidence even a single finger went inside her vagina

with difficulty then it was bound to be some injury in her vagina by forcible intercourse, but the Doctor did not find any injury on the person of the prosecutrix apart from certain injuries mentioned in the medical report. Therefore, there could not be any question of forcible intercourse.

9. The trial Court while recording such finding had taken note of the fact that because of the sexual intercourse lot of blood oozed out of her vagina and as a result of the same she became unconscious.

10. The High Court re-appreciated the entire evidence on record and particularly, the medical report which contained the following features:-

(a) Her gait was painful.

(b) There was also blood clot near her vagina.

(c) Her forcet had a tear of 1/2cm x 1/2cm.

(d) There was also an abrasion of 1/2cm above urethra.

(e) Her hymen tear was in 3-9 'o' clock position.

(f) Even small finger could not be admitted in her vagina without pain to her.

(g) Her posterior fornix also had a tear of 1cm and blood clot was also present.

11. Medical report as well as Dr. Katre (PW-8) opined that it could be a case of rape. The FSL report Exh.P/12 revealed that underwear, petikot and saree of the prosecutrix were having blood stained and human spermatozoa. Similarly, in the slides as well as in the underwear of accused-appellant, the blood stains and human spermatozoa were found. The said clothes had been seized from the prosecutrix and the appellant soon after the occurrence. So far as the issue of determining the age is concerned, in the instant case Doctor has found that

prosecutrix was having only 28 teeths, 14 in each jaw. Such an issue was considered by this Court in *Bishnudayal v. State of Bihar,* AIR 1981 SC 39, wherein the court appreciated the evidence as under:

> "8. The evidence with regard to the age of the girl was given by the prosecutrix (P.W.9), and her father. Jagarnath (P.W.4) and Dr. Asha Prasad (P.W. 14). P.W.9 and P.W.4 both stated that Sumitra (P.W.9) was 13-14 years of age at the time of occurrence. Dr. Asha Prasad opined that the girl was only 13 or 14 years of age on July 6, 1967 when the witness examined her. The Doctor based this opinion on physical facts, namely, that the examinee (P.W.9) **had 28 teeth, 14 in each jaw**, smooth pubic hair and axillary hair, which means the hair, according to the opinion of the Doctor, had just started appearing **at the age of 14."**
>
> (Emphasis added)

Similar view has been reiterated by this Court while deciding Criminal Appeal No.1962 of 2010, *Kailash @ Tanti Banjara v. State of M.P.,* vide judgment and order dated 10.4.2013, wherein relying upon several other factors for determining the age, this very Bench has taken a view that as the prosecutrix therein had only 28 teethes considering the other sexual character, she was only 14 years of age. Therefore, in view of the above, we do not find any fault with the finding recorded by the High Court so far as the issue of age is concerned.

12/13.In case, the prosecutrix was below 16 years of age at the relevant time, the issue of consent becomes totally irrelevant. Even the issue of consent is no more res integra even in a case where the prosecutrix was above 16 years of age.

In *State of H.P. v. Mange Ram,* AIR 2000 SC 2798, this Court, while dealing with the issue held:

> "Submission of the body under the fear or terror cannot be

> construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation **not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent.** Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances." (Emphasis added)

14. In *Uday v. State of Karnataka,* AIR 2003 SC 1639, a similar view has been reiterated by this Court observing :

> "……We are inclined to agree with this view that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them."

15. In *Pradeep Kumar Verma v. State of Bihar & Anr.,* AIR 2007 SC 3059, this Court held as under:

> "9.The crucial expression in Section 375 which defines rape as against her will. It seems to connote that the offending act was despite resistance and opposition of the woman. IPC does not define consent in positive terms. But what cannot be regarded as consent is explained by Section 90 which reads as follows:

"consent given firstly under fear of injury and secondly under a misconception of fact is not consent at all."

That is what is explained in first part of Section 90. There are two grounds specified in Section 90 which are analogous to coercion and mistake of fact which are the familiar grounds that can vitiate a transaction under the jurisprudence of our country as well as other countries. The factors set out in first part of Section 90 are from the point of view of the victim and second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the Court has to see whether the person giving the consent has given it under fear or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology. As observed by this Court in *Deelip Singh @ Dilip Kumar v. State of Bihar* (2005 (1) SCC 88), Section 90 cannot be considered as an exhaustive definition of consent for the purposes of IPC. The normal connotation and concept of consent is not intended to be excluded.

10. In most of the decisions in which the meaning of the expression consent under the IPC was discussed, reference was made to the passages occurring in Strouds Judicial Dictionary, Jowitts Dictionary on English Law, Words and Phrases, Permanent Edn. and other legal

dictionaries. Stroud defines consent "as an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side". Jowitt, while employing the same language added the following:

"Consent supposes three things a physical power, a mental power and a free and serious use of them. Hence it is that if consent be obtained by intimidation, force, meditated imposition, circumvention, surprise, or undue influence, it is to be treated as a delusion, and not as a deliberate and free act of the mind."

11. In Words and Phrases, Permanent Edn., Vol. 8-A, the following passages culled out from certain old decisions of the American courts are found:

"...adult females understanding of nature and consequences of sexual act must be intelligent understanding to constitute consent."

Consent within penal law, defining rape, requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent..."

16. In view of the above, we do not find fault with the impugned judgment and order. The appeal is liable to be dismissed and is accordingly dismissed.

17. Before parting with the case, we would like to express our anguish that the prosecution could have been more careful and the trial Court could have shown more sensitivity towards the case considering its facts and circumstances.

In *Delhi Domestic Working Women's Forum v. Union of India & Ors.,* (1995) 1 SCC 14, this Court found that in the cases of rape, the investigating agency as well as the Subordinate courts some times adopt totally a indifferent

attitude towards the prosecutrix and therefore, this court issued following directions in order to render assistance to the victims of rape:

"(1) The complainants of sexual assault cases should be provided with legal representation. It is important to have someone who is well-acquainted with the criminal justice system. The role of the victim's advocate would not only be to explain to the victim the nature of the proceedings, to prepare her for the case and to assist her in the police station and in court but to provide her with guidance as to how she might obtain help of a different nature from other agencies, for example, mind counselling or medical assistance. It is important to secure continuity of assistance by ensuring that the same person who looked after the complainant's interests in the police station represent her till the end of the case.

(2) Legal assistance will have to be provided at the police station since the victim of sexual assault might very well be in a distressed state upon arrival at the police station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.

(3) The police should be under a duty to inform the victim of her right to representation before any questions were asked of her and that the police report should state that the victim was so informed.

(4) A list of advocates willing to act in these cases should be kept at the police station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.

(5) The advocate shall be appointed by the court, upon application by the police at the earliest convenient moment, but in order to ensure that victims were questioned without

undue delay, advocates would be authorised to act at the police station before leave of the court was sought or obtained.

(6) In all rape trials anonymity of the victim must be maintained, as far as necessary.

(7) It is necessary, having regard to the Directive Principles contained under Article 38(1) of the Constitution of India to set up Criminal Injuries Compensation Board. Rape victims frequently incur substantial financial loss. Some, for example, are too traumatised to continue in employment.

(8) Compensation for victims shall be awarded by the court on conviction of the offender and by the Criminal Injuries Compensation Board whether or not a conviction has taken place. The Board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of the rape."

18. Undoubtedly, any direction issued by this Court is binding on all the courts and all civil authorities within the territory of India.

In addition thereto, it is an obligation on the part of the State authorities and particularly, the Director General of Police and Home Ministry of the State to issue proper guidelines and instructions to the other authorities as how to deal with such cases and what kind of treatment is to be given to the prosecutrix, as a victim of sexual assault requires a totally different kind of treatment not only from the society but also from the State authorities. Certain care has to be taken by the Doctor who medically examine the victim of rape. The victim of rape should generally be examined by a female doctor. Simultaneously, she should be provided the help of some psychiatric. The medical report should be prepared expeditiously and the Doctor should examine the victim of rape

thoroughly and give his/her opinion with all possible angle e.g. opinion regarding the age taking into consideration the number of teeths, secondary sex characters, and radiological test, etc. The Investigating Officer must ensure that the victim of rape should be handled carefully by lady police official/officer, depending upon the availability of such official/officer. The victim should be sent for medical examination at the earliest and her statement should be recorded by the I.O. in the presence of her family members making the victim comfortable except in incest cases. Investigation should be completed at the earliest to avoid the bail to the accused on technicalities as provided under Section 167 Cr.P.C. and final report should be submitted under Section 173 Cr.P.C., at the earliest.

We request the learned Chief Secretary of the State of M.P. to examine the aforesaid observations made by us and issue comprehensive guidelines in these regards, at the earliest.

A copy of this judgment be sent to the learned Chief Secretary, M.P. through Ms. Vibha Datta Makhija, learned Standing counsel for the State.

R.P. Appeal dismissed.

JATYA PAL SINGH & ORS.
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 2147 of 2010)

APRIL 17, 2013

[SURINDER SINGH NIJJAR AND ANIL R. DAVE, JJ.]

CONSTITUTION OF INDIA,1950:

Arts.12 and 226 - Writ petitions before High Court by employees of VSNL (renamed TCL) challenging termination of their services - Held: Are not maintainable - Government of India holding only 26.12% shares of TCL, would not be in control of affairs of TCL - TCL cannot be said to be 'other authority' within Art.12 - Merely because TCL is performing the functions which were initially performed by OCS would not be sufficient to hold that it is performing a public function - The functions performed by VSNL/TCL are not of such nature which could be said to be a public function - Therefore, High Court of Delhi and High Court of Bombay were fully justified in rejecting the claim of appellants that TCL would be amenable to writ jurisdiction of High Court by virtue of the 'other authority' within the purview of Art. 12 - Human Rights Act, 1998 - s.6(3)(b).

The appellants, in C.A. No. 3933 of 2013 and C.A. No. 2147 of 2010, who had joined the service of the Government of India in the Ministry of Telecommunication known as Overseas Communication Service (OSS), and were subsequently absorbed in Videsh Sanchar Nigam Limited (VSNL), filed writ petitions before the High Court of Bombay, challenging the termination of their services by the respondents. The writ petitions were dismissed in limine by the Division Bench. In the writ petitions filed before the Delhi High Court by former employees of

VSNL, the single Judge accepted the preliminary objection that the writ petitions were not maintainable, as VSNL was neither a State within the meaning of Art.12 of the Constitution of India nor was it performing any public function. Their Letters Patent Appeals were also dismissed by the Division Bench of the High Court. Writ Petition No. 689 of 2007 was filed by Videsh Sanchar Nigam Scheduled Castes/Tribes Employees Welfare Samiti.

The questions for consideration before the Court were: (i) Whether inspite of the Government of India holding only 26.97% shares in VSNL/TCL, would it still fall in the definition of State or other authority within the ambit of Art.12 of the Constitution; and (ii) Whether VSNL/ TCL "is performing a public function/public duty," and as such, would be amenable to writ jurisdiction of High Court under Art. 226 of the Constitution.

Dismissing the appeals and the writ petition, the Court

HELD: 1.1. It is significant to note that Ministry of Communication took a decision to convert its OCS Department into a Public Sector Corporation (PSC) known as VSNL. Eventually, from the date the OCS employees were transferred to VSNL on deputation basis without deputation allowance on foreign service terms, they ceased to be government servants. It is, thus, patent that the appellant accepted the absorption voluntarily. Therefore, it can not, be said that the appellants even after absorption in VSNL, continued to enjoy the protection available to them in the OCS as government servants. [para 10 and 45] [979-E-F; 996-G-H; 997-A]

1.2 Subsequent to the disinvestment in 2002, the name of VSNL being a Tata Group Company was changed to "Tata Communications Limited" (TCL). Since

13.2.2002, Government of India holds only 26.12 % shares of TCL. Therefore, it can be safely concluded that on the basis of the shareholding, the Government of India would not be in control of the affairs of TCL. [para 18 and 39] [983-F-G; 992-G; 993-A]

1.3 TCL cannot be said to be 'other authority' within Art. 12 of the Constitution of India. The share holding of Union of India would not satisfy test principles 1 and 2 in the case of Ramana Dayaram Shetty *. On perusal of the facts, it would be evident that test No.3 would also not be satisfied as TCL does not enjoy a monopoly status in ILDS. So far as domestic market is concerned, there is open competition between the numerous operators, like, MTNL, Airtel, Idea, Aircel, etc. Again in view of the 4th test, it cannot be said that the Government of India exercises deep and pervasive control in either the management or policy making of TCL which are purely private enterprises. It may also be noticed that, in fact, even Government Companies like MTNL and BSNL are competitors of TCL, in respect of ILDS. [para 43-44] [995-E-H; 996-A]

Ramana Dayaram Shetty vs. International Airport Authority of India **1979 (3) SCR 1014 = (1979) 3 SCC 489;** *Pradeep Biswas v. Indian Inst. of Chemical Biology* **2002 (3) SCR 100 =2002 (5) SCC 111 - relied on.**

1.4 Therefore, this Court is of the firm opinion that the High Court of Delhi and the High Court of Bombay were fully justified in rejecting the claim of the appellants that TCL would be amenable to writ jurisdiction of the High Court by virtue of the 'other authority' within the purview of Art. 12 of the Constitution. [para 44] [996-A-B]

1.5 It can also not be said that the activities of TCL are in aid of enforcing the fundamental rights under Art. 21-A of the Constitution. The recipients of the service of

the telecom service voluntarily enter into a commercial agreement for receipt and transmission of information. The function performed by VSNL/TCL cannot be put on the same pedestal as the function performed by private institution in imparting education to children. [para 52] [1001-B-D]

2.1 Merely because TATA Communication Limited is performing the functions which were initially performed by OCS would not be sufficient to hold that it is performing a public function. The functions performed by VSNL/TCL are not of such nature which could be said to be a public function. Undoubtedly, these operators provide a service to the subscribers. The service is available upon payment of commercial charges. [para 47-48] [998-A-B, C-D]

Steel Authority of India Ltd. & Ors. vs. National Union Waterfront Workers & Ors. **2001 (2) Suppl. SCR 343 = 2001 (7) SCC 1 - referred to.**

Air India Statutory Corporation vs. United Labour Union & Ors. **1996 (9) Suppl. SCR 579 = 1997 (9) SCC 377 - stood overruled.**

2.2 The functions performed by VSNL/TCL examined on the touchstone of the factors enumerated in s.6(3)(b) of the Human Rights Act 1998 cannot be declared to be the performance of a public function. The State has divested its control by transferring the functions performed by OCS prior to 1986 on VSNL/TCL. [para 50] [999-F-G]

2.3 In order for it to be held that the body is performing a public function, the appellant would have to prove that the body seeks to achieve some collective benefit for the public or a section of public and accepted by the public as having authority to do so. In the instant

case, all telecom operators are providing commercial service for commercial considerations. Such an activity in substance would be no different from any other amenity which facilitates the dissemination of information or DATA through any medium. [para 52] [1000-G-H; 1001-A-B]

Binny Ltd. vs. Sadasivan **2005 (2) Suppl. SCR 421 = (2005) 6 SCC 657;** *Federal Bank Ltd. vs. Sagar Thomas and Ors.* **2003 (4) Suppl. SCR 121 = 2003 (10) SCC 733; and** *Dwarkanath vs. Income-tax Officer, Special Circle, D-ward, Kanpur & Anr.* **1965 (3) SCR 536 - referred to.**

Commentary on Judicial Review of Administrative Action (Fifth Edn.) by de Smith, Woolf & Jowell in Chapter 3 para 0.24 **- referred to.**

Andi Mukta Sadguru Shree Muktaji Vandas Swami Suverna Jayanti Mahotsav Smarak Trust & Ors. vs. V.R.Rudani & Ors. **1989 (2) SCR 697 = (1989) 2 SCC 691 - held inapplicable.**

3. In the instant appeals, the claim of the appellants is that their services have been wrongly terminated by VSNL/TCL in breach of the assurances given by the Government of India and VSNL in clause 5.13 of the share holding agreement. A perusal of the aforesaid documents, however, would show that VSNL had merely promised not to retrench any employee who had come from OCS for a period of two years from 13.2.2002. Such a condition, would not clothe the same with the characteristic of a public duty which the employer was bound to perform. The employees had individual contracts with the employer. In case the employer is actually in breach of the contract, the appellants are at liberty to approach the appropriate forum to enforce their rights. [para 53 and 54] [1001-G-H; 1002-B-C]

Delhi Science Forum vs. Union of India **1996 (2) SCR 767 =1996 (2) SCC 405;** *Appeal of South Africa in Mittal Steel South Africa Limited (previously known as ISCOR Limited) vs. Mondli Shadrack Hlatshwayo,* **case No.326 of 2005 decided by Supreme Court of South Africa on 31.8.2006;** *Secretary, Ministry of Information and Broadcasting vs. Cricket Association of Bengal* **(1995) 2 SCC 122;** *Unni Krishnan J.P. & Ors. vs. State of Andhra Pradesh & Ors.* **1993 (1) SCR 594 = 1993 (1) SCC 645 ;** *Zee Telefilms Ltd. vs. Union of India* **2005 (1) SCR 913 = 2005 (4) SCC 649;** *Ramesh Ahluwalia vs. State of Punjab & Ors.* **2012 (12) SCC 331;** *All India ITDC Workers Union & Ors. v. ITDC & Anr.* **2006 (8) Suppl. SCR 127 = 2006 (10) SCC 66;** *G. Bassi Reddy vs. International Corps Research Institute* **2003 (1) SCR 1174 = 2003 (4) SCC 225;** *Balco Employees Union vs. Union of India & Ors.* **2001 (5) Suppl. SCR 511 = 2002 (2) SCC 333;** *Agricultural Produce Market Committee vs. Ashok Harikunj & Anr.* **2000 (3) Suppl. SCR 379 = 2000 (8) SCC 61;** *Radhakrishna Agarwal vs. State of Bihar* **1977 (3) SCR 249 = 1977 (3) SCC 457;** *Kulchinder Singh vs. Hardayal Singh Brar* **1976 (3) SCR 680 = 1976 (3) SCC 828; and** *Praga Tools Corp. vs. C.A. Imanual & Ors.* **1969 (3) SCR 773 = 1969 (1) SCC 585 - cited**

Case Law Reference:

1996 (2) SCR 767	**cited**	**para 25**
1996 (9) Suppl. SCR 579	**stood overruled**	**para 25**
2005 (2) Suppl. SCR 421	**referred to**	**para 26**
2003 (4) Suppl. SCR 121	**referred to**	**para 26**
case No.326 of 2005 decided by Supreme Court of South Africa on 31.8.2006	**cited**	**para 26**
(1995) 2 SCC 122	**cited**	**para 27**

1989 (2) SCR 697	**held inapplicable**	**para 27**
1993 (1) SCR 594	**cited**	**para 27**
2005 (1) SCR 913	**cited**	**para 32**
2012 (12) SCC 331	**cited**	**para 32**
2006 (8) Suppl. SCR 127	**cited**	**para 33**
2003 (1) SCR 1174	**cited**	**para 33**
2001 (5) Suppl. SCR 511	**cited**	**para 33**
2000 (3) Suppl. SCR 379	**cited**	**para 33**
1979 (3) SCR 1014	**relied on**	**para 39**
2002 (3) SCR 100	**relied on**	**para 33**
1977 (3) SCR 249	**cited**	**para 36**
1976 (3) SCR 680	**cited**	**para 36**
1969 (3) SCR 773	**cited**	**para 36**
2001 (2) Suppl. SCR 343	**referred to**	**para 39**
1965 (3) SCR 536	**referred to**	**para 50**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2147 of 2010.

From the Judgment and order dated 08.09.2009 of the High Court of Judicature at Bombay in Writ Petition No. 2652 of 2007.

WITH

Civil Appeal No. 3933 of 2013.

Civil Appeal No. 425 of 2012.

W.P. (C) No. 689 of 2007.

Civil Appeal No. 5740 of 2012.

Triloki Nath Razdan, P.P.N. Razdan, Dr. Krishan Singh Chauhan, Ajit Kumar Ekka, Chand Kiran, Kartar Singh, D.N. Ray, Amit Mahajan, Navin Chawla, Abhishek Kumar Jha for the Appellants.

C.U. Singh, Mahesh Agarwal, Rishi Agrawala, E.C. Agrawala, Ankur Saigal, Ankur, R.K. Rathore, Baldev Ateya (for D.S. Mahra), Arvind Kumar Sharma for the respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. Leave granted in SLP© No.4619 of 2011.

2. This judgment will dispose of a group of appeals, details of which are given hereunder, as they raise only one question of law :

Proceedings before the Bombay High Court :-

3. Writ Petition No.2139 of 2007 titled as Mahant Pal Singh vs. Union of India dismissed in limine by the Division Bench on 7th September, 2009. Civil Appeal No.3933 of 2013 @ Special Leave Petition (C) No.4619 of 2011 titled as M.P.Singh vs. Union of India & Ors. has been filed challenging the aforesaid order of the Division Bench. Writ Petition No.2652 of 2007 titled as Jatya Pal Singh & Ors. vs. Union of India & Ors. was dismissed in limine by the Division Bench on 8th September, 2009 in view of the order dated 7th September, 2009 passed in Writ Petition No.2139 of 2007. The aforesaid order has been impugned by the appellants (writ petitioners in the High Court) *Jatya Pal Singh & Ors. vs. Union of India & Ors.* in C.A.No.2147 of 2010.

Proceedings in the Delhi High Court :-

4. Ten writ petitions were filed by the former employees of the Videsh Sanchar Nigam Limited (VSNL). The common question of law raised in all the appeals relates to the very maintainability of the writ petitions. VSNL had raised a preliminary objection that a writ petition would not be maintainable against it as it is neither a State within the meaning of Article 12 of the Constitution of India nor is it performing any public function. The learned Single Judge accepted the aforesaid preliminary objection and dismissed the writ petitions by judgment and order dated 29th August, 2011. Letters Patent Appeal No.924 of 2011 challenging the aforesaid order was dismissed by the Division Bench on 14th November, 2011. LPA Nos. 930 of 2011 and 931 of 2011 were dismissed by the common order dated 15th November, 2011.

4A. Only two of the original writ appellants have approached this Court in the civil appeals against the judgment of the learned Single Judge and the Division Bench of the Delhi High Court by way of civil appeals. These are *Ram Prakash vs. Union of India & Ors.* in C.A.No.5740 of 2012 and *Vijay Thakur vs. V.S.N.L. and Anr.* in C.A.No.425 of 2012.

5. For the purpose of this order, we shall make a reference to the facts as pleaded in C.A.No.2147 of 2010. All the appellants in writ petitions had been working in the Ministry of Communication, in particular, Department of Overseas Communication Service (OCS) from 1st March, 1971 onwards. Their dates of appointment on various posts are as under :

6. Appellant Nos. 1 and 2 were appointed as Assistant Engineer on 16th May 1983 and 1st September, 1983, respectively. Appellant Nos. 3 and 4 were appointed as Junior Technical Assistant on 1st March, 1971 and 13th January, 1976 and appellants 5 and 6 were appointed on 8th January, 1980. During their continuous service with respondent No.1, they had earned promotions at due time on merit. They have a clean

record of service. Till 31st March, 1986, they were holding responsible posts in the OCS.

Background of VSNL:

A) Origin of Overseas Communication Service (in short OCS) -

7. On 1st of January, 1947 'Indian Radio and Telecommunication company Ltd.' a Private Company operating India's external telecommunication service was taken over by the Govt. along with its employees on the terms and conditions as they had with the private company.

8. The Govt. created a department in ministry of telecommunication known as Overseas Communication Service (OCS) that dealt communication of India subjects with the rest of the world.

9. The OCS department of Ministry of telecommunication continued till 31st of March, 1986.

B) Conversion of OCS into VSNL -

10. Ministry of Communication took a decision to convert its OCS Department into a Public Sector Corporation (PSC). A notification to this effect was issued on 19th March, 1986 and the Corporation was named as VSNL. Accordingly, w.e.f. 1st April, 1986, all international telecommunication services of the country handled by the Govt. stood transferred to VSNL. All the employees were deemed to have been transferred to the VSNL on the existing terms and conditions till their case for absorption or otherwise are decided upon by the VSNL in consultation with the cadre controlling authority and other concerned Govt. Departments. They were to be treated on deputation on Foreign Service to VSNL without deputation allowance. These employees also were to be treated as though on the strength of OCS as on 31st March, 1986 till their cases were finalized by the VSNL. Those who do not opt for

absorption will be treated as on deputation on foreign service with the Corporation for a period of 2 years without deputation allowance. The Corporation (VSNL) would finalise the terms and conditions for employment in the Corporation within a period of 12 months or on any specified date as may be agreed upon by the Government. It was provided that the employees will be asked to exercise their option for being absorbed in the company or otherwise within the stipulated period. The date of induction of the employees in the Corporation will be the date from which they have exercised the option to be absorbed in the Company with the approval of the competent authority. The notification also provided that pensionary and other retirement benefits to the employees on their absorption in the Corporation will be determined in accordance with the Department of Pensions and Pensioners Welfare O.M. No.4(8)-85-P & PW dated 13th January, 1986 and as amended from time to time.

11. Thereafter on 11th December, 1989, VSNL issued STAFF NOTICE on the subject 'Absorption of OCS Employees in VSNL'. In this notice, it is mentioned that date of absorption of OCS employees in the VSNL has been approved by the Ministry of Communication on 1st January, 1990. It is further mentioned that accordingly from that date, the OCS employees transferred to VSNL on deputation basis without deputation allowance on foreign service terms will cease to be government servants. The aforesaid notice of absorption including the terms and conditions of absorption was also issued individually to each employee. On 5th July, 1989, the Government had issued Office Memorandum No.4/18/87-P&PW (D) on the subject 'Settlement of Pensionary terms etc. in respect of Government employees transferred en masse to Central Public Sector Undertakings/Central Autonomous Bodies'. Under this, the employees were given the option to retain the pensionary benefits available to them under the Government rules or be governed by the rules of the Public Sector Undertaking/ Autonomous Bodies. The Government also assured that the

employees of the OCS will not be removed by the VSNL unless their case was placed before the competent authority in the Government. Finally, the VSNL absorbed en-masse the erstwhile employees of OCS with effect from 1st January, 1990. The solemn promise of not being removed was incorporated in the Conduct Discipline and Appeal Rules framed by the VSNL in the year 1992. It is pertinent to note here that all the appellants had opted to join VSNL.

C. Disinvestment

12. Between 1992 and 2000, Government of India divested a portion of its share holding in VSNL by sale of equity to certain funds, banks and financial institutions controlled by the Government in 1992 and to the general public in 1999. Thereafter, the company was listed on Indian Stock Exchange. In 1997, the Government of India sold some of its equity holdings by issuing Global Depository Receipts (GDRs) following which VSNL was listed on the London Stock Exchange. On 15th August, 2000, VSNL became first Public Sector Undertaking of India to be listed on the New York Stock Exchange through conversion of underlying GDRs to American Depository Receipts (ADRs). However on 13th February, 2002, Government of India which till then held 52.97% of shares in VSNL, divested 25% shares in favour of Panatone Finvest Limited, (comprising of 4 companies of the Tata Group) and 1.85% in favour of its employees after following due process in accordance with its disinvestment policy. This brought the share holding of the Government of India to 26.12 %. Tata Group also made a public offer for acquiring a further 20% of the share capital of the VSNL, from the public in terms of SEBI (Substantial Acquisition of Share and Takeover) Regulations 1997. Consequently, the total holding of the Tata Group in VSNL increased to 44.99 % of the paid up share capital in 2002. Presently, Tata Group holdings in VSNL is about 50.11%.

13. As per the share holding agreement and share purchase agreement, the Government of India mandated the

Tata Group to ensure that none of the employees should be retrenched for a period of one year. Clause 5.13 of the aforesaid agreement was as under :-

> "5.13 Employees.
>
> (a) Notwithstanding anything to the contrary in this Agreement, the Strategic Partner shall not cause the Company to retrench any of the employees of the Company for a period of 1 (one) year from the closing other than any dismissal or termination of employees of the company from their employment in accordance with the applicable staff regulations and standing orders of the Company or applicable law."

14. It appears that the Tata Group by a letter dated 14th April, 2002 to ensure that the morale of the present employees of the VSNL is maintained at a high level and that they continue to deliver their best performance, decided that it shall cause VSNL not to retrench any of the employees of VSNL for a period of two years from 13th February, 2002.

15. On 5th February, 2004, VSNL was granted a non exclusive licence by the Government of India pursuant to the disinvestment. Clause (1) of the non exclusive licence reads as under :-

> "1. In view of the fact that the LICENSEE is the INCUMBENT OPERATOR and in consideration of the payments including LICENCE FEE and due performance of all the terms and conditions mentioned in the SCHEDULE on the part of the LICENSEE, the Licensor does, hereby grant, under Section 4 of the Indian Telegraph Act, 1885, on a non-exclusive basis, this Licence to establish, install, operate and maintain INTERNATIONAL LONG DISTANCE SERVICE on the terms and conditions contained in the SCHEDULE and ANNEXURES appended to this LICENCE AGREEMENT." (emphasis added)

16. Prior to disinvestment, VSNL enjoyed the monopoly in respect of international long distance service (ILDS), which ceased with effect from 5th February, 2004. Thereafter other telecom licensees like Reliance, Airtel, Idea, Aircel, HFCL and even Government companies like MTNL and BSNL became competitors in respect of ILDS.

17. It appears that on 16th July, 2007 and 4th October, 2007, the services of 20 managerial employees were terminated after paying them 3 months' salary in lieu of notice. The aforesaid termination was said to have been effected in terms of Clause 1.6 of the appointment letter which reads as under :

> "1.6 After confirmation, your appointment may be terminated by either side at any time by giving three months notice in writing. VSNL however, reserve the right of terminating your services forthwith or before expiry of the stipulated period of notice of 3 months by making payment to you of a sum equivalent to the pay and allowances for the period of notice or unexpired portion thereof. The decision of the management shall not be question."

18. The orders of termination issued to the aforesaid 20 employees were identical. Meanwhile on 28th January, 2008, subsequent to the disinvestment in 2002, the name of VSNL being a Tata Group Company was changed to "Tata Communications Limited". Ten writ petitions were filed by the employees before the Delhi High Court and 2 writ petitions were filed before the Bombay High Court challenging the orders of termination. On 29th August, 2011, learned Single Judge of the Delhi High Court vide common order dismissed the 10 writ petitions, as not maintainable against TCL, the reconstituted entity of VSNL after disinvestment. The aforesaid order was challenged by four of the writ appellants in LPA which was dismissed by separate orders on 14th November, 2011, 15th

November, 2011 and 17th February, 2012. Out of the said four persons Ram Prakash and Vijay Thakur have filed Civil Appeal No.5740 of 2012 and Civil Appeal No. 425 of 2012 before this Court.

19. As noticed earlier, Division Bench of the Bombay High Court also dismissed the writ petitions by order dated 7th September, 2009 and 8th September, 2009 against which the appellant herein have filed Special Leave Petition (C) No. 4619 of 2011 and Civil Appeal No. 2147 of 2010.

Submissions:

20. We have heard the learned counsel for the parties.

21. Mr. T.N. Razdan, learned counsel for the appellants has submitted that VSNL cannot be said to have become an absolute private entity after Union of India sold its 25% shares out of 52.97% to Panatone Finvest Ltd. Union of India still holds 26.97% shares in VSNL. Other Government Companies hold 17.35 % shares in VSNL. Therefore, VSNL cannot be said to be not amenable to the writ jurisdiction. Furthermore, VSNL is under the complete control of Telecom Regulatory Authority of India (TRAI) Act, 1997 and the Telegraph Act, 1948. Therefore, the writ petition would lie in cases where the services of the employees were terminated in breach of the rules governing the service conditions of the employees. Referring to the share holding pattern in VSNL, it is claimed that Union of India is the single large shareholder holding 26.12% shares in VSNL. It is further the case of the appellant that Panatone Finvest Ltd. having stepped into the shoes of erstwhile shareholder and is bound by the commitments and obligations, rights and liabilities arising from the sale/purchase of shares.

22. Dr. K.S. Chauhan, learned counsel, also reiterated the aforesaid submissions. In addition, he submitted that Central Government still has pervasive control over the VSNL/TCL. The

strategic partner i.e. Panatone Finvest Limited/TATAs have been bound by the Government agreement in relation to divestment of the 25% stakes, and there is a further condition that if the strategic partner wish to sell its stakes in the VSNL/TCL, it is not free for the strategic partner to sell off the same in the open market, but the shares can be sold off back to the Government only. It clearly, according to learned counsel, buttresses the fact that the Government consider the function/activity so sacrosanct and of such public importance that it does not wish to alter the nature of the functions of VSNL/TCL. However, there is no such condition precedent in the agreement with the other telecommunication companies which are merely service providers. Thus, both the learned counsel have reiterated the submission that VSNL would be covered by the term "other authority" within the scope and ambit of Article 12.

Nature of the Functions performed by the VSNL:-

23. According to Mr. Razdan, the right to communication is a facet of freedom of speech and expression under Article 19(1) (a) of the Constitution of India. The Government of India is duty bound to provide uninterrupted Telecommunication Services to enable its citizen to effectively exercise the aforesaid right. This public duty was being provided through one of the departments i.e. Department of Telecommunication, in particular, the OCS. The same function was subsequently performed by the VSNL, a wholly owned government enterprises, till disinvestment. Even after disinvestment, VSNL continues to perform the same functions by connecting its subscribers to their receivers in India as well as abroad. VSNL performs the aforesaid functions under license in terms of Section 4 of Indian Telegraph Act, 1948. Being the licensee, VSNL is under the control of TRAI for all its activities of ILDS. After disinvestment, VSNL has spread its ILDS activities to 52 locations and has increased the strength of its employees from 3000 to 7000. It has been located in prime areas in all the cities like Delhi, Pune, and Kolkata. The aforesaid land belongs to

Union of India and is in the possession of VSNL. Union of India is the licensor of all the lands, assets, equipment machine and tools under the license of VSNL. Land belonging to Union of India is worth lakhs of crores of rupees. In the face of this, the High Court would not have concluded that Government of India has no control over the activities of VSNL.

24. This submission was also reiterated by Dr. K.S. Chauhan, learned counsel. Dr. Chauhan, in addition to the aforesaid arguments, submitted that Respondents herein have monopoly over the international communication, as VSNL/TCL is the gateway of the world. VSNL can communicate worldwide for India which facility is not available to any other communication company. Companies, such as Vodafone etc., are only transferring speech whereas VSNL is providing value added service. It provides EMER Set service to Defence Forces including Merchant Navy. VSNL/TCL is specially catering to the requirement of the President and Prime Minister of India for preparation of hotline, etc. Further, learned counsel submitted that even a private function which is performed for public benefit would be a public function. He submitted that in the case of *Delhi Science Forum vs. Union of India*[1] that telecommunication has been internationally recognized as a public utility of strategic importance. Therefore, it cannot be said that VSNL is not performing public functions.

25. The High Court, it was submitted, was unduly influenced by the fact that the VSNL does not enjoy a monopolistic character. Further more, it was wrongly held that services provided by other telecom operators are no different to the service provided by VSNL. Mr. Razdan further submitted that the High Court has failed to distinguish the expression 'other authority' as defined in Article 12 of the Constitution of India from that of 'any person or authority' in Article 226 of the Constitution. In fact, the High Court totally ignored the submission that the definition of other authority would now have to be seen by taking

1. (1996 (2) SCC 405.

into account the mixed economy of State and the private enterprises. The High Court, however, confined itself only to the issue as to whether VSNL after disinvestment is State within Article 12 of the Constitution. He submitted that it is important to have a re-look at the definition of State/other authorities under Article 12 of the Constitution. In view of the present set up of mixed economy i.e. where the State is in partnership with semi-government/private corporations that take over the Government companies in part or full. In support of his submission, he relies on the judgment of this Court in the case of *Air India Statutory Corporation vs. United Labour Union & Ors.*[2]

26. Dr. Chauhan further submitted that when the Government, in the exercise of its executive power by way of a policy decision, creates an entity or divests its functions, which may have a bearing upon the Fundamental Rights, in favour of a private body or transfer of public entity to a private body, in such an eventuality, the functions earlier discharged by the Government cannot be termed as purely a private function. He submitted that realizing the necessity to promote, protect and enjoyment of human rights, including the right to freedom of expression, on the internet and in other technologies, the U.N. Human Rights Council has passed a resolution with regard to the same. Similarly, the right to telecommunication (Overseas), a service exclusively provided by Government of India before disinvestment has the public law element and, therefore, nature of work performed by VSNL/TCL continued to remain the same. He submits that the functions performed by VSNL would satisfy all the tests for determining whether a function is a public function provided under the Human Rights Act, 1998. Learned counsel has submitted that it is necessary to look at the nature of the public functions which have been transferred. He submits that the meaning of public function would have to be determined by taking into account the effect of transfer of the public function from a public body to a private body. Learned counsel submitted

2. (1997 (9) SCC 377)

that in view of the above, it can be safely concluded that VSNL is performing a public function. He relied on the observations made by this Court in the case of *Binny Ltd. vs. Sadasivan*[3]. Besides, he relied on the judgment of this Court in *Federal Bank Ltd. vs. Sagar Thomas and Ors.*[4] Learned counsel also relied on a judgment of the Supreme Court of South Africa in Appeal of South Africa in *Mittal Steel South Africa Limited (previously known as ISCOR Limited) vs. Mondli Shadrack Hlatshwayo,* rendered in case No.326 of 2005 on 31st August, 2006.

27. Another submission made by Mr. Razdan is that the High Court has wrongly held that the functions performed by VSNL are not sovereign functions and, therefore, it cannot be said to be performing public functions. He submitted that the so called dichotomy between sovereign and non-sovereign functions of the State does not really exist. The question that whether a particular function of the State is a sovereign function depends on the nature of the power and manner of its exercise. Relying on the judgment of this Court in *Secretary, Ministry of Information and Broadcasting vs. Cricket Association of Bengal*[5], he submitted that airwaves or frequencies are public property. Their use has to be controlled and regulated by a public authority in the interest of the public and to prevent the invasion of their rights. The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed under Article 19(1)(a) of the Constitution. Therefore, it cannot be said that VSNL is not performing a public function. Learned counsel also relied on the judgment of this Court in *Andi Mukta Sadguru Shree Muktaji Vandas Swami Suverna Jayanti Mahotsav Smarak Trust & Ors. vs. V.R.Rudani & Ors.*[6]. Learned counsel has also placed reliance on the judgment of this Court in *Unni Krishnan J.P. &*

3. (2005) 6 SCC 657.
4. (2003) 10 SCC 733.
5. (1995) 2 SCC 122.
6. (1989) 2 SCC 691.

Ors. vs. State of Andhra Pradesh & Ors.[7].

Employees Structure:

28. It was also submitted by Mr. Razdan that the Government had assured that the employees of the OCS will not be removed by the VSNL unless their case was placed before the competent authority in the Government. The solemn promise of not being removed was incorporated in the Conduct Discipline and Appeal Rules framed by the VSNL in the year 1992.

29. According to the appellants, the employees of the VSNL fall into three categories which are as under :

(a) The employees that were transferred to VSNL by notification dated 19th March, 1986 i.e. erstwhile employees of OCS.

(b) The employees who are recruited directly under the VSNL Recruitment and Promotion Rules, 1983 dated 21st May, 1993, subject to the rules of Conduct Discipline and Appeal Rules of 1992 framed by VSNL.

(c) The employees recruited after the disinvestment on 13th February, 2002. The employees of TATA are guided by TATA Conduct Rules. It is pointed out that VSNL was granted a licence by the Ministry of Communication for short distance service and long distance service. International Long Distance Service (ILDS) was granted by the Department of Telecommunication, Government of India under Section 4 of the Indian Telegraph Act. The licences of VSNL for ILDS which expired on 31st March, 2004 has been re-granted for another 20 years.

The brief factual matrix of case:

30. Civil Appeal No.2147 of 2010 pertains to the group of

7. (1993) 1 SCC 645.

employees detailed in category 'a' above. The appellants in C.A.No.425 of 2012 are from category 'b'. In C.A.No.2647 of 2010, the VSNL terminated the services of appellants 2, 3, and 4 on 13th July, 2007 and those of appellants 1, 5, and 6 on 16th July, 2007. The termination letter of appellant Nos. 2, 3, and 4 is issued by Vice President while as those of appellant Nos. 1 and 5 is issued by the Chief Officer Global operation. The termination order of appellant No.6 is issued by the Chief International Facilities Officer.

31. According to the appellants, none of these officers were either competent or authorised officers to terminate the services of appellants in terms of Conduct Discipline and Appeal Rules of VSNL. Similarly, in C.A.No.421 of 2012, the services of the appellants were terminated by the Vice President without any authority of law. Challenging the order of the Division Bench in C.A.No.2147 of 2010, it is submitted that the Division Bench has erroneously held that the service rules governing the appellants do not have any statutory force and the status of the rules of a contract between the employer and the employee. The High Court failed to appreciate the issue raised in the writ petition that VSNL has breached the fundamental rules and regulations contained in its Conduct Discipline and Appeal Rules, 1992 which had the force of law. It was also pointed out that the Corporation (VSNL) being in partnership with Union of India is duty bound to uphold the rule of law. Learned Counsel submitted that the aforesaid judgment is liable to be set aside on the short ground that it is cryptic and non-speaking.

32. This submission was also reiterated by Dr.K.S. Chauhan, learned counsel. He submitted that the powers of the High Court under Article 226 is much wider than the powers of this Court under Article 32 of the Constitution of India. He relied on the Constitution Bench judgment of this Court in *Zee Telefilms Ltd. vs. Union of India*[8]. In this case, the activities of Board of Cricket Control of India were held to be akin to public

8. 2005 (4) SCC 649.

duties or State functions. On the basis of the above, he submitted that when a private body exercises public functions even if it is not a State, the aggrieved person would have a remedy by way of a writ petition under Article 226. Dr. Chauhan relied on a judgment of this Court in *Ramesh Ahluwalia vs. State of Punjab & Ors.* in C.A.No.6634 of 2012 decided on 13th September, 2012.

33. In response, Mr. C.U. Singh, learned senior counsel appearing for the respondent has submitted that the tests for determining as to whether a particular body would fall within the definition of State or other authority have been well defined by this Court in a number of judgments. Therefore, there is no scope for enlarging the time tested definitions rendered by this Court. In support of the submissions, he relied on *All India ITDC Workers Union & Ors. v. ITDC & Anr.*[9]; *Pradeep Biswas v. Indian Inst. of Chemical Biology*[10]; *G.Bassi Reddy vs. International Corps Research Institute*[11]; *Balco Employees Union vs. Union of India & Ors.*[12]; *Agricultural Produce Market Committee vs. Ashok Harikunj & Anr.*[13]

34. On the basis of the tests laid down in the aforesaid judgments, learned counsel submitted that VSNL is not a State or other authority under Article 226 of the Constitution. Therefore, both the High Courts have correctly held that the writ petitions would not be amenable against the VSNL.

35. Learned senior counsel then submitted that TCL erstwhile VSNL is not performing a public function or a mandatory public duty and, therefore, would not be amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution. In support of the submission, learned counsel

9. 2006 (10) SCC 66.
10. 2002 (5) SCC 111.
11. 2003 (4) SCC 225.
12. 2002 (2) SCC 333.
13. 2000 (8) SCC 61.

relied on *G. Bassi Reddy* (supra), and *Binny Ltd.* (supra).

36. He further submitted that without prejudice to the aforesaid two submissions, so far as employment/service contract is concerned, a writ petition would not be maintainable. The appellants would have to first exhaust the alternative remedies available. In support of this submission, he relied on *Radhakrishna Agarwal vs. State of Bihar*[14]*; Binny Ltd.* (supra), *Kulchinder Singh vs. Hardayal Singh Brar*[15] and *Praga Tools Corp. vs. C.A.Imanual & Ors.*[16]

37. In view of the above, learned senior counsel submitted that all these appeals deserve to be dismissed.

38. We have considered the submissions made by the learned counsel for the parties. In essence, learned counsel for the appellants have made only two submissions -

(i) That inspite of the Government of India holding only 26.97 % shares in VSNL now TCL, it would still fall in the definition of State or other authority within the ambit of Article 12 of the Constitution.

(ii) Even if it is held that VSNL/TCL is a purely private entity, it would be amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution of India as it is performing a public function/public duty.

39. We are unable to accept the aforesaid submissions. We have earlier set out in detail the manner in which the function which was earlier being performed by OCS which were gradually transferred with effect from 1st April, 1986 to VSNL. Since 13th February, 2002, Government of India holds only 26.12 % shares of TCL. Therefore, it can be safely concluded that on the basis of the shareholding, the Government of India

14. 1977 (3) SCC 457.
15. [1976 (3) SCC 828]
16. [1969 (1) SCC 585.]

would not be in control of the affairs of TCL. In order for TCL to be declared as a State or other authority within the meaning of Article 12 of the Constitution of India, it would have to fall within the well recognized parameters laid down in a number of judgments of this Court. In the case of *Pradip Kumar Biswas* (supra), a Seven Judge Bench of this Court considered the question as to whether Indian Institute of Chemical biology would fall within the definition of State or other authority under Article 12. Ruma Pal, J. speaking for the majority considered the manner in which the aforesaid two expressions have been construed by this Court in the earlier cases. The tests propounded for determining as to when the Corporation will be said to be an instrumentality or agency of the Government as stated, *Ramana Dayaram Shetty vs. International Airport Authority of India*[17] were summarized as follows :

> "(1) One thing is clear that if the entire share capital of the corporation is held by Government, it would go a long way towards indicating that the corporation is an instrumentality or agency of Government. (SCC p. 507, para 14)
>
> (2) Where the financial assistance of the State is so much as to meet almost entire expenditure of the corporation, it would afford some indication of the corporation being impregnated with governmental character. (SCC p. 508, para 15)
>
> (3) It may also be a relevant factor ... whether the corporation enjoys monopoly status which is State-conferred or State-protected. (SCC p. 508, para 15)
>
> (4) Existence of deep and pervasive State control may afford an indication that the corporation is a State agency or instrumentality. (SCC p. 508, para 15)
>
> (5) If the functions of the corporation are of public importance and closely related to governmental functions,

17. (1979) 3 SCC 489.

> it would be a relevant factor in classifying the corporation as an instrumentality or agency of Government. (SCC p. 509, para 16)
>
> (6) 'Specifically, if a department of Government is transferred to a corporation, it would be a strong factor supportive of this inference' of the corporation being an instrumentality or agency of Government. (SCC p. 510, para 18)"

40. The aforesaid ratio in *Ramana Dayaram Shetty* (supra) has been consistently followed by this Court, as is evident from paragraph 31 of the judgment in *Biswas* (supra). Para 31 reads as under :

> "31. The tests to determine whether a body falls within the definition of "State" in Article 12 laid down in Ramana with the Constitution Bench imprimatur in Ajay Hasia form the keystone of the subsequent jurisprudential superstructure judicially crafted on the subject which is apparent from a chronological consideration of the authorities cited."

41. The subsequent paragraphs of the judgment noticed the efforts made to further define the contours within which to determine; whether a particular entity falls within the definition of other authority, as given in Article 12. The ultimate conclusion of the Constitution Bench are recorded in paragraph 39 and 40 as under :-

> "39. Fresh off the judicial anvil is the decision in *Mysore Paper Mills Ltd. v. Mysore Paper Mills Officers'* Assn. which fairly represents what we have seen as a continuity of thought commencing from the decision in Rajasthan Electricity Board in 1967 up to the present time. It held that a company substantially financed and financially controlled by the Government, managed by a Board of Directors nominated and removable at the instance of the Government and carrying on important functions of public

interest under the control of the Government is "an authority" within the meaning of Article 12.

40. The picture that ultimately emerges is that the tests formulated in Ajay Hasia are not a rigid set of principles so that if a body falls within any one of them it must, ex hypothesi, be considered to be a State within the meaning of Article 12. The question in each case would be - whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

42. In view of the aforesaid authoritative decision of the Constitution Bench (Seven Judges), it would be wholly unnecessary for us to consider the other judgments cited by the learned counsel for the parties.

43. If one examines the facts in the present case on the basis of the aforesaid tests, the conclusion is inescapable that TCL cannot be said to be other authority within Article 12 of the Constitution of India. As noticed above, the share holding of Union of India would not satisfy test principles 1 and 2 in the case of *Ramana Dayaram Shetty* (supra).

44. On perusal of the facts, it would be evident that test No.3 would also not be satisfied as TCL does not enjoy a monopoly status in ILDS. So far as domestic market is concerned, there is open competition between the numerous operators, some of which have been enumerated earlier namely, MTNL, Airtel, Idea, Aircel, etc. This brings us to the 4th test and again we are unable to hold that the Government of India exercises deep and pervasive control in either the management or policy making of TCL which are purely private enterprises. We may also notice that in fact even Government

Companies like MTNL and BSNL are competitors of TCL, in respect of ILDS. We are, therefore, of the firm opinion that the High Court of Delhi and the High Court of Bombay were fully justified in rejecting the claim of the appellants that TCL would be amenable to writ jurisdiction of the High Court by virtue of the other authority within the purview of Article 12 of the Constitution of India.

Is TCL performing a public function :-

45. It has been noticed earlier that ILDS functions, prior to 1986, were being performed by OCS, a Department of Ministry of Communications. VSNL was incorporated under the Indian Companies Act, 1956 as a wholly owned Government company to take over the activities of erstwhile OCS with effect from 1st April, 1986. The employees of erstwhile OCS continue to work for VSNL on deputation till 1st January, 1990. However, as noticed earlier, an option was given in 1989 to the pre 1986 employees for permanent absorption in VSNL. It was made clear to all the employees that they would be permanently absorbed in VSNL upon resigning from the Government of India. It was also made clear that these employees had the choice to remain as Government employees but they would be transferred to surplus staff cell of Government of India for re-deployment against the vacancies in other government offices. It is an accepted fact before us that all the appellants opted to be absorbed in VSNL. They were, in fact, absorbed in VSNL with effect from 1st January, 1990. In the staff notice issued on 11th December, 1989, it was also made clear that OCS employees transferred to VSNL on deputation basis without deputation allowance on foreign service terms will cease to be government servants. It is, therefore, patent that the appellant accepted the absorption voluntarily. Therefore, it would be difficult to accept the submission of the learned counsel for the appellants that even after absorption in VSNL, the appellants continued to enjoy the protection available to them in the OCS as government servants. The appellants have, however, sought

to rely on the memorandum No.4/18/87-P &PWD dated 5th July, 1989 of the Department of Pension and Pensioners' Welfare, Government of India. In the said letter, certain safeguards have been granted to ex-OCS employees which are as under:

> "Dismissal/removal from the service of a public sector undertaking/autonomous body after absorption for any subsequent misconduct shall not amount to forfeiture of his retirement benefits for the service rendered in the Central Government. Also in the event of Dismissal/removal of a transferred employee from the public sector undertaking/ autonomous body the employee concerned will be allowed protection to the extent that the administrative Ministry/ Department will review such order before taking a final decision."

46. In our opinion, the aforesaid condition would make no difference to the legal status of the appellants within VSNL. It was only an assurance that the rights to pension which had already accrued to them on the basis of their service in OCS shall be protected. Undoubtedly, this assurance was accepted by VSNL on 1st May, 1992. It was, in fact, incorporated in the rules governing the service conditions of these employees in VSNL. It is a matter of record that with effect from 13th February, 2002, the shareholding of Government of India is 26.97 %. Soon thereafter, the total shareholding of TATA Group in VSNL increased to 44.99% of the paid up share capital in 2002. It is also an accepted fact that shareholding of the TATA Group in VSNL is 15.11%. It is also noteworthy that since 2002, VSNL was a TATA Group Company and accordingly on 28th January, 2008 its name was changed to 'TATA Communication Limited". In our opinion, the aforesaid facts make it abundantly clear that the Government of India did not have sufficient interest in the control of either management or policy making functions of TATA Communication Limited.

47. Merely because TATA Communication Limited is performing the functions which were initially performed by OCS would not be sufficient to hold that it is performing a public function. It has been categorically held in the case of *Ramana Dayaram Shetty* (supra) if only the functions of the Corporation are of public importance and *closely related to Government functions, it would be a relevant factor in classifying the Corporation as an instrumentality or agency of the Government.*

48. As noticed above, the functions performed by VSNL/ TCL are not of such nature which could be said to be a public function. Undoubtedly, these operators provide a service to the subscribers. The service is available upon payment of commercial charges. Learned counsel for the appellants had placed strong reliance on the judgment of this Court in *Air India Statutory Corporation* (supra). However, the aforesaid judgment is of no assistance to the appellants as it was subsequently overruled by a Constitution Bench in *Steel Authority of India Ltd. & Ors. vs. National Union Waterfront Workers & Ors.*[18]. Dr. K.S. Chauhan had also relied on the Human Rights Act, 1998 (Meaning of Public Function) Bill which sets out the factors to be taken into account in determining whether a particular function is a public function for the purpose of sub-section (3)(b) of Section 6 of the aforesaid Act. Section (1) enumerates the following factors which may be taken into account in determining the question as to whether a function is a function of public nature.

> "(a) the extent to which the state has assumed responsibility for the function in question ;
>
> (b)the role and responsibility of the state in relation to the subject matter in question ;
>
> (c) the nature and extent of the public interest in the function in question ;

18. (2001 (7) SCC 1)

(d) the nature and extent of any statutory power or duty in relation to the function in question ;

(e) the extent to which the state, directly or indirectly, regulates, supervises or inspects the performance of the function in question ;

(f) the extent to which the state makes payment for the function in question ;

(g) whether the function involves or may involve the use of statutory coercive powers ;

(h) the extent of the risk that improper performance of the function might violate an individual's Convention right.

Performance of public function by private provider -

49. For the avoidance of doubt, for the purposes of Section 6(3)(b) of the Human Rights Act 1998, a function of a public nature includes a function which is required or enabled to be performed wholly or partially at public expense, irrespective of-

(a) the legal status of the person who performs the function, or

(b) whether the person performs the function by reason of a contractual or other agreement or arrangement".

50. In our opinion, the functions performed by VSNL/TCL examined on the touchstone of the aforesaid factors cannot be declared to be the performance of a public function. The State has divested its control by transferring the functions performed by OCS prior to 1986 on VSNL/TCL. Dr. Chauhan had also relied on *Binny Ltd.* (supra) wherein this Court reiterated the observations made by this Court in *Dwarkanath vs. Income-tax Officer, Special Circle, D-ward, Kanpur & Anr.*[19], it was observed that :

19. (1965 (3) SCR 536.

"It is difficult to draw a line between the public functions and private functions when it is being discharged by a purely private authority. A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest."

51. This Court also quoted with approval the Commentary on Judicial Review of Administrative Action (Fifth Edn.) by de Smith, Woolf & Jowell in Chapter 3 para 0.24 therein it has been stated as follows :

"A body is performing a "public function" when it seeks to achieve some collective benefit for the public or a section of the public and is accepted by the public or that section of the public as having authority to do so. Bodies therefore exercise public functions when they intervene or participate in social or economic affairs in the public interest.

Public functions need not be the exclusive domain of the state. Charities, self-regulatory organizations and other nominally private institutions (such as universities, the Stock Exchange, Lloyd's of London, churches) may in reality also perform some types of public function. As Sir John Donaldson M.R. urged, it is important for the courts to "recognize the realities of executive power" and not allow "their vision to be clouded by the subtlety and sometimes complexity of the way in which it can be exerted." Non-governmental bodies such as these are just as capable of abusing their powers as is government."

52. These observations make it abundantly clear that in order for it to be held that the body is performing a public function, the appellant would have to prove that the body seeks to achieve some collective benefit for the public or a section

of public and accepted by the public as having authority to do so. In the present case, as noticed earlier, all telecom operators are providing commercial service for commercial considerations. Such an activity in substance is no different from the activities of a bookshop selling books. It would be no different from any other amenity which facilitates the dissemination of information or DATA through any medium. We are unable to appreciate the submission of the learned counsel for the appellants that the activities of TCL are in aid of enforcing the fundamental rights under Article 21(1)(a) of the Constitution. The recipients of the service of the telecom service voluntarily enter into a commercial agreement for receipt and transmission of information. The function performed by VSNL/ TCL cannot be put on the same pedestal as the function performed by private institution in imparting education to children. It has been repeatedly held by this Court that private education service is in the nature of sovereign function which is required to be performed by the Union of India. Right to education is a fundamental right for children upto the age of 14 as provided in Article 21A. Therefore, reliance placed by the learned counsel for the appellants on the judgment of this Court in *Andi Mukta* (supra) would be of no avail. In any event, in the aforesaid case, this Court was concerned with the non-payment of salary to the teachers by the Andi Mukta Trust. In those circumstances, it was held that the Trust is duty bound to make the payment and, therefore, a writ in the nature of mandamus was issued. Mr. C.U.Singh, senior counsel relied on *Binny Ltd.* (supra) in support of the submissions that VSNL/TCL is not performing a public function. In our opinion, the observations made by this Court in the aforesaid judgment are fully applicable in the facts and circumstances of this case.

53. In these appeals, the claim of the appellants is that their services have been wrongly terminated by VSNL/TCL in breach of the assurances given by the Government of India and VSNL in clause 5.13 of the share holding agreement. If that be so,

they would be at liberty to seek redress by taking recourse to the normal remedies available under law.

54. A perusal of the aforesaid documents, however, would show that VSNL had merely promised not to retrench any employee who had come from OCS for a period of two years from 13th February, 2002. Such a condition, in our opinion, would not clothe the same with the characteristic of a public duty which the employer was bound to perform. The employees had individual contacts with the employer. In case the employer is actually in breach of the contract, the appellants are at liberty to approach the appropriate forum to enforce their rights.

55. We see no merit in the appeals and the same are accordingly dismissed.

Writ Petition No.689 of 2007 -

56. This writ petition has been moved by the VSNL Scheduled Castes/Tribes employees Welfare Samiti (Regd.) (Petitioner No.1) and Scheduled Castes and Schedule Tribes Employees Welfare Association of VSNL (Regd.)-Petitioner No.2.

57. The prayer in this writ petition is inter alia for the issuing a writ in the nature of mandamus directing the official respondents to safeguard the fundamental rights of the members of the appellant as per the undertaking given on 16th March, 2001, 9th October, 2001 and 30th April, 2002. For the reasons already stated in the earlier part of the judgment relating to the civil appeals, we are unable to entertain the present writ petition. In our opinion, it is not maintainable and accordingly dismissed.

R.P. Appeals & Writ Petition dismissed.

RATTIRAM & ORS. ETC.

v.

STATE OF M.P. THROUGH INSPECTOR OF POLICE ETC.

(Criminal Appeal No. 223 of 2008 etc.)

APRIL 18, 2013

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

PENAL CODE,1860

s.302/149 – Victim stated to have been assaulted by a number of accused resulting in his death – Conviction – Held: The evidence establishes that five of the accused assaulted the deceased – One of them died before filing of the appeals – Conviction and sentence of life imprisonment of the remaining four is upheld – As far other accused persons are concerned, there are contradictory statements leading to a reasonable doubt with regard to their presence at the place of occurrence and assaulting the deceased – They are accordingly acquitted – Evidence – Contradictory statements of witnesses.

CODE OF CRIMINAL PR0CEDURE, 1973:

s.157 – Sending of special report to Magistrate – Held: When there is delayed despatch of FIR, it is necessary on the part of prosecution to give an explanation for delay – However, if court is convinced as to truthfulness of prosecution version and trustworthiness of its witnesses, delay in despatch of FIR may not be regarded as detrimental to prosecution case- In the case at hand, the evidence cannot be thrown overboard as the version of witnesses deserves credence.

The appellants alongwith three others were prosecuted for causing the death of one 'D'. The case of the prosecution was that on 29.9.1995 at about 11 p.m.

when PWs.5,6,7 and 12 alongwith 'D' were at a shop to purchase medicine for PW.5, all the accused surrounded 'D', attacked him and caused his death. The trial court convicted accused 'M' u/ss.148 and 302 IPC and the remaining accused u/ss.147 and 302 read with s.149 IPC, and sentenced all of them to imprisonment for life. On appeal, the High Court acquitted accused 'G' and upheld the conviction and sentence of the other accused. Accused 'Chh' had died during pendency of appeal before High Court and appellant 'B' died after the instant appeals were filed. The appeals were referred to a three-Judge Bench which answered the reference*.

It was contended for the appellants that the finding of the trial court as accepted by the High court that all the accused had assaulted the deceased was founded absolutely on non-appreciation of the evidence; and that non-compliance of s.157 Cr.P.C. vitiated the trial.

Allowing the appeals in part, the Court

HELD: 1.1. The High Court in one line has stated that considering the overall evidence on record it could be said that barring accused 'G' all the other accused persons were present and they jointly assaulted the deceased. The concurrence of the High Court is bereft of any scrutiny of evidence. On a studied evaluation of the evidence on record, it is evident that accused 'Chh' exhorted and he along with accused 'Dh', 'M', 'B' and 'GD' assaulted the deceased. There is ample evidence on record to safely conclude that they formed an unlawful assembly and there was common object to assault the deceased who,

*. It has been held in *Rattiram & Ors. vs. State of M.P. Through Inspector of Police etc.* 2012 (3) SCR 496 = 2012(4) SCC 516 that *Moly and Another v. State of Kerala* 2004 (3) SCR = AIR 2004 SC 1890 and *Vidyadharan v. State of Kerala* 2003 (5) Suppl. SCR 524 = (2004) 1 SCC 215 did not noted the decision in *State of M.P. v. Bhooraji & Ors.* 2001 (2) Suppl. SCR 128 = 2001 AIR 3372, and as such, *Moly and Vidyadharan are per incurium* and the view therein regarding retrial is overruled.

eventually, succumbed to the injuries inflicted in the assault. There is clear cut evidence of their involvement and PW-5 and PW-12 have categorically spoken about their overt acts. Therefore conviction and sentence of appellants 'Dh', 'M', 'B' and 'GD' is affirmed. [para 11, 19 and 22] [1012-G-H, 1013-A-B; 1016-D-E; 1018-D]

1.2. As far as other accused are concerned, there are material contradictions about their presence at the place of occurrence and assaulting the deceased. From the apparent contradictions in the depositions of PW-5 and PW-12, it seems that they have implicated the other accused in the crime. Thus, their involvement in any overt act is not proven by the prosecution. Therefore, the view of the trial court which has been concurred with by the High Court that all the accused persons had assaulted the deceased, can not be accepted. [para 11 and 19] [1013-B-C; 1016-E-G]

Baladin and Others v. State of Uttar Pradesh **AIR 1956 SC 181;** *Masalti v. State of Uttar Pradesh* **1964 SCR 133 = AIR 1965 SC 202;** *Lalji v. State of Uttar Pradesh* **1989 (1) SCR 130 = (1989) 1 SCC 437;** *Bhargavan and Others v. State of Kerala* **2003 (5) Suppl. SCR 535 = (2004) 12 SCC 414;** *Debashis Daw and Others v. State of West Bengal* **2010 (9) SCR 654 = (2010) 9 SCC 111;** *Akbar Sheikh v. State of W. B.* **2009 (7) SCR 518 = (2009) 7 SCC 415 and** *Ramachandran and Others v. State of Kerala* **2011 (13) SCR 923 = (2011) 9 SCC 257 - referred to.**

1.3. It is borne out in the evidence that the deceased was involved in many criminal offences and there was some bad blood between the accused persons and the deceased. In such a situation it is not unusual to implicate some more persons as accused along with the real assailants. [para 19] [1017-A-B]

1.4. Regard being had to the totality of the evidence on record, filtering the evidence of PW-5 and PW-12 and on studied evaluation thereof, it is not safe to hold that the accused-appellants 'R', 'K', 'RR' and 'S' were present at the spot and, therefore, it will be inappropriate to record a conviction against them with the aid of s. 149 IPC as there is a reasonable doubt about their presence at the scene of occurrence. They are, accordingly, acquitted. [para 20-22] [1017-C-D; 1018-E-F]

2. As regards non-compliance of s.157 Cr.PC, suffice it to say that when there is delayed despatch of the FIR, it is necessary on the part of the prosecution to give an explanation for the delay. The purpose behind sending a copy of the FIR to the magistrate is to avoid any kind of suspicion being attached to the FIR. If the court is convinced as regards the truthfulness of the prosecution version and trustworthiness of the witnesses, the delay despatch of FIR may not be regarded as detrimental to the prosecution case. It would depend on the facts and circumstances of the case. In the case at hand, the evidence cannot be thrown overboard as the version of the witnesses deserves credence. [para 21] [1017-E and G-H; 1018-A-C]

Gangula Ashok and Another v. State of Andhra Pradesh **2000 (1) SCR 468 = AIR 2000 SC 740 - referred to.**

Case Law Reference:

2000 (1) SCR 468	**referred to**	**para 5**
2004 (3) SCR 346	**held per incurium and stood overruled**	**para 5**
2003 (5) Suppl. SCR 524	**held per incurium and stood overruled**	**para 5**

2001 (2) Suppl. SCR 128	**referred to**	**para 5**
2012 (3) SCR 496	**referred to**	**para 6**
AIR 1956 SC 181	**referred to**	**para 13**
1964 SCR 133	**referred to**	**para 14**
1989 (1) SCR 130	**referred to**	**para 15**
2003 (5) Suppl. SCR 535	**referred to**	**para 16**
2010 (9) SCR 654	**referred to**	**para 17**
2009 (7) SCR 518	**referred to**	**para 17**
2011 (13) SCR 923	**referred to**	**para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 223 of 2008.

From the Judgment and Order dated 12.03.2007 of the High Court of Judicature, Madhya Pradesh at Jabalpur in Criminal Appeal No. 1568 of 1996.

WITH

Crl.A.No. 458 of 2008.

Fakhruddin, Raj Kishor Choudhary, Surya Kamal Mishra, Arishul Chandra, T. Mahipal, Anis Ahmed Khan, Shoaib Ahmad Khan for the Appellants.

Vibha Datta Makhija for the Respondent.

The Judgmet of the Court was delivered by

DIPAK MISRA, J. 1. In these two appeals assail is to the judgment of conviction and order of sentence passed by the Division Bench of the High Court of Judicature, Madhya Pradesh at Jabalpur, in Criminal Appeal No. 1568 of 1996 whereby the High Court concurred with the judgment of

conviction and order of sentence passed by the learned Additional Sessions Judge, Sagar, in Sessions Trial No. 97 of 1995, except in respect of one Gorelal, Appellant No. 2 before the High Court and Accused No. 2 before the trial court, wherein the present appellants along with Gorelal stood convicted for offences under Section 302 read with Section 149 Indian Penal Code and other offences and sentenced to imprisonment for life with fine of Rs.1000/-, in default of payment of fine, to further undergo rigorous imprisonment for three months.

2. The factual score, as depicted, is that on 29.9.1995, deceased Dhruv @ Daulat along with Ashok Kumar, PW-5, Dheeraj, PW-6, Naresh, PW-7, and Leeladhar, PW-12, was returning home about 11.00 p.m. after attending a wrestling event which was organised at "Kher Mata" (temple) in Makronia, a village in the district of Sagar. As Ashok Kumar, PW-5, complained of pain in the stomach, all of them went to the shop of Gorelal for purchasing medicine and when they reached the shop, all the accused persons coming from the house of Chhotelal surrounded deceased Daulat and started assaulting him and despite the beseeching and imploring by the companions the accused persons continued the assault, as a result of which the deceased fell unconscious. As the prosecution story proceeds, he was taken to the hospital and, eventually, succumbed to his injuries. On an FIR being lodged, the criminal law was set in motion and after investigation the appellants were charge-sheeted under Section 3(1)(x) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short "the Act"), but, eventually, charges were framed under Sections 147, 148 and 302 read with Section 149 IPC. The accused persons pleaded innocence and false implication and claimed to be tried.

3. The prosecution, in order to establish its case, examined 13 witnesses and exhibited number of documents. The defence chose not to adduce any evidence.

4. The learned trial Judge, appreciating the evidence on record, came to hold that the prosecution had brought home the charges against accused, Mohan, under Sections 148 and 302 IPC and against the remaining accused persons under Sections 147 and 302 IPC read with Section 149 IPC and apart from imposing separate sentences under Section 147 IPC sentenced each of them to suffer imprisonment for life as stated hereinbefore.

5. Being dissatisfied with the judgment of conviction, the appellants along with others preferred a singular criminal appeal. In appeal, apart from raising various contentions on merits, it was submitted that the entire trial was vitiated as it had commenced and concluded without committal of the case to the Court of Session by the competent court inasmuch as the Sessions Court could not have directly taken cognizance of the offence under the Act without the case being committed for trial. To bolster the said contention reliance was placed on *Gangula Ashok and Another v. State of Andhra Pradesh*[1], *Moly and Another v. State of Kerala*[2] and *Vidyadharan v. State of Kerala*[3]. The High Court relied on decision in *State of M. P. v. Bhooraji & Ors*[4]. and treated it to be a binding precedent and declined to set aside the conviction or remit the matter for *de novo* trial. The High Court proceeded to deal with the appeals on merits and came to hold that except accused Gorelal all other accused persons were present on the scene of occurrence and had participated in the assault and, accordingly, maintained the conviction and sentence in respect of other accused persons and acquitted appellant No. 2 before the High Court.

6. For the sake of completeness, it is necessary to state that when the matter was listed before a two-Judge Bench, it

1. AIR 2000 SC 740.
2. AIR 2004 SC 1890.
3. (2004) 1 SCC 215.
4. AIR 2001 SC 3372.

was noticed that there was a conflict between two lines of judgment of this Court and, accordingly, referred the matter to the larger Bench. The three-Judge Bench noticed that the real conflict or discord was manifest between *Moly and Another* (supra)**,** *Vidyadharan* (supra) on one hand and *Bhooraji & Ors.* (supra) on the other and after due deliberation in *Rattiram and others v. State of Madhya Pradesh through Inspector of Police*[5]*,* came to hold as follows: -

> "**66.** Judged from these spectrums and analyzed on the aforesaid premises, we come to the irresistible conclusion that the objection relating to non-compliance of Section 193 of the Code, which eventually has resulted in directly entertaining and taking cognizance by the Special Judge under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989, does not vitiate the trial and on the said ground alone, the conviction cannot be set aside or there cannot be a direction of retrial and, therefore, the decision rendered in *Bhooraji* (supra) lays down the correct law inasmuch as there is no failure of justice or no prejudice is caused to the accused.
>
> **67.** The decisions rendered in *Moly* (supra) and *Vidyadharan* (supra) have not noted the decision in *Bhooraji* (supra), a binding precedent, and hence they are *per incuriam* and further, the law laid down therein, whereby the conviction is set aside or matter is remanded after setting aside the conviction for fresh trial, does not expound the correct proposition of law and, accordingly, they are hereby, to that extent, overruled."

7. As the controversy on the said score has been put to rest, we are presently required to advert to the merits of the appeal. At this juncture, we may state that Chhotelal died after pronouncement of the decision in appeal by the High Court and Babulal has expired during the pendency of the appeal before

5. (2012) 4 SCC 516.

this Court and, therefore, the appeal, as far as Babulal is concerned, stands abated.

8. Mr. Fakhruddin, learned senior counsel for the appellants in Criminal Appeal No. 223 of 2008, has contended that the finding by the trial court which has been accepted by the High Court that all the accused persons had assaulted is founded on absolutely non-appreciation of evidence inasmuch as there is nothing to implicate them in any of the overt acts. It is his alternative submission that all the accused were not present at the scene of occurrence and, therefore, the conviction in aid of Section 149 IPC of all the appellants herein is wholly unsustainable.

9. Mr. Anis Ahmed Khan, learned counsel appearing for the appellants in Criminal Appeal No. 458 of 2008, has submitted that there has been delay in lodging the FIR and further copy of the report had not been sent to the Magistrate as required under Section 157 of the Code and, therefore, the trial is vitiated. It is also his submission that due to previous animosity the informant has tried to rope in number of persons though they had no role to play in the commission of the crime in question and, hence, they deserve to be acquitted.

10. Per contra, Ms. Vibha Dutta Makhija, learned counsel for the State, would contend that there is evidence implicating all the accused persons in the assault and even assuming no overt act is attributed to them, they were a part of the unlawful assembly being aware of the common object of assault and, hence, the conviction under Section 149 IPC does not warrant any interference.

11. First, we shall advert to the issue whether all the accused persons had participated in the assault or not. Be it noted, the learned trial Judge as well as the High Court has taken into consideration that Ext. P-7, the FIR and relied on the testimony of PW-5, Ashok Kumar and PW-12, Leeladhar, to record a finding that all the accused persons had assaulted the

deceased. On a perusal of the FIR, it is seen that the allegation against Ramesh, Kanchedi, Babulal, Ramcharan and Rattiram is that they came with lathis to assault the deceased. There is mention in the FIR that Kanchedi Kurmi hit the deceased with a big piece of stone and Ramcharan Kurmi hit with a stick. The accused Babulal, Rattiram, Satyanarayan and Ramesh gave blows with fists and kicks. In the FIR it has been mentioned that Chhotelal exhorted to kill the deceased and Dhaniram Kurmi, Govardhan Kurmi, Badri Kurmi and Mohan Kurmi assaulted and specific overt acts have been attributed to them. Ashok Kumar, PW-5 in examination-in-chief has deposed that Dhaniram hit Daulat on the head with a stick, Mohan gave a blow on the head with a sword and Badri and Govardhan hit him on the back and hand. Thereafter, he has proceeded to depose that rest of the accused gave fists and kick blows. In the cross-examination, this witness, who had lodged the FIR, has stated that accused Chhotelal, Kanchedi, Ramcharan, Ramesh and Gorelal did not possess sticks. Thus, he has not stated that Kanchedi hit with a big stone. Leeladhar, PW-12, has stated about the exhortation made by Chhotelal and the blows given by Dhaniram and Mohan. As far as Chhotelal, Babulal, Satyanarayan, Rattiram and Gorelal are concerned, he has stated that they hit the deceased with their feet and clenched fists. In the cross-examination he has deposed that Babulal was not present at the place of occurrence. He has also stated that Daulat did not sustain any lathi blow on his legs. He has admitted that some persons were unarmed. Dheeraj, PW-6, and Naresh, PW-7, who were cited as eye-witnesses, have turned hostile. The learned trial Judge, as is evident from the judgment, has not adverted to this facet and reached the conclusion that all the accused persons were armed and had assaulted the deceased. The High Court in one line has stated that considering the overall evidence on record it could be said that barring Gorelal all the other accused persons were present and jointly assaulted the deceased. The concurrence of the High Court, we may respectfully state, is bereft of any scrutiny of evidence. On a studied evaluation of the evidence on record,

we are of the considered opinion that Chhotelal exhorted and he along with Dhaniram, Mohan, Badri and Govardhan assaulted the deceased. We are disposed to think so because there is clear cut evidence of their involvement and PW-5 and PW-12 have categorically spoken about their overt acts whereas as far as others are concerned, there are material contradictions about their assaulting the deceased. Thus, their involvement in any overt act is not proven by the prosecution and, therefore, we are unable to accept the view of the learned trial Judge which has been concurred with by the High Court that all the accused persons had assaulted the deceased.

12. The next limb of submission relates to justifiability of conviction of all the accused persons in aid of Section 149 IPC. The learned trial Judge has held that all the accused persons were present and had assaulted the deceased. The High Court has opined that there is no evidence against the appellant Gorelal. Ms. Makhija, learned counsel for the State would contend that there is ample material that the accused-appellants were present at the place of occurrence and their common object is clear from the facts and circumstances that they shared the common object to assault the deceased and they were in know of the act to be done. Elaborating the same, it is urged by her that it is not a case where the accused persons were just bystanders but, in fact, came with others being aware that some of the accused persons were carrying lathis amd Mohan was carrying a sword. Mr. Fakhruddin and Mr. Anis Ahmed Khan, learned counsel for the appellants, per contra, would vehemently urge that the prosecution has really not proven, barring the people who were involved in the assault, that the other accused persons were really present and further assuming that they were present, their mere presence would not attract the concept of common object as engrafted under Section 149 IPC.

13. Before we proceed to analyse the evidence on this score, we think it appropriate to refer to certain pronouncements

pertaining to attractability of Section 149 IPC. In *Baladin and others v. State of Uttar Pradesh*[6], a three-Judge Bench has opined as follows: -

> "It is well settled that mere presence in an assembly does not make such a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of an unlawful assembly, or unless the case falls under section 142, Indian Penal Code."

14. The dictum in the aforesaid case was considered by a four-Judge Bench in *Masalti v. The State of Uttar Pradesh*[7], wherein the Bench distinguished the observations made in the case of *Baladin* (supra) on the ground that the said decision must be read in the context of special facts of that case and may not be treated as laying down an unqualified proposition of law. The four-Judge Bench, after explaining the said decision, proceeded to lay down as follows: -

> "It would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, S. 149 make it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by S. 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly."

6. AIR 1956 SC 181.

7. AIR 1965 SC 202.

15. In *Lalji v. State of U.P*[8]*.* it has been observed that common object of the unlawful assembly can be gathered from the nature of the assembly, arms used by them and the behaviour of the assembly at or before scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case.

16. In *Bhargavan and Others v. State of Kerala*[9] it has been held that it cannot be laid down as general proposition of law that unless an overt act is proved against a person who is alleged to be a member of an unlawful assembly, it cannot be said that he is a member of an assembly. The only thing required is that he should have understood that the assembly was unlawful and was likely to commit any of the acts which fall within the purview of Section 141 IPC. The Bench emphasised on the word "object" and proceeded to state that it means the purpose or design and, in order to make it "common", it must be shared by all.

17. In *Debashis Daw and Others v. State of West Bengal*[10]*,* this Court, after referring to the decision in *Akbar Sheikh v. State of W.B.*[11]*,* observed that the prosecution in a case of such nature is required to establish whether the accused persons were present and whether they shared a common object.

18. In *Ramachandran and Others v. State of Kerala*[12]*,* this Court has opined thus: -

> "**27**. Thus, this Court has been very cautious in a catena of judgments that where general allegations are made against a large number of persons the court would categorically scrutinise the evidence and hesitate to convict

8. (1989) 1 SCC 437.
9. (2004) 12 SCC 414.
10. (2010) 9 SCC 111.
11. (2009) 7 SCC 415.
12. (1989) 1 SCC 437.

> the large number of persons if the evidence available on record is vague. It is obligatory on the part of the court to examine that if the offence committed is not in direct prosecution of the common object, it yet may fall under the second part of Section 149 IPC, if the offence was such as the members knew was likely to be committed. Further inference has to be drawn as to what was the number of persons; how many of them were merely passive witnesses; what were their arms and weapons. The number and nature of injuries is also relevant to be considered. "Common object" may also be developed at the time of incident."

19. Applying the aforesaid principles, we are required to see whether all the appellants were present at the time of occurrence. We have already opined that Chhotelal exhorted and other accused persons, namely, Dhaniram, Mohan, Badri and Govardhan had assaulted the deceased and there is ample evidence on record to safely conclude that they formed an unlawful assembly and there was common object to assault the deceased who, eventually, succumbed to the injuries inflicted in the assault. As far as other accused persons, namely, Babulal, Satyanarayan, Rattiram, Kanchedi, Ramcharan and Ramesh are concerned, there are really contradictory statements with regard to the presence of the accused persons because PW-12 has stated that Babulal was not present at the place of occurrence. Ashok Kumar, PW-5, has contradicted himself about the weapons carried by Kanchedi, Ramcharan, Ramesh and Gorelal. Leeladhar, PW-12, has not mentioned anything about Ramesh and Govardhan. From the apparent contradictions from the depositions of PW-5 and PW-12 it seems that they have implicated Babulal, Satyanarayan, Rattiram, Ramesh and Ramcharan in the crime. As far as Govardhan is concerned, PW-5 has clearly stated that he and Badri hit Daulat with sticks on the back and the neck. The medical evidence corroborates the same. Nothing has been elicited in the cross-examination of PW-5 to discard his

testimony. It has come out in the evidence of PW-13 that PW-5 was going along with Babulal, Kanchedi and his brother. We are referring to the same only to highlight that there is an attempt to implicate number of persons. It is borne out in the evidence that the deceased was involved in many criminal offences and there was some bad blood between the accused persons and the deceased. In such a situation it is not unusual to implicate some more persons as accused along with the real assailants.

20. Regard being had to the totality of the evidence on record, filtering the evidence of PW-5 and PW-12 and on studied evaluation we are of the considered opinion that it is not safe to hold that the accused-appellants Ramesh, Kanchedi, Rattiram and Satyanarayan were present at the spot and, therefore, it will be inappropriate to record a conviction in aid of Section 149 IPC and we are inclined to think so as we entertain a reasonable doubt about their presence at the scene of occurrence.

21. We will be failing in our duty if we do not deal with the contention of Mr. Khan that when there has been total non-compliance of Section 157 of the Code of Criminal Procedure, the trial is vitiated. On a perusal of the judgment of the learned trial Judge we notice that though such a stance had been feebly raised before the learned trial Judge, no question was put to the Investigating Officer in this regard in the cross-examination. The learned trial Judge has adverted to the same and opined, regard being had to the creditworthiness of the testimony on record that it could not be said that the FIR, Ext. P-7, was ante-dated or embellished. It is worth noting that such a contention was not raised before the High Court. Considering the facts and circumstances of the case, we are disposed to think that the finding recorded by the learned trial Judge cannot be found fault with. We may hasten to add that when there is delayed despatch of the FIR, it is necessary on the part of the prosecution to give an explanation for the delay. We may further state that the purpose behind sending a copy of the FIR to the

concerned magistrate is to avoid any kind of suspicion being attached to the FIR. Such a suspicion may compel the court to record a finding that there was possibility of the FIR being ante-timed or ante-dated. The court may draw adverse inferences against the prosecution. However, if the court is convinced as regards to the truthfulness of the prosecution version and trustworthiness of the witnesses, the same may not be regarded as detrimental to the prosecution case. It would depend on the facts and circumstances of the case. In the case at hand, on a detailed scrutiny of the evidence upon bestowing our anxious consideration, we find that the evidence cannot be thrown overboard as the version of the witnesses deserves credence as analysed before. Thus, this colossal complaint made by Mr. Khan pales into insignificance and the submission is repelled.

22. In the result, we allow the appeals in part and affirm the judgment of conviction and order of sentence recorded against the appellants, namely, Dhaniram, Mohan, Badri and Govardhan. Accused Mohan has been released after completing fourteen years of imprisonment on getting the benefit of remission under Section 433A of the Code of Criminal Procedure. As far as Dhaniram is concerned, he is in custody. The accused-appellants, namely, Badri and Govardhan are on bail. Their bail bonds are cancelled and they be taken into custody forthwith. The accused-appellants, namely, Satyanarayan, Ramesh, Kanchedi and Rattiram are acquitted and as they are on bail, they be discharged from their bail bonds.

R.P. Appeals partly allowed.

SAHIB HUSSAIN @ SAHIB JAN
v.
STATE OF RAJASTHAN
(Criminal Appeal Nos. 2083-2084 of 2008)

APRIL 18, 2013

[P. SATHASIVAM AND M.Y. EQBAL, JJ.]

PENAL CODE, 1860:

s.302- Accused committing 5 murders including of three children – Circumstantial evidence – Held: The deaths established as homicidal in nature, evidence of witnesses, extra-judicial confession, absconding of accused, his conduct at the time of his arrest, recoveries of incriminating articles made pursuant to disclosure statement, the motive and the statement of accused u/s 313 CrPC, all connect him to the crime and establish his guilt – Judgment of High Court affirming the conviction and commuting the death sentence to imprisonment for 20 years with a further direction that accused be not granted any remission meanwhile, upheld – Sentence/Sentencing – Evidence – Circumstantial evidence – Extra – judicial confession.

SENTENCE/SENTENCING:

Sentence for a fixed term with a further embargo on remissions – Death sentence awarded by trial court to accused found guilty of causing death of five persons including of three children – Commuted by High Court to imprisonment for 20 years with a further direction that accused be not granted any remissions till then – Held: The decision of High Court cannot be faulted with in the light of well reasoned judgments of Supreme Court over a decade – Penal Code, 1860 - s.302.

The appellant was prosecuted for causing death of 5 persons including three children. The prosecution case was that on 27-10-2006 at 10.30 p.m., PW1 found the appellant talking to PW4 that he had finished 'S' the sister-in-law, three children and one 'MM'. PW1 rushed towards their house and found 'MM' lying in a pool of blood outside the room and the bodies of the three children and 'S' lying inside the rooms. He informed the employer (PW2) over telephone. Subsequently, a written report was handed over to police. 'MM' also on the way to hospital. The trial court convicted the appellant u/s 302 IPC and sentenced him to death. The High Court upheld the conviction, but commuted the sentence to life imprisonment for a period of 20 years and further directed that till then the accused should not get the benefit of any remission.

Dismissing the appeals, the Court

HELD: 1.1. It is not in dispute that in the incident in question 5 persons died and as per the *post mortem* reports, the deaths were due to multiple injuries on various parts of the bodies. It is also not in dispute that there is no direct eye witness to the incident. Even in the absence of eye-witness to the incident, if various circumstances prove that the appellant-accused was responsible for and involved in the gruesome murders, the decision of the court based on such circumstances cannot be faulted with. [para 6] [1028-B-D]

1.2. The post mortem report, ante mortem injuries noted therein and the evidence of doctors show that all the five deaths were homicidal in nature. [para 7] [1028-E]

1.3. The entire evidence of PWs 1 and 4, though they did not witness the occurrence, as rightly observed by the High Court, the manner in which they deposed before the court and the details stated by them are acceptable

and there is no valid reason to disbelieve their statements. Their evidence very clearly establishes that the appellant-accused was the person who was involved in the incident occurred. [para 9] [1029-C]

1.4. The extra-judicial confession, though a weak type of evidence, can form the basis for conviction if the confession made by the accused is voluntary, true and trustworthy and inspires confidence. The appellant-accused mentioned details of the incident to PW-4 and the courts below accepted his version as reliable and trustworthy. The evidence of PW-4 is reliable, acceptable and inspires confidence. It supports the stand taken by PW-1. It is also on record that PW-4 was the friend of the appellant and they were residing in the same area. In those circumstances, the confession made by the appellant to PW-4 can be acted upon along with other material evidence. [para 10] [1029-D-G]

1.5. On the basis of the disclosure statement made by the appellant, a blood stained axe and the clothes worn by him were recovered in the presence of PW-2 and PW-3. Further, blood stained chappals were also seized. On going through the evidence of PWs 2 and 3, both the courts below have found that the recoveries are acceptable and concluded that there is no reason to disbelieve their statements. [para 11] [1029-H; 1030-A-C]

1.6. Though the conduct of the appellant may not be the main link in the chain of circumstances to prove his guilt, however, absconding from the scene would establish his guilt and rule out hypothesis of innocence. It has come out from the evidence that immediately after the incident, the accused left the village and boarded a bus to Delhi. However, he was arrested in the way by PW-16 at 2.20 a.m., on 28.10.2006. [para 12] [1030-C-D]

1.7. There is no proper explanation by the appellant even u/s 313 statement for his sudden departure from the scene and going to Delhi. In the absence of any reason, the conduct of the appellant supports the case of the prosecution. Further, the appellant, when questioned by PW-16 in the bus, suppressed his original name and gave a false name and only on further interrogation, disclosed his original name. These aspects go against his conduct and support the case of the prosecution. [para 12-13] [1030-G-H; 1031-B]

1.8. As regards motive, PW-1 - the informant stated that the appellant had a quarrel with deceased 'S' on the day of Eid. This statement of PW-1 gets corroboration from the evidence of PW-4. [para 14] [1031-C-D]

1.9. Further the FSL report and DNA report matched with the blood group of the deceased and the blood group found on the chappals, pant, shirt and axe. As rightly concluded by the courts below, the reports support the case of the prosecution. In the statement of the accused recorded u/s 313 of the Code, he has neither denied nor stated about the incriminating circumstances relied on by the prosecution. [para 15-16] [1031-E-G]

1.10. It is true that the prosecution could have examined the husband of he deceased, however, in view of various circumstances, merely because one person was not examined, the entire case of the prosecution cannot be thrown out. [para 17] [1032-A-B]

1.11. This court is satisfied that all the circumstances relied on by the prosecution are reliable, acceptable and connect the appellant-accused to the crime and establish his guilt. The conclusion arrived at by the High Court is affirmed. [para 17] [1032-B-C]

2.This Court, in many cases has commuted death sentence to life imprisonment where the offence alleged is serious in nature, and while awarding life imprisonment, reiterated minimum imprisonment of 20 years or 25 years or 30 years or 35 years, mentioning that if the appropriate Government wants to give remission, the same has to be considered only after the expiry of the said period. Taking note of the facts in the instant case, the High Court commuted the death sentence into life imprisonment imposing certain restrictions, its decision cannot be faulted with and in the light of well reasoned judgments over a decade, this Court upholds the conclusion arrived at by the High Court including the reasons stated therein. [para 29 and 31] [1036-B-C; 1043-H; 1044-A-B]

Shri Bhagwan vs. State of Rajasthan **2001 (3) SCR 656 = (2001) 6 SCC 296;** *Prakash Dhawal Khairnar (Patil) vs. State of Maharashtra with State of Maharashtra vs. Sandeep @ Babloo Prakash Khairnar (Patil)* **2001 (5) Suppl. SCR 612 = (2002) 2 SCC 35;** *Ram Anup Singh and Ors. vs. State of Bihar* **(2002) 6 SCC 686;** *Nazir Khan and Ors. vs. State of Delhi* **2003 (2) Suppl. SCR 884 = (2003) 8 SCC 461;** *Swamy Shraddananda (2) @ Murali Manohar Mishra vs. State of Karnataka*, **2008 (11) SCR 93 = (2008) 13 SCC 767;** *Haru Ghosh vs. State of West Bengal* **2009 (13) SCR 847 = (2009) 15 SCC 551;** *Ramraj @ Nanhoo @ Bihnu vs. State of Chhattisgarh* **2009 (16) SCR 367 = (2010) 1 SCC 573;** *Neel Kumar @ Anil Kumar vs. The State of Haryana* **2012 (5) SCR 696 = (2012) 5 SCC 766;** *Sandeep vs. State of UP* **2012 (5) SCR 952 = (2012) 6 SCC 107;** *Gurvail Singh @ Gala and Anr. vs. State of Punjab* **(2013) 2 SCC 713;** *Jagmohan Singh vs. State of U.P.* **(1973) 1 SCC 20;** *Bachan Singh vs. State of Punjab* **(1980) 2 SCC 684 - relied on.**

Sangeet and Anr. vs. State of Haryana **(2013) 2 SCC 452- held inapplicable.**

Case Law Reference:

2001 (3) SCR 656	**relied on**	**para 19**
2001 (5) Suppl. SCR 612	**relied on**	**para 20**
(2002) 6 SCC 686	**relied on**	**para 21**
2003 (2) Suppl. SCR 884	**relied on**	**para 22**
2008 (11) SCR 93	**relied on**	**para 23**
2009 (13) SCR 847	**relied on**	**para 24**
2009 (16) SCR 367	**relied on**	**para 25**
2012 (5) SCR 696	**relied on**	**para 26**
2012 (5) SCR 952	**relied on**	**para 27**
(2013) 2 SCC 713	**relied on**	**para 28**
(2013) 2 SCC 452	**held inapplicable**	**para 29**
1973 (2) SCR 541	**relied on**	**para 30**
1980 (2) SCC 684	**relied on**	**para 30**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 2083-2084 of 2008.

From the Judgment & Order dated 05.03.2008 of the High Court Rajasthan at Jaipur in Crl. Appeal No. 91 of 2008.

Pijush K. Roy, Kakali Roy for the Appellant.

Archana Pathak Dave, Dr. Sumant Bharadwaj, Ankita Chaudhary, Mridula Ray, Milind Kumar for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. These appeals are directed against the final judgment and order dated 05.03.2008 passed by the High Court of Judicature for Rajasthan at Jaipur in Criminal Death Reference No. 1 of 2007 and Criminal Appeal

Nos. 91 and 92 of 2008 whereby the High Court disposed of the appeals filed by the appellant herein against the order of conviction and sentence dated 13.12.2007 passed by the Court of Additional Sessions Judge (Fast Track), Serial No. 1, Jaipur, District Jaipur (Rajasthan) by commuting the sentence of death to imprisonment for life.

2. Brief facts:

(a) It is an unfortunate incident of killing of five persons who were residing at Bharti Colony, Kunda, Tehsil Aamer, District Jaipur, Rajasthan.

(b) On 27.10.2006, at 10.30 p.m., one Zafar (PW-1)-the informant, who was also residing at the above said place, while on his way back home found the appellant herein talking to one Satish (PW-4) that he had finished Seema Bhabhi (sister-in-law) and also killed the three children and Munna Mawali. On hearing this, PW-1 went towards their house and found that Munna Mawali was lying in a pool of blood on the Chabutra outside his room and his nephew Kalu was lying dead inside the room and the bodies of Seema–the wife of Munna, Isha-son of Lalu Chacha and Sonu-son of Munna were lying in pool of blood in the other room. After seeing this, he ran towards Satish (PW-4) and asked him about the appellant herein. PW-4 informed him that he ran towards the Highway after changing the clothes. Thereafter, PW-1 informed the same to Ballu Bhai @ Ballu (PW-2) over telephone. After some time, a written report was handed over to the S.H.O., Police Station, Aamer by PW-1, at 12.30 a.m. Munna Mawali was removed to the hospital by the police but he died on the way.

(c) On the basis of the said information, a case being Crime No. 466/2006 under Section 302 of the Indian Penal Code, 1860 (in short 'the IPC) was registered against Sahib Hussain. Post mortem on the dead bodies was also performed. After investigation and filing of chargesheet, the case was committed to the Court of Additional Sessions Judge (Fast Track), Serial

No. 1, Jaipur, District Jaipur (Rajasthan) and numbered as Session Case No. 90/2006. During trial, it came to the knowledge of the court that there was a scuffle between the appellant herein and Seema (since deceased) on the day of Eid which resulted in such a gruesome act. However, taking note of circumstantial evidence, the Additional Sessions Judge, by order dated 13.12.2007, convicted the appellant-accused for the offence punishable under Section 302 of IPC and sentenced him to death.

(d) Aggrieved by the said order, the appellant-accused preferred appeals being Criminal Appeal Nos. 91 and 92 of 2008 before the High Court. Death Reference No. 1 of 2007 under Section 366 of the Code of Criminal Procedure, 1973 (in short 'the Code) was also preferred by the trial court for confirmation of the death sentence. By impugned judgment dated 05.03.2008, the High Court disposed of the appeals filed by the appellant-accused by commuting the sentence of death to the imprisonment for life and also made a direction that he shall not be released from the prison unless he serve out at least 20 years of imprisonment including the period already undergone and also he shall not get the benefit of any remission either by the State or by the Government of India on any auspicious occasion.

(e) Aggrieved by the said order, the appellant preferred these appeals from jail by way of special leave before this Court.

3. Heard Mr. Pijush K. Roy, learned amicus curiae for the appellant-accused and Ms. Archana Pathak Dave, learned counsel for the State of Rajasthan.

Contentions:

4. (a) Mr. Pijush K. Roy, learned amicus, after taking us through the entire materials, submitted that there is no direct eye witness to speak about the incident and the case of the prosecution entirely rests upon circumstantial evidence.

According to him, the circumstances relied on by the prosecution have not been satisfactorily established and, in any event, the circumstances said to have been established against the appellant do not provide a complete chain to bring home the guilt against the appellant. He further submitted that the FIR itself is doubtful, there are contradictions with regard to the place where the accused has first of all disclosed about the incident to Satish (PW-4), a number of infirmities in the statements of witnesses in respect of the fact that the place of incident was surrounded by many households, no reliable person was examined on the side of the prosecution and recovery of weapon (Axe), clothes, pair of chappal etc. are doubtful, hence, he prayed for acquittal of the appellant-accused. Alternatively, Mr. Roy contended that the High Court was not justified in passing the order taking away the right of remission by the Government before completion of 20 years' of imprisonment.

(4)(b) On the other hand, Ms. Archana Pathak Dave, learned counsel for the State, after taking us through all the materials submitted that the prosecution has fully established various circumstances which speak about the guilt of the appellant including the recoveries, extra judicial confession, conduct of the appellant mentioning false name at the time of his arrest etc. She further submitted that there is no denial in his statement under Section 313 of the Code that he was absconding from the scene of occurrence till he was arrested and the evidence of PWs 1 & 4 with regard to the same are also consistent and reliable. Ms. Archana also submitted that taking note of the fact that the appellant caused the death of 5 persons and the High Court has commuted the death sentence into life imprisonment, based on various earlier decisions of this Court, the High Court justified in imposing restrictions in granting remission before completion of 20 years' of imprisonment.

5. We have carefully considered the rival contentions and

perused all the materials including oral and documentary evidence.

Discussion:

6. It is not in dispute that in the incident in question 5 persons, viz., Seema, Munna Mawali, Kalu, Isha and Sonu died and as per the post mortem reports, the deaths were due to multiple injuries on various parts of the bodies. It is also not in dispute that there is no direct eye witness to the incident which occurred around 10.30 p.m., on 27.10.2006. Even in the absence of eye-witness to the incident, if various circumstances prove that the appellant-accused was responsible and involved in the gruesome murders, the decision of the Court based on such circumstances cannot be faulted with. However, we have to see whether the circumstances relied on by the prosecution have been fully established or not?

7. The *post mortem* report, *ante mortem* injuries noted therein and the evidence of doctors concerned show that all the five deaths were homicidal in nature. Since the above aspect is not seriously disputed, there is no reason to refer the nature of injuries and the ultimate opinion of the doctor who conducted the post mortem.

8. The prosecution heavily relied on the evidence of Jafar (PW-1) and Satish (PW-4). PW-1, in his evidence has stated that he used to reside with one Ballu Bhai in Bharti Colony Kunda, Aamer. According to him, Ballu Bhai had many elephants and he used to ride one of his elephant. Munna and Munna Mawali (since deceased) were also elephant riders. He further explained that on the day of the occurrence, around 10.30 p.m., while he was going to his home, he noticed the appellant-accused talking to Satish (PW-4) that he had committed the murder of Seema Bhabai, Munna Mawalai and three children. On hearing this, he immediately rushed to their house and noticed that Munna Mawali was lying outside his room in pool of blood and inside the rooms, Seema and three

children were lying dead. In addition to the evidence of PW-1, one Satish, who was examined as PW-4, supported the testimony of Jafar (PW-1). In his evidence, he explained that he was an elephant rider and used to ride the elephant of Ballu Bhai and also residing at the above said place. He further stated that at about 10.30 p.m., the appellant-accused came to him and disclosed about the incident.

9. A perusal of the entire evidence of PWs 1 & 4, though they did not witness the occurrence, as rightly observed by the High Court, the manner in which they deposed before the Court and the details stated by them are acceptable and there is no valid reason to disbelieve their statements. Their evidence very clearly establishes that the appellant-accused was the person who was involved in the incident occurred.

10. The prosecution heavily relied on the extra judicial confession. The extra judicial confession, though a weak type of evidence, can form the basis for conviction if the confession made by the accused is voluntary, true and trustworthy. In other words, if it inspires the confidence, it can be acted upon. We have already noted that the appellant-accused mentioned the details of the incident to Satish (PW-4) and the courts below accepted his version as reliable and trustworthy. Ms. Archana, learned counsel for the State took us through the entire evidence of Satish (PW-4) and on going through the same, we are satisfied that his evidence is reliable, acceptable and inspires our confidence. We have already noted that the evidence of PW-4 supports the stand taken by PW-1. It is also on record that PW-4 was the friend of the appellant-accused and they were residing in the same area. In those circumstances, the confession made by the appellant to PW-4 can be acted upon along with other material evidence.

11. Let us consider the recoveries made and relied upon by the prosecution for proving the case. It is the case of the prosecution that the appellant-accused was arrested on 28.10.2006, at 10.30 a.m. On the basis of his disclosure

statement, a blood stained axe got recovered vide recovery memo (Exh. P-10) and the clothes worn by him, which were concealed in a room, got recovered vide recovery memo (Exh. P-11) in the presence of Mohd. Salim @ Ballu (PW-2) and Abdul Majid (PW-3). Further, a pair of blood stained chappal was also seized vide recovery memo (Ex.P-8). On going through the evidence of PWs 2 & 3, both the courts below found that the recoveries are acceptable and concluded that there is no reason to disbelieve their statements.

12. Another important aspect relied on by the prosecution is the conduct of the appellant-accused. Though it may not be a main link in the chain of circumstances to prove the guilt of the appellant-accused, however, absconding from the scene would establish the guilt of the accused and rule out hypothesis of innocence. In the case on hand, it has come out from the evidence that immediately after the incident, he left village Kunda and boarded a bus to Delhi. However, he was arrested at 2.20 a.m., on 28.10.2006, at old Barrier Shahjahanpur. It has come out from the evidence of Murari Lal (PW-16), sub-Inspector, Kotwali Jhunjhunu that on 28.10.2006, at about 2.00 a.m., Commanding Officer, Behrod, informed him that one Sahib Hussain had absconded after committing murder of 5 persons. He further explained that he recorded the said information in Rojnamcha (Exh. P-51). According to him, around 2.20 a.m., he stopped a bus at Shahjahanpur Barrier which was proceeding to Delhi from Jaipur and the appellant was sitting in that bus. When he asked the appellant about his identity, initially, he gave his name as Zakir Hussain but when he got panicked, it raised suspicion in his mind. On being interrogated, he disclosed his correct name as Sahib Hussain and, thereafter, he was handed over to Police Station Aamer. There is no proper explanation by the appellant-accused even under Section 313 statement for his sudden departure from the scene and going to Delhi. In the absence of any reason, the conduct of the appellant supports the case of the prosecution.

13. Another aspect which goes against the conduct of the appellant which relates to the earlier paragraph is that when he was questioned by PW-16 in the bus, which was going to Delhi from Jaipur, he suppressed his original name and gave his name as Zakir Hussain and only on further interrogation, he disclosed his original name. As rightly pointed out by learned counsel for the State, there was no reason to suppress his original name and furnish false name to PW-16. These aspects go against his conduct and support the case of the prosecution.

14. As regards motive, the prosecution relied on the evidence of Jafar (PW-1) - the informant, that the appellant had a quarrel with Seema (the deceased) on the day of Eid. The above statement of Jafar (PW-1) gets corroboration from the evidence of Satish (PW-4) who deposed before the Court that on the day of Eid there was a quarrel between the deceased and the accused. As rightly pointed out by learned counsel for the State, the above incident cannot be ruled out in view of the fact that while the appellant was inflicting blows using an axe on the person of Seema, Munna Mawali, Kalu, Isha and Sonu arrived there to help her but they were also done to death.

15. Another important aspect which supports the prosecution theory is the FSL report and DNA report which matches with the blood group of the deceased and the blood group found on the chappals, pant, shirt and axe. According to us, as rightly concluded by the courts below, the above reports support the case of the prosecution.

16. In addition to the same, we also verified the statement of the accused recorded under Section 313 of the Code which shows that the appellant has neither denied nor stated about the incriminating circumstances relied on by the prosecution.

17. Though Mr. Roy, learned counsel for the appellant-accused has stated that the FIR itself is doubtful, on going through the same, along with other materials relied on by the prosecution, we are satisfied that the FIR was not deliberately

withheld by the prosecution. Learned counsel for the appellant has also pointed out that non-examination of Munna-the husband of the deceased Seema, is fatal to the case of the prosecution. It is true that the prosecution could have examined Munna, however, in view of various circumstances stated by the prosecution, we are of the view that merely because one person was not examined, the entire case of the prosecution cannot be thrown out. We are satisfied that all the circumstances relied on by the prosecution are reliable, acceptable and connect the appellant-accused in respect of the guilt in question. We are in agreement with the conclusion arrived at by the High Court.

18. Regarding the alternative argument, viz., that the direction of the High Court that the appellant shall not be released from prison unless he has served out 20 years of imprisonment including the period already undergone by him and not entitled to the benefit of any remission either from the State or from the Government of India on any auspicious occasion, let us consider various earlier decisions of this Court on this aspect. In other words, we are posing a question whether the courts are warranted to limit the remission power under the Code for whatsoever reasons?

19. In the case of *Shri Bhagwan vs. State of Rajasthan* (2001) 6 SCC 296, this Court held as under:

> "24 Therefore, in the interest of justice, we commute the death sentence imposed upon the appellant and direct that the appellant shall undergo the sentence of imprisonment for life. We further direct that the appellant shall not be released from the prison unless she had served out at least 20 years of imprisonment including the period already undergone by the appellant."

20. In *Prakash Dhawal Khairnar (Patil) vs. State of Maharashtra With State of Maharashtra vs. Sandeep @*

Babloo Prakash Khairnar (Patil) (2002) 2 SCC 35, this Court held as under:

> "24….In this case also, considering the facts and circumstances, we set aside the death sentence and direct that for murders committed by him, he shall served out at least 20 years of imprisonment including the period already undergone by him."

21. In *Ram Anup Singh and Ors. vs. State of Bihar* (2002) 6 SCC 686, a three-Judge Bench of this Court held as follows:

> "27…..Therefore, on a careful consideration of all the relevant circumstances we are of the view that the sentence of death is not warranted in this case. We, therefore, set aside the death sentence awarded by the Trial Court and confirmed by the High Court to appellants Lallan Singh and Babban Singh. We instead sentence them to suffer rigorous imprisonment for life with the condition that they shall not be released before completing an actual term of 20 years including the period already undergone by them."

22. In *Nazir Khan and Ors. vs. State of Delhi* (2003) 8 SCC 461, this Court concluded,

> "44….Considering the gravity of the offence and the dastardly nature of the acts and consequences which have flown out and, would have flown in respect, of the life sentence, incarceration for the period of 20 years would be appropriate. The accused appellants would not be entitled to any remission from the, aforesaid period of 20 years."

23. In *Swamy Shraddananda (2) @ Murali Manohar Mishra vs. State of Karnataka,* (2008) 13 SCC 767, this aspect has been considered in detail by a three-Judge Bench of this Court which we are going to refer in the later part of our order.

24. In *Haru Ghosh vs. State of West Bengal* (2009) 15 SCC 551, this Court held as under:

> "43. That leaves us with a question as to what sentence should be passed. Ordinarily, it would be the imprisonment for life. However, that would be no punishment to the appellant/accused, as he is already under the shadow of sentence of imprisonment for life, though he has been bailed out by the High Court. Under the circumstance, in our opinion, it will be better to take the course taken by this Court in the case of Swamy Shraddananda (cited supra), where the Court referred to the hiatus between the death sentence on one part and the life imprisonment, which actually might come to 14 years' imprisonment. In that case, the Court observed that the convict must not be released from the prison for rest of his life or for the actual term, as specified in the order, as the case may be.
>
> 44. We do not propose to send the appellant/accused for the rest of his life; however, we observe that the life imprisonment in case of the appellant/accused shall not be less than 35 years of actual jail sentence, meaning thereby, the appellant/accused would have to remain in jail for minimum 35 years.
>
> 45. With this observation, the appeal is disposed of, however, the death sentence is not confirmed and instead, would be substituted by the sentence that we have indicated."

25. In *Ramraj @ Nanhoo @ Bihnu vs. State of Chhattisgarh* (2010) 1 SCC 573, this Court held,

> "25. In the present case, the facts are such that the petitioner is fortunate to have escaped the death penalty. We do not think that this is a fit case where the petitioner should be released on completion of 14 years

imprisonment. The petitioner's case for premature release may be taken up by the concerned authorities after he completes 20 years imprisonment, including remissions earned."

26. *Neel Kumar @ Anil Kumar vs. The State of Haryana* (2012) 5 SCC 766, this Court held as follows:

"39. Thus, in the facts and circumstances of the case, we set aside the death sentence and award life imprisonment. The Appellant must serve a minimum of 30 years in jail without remissions, before consideration of his case for pre-mature release."

27. In *Sandeep vs. State of UP* (2012) 6 SCC 107, this Court observed as follows:

"75. Taking note of the above decision and also taking into account the facts and circumstances of the case on hand, while holding that the imposition of death sentence to the accused Sandeep was not warranted and while awarding life imprisonment we hold that accused Sandeep must serve a minimum of 30 years in jail without remissions before consideration of his case for premature release."

28. In the case of *Gurvail Singh @ Gala and Anr. vs. State of Punjab* (2013) 2 SCC 713, this Court concluded:

"20….Considering the totality of facts and circumstances of this case we hold that imposition of death sentence on the Appellants was not warranted but while awarding life imprisonment to the Appellants, we hold that they must serve a minimum of thirty years in jail without remission. The sentence awarded by the trial court and confirmed by the High Court is modified as above. Under such circumstance, we modify the sentence from death to life imprisonment. Applying the principle laid down by this Court in *Sandeep* (supra), we are of the view that the minimum sentence of thirty years would be an adequate punishment, so far as the facts of this case are concerned."

29. It is clear that since more than a decade, in many cases, whenever death sentence has been commuted to life imprisonment where the offence alleged is serious in nature, while awarding life imprisonment, this Court reiterated minimum years of imprisonment of 20 years or 25 years or 30 years or 35 years, mentioning thereby, if the appropriate Government wants to give remission, the same has to be considered only after the expiry of the said period. No doubt, the said aspect was not agreeable by this Court in the case of *Sangeet and Anr. vs. State of Haryana* (2013) 2 SCC 452 in which it was held as under:

"54. A reading of some recent decisions delivered by this Court seems to suggest that the remission power of the appropriate Government has effectively been nullified by awarding sentences of 20 years, 25 years and in some cases without any remission. Is this permissible? Can this Court (or any Court for that matter) restrain the appropriate Government from granting remission of a sentence to a convict? What this Court has done in Swamy Shraddananda and several other cases, by giving a sentence in a capital offence of 20 years or 30 years imprisonment without remission, is to effectively injunct the appropriate Government from exercising its power of remission for the specified period. In our opinion, this issue needs further and greater discussion, but as at present advised, we are of the opinion that this is not permissible. The appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence, whatever the reason."

In this case, though the Division Bench raised a doubt about the decision of a three-Judge Bench in *Swamy Shraddananda* (supra), yet the same has not been referred to

a larger Bench. In *Swamy Shraddananda* (supra), after taking note of remissions by various State Governments without adequate reasons or even on flimsy grounds, in order to set right the same, a three-Judge Bench analysed all the relevant aspects including the earlier decisions and discussed them in the following paragraphs:

> "88. It is thus to be seen that both in Karnataka and Bihar remission is granted to life convicts by deemed conversion of life imprisonment into a fixed term of 20 years. The deemed conversion of life imprisonment into one for fixed term by executive orders issued by the State Governments apparently flies in the face of a long line of decisions by this Court and we are afraid no provision of law was brought to our notice to sanction such a course. It is thus to be seen that life convicts are granted remission and released from prison on completing the fourteen-year term without any sound legal basis. One can safely assume that the position would be no better in the other States. This Court can also take judicial notice of the fact that remission is allowed to life convicts in the most mechanical manner without any sociological or psychiatric appraisal of the convict and without any proper assessment as to the effect of the early release of a particular convict on the society. The grant of remission is the rule and remission is denied, one may say, in the rarest of rare cases.
>
> 89. Here, it may be noted that this has been the position for a very long time. As far back as in 1973, in Jagmohan Singh a Constitution Bench of this Court made the following observation:
>
> "14. … In the context of our criminal law which punishes murder, one cannot ignore the fact that life imprisonment works out in most cases to a dozen years of imprisonment and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty." (emphasis added)

Five years after Jagmohan, Section 433-A was inserted in the Code of Criminal Procedure, 1973 imposing a restriction on the power of remission or commutation in certain cases. After the introduction of Section 433-A another Constitution Bench of this Court in Bachan Singh made the following observation:

> "156. It may be recalled that in Jagmohan this Court had observed that, in practice, life imprisonment amounts to 12 years in prison. Now, Section 433-A restricts the power of remission and commutation conferred on the appropriate Government under Sections 432 and 433, so that a person who is sentenced to imprisonment for life or whose death sentence is commuted to imprisonment for life must serve actual imprisonment for a minimum of 14 years."

Thus all that is changed by Section 433-A is that before its insertion an imprisonment for life in most cases worked out to a dozen years of imprisonment and after its introduction it works out to fourteen years' imprisonment. But the observation in Jagmohan that this cannot be accepted as an adequate substitute for the death penalty still holds true.

90. Earlier in this judgment it was noted that in the decision in Shri Bhagwan there is a useful discussion on the legality of remission in the case of life convicts. The judgment in Shri Bhagwan, refers to and quotes from the earlier decision in *State of M.P. v. Ratan Singh* which in turn quotes a passage from the Constitution Bench decision in Gopal Vinayak Godse. It will be profitable to reproduce here the extract from Ratan Singh:

> "4. As regards the first point, namely, that the prisoner could be released automatically on the expiry of 20 years under the Punjab Jail Manual or the Rules framed under the Prisons Act, the matter is no longer res integra and stands

concluded by a decision of this Court in *Gopal Vinayak Godse v. State of Maharashtra,* where the Court, following a decision of the Privy Counsel in *Pandit Kishori Lal v. King* Emperor observed as follows:

'4. … Under that section a person transported for life or any other terms before the enactment of the said section would be treated as a person sentenced to rigorous imprisonment for life or for the said term.

5. If so the next question is whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by appropriate Government, can be automatically treated as one for a definite period. No such provision is found in the Penal Code, Code of Criminal Procedure or the Prisons Act. … A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life.'

The Court further observed thus:

'7. … But the Prisons Act does not confer on any authority a power to commute or remit sentences; it provides only for the regulation of prisons and for the treatment of prisoners confined therein. Section 59 of the Prisons Act confers a power on the State Government to make rules, inter alia, for rewards for good conduct. Therefore, the rules made under the Act should be construed within the scope of the ambit of the Act. … Under the said rules the order of an appropriate Government under Section 401, Criminal Procedure Code, are a prerequisite for a release. No other rule has been brought to our notice which confers an indefeasible right on a prisoner sentenced to transportation for life to an unconditional release on the expiry of a particular term including remissions. The rules

under the Prisons Act do not substitute a lesser sentence for a sentence of transportation for life.

8. … The question of remission is exclusively within the province of the appropriate Government; and in this case it is admitted that, though the appropriate Government made certain remissions under Section 401 of the Code of Criminal Procedure, it did not remit the entire sentence. We, therefore, hold that the petitioner has not yet acquired any right to release.'

It is, therefore, manifest from the decision of this Court that the Rules framed under the Prisons Act or under the Jail Manual do not affect the total period which the prisoner has to suffer but merely amount to administrative instructions regarding the various remissions to be given to the prisoner from time to time in accordance with the rules. This Court further pointed out that the question of remission of the entire sentence or a part of it lies within the exclusive domain of the appropriate Government under Section 401 of the Code of Criminal Procedure and neither Section 57 of the Penal Code nor any Rules or local Acts can stultify the effect of the sentence of life imprisonment given by the court under the Penal Code. In other words, this Court has clearly held that a sentence for life would ensure till the lifetime of the accused as it is not possible to fix a particular period the prisoner's death and remissions given under the Rules could not be regarded as a substitute for a sentence of transportation for life."

(emphasis supplied)

Further, in para 23, the judgment in Shri Bhagwan observed as follows:

"23. In *Maru Ram v. Union of India* a Constitution Bench of this Court reiterated the aforesaid position and observed that the inevitable conclusion is that since in

Section 433-A we deal only with life sentences, remissions lead nowhere and cannot entitle a prisoner to release. Further, in *Laxman Naskar v. State of W.B.,* after referring to the decision of *Gopal Vinayak Godse v. State of Maharashtra,* the Court reiterated that sentence for 'imprisonment for life' ordinarily means imprisonment for the whole of the remaining period of the convicted person's natural life; that a convict undergoing such sentence may earn remissions of his part of sentence under the Prison Rules but such remissions in the absence of an order of an appropriate Government remitting the entire balance of his sentence under this section does not entitle the convict to be released automatically before the full life term if served. It was observed that though under the relevant Rules a sentence for imprisonment for life is equated with the definite period of 20 years, there is no indefeasible right of such prisoner to be unconditionally released on the expiry of such particular term, including remissions and that is only for the purpose of working out the remissions that the said sentence is equated with definite period and not for any other purpose."

(emphasis supplied)

91. The legal position as enunciated in *Pandit Kishori Lal, Gopal Vinayak Godse, Maru Ram, Ratan Singh and Shri Bhagwan* and the unsound way in which remission is actually allowed in cases of life imprisonment make out a very strong case to make a special category for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond the application of remission.

92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant

comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh besides being in accord with the modern trends in penology.

94. In the light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and

further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be.

95. In conclusion, we agree with the view taken by Sinha, J. We accordingly substitute the death sentence given to the appellant by the trial court and confirmed by the High Court by imprisonment for life and direct that he shall not be released from prison till the rest of his life."

30. It is clear that in *Swamy Shraddananda* (supra), this Court noted the observations made by this Court in *Jagmohan Singh vs. State of U.P.,* (1973) 1 SCC 20 and 5 years after the judgment in Jagmohan's case, Section 433-A was inserted in the Code imposing a restriction on the power of remission or commutation in certain cases. After the introduction of Section 433-A another Constitution Bench of this Court in *Bachan Singh vs. State of Punjab,* (1980) 2 SCC 684, with reference to power with regard to Section 433-A which restricts the power of remission and commutation conferred on the appropriate Government, noted various provisions of Prisons Act, Jail Manual etc. and concluded that reasonable and proper course would be to expand the option between 14 years imprisonment and death. The larger Bench has also emphasized that "the Court would take recourse to the extended option primarily because in the facts of the case the sentence of 14 years' imprisonment would amount to no punishment at all." In the light of the detailed discussion by the larger Bench, we are of the view that the observations made in *Sangeet's case* (supra) are not warranted. Even otherwise, the above principles, as enunciated in *Swami Shraddananda* (supra) are applicable only when death sentence is commuted to life imprisonment and not in all cases where the Court imposes sentence for life.

31. Taking note of the fact that the prosecution has established the guilt by way of circumstantial evidence, analyzed and discussed earlier, and of the fact that in the case on hand

5 persons died and also of the fact that the High Court commuted the death sentence into life imprisonment imposing certain restrictions, the decision of the High Court cannot be faulted with and in the light of well reasoned judgments over a decade, we agree with the conclusion arrived at by the High Court including the reasons stated therein.

32. Consequently, both the appeals fail and are dismissed.

33. We record our appreciation for the assistance rendered by learned amicus curiae and the counsel for the State.

R.P. Appeals dismissed.

UNION OF INDIA

v.

SANDUR MANGANESE & IRON ORES LTD. AND ORS.

(Review Petition (C) No. 739 of 2012)

IN

(Civil Appeal No. 7944 of 2010)

APRIL 23, 2013

[P. SATHASIVAM AND H.L. DATTU, JJ.]

CONSTITUTION OF INDIA,1950

Art. 137 - Review Petition - Held: Review proceedings are not by way of an appeal; they have to be strictly confined to the scope and ambit of 0.47, r.1 CPC - In the instant case, the error contemplated in the impugned judgment is not one which is apparent on the face of the record, rather the dispute is wholly founded on interpretation and applicability of ss. 11(2) and 11(4) of MMDR Act - In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same - However, the misquoted portion of the Report, owing to clerical mistakes, is deleted from the judgment - Code of Civil Procedure, 1908 - O.47, r.1 - Supreme Court Rules. 1966 - O.40 - Mines and Minerals (Development and Regulation) Act, 1957 - ss. 11(2) and 11(4) - Delay/Laches.

The petitioner-Union of India filed the instant review petition seeking review of the judgment and order dated 13.9.2010 passed in *Sandur Manganese and Iron Ores Ltd.*[1] **It was the case of the petitioner that it could not put forth its view in the case for the reason that copy of the special leave petition was not served upon it and, as such, it could not get an opportunity to be heard in the case. The**

1. *Sandur Manganese and Iron Ores Ltd. vs. State of Karnataka and Ors.* 2010 (11) SCR 240.

impugned judgment was mainly challenged on two issues (i) "that the impugned judgment has incorrectly reported the *'Report of the Committee to Review the Existing Laws and Procedures for Regulation and Development of Minerals'***. As a consequence, the ratio of impugned judgment, which relies on this Expert Committee Report, shall stand erroneous in the eyes of law"; and (ii) that s. 11(2) and s. 11(4) of the Mines and Minerals (Development and Regulation Act, 1957) should be applicable to both virgin and previously held areas.**

Disposing of the petition, the Court

HELD: 1.1 The details furnished in I.A. No. 1 of 2011 filed for condoning the delay of 320 days in filing the review petition sufficiently prove that steps were taken at various levels in the Ministry of Mines. In view of the same, the delay is condoned. [para 6] [1050-A]

1.2 It is true that the Expert Committee's Report has been misquoted to the extent of adding four lines, which was originally not a part of the report. Thus, this Court has the power to modify the impugned judgment to the extent of deletion of the misquoted statement under review jurisdiction. Therefore, the portion of para 2.1.21 of the report which is misquoted in the impugned judgment owing to clerical mistake, is deleted. Consequently, a portion of para 51 of the impugned judgment is also deleted. [para 17, 19 and 20] [1053-D-E; 1054-B-C]

1.3 However, it cannot be said that the impugned judgment is erroneous on the face of law merely because the Expert Committee Report was misquoted. In the considered view of this Court, the impugned judgment stands good of reason even without these misquoted lines as well. [para 20] [1054-C-D]

Sandur Manganese and Iron Ores Ltd. vs. State of Karnataka and Ors. **2010 (11) SCR 240 = 2010(13) SCC 1 - referred to.**

2.1 With regard to the second issue that both s.11(2) and s. 11(4) of the Mines and Minerals (Development and Regulation) Act, 1957 should be applicable to both virgin and previously held areas, the same has been well reasoned in the impugned judgment. The error contemplated in the impugned judgment is not one which is apparent on the face of the record rather the dispute is wholly founded on the point of interpretation and applicability of ss. 11(2) and 11(4) of the MMDR Act. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction. Review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of O. 47, r. 1 of CPC. Therefore, in review jurisdiction, the court shall interfere only when there is a glaring omission or patent mistake or when a grave error has crept in the impugned judgment, which is not so in the instant case.
[para 21, 23 and 24] [1055-C-F]

Parsion Devi & Ors. vs. Sumitri Devi & Ors. **1997 (4) Suppl. SCR 470 = (1997) 8 SCC 715 - relied on.**

Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulose Athanasius & Ors., **(1955) 1 SCR 520 - referred to.**

Chhajju Ram vs. Neki, **AIR 1922 PC 112 - referred to.**

2.2 Keeping in view the provisions of Art.137 of the Constitution, read with O.40 of Supreme Court Rules and O.47, r.11(1), CPC, the petitioner-Union of India has not

invoked any valid ground for exercising the power under review jurisdiction. Further, after the judgment in Sandur, another coordinate Bench of this Court followed the ratio decidendi in Monnet Ispat and Energy Ltd. However, a further period of 4 months is granted to comply with the directions issued in the impugned judgment. [para 28 and 30] [1057-B-E]

Monnet Ispat and Energy Ltd. vs. Union of India & Ors. **2012 (7) SCR 644 = 2012 (11) SCC 1 - referred to.**

Case Law Reference:

2010 (11) SCR 240	**referred to**	**para 1**
1922 PC 112	**referred to**	**para 13**
(1955) 1 SCR 520	**referred to**	**para 13**
1997 (4) Suppl. SCR 470	**relied on**	**para 22**
2012 (7) SCR 644	**referred to**	**para 28**

CIVIL APPELLATE JURISDICTION : Review Petition (Civil) No. 739 of 2012 in C.A. No. 7944 of 2010.

Goolam E. Vahanvati, AG, F.S. Nariman, Mukul Rohatgi, D.L.N. Rao, Abhishek Manu Singhvi, Krishnan Venugopal, L.N. Rao, P.S. Narsimhan, K.K. Venugopal, Devdatt Kamat, Anoopam Prasad, Anandh Kannan, Mohd. Nizam Pasha, Tara Narula, D.S. Mahra, Sunil Gogra, M.P. Shorawala, S.K. Kulkarni, Ankur S. Kulkarni, Vishal Gupta, Kumar Mihir, Sidhartha Singh, Rajat Jasiwal, Sanjeev Kumar, (for Khaitan & Co.), Anitha Shenoy, Vishruti Vijay, Uday Tiwary, A. Raghunath for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This review petition has been filed by the Union of India, Ministry of Mines, seeking review of the

judgment and order dated 13.09.2010 passed in *Sandur Manganese & Iron Ores Ltd. vs. State of Karnataka & Others,* 2010 (13) SCC 1 (Civil Appeal No. 7944 of 2010 and Civil Appeal Nos. 7945-54 and 7955-61 of 2010).

2. In *Sandur* (supra), this Court had interpreted various provisions of the Mines and Minerals (Development and Regulation) Act, 1957 (in short "the MMDR Act") and the Mineral Concession Rules, 1960 (in short "the MC Rules") framed thereunder. It is the grievance of the petitioner herein that this review is instituted since the Ministry of Mines, Government of India, could not put forth its view on the interpretation of the provisions of the MMDR Act in *Sandur* (supra) for the reason that the copy of the special leave petition was not served upon the review petitioner which is a necessary and relevant party to the subject-matter in issue/dispute and the review petitioner did not get an opportunity of being heard.

3. It is also brought to our notice that vide notification dated 30.01.2003, the Ministry of Coal and Mines was bifurcated into separate Ministries since the petitioners in various SLPs furnished the name of the Ministry as "Ministry of Coal and Mines" in all the matters and according to them, it was not noticed by the Department concerned, namely, the Department of Mines.

4. We are conscious of the fact that the principles of natural justice guarantee every person the right to represent his/her case in the court of law, wherein the final verdict of the court would adversely affect his/her interest. Considering the above principle, this Court, vide order dated 04.10.2012, granted the opportunity to the Union of India to represent its case.

5. Before considering the claim of the Union of India about acceptability or otherwise of various conclusions in the impugned judgment, we have to consider whether the petitioner has shown sufficient cause for condoning the delay of 320 days.

6. The details furnished in I.A. No. 1 of 2011 filed for condoning the delay in filing the above review petition sufficiently prove that steps were taken at various levels in the Ministry of Mines, accordingly, we accept the reasons furnished therein. In view of the same, the delay is condoned.

7. Taking note of the reasons stated for the delay and the stand of the Department that the Ministry concerned, namely, Department of Mines was not duly projected and represented before this Court, we heard Mr. Goolam E. Vahanvati, learned Attorney General for the review petitioner, on merits, particularly, with reference to the points formulated for consideration and ultimate conclusion arrived therein and Mr. Fali S. Nariman, Mr. Mukul Rohatgi, Mr. A.M. Singhvi, Mr. Krishnan Venugopal, Mr. L.N. Rao, learned senior counsel for the contesting respondents and Ms. Anita Shenoy, learned counsel for the State of Karnataka.

8. Now, let us consider whether the review petitioner has made out a case for reviewing the judgment and order dated 13.09.2010 and satisfies the criteria for entertaining the matter in review jurisdiction.

Review Jurisdiction

9. Article 137 of the Constitution of India provides for review of judgments or orders by the Supreme Court which reads as under:

> "Subject to the provisions of any law made by Parliament or any rules made under Article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it."

10. Further, Part VIII Order XL of the Supreme Court Rules, 1966 deals with the review and consists of four rules. Rule 1 is important for our purpose which reads as under:

"The Court may review its judgment or order, but no

application for review will be entertained in a civil proceeding except on the ground mentioned in Order XLVII Rule 1 of the Code and in a criminal proceeding except on the ground of an error apparent on the face of the record."

11. Order XLVII, Rule 1(1) of the Code of Civil Procedure, 1908 provides for an application for review which reads as under:

"Any person considering himself aggrieved-

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

b) by a decree or order from which no appeal is allowed, or

c) by a decision on a reference from a Court of Small Causes,

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the court which passed the decree or made the order."

12. Thus, in view of the above, the following grounds of review are maintainable as stipulated by the statute:

i) Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;

ii) Mistake or error apparent on the face of the record;

iii) Any other sufficient reason

13. The words "any other sufficient reason" has been interpreted in *Chhajju Ram vs. Neki,* AIR 1922 PC 112 and approved by this Court in *Moran Mar Basselios Catholicos vs. Most Rev. Mar Poulose Athanasius & Ors.,* (1955) 1 SCR 520, to mean "a reason sufficient on grounds at least analogous to those specified in the rule". With the above statutory provisions, let us discuss the claim of the petitioner-Union of India.

Discussion

14. The respondent - Company (Sandur Manganese & Iron Ores Ltd.) by filing S.L.P.(C) No. 22077 of 2009 (converted into Civil Appeal No. 7944 of 2010) challenged before this Court the final judgment and order dated 05.06.2009 passed by the High Court of Karnataka at Bangalore in Writ Appeal No. 5084 of 2008 and allied matters wherein the High Court dismissed the appeals and held that the decision of the State Government in not recommending mining lease to the Sandur Manganese & Iron Ores Ltd. and instead preferring two other Companies for grant of mining lease does not suffer from any irregularity, illegality, discrimination, arbitrariness, unreasonableness or violative of principles of natural justice.

15. This Court, in *Sandur* (supra), allowed the appeal filed by Sandur Manganese & Iron Ores Ltd. and quashed the impugned order dated 05.06.2009 passed by the Division Bench of the High Court of Karnataka in Writ Appeal No. 5084 of 2008 etc. etc. as well as the decision of the State Government dated 26/27.02.2002 and the subsequent decision of the Central Government dated 29.07.2003 and directed the State Government to consider all applications afresh in light of this Court's interpretation of Section 11 of the MMDR Act and Rules 35, 59 and 60 of the MC Rules in particular, and make recommendation to the Central Government within a period of four months.

16. Consequently, the UOI has raised mainly two issues on merits of the case, thereby challenging the impugned

judgment. They are:-

(1) Firstly, that the impugned judgment has incorrectly reported the *'Report of the Committee to Review the Existing Laws and Procedures for Regulation and Development of Minerals'*. As a consequence, the ratio of impugned judgment, which relies on this Expert Committee Report, shall stand erroneous in the eyes of law.

(2) Secondly, Section 11(2) and Section 11(4) should be applicable to both virgin and previously held areas.

Now we shall discuss the above mentioned issues respectively.

First Contention:

17. The first contention of learned Attorney General is two fold viz., that the Expert Committee's Report was misquoted and as a result the impugned judgment which relies on the same, shall stand erroneous on the face of law. We accede to the above contention partially. It is true that the Expert Committee's Report has been misquoted to the extent of adding four lines, which was originally not a part of the report. Thus, this Court has the power to modify the impugned judgment to the extent of deletion of the misquoted statement under review jurisdiction.

18. The Report of the Committee to Review the Existing Laws and Procedures for Regulation and Development of Minerals, referred in the impugned judgment reads as under:

Para 2.1.21 of the Report:

"49…… The concept of first-come, first-serve has become necessary in view of the fact that the Act does not provide for inviting applications through advertisement for grant of PL/ML in respect of virgin areas. No doubt, there is provision in Rule 59 of the MC Rules for advertisement of an area earlier held under PL/ML with provision for relaxation. **In this background, the Committee**

recommended the introduction of the proviso to S. 11(2) permitting calling for applications by way of a notification. There is a distinction between virgin areas and areas covered under Rule 59 and S. 11(2) ought to be interpreted to cover virgin areas alone."

19. Hence, the above underlined portion of the report which is misquoted in the impugned judgment owing to clerical mistake requires to be deleted, accordingly, we do so.

20. However, we are not in agreement with learned Attorney General that the impugned judgment is erroneous on the face of law merely because the Expert Committee Report was misquoted. In our considered view, the impugned judgment stands good of reason even without these misquoted lines as well. Hence, mere deletion of these lines along with removal of certain portion of para 51 of the impugned judgment will clarify the mistake.

Portion of Para 51 of *Sandur* (supra) to be deleted:

"51…..The analysis of the Report makes it clear that the main provision in Section 11(2) applies to "virgin areas". It further makes it clear that to the extent that an area that is previously held or reserved would require a notification for it to become available."

Thus the first contention is considered as per the above terms.

Second Contention:

21. With regard to the second contention that both Section 11(2) and Section 11(4) should be applicable to both virgin and previously held areas, the same has been well reasoned in the impugned judgment and the mere fact that different views on the same subject are possible is no ground to review the earlier judgment passed by this Bench.

22. It has been time and again held that the power of review jurisdiction can be exercised for the correction of a mistake and not to substitute a view. In *Parsion Devi & Ors. vs. Sumitri Devi*

& Ors., (1997) 8 SCC 715, this Court held as under:-

> "9. Under Order 47 Rule 1 CPC a judgment may be open to review inter alia if there is a mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the court to exercise its power of review under Order 47 Rule I CPC. In exercise of the jurisdiction under Order 47 Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered has a limited purpose and cannot be allowed to be "an appeal in disguise".

23. This Court, on numerous occasions, had deliberated upon the very same issue, arriving at the conclusion that review proceedings are not by way of an appeal and have to be strictly confined to the scope and ambit of Order 47 Rule 1 of CPC.

24. In the present case, the error contemplated in the impugned judgment is not one which is apparent on the face of the record rather the dispute is wholly founded on the point of interpretation and applicability of Section 11(2) and 11(4) of the MMDR Act. In review jurisdiction, mere disagreement with the view of the judgment cannot be the ground for invoking the same. As long as the point is already dealt with and answered, the parties are not entitled to challenge the impugned judgment in the guise that an alternative view is possible under the review jurisdiction. Hence, in review jurisdiction, the court shall interfere only when there is a glaring omission or patent mistake or when a grave error has crept in the impugned judgment, which we fail to notice in the present case.

25. For the above reasons, the second ground for review petition is liable to be rejected.

26. Further, the contention regarding MoU entered into by the State Government and investments made thereunder is concerned, this Court has noticed this fact and rejected the

contention made by the respondents in *Sandur* (supra). It is relevant to point out that the State of Karnataka is stated to have committed to JSW Steels Limited on 11.10.1994 for grant of mining leases but the same has been invoked by JSW Steels after a lapse of 8 years and more precisely, after 5 years of commencing commercial operations in its steel plant by making an application on 24.10.2002. Once an area is notified for re-grant and applications are invited from the mining public for grant of mining lease, the applications must be disposed of in terms of the provisions of the MMDR Act and the MC Rules and not de hors. In para 80 of *Sandur Manganese* (supra), this Court has held as follows:

> "80. It is clear that the State Government is purely a delegate of Parliament and a statutory functionary, for the purposes of Section 11(3) of the Act, hence it cannot act in a manner that is inconsistent with the provisions of Section 11(1) of the MMDR Act in the grant of mining leases. Furthermore, Section 2 of the Act clearly states that the regulation of mines and mineral development comes within the purview of the Union Government and not the State Government. As a matter of fact, the respondents have not been able to point out any other provision in the MMDR Act or the MC Rules permitting grant of mining lease based on past commitments. As rightly pointed out, the State Government has no authority under the MMDR Act to make commitments to any person that it will, in future, grant a mining lease in the event that the person makes investment in any project. Assuming that the State Government had made any such commitment, it could not be possible for it to take an inconsistent position and proceed to notify a particular area. Further, having notified the area, the State Government certainly could not thereafter honour an alleged commitment by ousting other applicants even if they are more deserving on the merit criteria as provided in Section 11(3).

Hence, the petitioner cannot be permitted to re-argue the very same point.

27. Regarding the issue of Mineral Policies, this Court has already held in *Sandur* (supra) that in view of the specific parliamentary declaration as discussed and explained by this Court in various decisions, there is no question of the State having any power to frame a policy de hors the MMDR Act and the MC Rules.

28. In view of the above, the petitioner-Union of India has not invoked any valid ground for exercising the power under review jurisdiction. In addition to the same, after the judgment in *Sandur* (supra), another coordinate Bench of this Court followed the ratio decidendi in *Monnet Ispat and Energy Ltd. vs. Union of India & Ors.,* 2012 (11) SCC 1.

29. For the aforesaid reasons, we are unable to accept any of the contentions raised by Learned Attorney General, therefore, the review petition is disposed of by deleting the misquoted lines in the Expert Committee Report.

30. In view of the above order and the directions issued by us in para 98 of *Sandur* (supra), we grant a further period of 4 months from the date of receipt of copy of this order to comply with the same.

31. In view of the dismissal of the review petition filed by the Union of India, the impleadment applications stand dismissed.

R.P. Review Petition disposed of.

VIRENDER JAIN

v.

ALAKNANDA COOPERATIVE GROUP HOUSING SOCIETY LIMITED AND OTHERS

(Civil Appeal No. 64 of 2010 etc.)

APRIL 23, 2013

[G.S. SINGHVI, RANJANA PRAKASH DESAI AND SHARAD ARVIND BOBDE, JJ.]

CONSUMER PROTECTION ACT, 1986:

s.2 (1) (d) -- 'Consumer'-Members of Co-operative Group Housing Society - Challenging action of Society terminating their membership by refunding the amounts deposited by them - Held: Members of the Society are 'consumer' within the meaning of s.2 (1) (d) - Further, the action of Society even if approved by authorities under Co-operative Societies Act, cannot deprive the members of their legitimate right to seek remedy under Consumer Protection Act which is in addition to other remedies available to them under Cooperative Societies Act - State Commission directed to decide appeals filed by complainants on merits - Haryana Co-operative Societies Act, 1984.

The appellants, who were members of respondent no.1 Co-operative Group Housing Society, filed complaints u/s 12 of the Consumer Protection Act, 1986, as respondent no.1 returned the amount deposited by them and indirectly terminated their membership on the ground that they had failed to deposit the required installments. The District Forum dismissed the complaints on merits. However, the State Commission and the National Commission held that the appellants could not be treated as 'consumer' within the meaning of s.2 (1) (d) of the Consumer Protection Act.

Allowing the appeals, the Court

HELD: 1.1 In view of the judgments of this Court, it must be held that the appellants, who had deposited the instalments of price for the flats being constructed by respondent No.1 are covered by the definition of 'consumer' contained in s 2(1)(d) of the Consumer Protection Act, 1986 and the contrary view expressed by the National Commission in B.K. Prabha's case* which has been reiterated in the impugned order is not correct. [para 12] [1068-E-F]

Lucknow Development Authority v. M.K. Gupta, **1993 (3) Suppl. SCR 615 = (1994) 1 SCC 243;** *Chandigarh Housing Board v. Avtar Singh,* **2010 (12) SCR 96 = (2010) 10 SCC 194 - relied on.**

******B.K. Prabha v. Secretary Kendriya Upadyarasanga* **(2004) 2 CLT 305 - overruled.**

1.2 As regards the approval of action of respondent no.1 by the authorities constituted under the Cooperative Societies Act, the appellants, in their complaints had primarily challenged the action of respondent No.1 to refund the amounts deposited by them and to extinguish their entitlement to get the flats. Therefore, the mere fact that the action taken by respondent No.1 was approved by the Assistant Registrar, Cooperative Societies and higher authorities, cannot deprive the appellants of their legitimate right to seek remedy under the Act, which is in addition to the other remedies available to them under the Cooperative Societies Act and availability of alternative remedies is not a bar to the entertaining of a complaint filed under the Act. [para 13-14] [1068-H; 1069-A-B]

National Seeds Corporation Ltd. Vs. M. madhusudhan

Reddy **2012 (2) SCR 1065 = (2012) 2 SCC 506;** *Secretary, Thirumurugan Co-operative Agricultural Credit Society vs. M. Lalitha* **2003 (6) Suppl. SCR 659 = (2004)1 SCC 305;** *Kishore Lal v. ESI Corporation,* **2007 (6) SCR 139 = (2007) 4 SCC 579;** *Fair Air Engineers (P) Ltd. v. N.K. Modi,* **1996 (4) Suppl. SCR 820 = (1996) 6 SCC 385;** *Skypak Couriers Ltd. v. Tata Chemicals Ltd.,* **2000 (1) Suppl. SCR 324 = (2000) 5 SCC 294;** *Trans Mediterranean Airways v. Universal Exports* **(2011) 10 SCC 316 - relied on.**

1.3 The impugned order as also the orders passed by the State Commission are set aside and the matters are remitted to the State Commission with the direction that it shall decide the appeals filed by the appellants on merits. [para 16] [1069-G]

Case Law Reference:

1993 (3) Suppl. SCR 615	**relied on**	**para 7**
2010 (12) SCR 96	**relied on**	**para 10**
(2004) 2 CLT 305	**overruled**	**para 11**
2012 (2) SCR 1065	**relied on**	**para 12**
2003 (6) Suppl. SCR 659	**relied on**	**para 12**
2007 (6) SCR 139	**relied on**	**para 12**
1996 (4) Suppl. SCR 820	**relied on**	**para 13**
2000 (1) Suppl. SCR 324	**relied on**	**para 13**
(2011) 10 SCC 316	**relied on**	**para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 64 of 2010.

From the Judgment and Order dated 11.02.2009 of National Consumer Disputes Redressal Commission New

Delhi in Revision Petition No. 4209 of 2008.

WITH

C.A. Nos. 65, 66, 67 & 68 of 2010.

S.B. Sanyal, K.K. Mehrotra for the Appellant.

Neeraj Kumar Jain, Pratham Kant, Aseem Mehrotra, Abhijat P. Medh, Rauf Rahim, Devyani Ashra, Yadunandan Bansal for the Respondents.

The Judgment of the Court was delivered by

J U D G M E N T

1. The appellants were enrolled as members of respondent No.1-Alaknanda Cooperative Group Housing Society Limited. They applied for 'A' type flats, which were being constructed by respondent No.1. They are said to have deposited the instalments of price between 10.12.1995 and 15.12.2003. The details of the amounts deposited by the appellants are as under:

1. Virender Jain	Rs.1,96,000/-
2. Sudesh Kumar Jain	Rs.1,96,100/-
3. Pankaj Jain	Rs.2,96,110/-
4. Nitin Jain	Rs.1,96,100/-
5. Sudershan Kumar Jain	Rs.2,96,100/-

2. By letters dated 9.2.2004, respondent No.1 returned the amount deposited by the appellants and indirectly terminated their membership on the ground that they had failed to deposit the instalments of first and second stage of construction as also the instalment of the cost of land allotted by HUDA. For the sake of reference, the letter sent by respondent No.1 to appellant - Virender Jain is reproduced below:

"THE ALAKNANDA COOP. GROUP HOUSEING SOCIETY GURGAON

PLOT NO. GH-45, SECTOR-56,
GURGAON-122002

Ref no.7115 Regd. Date:9.02.04

Mr. Virender Jain

Sub: Refund of payment due to persistent default

The following payments had been demanded by the Society from time to time

(a) 1st construction inst. due on 15.07.03 Rs.1,00,000/-

(b) 2nd construction inst due on 15.07.03 Rs.1,00,000/-

(c) lnst. of HUDA land cost due on 15.10.03 Rs.42,000/-

But, the above mentioned payments have not yet been received from you by the society inspite of reminders issued from time to time as indicated in our last office letter no. 6878 -97 dt. 28.12.2003. Further, no communication/representation has been received from you.

The matter was brought to the notice of the managing Committee. The managing Committee, in its meeting held on 11.01.04 has taken a very serious view of your non-compliance and non-response and presumed that you are not interested in the housing project of the Society.

In view of the above, your contribution alongwith share money, as per details given below is sent herewith vide Ch.No.331971 dated 01.02.04 for Rs.1,82,350/-

(a) Share money 1,00/-

(b) Contribution 1,95,900/-

1,96,000/-

Less installment on dues of Rs.84,000 of HUDA Land cost installment @ 15 % p.a. from January'03 to January' 04 (3months)

(-) 13,650.00

1,82,350/-"

3. The appellants challenged the aforesaid action of respondent No.1 by filing complaints under Section 12 of the Consumer Protection Act, 1986 (for short, 'the Act') and prayed that respondent No.1 may be directed to restore their membership and issue necessary share certificates after receiving the balance cost. They further prayed for award of damages to the tune of Rs.50,000/- in each case.

4. On notice, respondent No.1 filed applications under Section 13 of the Act and challenged the jurisdiction of District Consumer Disputes Redressal Forum, Gurgaon (for short, 'the District Forum') to entertain the complaints. Respondent No.1 claimed that the complaints were not maintainable because the appellants do not fall within the definition of 'consumer'. Respondent No.1 also pleaded that the Haryana Cooperative Societies Act, 1984 (hereinafter referred to as, 'the Cooperative Societies Act') is a special statute vis-à-vis the Act and the only remedy available to the appellants in the matter of termination of their membership and/or refund of the entire amount deposited by them was to file a petition under the Cooperative Societies Act.

5. By separate orders dated 16.6.2006, the District Forum overruled the objections raised by respondent No.1. The relevant portion of the order passed in the case of Virender Jain is extracted below:

"The remedy provided under the act is an additional remedy it is not in derogation to remedy provided under the other Acts. It is the choice of the complainant either to avail the remedy under the Consumer Protection Act or any other applicable. In coming to our above conclusion we are guided by the AIR 2004 Supreme Court 448 "Secretary, Thirumurugan Co-Operative Agricultural Credit Society Versus M. Lalitha (dead) through L.Rs. and others" wherein it is held so. The respondent has also relied upon the case law stated to have been reported in 2004(2) CLT 304(NC)"B.K. Prabha Versus Secretary Kendriya Upadyarasanga" wherein it is held that merely becoming a member of the Society does not amount to hiring of services of the respondent by the complainant and the dispute does not fall within the definition of the consumer. The above citation has been referred from the subject index only, detailed judgment has not been supplied by the respondent. Besides this the citation relied upon by the complainant is of the Apex Court, the same, therefore, is of binding nature on all other Courts Judicial as well as quasi Judicial."

6. However, the District Forum did not find merit in the grievance made by the appellants and dismissed the complaints vide orders dated 17.11.2006 by observing that there was no deficiency in service on the part of respondent No.1.

7. The appeals and the revisions filed by the appellants under Sections 17 and 21 of the Act were dismissed by the State Commission and the National Commission respectively solely on the ground that the appellants cannot be treated as consumer within the meaning of Section 2(1)(d) of the Act.

8. Shri S.B. Sanyal, Senior Advocate appearing for the appellants relied upon the judgment of this Court in *Lucknow Development Authority v. M.K. Gupta* (1994) 1 SCC 243 and argued that the impugned order as also the orders passed by

the State Commission are liable to be set aside because the view expressed by the two consumer forums on the issue of maintainability of the complaints is ex-facie erroneous and is contrary to the law laid down by this Court. Shri Neeraj Kumar Jain, Senior Advocate appearing for respondent No.1 supported the impugned order and argued that the appellants cannot be treated as consumer because respondent No.1 was not providing any service to them.

9. We have considered the respective arguments. Section 2(1)(d) of the Act, which defines the term 'consumer' reads as under:

> '"consumer' means any person who-
>
> i. buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
>
> ii. hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised or partly paid and partly promised or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for commercial purpose.
>
> Explanation-For the purposes of this clause, commercial purpose does not include use by a person of goods bought and used by him and services availed by him exclusively for the purposes of earning his livelihood by means of self employment."

10. The above quoted definition was interpreted by this Court in *M.K. Gupta's* case. After analyzing the definition of 'consumer', this Court observed:

> "The provisions in the Acts, namely, Lucknow Development Act, Delhi Development Act or Bangalore Development Act clearly provide for preparing plan, development of land, and framing of scheme etc. Therefore if such authority undertakes to construct building or allot houses or building sites to citizens of the State either as amenity or as benefit then it amounts to rendering of service and will be covered in the expression 'service made available to potential users'. A person who applies for allotment of a building site or for a flat constructed by the development authority or enters into an agreement with a builder or a contractor is a potential user and nature of transaction is covered in the expression 'service of any description'. It further indicates that the definition is not exhaustive. The inclusive clause succeeded in widening its scope but not exhausting the services which could be covered in earlier part. So any service except when it is free of charge or under a constraint of personal service is included in it. Since housing activity is a service it was covered in the clause as it stood before 1993."
>
> (emphasis supplied)

11. The ratio of the aforementioned judgment was reiterated in *Chandigarh Housing Board v. Avtar Singh* (2010) 10 SCC 194. The questions considered in that case were whether members of the Cooperative House Building Societies, who would have been benefited by allotment of land under the scheme framed by the Chandigarh Administration could be treated as 'consumer' within the meaning of Section

2(1)(d) and whether the District Forum had the jurisdiction to entertain the complaints filed by them for refund of 10% earnest money forfeited by the Chandigarh Housing Board. After noticing the relevant passages from the judgment in M.K. Gupta's case, this Court observed:

> "From what we have noted above, it is crystal clear that even though the 1991 Scheme was ostensibly framed for allotment of land to the Societies for construction of multistoreyed structures (dwelling units/flats) for their members, but the provisions contained therein not only regulated the relationship of the Societies with their members, but also made them jointly and severally responsible for payment of the earnest money, etc. The Finance Secretary and the Board issued directions from time to time for payment of the earnest money and interest by the members of the Societies. If the Scheme had nothing to do with the members of the Societies, then it would not have contained provisions to regulate their eligibility and entitlement to get dwelling units to be constructed on the land allotted by the Board and made them jointly and severally responsible for payment of the premium, etc. and the Finance Secretary would not have issued directions vide Memos dated 9-6-1993 and 9-3-2000 in the matter of refund of earnest money and interest. The Board too would not have entertained the request made by the members of the Societies for refund of the earnest money and remitted the amount to the Societies after deducting 10%.
>
> Thus, even though no formal contract had been entered into between the Chandigarh Administration and the Board on the one hand and the members of the Societies on the other hand, the former exercised sufficient degree of control over the latter. By making applications for allotment of land, the Societies will be deemed to have hired or availed the services of the Chandigarh Administration and the Board in relation to housing construction as elucidated and explained in M.K. Gupta case and Balbir Singh case. If the Scheme had been faithfully implemented and land had been allotted to the Societies, their members would have been the actual and real beneficiaries. Therefore, they were certainly covered by the definition of "consumer" under Section 2(1)(d)(ii), the second part of which includes any beneficiary of the services hired or availed for consideration which has been paid or promised or partly paid and partly promised. As a sequel to this, it must be held that the members of the Societies had every right to complain against illegal, arbitrary and unjustified forfeiture of 10% earnest money and non-refund of 18% interest and the District Consumer Forum did not commit any jurisdictional error by entertaining the complaints."

(emphasis supplied)

12. In view of the above noted judgments, it must be held that the appellants, who had deposited the instalments of price for the flats being constructed by respondent No.1 are covered by the definition of 'consumer' contained in Section 2(1)(d) of the Act and the contrary view expressed by the National Commission in *B.K. Prabha v. Secretary Kendriya Upadyarasanga* (2004) 2 CLT 305, which has been reiterated in the impugned order is not correct.

13. The other question which needs to be considered is whether the District Forum should not have entertained the complaints filed by the appellants and directed them to avail the statutory remedies available under the Cooperative Societies Act. Shri Neeraj Jain vehemently argued that the forums constituted under the Act cannot grant relief to the appellants because the action taken by respondent No.1 was approved by the authorities constituted under the Cooperative Societies Act, who were not impleaded as parties in the complaints.

14. In our view, there is no merit in the submission of the learned senior counsel. In the complaints filed by them, the appellants had primarily challenged the action of respondent No.1 to refund the amounts deposited by them and thereby extinguished their entitlement to get the flats. Therefore, the mere fact that the action taken by respondent No.1 was approved by the Assistant Registrar, Cooperative Societies and higher authorities, cannot deprive the appellants of their legitimate right to seek remedy under the Act, which is in addition to the other remedies available to them under the Cooperative Societies Act. Law on this issue must be treated as settled by the judgments of this Court in *Secretary, Thirumurugan Co-operative Agricultural Credit Society v. M. Lalitha* (2004) 1 SCC 305, *Kishore Lal v. ESI Corporation* (2007) 4 SCC 579 and *National Seeds Corporation Ltd. v. M. Madhusudhan Reddy* (2012) 2 SCC 506.

15. In the last mentioned judgment, this Court referred to the earlier judgments in *Fair Air Engineers (P) Ltd. v. N.K. Modi* (1996) 6 SCC 385, *Thirumurugan Co-operative Agricultural Credit Society v. M. Lalitha* (supra), *Skypak Couriers Ltd. v. Tata Chemicals Ltd.* (2000) 5 SCC 294, *Trans Mediterranean Airways v. Universal Exports* (2011) 10 SCC 316 and held that the remedy available under the Act is in addition to the remedies available under other statutes and the availability of alternative remedies is not a bar to the entertaining of a complaint filed under the Act.

16. In the result, the appeals are allowed, the impugned order as also the orders passed by the State Commission are set aside and the matters are remanded to the State Commission with the direction that it shall decide the appeals filed by the appellants on merits after giving opportunities of hearing to the parties.

R.P. Appeals allowed.

STATE OF J & K
v.
LAKHWINDER KUMAR & ORS.
(Criminal Appeal No. 624 of 2013 etc.)

APRIL 25, 2013

[CHANDRAMAULI KR. PRASAD AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

BORDER SECURITY FORCE RULES, 1969:

r.41(1) (i) and (ii) read with ss. 47 and 80 of Border Security Force Act - Owing to a quarrel between BSF personnel and some boys, death of a boy by gunfire caused by BSF Constable in Srinagar - Charge sheet submitted by police in the Court of Chief Judicial Magistrate - Application filed by Dy. Inspector General praying for trial of the accused in Security Force Court allowed by CJM - Order affirmed by High Court - Held: In view of Notification, accused were on active duty at the time of commission of the offence - Therefore, the bar under s.47 of the Act shall not stand in their way for trial by a Security Force Court - However, in the instant case, the criminal court and the Security Force Court each will have jurisdiction for trial of the offence - The allegations in the case do not indicate that the accused committed the offence in course of performance of their duty in any of the situations enumerated in r. 41(1)(i) - Though the Commanding Officer, has exercised his power u/s. 80 of the Act, but he has nowhere stated that the trial of the accused by Security Force Court is necessary in the interest of discipline of the Force as required under r. 41(1)(ii) - Commanding Officer has exercised his power ignorant of the restriction placed on him under the Rules -- Hiis decision is, therefore, illegal - Order of CJM as affirmed by High Court set aside - However, liberty given to Director General to make

an appropriate application before CJM - Border Security Force Act, ss.47, 80 and 141.

ADMINISTRATIVE LAW:

Delegated legislation - r.41 of Border Security Force Rules, 1969 - Held is not in conflict with provisions of s.80 of the Act - Border Security Force Act, 1969 - s.80.

Delegated legislation - Exercise of power - Extent of - Held: When the power is conferred in general and thereafter in respect of enumerated matters, as in the instant case, the particularlisation in respect of specified subject is construed as merely illustrative and does not limit the scope of general power.

An F.I.R. was registered against a Constable and a Commandant of Border Security Force, namely, respondent nos.1 and 2 in Crl. A. No. 624 of 2013, on the allegation that they while returning after Annual Medical examination at Composite Hospital, on the way, got involved in a quarrel with some boys, and on the instigation of respondent no. 2, respondent no.1 fired twice and one such bullet hit one of the boys, causing his death. The police submitted a charge-sheet against both the respondents for offences punishable u/ss.302, 109 and 201 of Ranbir Penal Code before the Chief Judicial Magistrate. The Dy. Inspector General, Border Security Force filed an application before the CJM to stay the proceedings and to forward the accused persons for trial before Security Force Court. The application was allowed. The order was unsuccessfully challenged by the father of the deceased and the State Government in revision petitions before the High Court.

In the instant appeals it was contended that the offence committed was a civil offence triable by a criminal

court as at the time of commission of offence, the accused persons were not engaged in any operation nor were they on active duty so as to give jurisdiction to the force to try them before Security Force Court.

Allowing the appeals, the Court

HELD: 1.1. There is no connection, not even the remotest one, between duty of the accused persons, as members of the Force and the crime in question. The situs of the crime was neither under Force control nor the victim of crime was in any way connected with the Force. But for the notification, these could have been sufficient to answer that accused persons were not on active duty at the time of commission of the crime. However, the notification issued by the Central Government in terms of s.2(1)(a) of the Border Security Force Act, 1969, states "duty of every person" of the Force "serving in the State" of Jammu and Kashmir "with effect from the 1st of July, 2007 to 30th of June, 2010 as active duty". The notification does not make any reference to the nature of duty, but lays emphasis at the place where the members of the Force are serving, to come within the definition of 'active duty'. Therefore, the accused were on active duty at the time of commission of the offence and, as such, the bar u/s 47 of the Act shall not stand in the way for their trial by a Security Force Court. [para 9,10 and 12] [1080-G-H; 1081-E-G; 1082-E]

1.2 The bar of trial by a Security Force Court though is lifted, but it does not mean that the accused who committed the offence of the nature indicated in s. 47 of the Act shall necessarily have to be tried by a Security Force Court. In a given case, there may not be a bar of trial by a Security Force Court, but still an accused can be tried by a criminal court. In such a situation, the choice of trial is between the criminal court and the Security

Force Court. This situation is visualized u/s. 80 of the Act. [para 12] [1082-E-G]

1.3 In the instant case, the criminal court and the Security Force Court each will have jurisdiction for trial of the offence which the accused persons are alleged to have committed. In such a contingency s. 80 of the Act has conferred discretion on the Director General or the Inspector General or the Deputy Inspector General of the Force within whose Command the accused person is serving, to decide before which court the proceeding shall be instituted. For exercise of discretion u/s. 80 of the Act, rules have been framed. [para 13] [1083-B-D and E-F]

2.1. Rule 41(1)(i) of the Border Security Force Rules, 1969, states that where the offence is committed in the course of the performance of duty as a member of the Force or, in relation to property belonging to the Government or the Force or a person subject to the Act or the offence was committed against a person subject to the Act, the officer competent to exercise the power u/s. 80 of the Act may direct that the members of the Force who have committed the offence, be tried by a Security Force Court. The allegations in the instant case do not indicate that the accused committed the offence in any of the situations enumerated in r. 41(i). Therefore, the jurisdictional fact necessary for trial of the accused persons by a Security Force Court does not exist. [para 14] [1084-G-H; 1085-A-B]

2.2 Rule 41 (1)(ii) further authorizes the officer competent to exercise his power u/s 80 of the Act to decide as to whether or not it would be necessary in the interest of discipline to claim for trial by a Security Force Court. In the instant case, the Commanding Officer has exercised his power u/s. 80 of the Act and excepting to

say that the said power has been exercised in his discretion, he has nowhere stated that the trial of the accused by Security Force Court is necessary in the interest of discipline of the Force. Once a statutory guideline has been issued for giving effect to the provisions of the Act, the exercise of discretion without adherence to those guidelines shall render the decision vulnerable. The Commanding Officer has exercised his power ignorant of the restriction placed on him under the Rules, his decision is, therefore, illegal and the order passed by the Chief Judicial Magistrate as affirmed by the High Court based on that cannot be allowed to stand. [para 14 and 22] [1085-C; 1092-B-D]

3.1 One of the most common mode adopted by the legislature conferring rule making power is first to provide in general terms i.e., for carrying into effect the provisions of the Act, and then to say that in particular, and without prejudice to the generality of the foregoing power, rules may provide for number of enumerated matters. Section 141 of the Act, which confers on the Central Government the power to make rules is of such a nature. [para 16] [1085-G-H; 1086-A]

3.2 When the power is conferred in general and thereafter in respect of enumerated matters, as in the instant case, the particularlisation in respect of specified subject is construed as merely illustrative and does not limit the scope of general power. [para 17] [1088-C]

Rohtak & Hissar Districts Electric Supply Co. Ltd. v. State of U.P., **1966 SCR 863 = AIR 1966 SC 1471 and** *Afzal Ullah v. State of Uttar Pradesh,* **1964 SCR 991 = AIR 1964 SC 264 - relied on.**

Emperor v. Sibnath Banerji, **AIR 1945 PC 156 - referred to.**

3.3 Wide discretion has been given to the specified officer u/s 80 of the Act to make a choice between a criminal court and a Security Force Court, but r.41 made for the purposes of carrying into effect the provision of the Act has laid down guidelines for exercise of that discretion. Rule 41 has not gone beyond what the Act has contemplated nor is it any way in conflict thereof. Therefore, this has to be treated as if the same is contained in the Act. The Commanding Officer has to bear in mind the guidelines laid for the exercise of discretion. [para 20] [1090-F-H]

4. In the instant case, the Force has exercised its option for trial of the accused immediately on submission of the charge-sheet and before the commencement of the trial. In the facts and circumstances of the case, liberty is given to the Director General of the Force, if so advised, to re-visit the entire issue in accordance with law bearing in mind the observation made in the judgment and if he comes to the conclusion that the trial deserves to be conducted by the Security Force Court, nothing will prevent him to make an appropriate application afresh before the Chief Judicial Magistrate. [para 24 and 25] [1094-A-C]

Joginder Singh v. State of H.P., **1971 (2) SCR 851 = (1971) 3 SCC 86 - distinguished.**

Case Law Reference:

1966 SCR 863	**relied on**	**para 17**
AIR 1945 PC 156	**referred to**	**para 17**
1964 SCR 991	**relied on**	**para 19**
1971 (2) SCR 851	**distinguished**	**para 23**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 624 of 2013.

From the Judgment and order dated 21/10/2011 in CRLR No.30/2010, of the High Court of Jammu & Kashmir at Srinagar.

WITH

Criminal Appeal No. 625 of 2013.

Gaurav Pachnanda, Sunil Fernandes, Renu Gupta, Rahul Sharma, Vernika Tomar, Kamini Jaiswal, Varinda Grover, Abhimanue Shrestha for the Appellant.

R.F. Nariman, SG, Siddartha Dave, Ritin Rai, B. Krishna Prasad, Sunil Fernandez for the Respondents.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. The allegation in the case is very distressing. A Kashmiri teenager lost his life by the bullet of Lakhwinder Kumar, a constable of the Border Security Force (hereinafter referred to as "the Force") at the Boulevard Road, Srinagar. He allegedly fired at the instigation of R.K. Birdi, Commandant of the 68th Battalion of the Force. The cause of firing, as alleged by the prosecution, if true, is appalling. R.K. Birdi on 5th of February, 2010 had gone for Annual Medical Examination at Composite Hospital, Humhama. While on way back at 4.40 P.M. to the Force Headquarters at Nishat, Srinagar, accompanied by other Force personnel, they got stuck in a traffic jam. This led to a verbal duel with some boys present at Boulevard Road, Brain, Srinagar. The verbal duel took an ugly turn and the Force personnel started chasing the boys. It is alleged that at the instigation of R.K. Birdi, constable Lakhwinder Kumar fired twice and one of the rounds hit Zahid Farooq Sheikh. Zahid died of the fire arm injury instantaneously. The aforesaid incident led to registration of FIR No. 4 of 2010 at Police Station, Nishat. It is relevant here to state that the Commandant of the Force by his letter dated 10.02.2010 handed over the investigation to the police. The case was investigated without any murmur by the local police and, during the course of investigation, both R.K.Birdi and

Lakhwinder Kumar were arrested. On completion of investigation, the police submitted the charge-sheet on 05th of April, 2010 against both the accused for commission of offence under Section 302, 109 and 201 of the Ranbir Penal Code before the Chief Judicial Magistrate, Srinagar, whereupon an application was filed on behalf of the Force seeking time to exercise option for trial of the accused by Security Force Court. Accordingly, an application was filed by the Deputy Inspector General, Station Headquarters, Border Security Force, Srinagar before the Chief Judicial Magistrate, Srinagar on 6th of April, 2010 inter alia stating that the criminal case is pending against R.K. Birdi, Commandant and Lakhwinder Kumar, Constable and they are serving under his Command and both of them are in judicial custody. He went on to say that in exercise of his discretion under Section 80 of the Border Security Force Act, 1968 (hereinafter referred to as "the Act") he has decided to institute proceeding against them before the Security Force Court. In the aforesaid premise it was requested to stay the proceeding and to forward the accused persons along with all connected documents and exhibits for trial before the Security Force Court. This application was filed in the light of the provisions of Section 549 of the Code of Criminal Procedure, Svt. 1989, as in force in the State of Jammu & Kashmir. It was further stated that the outcome of the trial of the accused shall be intimated to the court as required under Rule 7 of the Jammu & Kashmir Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1983. The prayer of the Force was opposed by the State of Jammu & Kashmir and the deceased's uncle Ghulam Mohammad Shiekh. The Chief Judicial Magistrate by his order dated 25th of November, 2010 allowed the application filed by the Commandant and handed over the accused together with the charge-sheet and other materials collected by the investigating agency for trying the accused by the Security Force Court. While doing so, the learned Chief Judicial Magistrate observed as follows:

> "In the light of the above discussion it has been shown that accused have committed alleged offence while on active duty and the case squarely falls within 1st exception to the general provisions of Section 47 of the BSF Act, for which option is available to the applicant either to try them at BSF Court or let the Criminal Court of Ordinary jurisdiction to go ahead with their trial. In the instant case applicant has chosen to try them at BSF Court. Therefore, this court has no option but to hand-over the accused together with the charge-sheet and other material collected by Investigating agency to the applicant for trying them at the BSF Court, Application is therefore accepted and accused are ordered to be handed over under custody so the applicant together with charge-sheet and the supporting material as well as all the seized articles. The Officer concerned shall try the accused expeditiously and convey the final out-come of the case to this court as soon as it is completed"

2. Aggrieved by the aforesaid order Ghulam Mohammad Sheikh and the State of Jammu & Kashmir filed separate revision applications before the High Court. Both the applications were heard together by the High Court and have been dismissed by the impugned order dated 21st of October, 2011. It is against this order the State of Jammu & Kashmir and Ghulam Mohammad Sheikh have preferred separate special leave petitions under Article 136 of the Constitution of India.

3. Leave granted.

4. We have heard Mr. Gaurav Pachnanda, Senior Advocate on behalf of the appellant, the State of Jammu & Kashmir and Ms. Kamini Jaiswal, Advocate for the appellant, Ghulam Mohammad Sheikh. We have also heard Mr. R.F. Nariman, learned Solicitor-General of India. Despite service of notice, Respondent Nos. 1 and 2 i.e., Lakhwinder Kumar & R.K. Birdi respectively have not chosen to appear.

5. It may be mentioned here that Section 47 of the Act bars trial of a person subject to the Act by a Security Force Court who has committed an offence of murder or of culpable homicide not amounting to murder or rape in relation to a person not subject to the Act. However, this bar will not operate if the person subject to the Act has committed the offence while on active duty. In other words, if a member of the Force commits offence of the nature specified above and the victim of crime is a civilian member, he cannot be tried by a Security Force Court but this bar will not operate if the offence has been committed while on active duty. The expression 'active duty' has been defined under Section 2(1)(a) of the Act, it reads as follows:

"2. Definitions.-(1) In this Act, unless the context otherwise requires,-

(a) "active duty", in relation to a person subject to this Act, means any duty as a member of the Force during the period in which such person is attached to, or forms part of, a unit of the Force-

(i) which is engaged in operations against an enemy, or

(ii) which is operating at a picket or engaged on patrol or other guard duty along the borders of India,

and includes duty by such person during any period declared by the Central Government by notification in the Official Gazette as a period of active duty with reference to any area in which any person or class of persons subject to this Act may be serving;"

6. Aforesaid provision makes the duty of the nature specified therein to be active duty and includes duty declared by the Central Government by notification in the official Gazette. From a plain reading of the aforesaid, it is evident that any duty

as a member of the Force and enumerated in clauses (i) and (ii), i.e., engaged in operations against an enemy or operating at a picket or engaged on patrol or other guard duty along the borders of India shall come within the definition of active duty. It shall also include such duty by the member of the Force as active duty declared by the Central Government in the Official Gazette.

7. The Central Government by Notification SO.1473(E) dated 8th of August, 2007 in exercise of the powers conferred under Section 2(1)(a) of the Act, had made a declaration that the duty of every personnel serving in the State as mentioned in the said Notification for the period 01st of July 2007 to 30th of June, 2010, shall be 'active duty'. The State of Jammu & Kashmir is at Serial Number 16 of the said Notification.

8. It is common ground that offence committed is a civil offence which is triable by a Criminal Court and at the time of commission of the offence, the accused persons were not engaged in any operation against any enemy or operating at a picket or engaged on patrolling or other guard duty along the borders of India. According to the appellants, accused persons were not engaged in the duty of the nature specified above pursuant to any lawful command, therefore, they cannot be said to be on active duty so as to give jurisdiction to the Force to try them before Security Force Court. The learned Solicitor General does not join issue and accepts that accused persons were not performing duty of the nature mentioned in clauses (i) and (ii) of Section 2(1)(a) of the Act, but, according to him, in view of declaration of the Central Government, their act shall come within the inclusive definition of active duty.

9. There is no connection, not even the remotest one, between their duty as members of the Force and the crime in question. The situs of the crime was neither under Force control nor the victim of crime was in any way connected with the Force. But, for the notification, these could have been sufficient to answer that accused persons were not on active

duty at the time of commission of the crime. However, answer to this question would depend upon the effect of notification issued in exercise of the power under Section 2(1)(a) of the Act. From a plain reading of this section it is evident that 'active duty' would include duty of such person during any period declared by the Central Government by notification in the Official Gazette as a period of active duty. Section 2(1)(a) finds place in the definition section of the Act.

10. It is well settled that legislature has authority to define a word even artificially and while doing so, it may either be restrictive of its ordinary meaning or it may be extensive of the same. When the legislature uses the expression "means" in the definition clause, the definition is prima facie restrictive and exhaustive. However, use of the expression "includes" in the definition clause makes it extensive. Many a times, as in the present case, the legislature has used the term "means" and "includes" both and, hence, definition of the expression "active duty" is presumed to be exhaustive. In our opinion, the use of the expression "includes" enlarges the meaning of the word "active duty" and, therefore, it shall not only mean the duty specified in the section but those duty also as declared by the Central Government in the Official Gazette. The notification so issued by the Central Government states that "duty of every person" of the Force "serving in the State" of Jammu and Kashmir "with effect from the 1st of July, 2007 to 30th of June, 2010 as active duty". The notification does not make any reference to the nature of duty, but lays emphasis at the place where the members of the Force are serving, to come within the definition of 'active duty'. In view of the aforesaid, there is no escape from the conclusion that the accused persons were on active duty at the time of commission of the offence.

11. The natural corollary of what we have found above is that the bar of trial by the Security Force Court provided in Section 47 of the Act would not operate. Section 47 of the Act which is relevant for the purpose reads as follows:

> **"47. Civil offences not triable by a Security Force Court.-** A person subject to this Act who commits an offence of murder or of culpable homicide not amounting to murder against, or of rape in relation to, a person not subject to this Act shall not be deemed to be guilty of an offence against this Act and shall not be tried by a Security Force Court, unless he commits any of the said offences,-
>
> (a) while on active duty; or
>
> (b) at any place outside India; or
>
> (c) at any place specified by the Central Government by notification in this behalf."

12. The aforesaid provision makes it clear that a member of the Force accused of an offence of murder or culpable homicide not amounting to murder or rape shall not be tried by a Security Force Court, unless the offence has been committed while on active duty. As we have found that the accused persons have committed the offence while on active duty within the extended meaning, the bar under Section 47 of the Act shall not stand in their way for trial by a Security Force Court. The bar of trial by a Security Force Court though is lifted, but it does not mean that the accused who had committed the offence of the nature indicated in Section 47 of the Act shall necessarily have to be tried by a Security Force Court. In a given case, there may not be a bar of trial by a Security Force Court, but still an accused can be tried by a Criminal Court. In other words, in such a situation, the choice of trial is between the Criminal Court and the Security Force Court. This situation is visualized under Section 80 of the Act, which reads as follows:

> **"80.Choice between criminal court and Security Force Court.**- When a criminal court and a Security Force Court have each jurisdiction in respect of an offence, it shall be in the discretion of the Director-General, or the Inspector-General or the Deputy Inspector-General within

whose command the accused person is serving or such other officer as may be prescribed, to decide before which court the proceedings shall be instituted, and, if that officer decides that they shall be instituted before a Security Force Court, to direct that the accused person shall be detained in Force custody."

13. As we have observed above, in the present case, the Criminal Court and the Security Force Court each have jurisdiction for trial of the offence which the accused persons are alleged to have committed. In such a contingency Section 80 of the Act has conferred discretion on the Director General or the Inspector General or the Deputy Inspector General of the Force within whose Command the accused person is serving, to decide before which court the proceeding shall be instituted. Section 141 of the Act confers power on the Central Government to make rules for the purpose of carrying into effect the provisions of the Act. It is relevant here to state that the Central Government in exercise of the powers under Section 141 (1) and (2) of the Act has made the Border Security Force Rules, 1969, hereinafter referred to as "the Rules". Chapter VI of the Rules is in relation to choice of jurisdiction between Security Force Court and criminal court. Thus, for exercise of discretion under Section 80 of the Act, Rules have been framed and Rule 41 of the Rules, which is relevant for the purpose, reads as follows:

"41. Trial of cases either by Security Force Court or criminal court.- (1) Where an offence is triable both by a criminal court and a Security Force Court, an officer referred to in section 80 may,-

(i) (a) where the offence is committed by the accused in the course of the performance of his duty as a member of the Force, or

(b) where the offence is committed in relation to property belonging to the Government or the Force

or a person subject to the Act, or

(c) where the offence is committed against a person subject to the Act,

direct that any person subject to the Act, who is alleged to have committed such an offence, be tried by a Court; and

(ii) in any other case, decide whether or not it would be necessary in the interests of discipline to claim for trial by a Court any person subject to the Act who is alleged to have committed such an offence.

(2) In taking a decision to claim an offender for trial by a Court, an officer referred to in section 80 may take into account all or any of the following factors, namely:-

(a) the offender is on active duty or has been warned for active duty and it is felt that he is trying to avoid such duty;

(b) the offender is a young person undergoing training and the offence is not a serious one and the trial of the offender by a criminal court would materially affect his training.

(c) the offender can, in view of the nature of the case, be dealt with summarily under the Act."

14. Rule 2 (c) of the Rules defines Court to mean the Security Force Court. A bare reading of Rule 41(1) makes it evident that where the offence is committed in the course of the performance of duty as a member of the Force or where the offence is committed in relation to property belonging to the Government or the Force or a person subject to the Act or where the offence is committed against a person subject to the Act, the officer competent to exercise the power under Section 80 of the Act may direct that the members of the Force who have committed the offence, be tried by a Security Force Court. The

allegations in the present case do not indicate that the accused committed the offence in course of performance of their duty as a member of the Force or in relation to property belonging to the Government or the Force or a person subject to the Act or the offence was committed against a person subject to the Act. In that view of the matter, the aforesaid ingredients are not satisfied and, therefore, the jurisdictional fact necessary for trial of the accused persons by a Security Force Court does not exist. Rule 41 (1)(ii) further authorizes the officer competent to exercise its power under Section 80 of the Act to decide as to whether or not it would be necessary in the interest of discipline to claim for trial by a Security Force Court. It is worth mentioning here that Rule 41 (2) enumerates the factors which the officer competent under Section 80 of the Act is to take into account for taking a decision for trial of an accused by a Security Force Court. None of the clauses of Rule 41(1)(i) and 41(2) apply in the facts of the present case. The condition under which the authority could exercise the discretion is provided under Rule 41(1)(ii) of the Rules.

15. We must answer here an ancillary submission. It is pointed out that the Rules made to give effect to the provisions of the Act has to be consistent with it and if a rule goes beyond what the Act contemplates or is in conflict thereof, the rule must yield to the Act. It is emphasized that Section 80 of the Act confers discretion on the Officer within whose Command the accused person is serving the choice between Criminal Court and Security Force Court without any rider, whereas Rule 41 of the Rules specifies grounds for exercise of discretion. Accordingly, it is submitted that this rule must yield to Section 80 of the Act. We do not find any substance in this submission.

16. One of the most common mode adopted by the legislature conferring rule making power is first to provide in general terms i.e., for carrying into effect the provisions of the Act, and then to say that in particular, and without prejudice to the generality of the foregoing power, rules may provide for

number of enumerated matters. Section 141 of the Act, with which we are concerned in the present appeal, confers on the Central Government the power to make rules is of such a nature. It reads as follows:

> **"141. Power to make rules.**-(1) The Central Government may, by notification, make rules for the purpose of carrying into effect the provisions of this Act.
>
> (2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for,-
>
> (a) the constitution, governance, command and discipline of the Force;
>
> (b) the enrolment of persons to the Force and the recruitment of other members of the Force;
>
> (c) the conditions of service including deductions from pay and allowances of members of the Force;
>
> (d) the rank, precedence, powers of command and authority of the officers, subordinate officers, under-officers and other persons subject to this Act;
>
> (e) the removal, retirement, release or discharge from the service of persons subject to this Act;
>
> (f) the purposes and other matters required to be prescribed under section 13;
>
> (g) the convening, constitution, adjournment, dissolution and sittings of Security Force Courts, the procedure to be observed in trials by such courts, the persons by whom an accused may be defended in such trials and the appearance of such persons thereat;
>
> (h) the confirmation, revision and annulment of, and petitions against, the findings and sentences of

Security Force Courts;

(i) the forms of orders to be made under the provisions of this Act relating to Security Force Courts and the awards and infliction of death, imprisonment and detention;

(j) the carrying into effect of sentences of Security Force Courts;

(k) any matter necessary for the purpose of carrying this Act into execution, as far as it relates to the investigation, arrest, custody, trial and punishment of offences triable or punishable under this Act;

(l) the ceremonials to be observed and marks of respect to be paid in the Force;

(m) the convening of, the constitution, procedure and practice of, Courts of inquiry, the summoning of witnesses before them and the administration of oaths by such Courts;

(n) the recruitment and conditions of service of the Chief Law Officer and the Law Officers;

(o) any other matter which is to be, or may be prescribed or in respect of which this Act makes no provision or makes insufficient provision and provision is, in the opinion of the Central Government, necessary for the proper implementation of this Act.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two more successive sessions, and if, before the expiry of the session immediately following the session or the

successive sessions aforesaid both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule."

17. In our opinion, when the power is conferred in general and thereafter in respect of enumerated matters, as in the present case, the particularlisation in respect of specified subject is construed as merely illustrative and does not limit the scope of general power. Reference in this connection can be made to a decision of this Court in the case of *Rohtak & Hissar Districts Electric Supply Co. Ltd. v. State of U.P.,* AIR 1966 SC 1471, in which it has been held as follows:

"……Section 15(1) confers wide powers on the appropriate Government to make rules to carry out the purposes of the Act; and Section 15(2) specifies some of the matters enumerated by clauses (a) to (e), in respect of which rules may be framed. It is well-settled that the enumeration of the particular matters by sub-section (2) will not control or limit the width of the powers conferred on the appropriate Government by sub-section (1) of Section 15; and so, if it appears that the item added by the appropriate Government has relation to conditions of employment, its addition cannot be challenged as being invalid in law……."

(Underlining ours)

18. The Privy Council applied this principle in the case of *Emperor v. Sibnath Banerji,* AIR 1945 PC 156, to uphold the validity of Rule 26 of the Defence of India Rules, which though was found in excess of the express power conferred under enumerated provision, but covered under general power. Relevant portion of the judgment reads as under:

"Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statement of the relative positions of sub-sections (1) and (2) of Section 2, Defence of India Act, and counsel for the respondents in the present appeal was unable to support that statement, or to maintain that R.26 was invalid. In the opinion of their Lordships, the function of sub-section (2) is merely an illustrative one; the rule-making power is conferred by sub-section (1), and "the rules" which are referred to in the opening sentence of sub-section (2) are the rules which are authorized by, and made under, sub-section (1); the provisions of sub-section (2) are not restrictive of sub-section (1), as indeed is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-section (1)." There can be no doubt - as the learned Judge himself appears to have thought - that the general language of sub-section (1) amply justifies the terms of R.26, and avoids any of the criticisms which the learned Judge expressed in relation to sub-section (2).

Their Lordships are therefore of opinion that *Keshav Talpade v. Emperor,* I.L.R. (1944) Bom. 183, was wrongly decided by the Federal Court, and that R.26 was made in conformity with the powers conferred by sub-section (1) of Section 2, Defence of India Act……."

19. A constitution Bench of this Court in the case of *Afzal Ullah v. State of Uttar Pradesh,* AIR 1964 SC 264, quoted with approval the law laid down by the Privy Council in the case of *Sibnath Banerji* (supra) and held that enumerated provisions do not control the general terms as particularization of topics is illustrative in nature. It reads as follows:

"13. Even if the said clauses did not justify the impugned bye-law, there can be little doubt that the said bye-laws would be justified by the general power conferred on the Boards by Section 298(1). It is now well-settled that the

specific provisions such as are contained in the several clauses of Section 298(2) are merely illustrative and they cannot be read as restrictive of the generality of powers prescribed by Section 298(1), vide *Emperor v. Sibnath Banerji,* AIR 1945 PC 156. If the powers specified by Section 298(1) are very wide and they take in within their scope bye-laws like the ones with which we are concerned in the present appeal, it cannot be said that the powers enumerated under Section 298(2) control the general words used by Section 298(1). These latter clauses merely illustrate and do not exhaust all the powers conferred on the Board, so that any cases not falling within the powers specified by Section 298(2) may well be protected by Section 298(1), provided, of course, the impugned bye-law can be justified by-reference to the requirements of Section 298(1). There can be no doubt that the impugned bye-laws in regard to the markets framed by Respondent No. 2 are for the furtherance of municipal administration under the Act, and so, would attract the provisions of Section 298(1). Therefore, we are satisfied that the High Court was right in coming to the conclusion that the impugned bye-laws are valid."

20. In view of what we have observed above it is evident that Rule 41 of the Rules has been made to give effect to the provisions of the Act. In our opinion, it has not gone beyond what the Act has contemplated or is any way in conflict thereof. Hence, this has to be treated as if the same is contained in the Act. Wide discretion has been given to the specified officer under Section 80 of the Act to make a choice between a Criminal Court and a Security Force Court but Rule 41 made for the purposes of carrying into effect the provision of the Act had laid down guidelines for exercise of that discretion. Thus, in our opinion, Rule 41 has neither gone beyond what the Act has contemplated nor it has supplanted it in any way and, therefore, the Commanding Officer has to bear in mind the guidelines laid for the exercise of discretion.

21. To test as to whether the Commanding Officer, who had exercised the power under Section 80 of the Act, satisfied the aforesaid requirement, it is apt to reproduce the application filed by him in this regard. The relevant portion of the application reads as follows:

"Whereas a criminal case under FIR No. 04/201 of Police Station Nishat titled State Vs. Lakhwinder Kumar and another is pending against Lakhwinder Kumar and Randhir Kumar Birdi before your Court for adjudication.

2. Whereas the said accused persons namely Lakhwinder Kumar (No. 01005455 Constable of 68 Bn BSF) and Randhir Kumar Birdi (Commandant BSF) are serving under my command and,

3. Whereas in exercise of my discretion as envisaged in Section 80 of the BSF Act, 1968, I have decided to institute proceedings against the said accused persons Lakhwinder Kumar and Randhir Kumar Birdi before the Border Security Force Court.

4. Whereas, the accused persons i.e. Lakhwinder Kumar and Randhir Kumar Birdi are presently under judicial custody and in your control.

5. I therefore request you to stay proceedings in your court against the two accused persons and may forward all connected documents and exhibits of this case and custody of accused person to the undersigned as per Section 549 of Cr.P.C. 1989 (J & K) for instituting proceedings against them under the BSF Act and Rules made thereunder.

6. That the outcome of the trial of the accused persons by Border Security Force Court of the result of effectual proceedings instituted or ordered to be taken against them shall be intimated as per Rules 7 of the J & K Criminal

Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1983."

22. The Commanding Officer, thus, has exercised his power under Section 80 of the Act and excepting to say that the said power has been exercised in his discretion, there is not even a whisper as to why said discretion has been exercised for trial of the accused persons by a Security Force Court. The Commanding Officer has nowhere stated that the trial of the accused by Security Force Court is necessary in the interest of discipline of the Force. Once a statutory guideline has been issued for giving effect to the provisions of the Act, in our opinion, the exercise of discretion without adherence to those guidelines shall render the decision vulnerable. In our opinion, the Commanding Officer has exercised his power ignorant of the restriction placed on him under the Rules. Having found that the Commanding Officer's decision is illegal, the order passed by the learned Chief Judicial Magistrate as affirmed by the High Court based on that cannot be allowed to stand.

23. It has also been pointed out on behalf of the appellant that after lodging of the first information report, the Force voluntarily handed over the custody of accused Lakhwinder Kumar on 10th of February, 2010 and R.K. Birdi on 4th of March, 2010 and allowed the investigation to be conducted by the police without any objection and did not exercise option for trial by Security Force Court. Later on, such an option cannot be exercised, submits the learned counsel. In support of the submission, reliance has been placed on a decision of this Court in the case of *Joginder Singh v. State of H.P.,* (1971) 3 SCC 86, and our attention has been drawn to Paragraph 29 of the judgment which reads as follows:

"29. Rule 4 is related to clause (a) of Rule 3 and will be attracted only when the Magistrate proceeds to conduct the trial without having been moved by the competent military authority. It is no doubt true that in this case the Assistant Sessions Judge has not given a written

notice to the Commanding Officer as envisaged under Rule 4. But, in our view, that was unnecessary. When the competent military authorities, knowing full well the nature of the offence alleged against the appellant, had released him from military custody and handed him over to the civil authorities, the Magistrate was justified in proceeding on the basis that the military authorities had decided that the appellant need not be tried by the Court-martial and that he could be tried by the ordinary criminal court."

24. This submission does not commend us. As observed earlier, on the very date of filing of the charge-sheet, an application was filed on behalf of the Force seeking time to exercise option for trial of the accused by the Security Force Court. On the following date such an application was filed. At that particular point of time the trial of the accused persons had not commenced and before it could commence, the option was exercised. As regards the authority of this Court in the case of *Joginder Singh* (supra), the same is clearly distinguishable. In the said case, the Criminal Court proceeded with the trial of a military personnel without complying Rule 4 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952, which obliged the Criminal Court to give written notice to the Commanding Officer of the accused before trying the said accused. The Criminal Court did not give any notice to the Commanding Officer and proceeded to try the accused and ultimately conviction was recorded. Said conviction was assailed on the ground that the Criminal Court having proceeded to try the accused without giving any notice, the conviction is vitiated. While answering the said question this Court took into consideration the conduct of the Commanding Officer of releasing the accused from military custody and handing over the accused to the authorities and in that background observed that the Criminal Court was justified in proceeding with the trial and failure to give notice to the Commanding Officer by the Criminal Court shall not vitiate the conviction. Here, in the present case, the Force has exercised

his option for trial of the accused immediately on submission of the charge-sheet and before the commencement of the trial. Hence, the submission made has no substance and is rejected accordingly.

25. In the facts and circumstances of the case, we give liberty to the Director General of the Force, if so advised, to re-visit the entire issue within eight weeks bearing in mind the observation aforesaid in accordance with law and if he comes to the conclusion that the trial deserves to be conducted by the Security Force Court, nothing will prevent him to make an appropriate application afresh before the Chief Judicial Magistrate. Needless to state that in case the Director General of the Force takes recourse to the aforesaid liberty and files application for the trial by the Security Force Court, the Chief Judicial Magistrate shall consider the same in accordance with law. It is made clear that observations made in these appeals are for the purpose of their disposal and shall have no bearing on trial.

26. In the result, both the appeals are allowed, the impugned judgment and order of the Chief Judicial Magistrate dated 25th of November, 2010 and that of the High Court dated 21st October, 2011 are set aside. The Security Force Court shall forthwith transmit the record sent to it, to the Chief Judicial Magistrate, Srinagar, who in turn shall proceed in the matter in accordance with law bearing in mind the observation aforesaid.

R.P. Appeals allowed.

PREM KAUR
v.
STATE OF PUNJAB AND ORS.
(Criminal Appeal No. 1364 of 2008)

APRIL 25, 2013

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

PENAL CODE, 1860:

ss. 376, 363, 148, 323, 149, 342 and 506 - Accused persons including father and son stated to have beaten, raped and tortured a labourer - Acquittal by trial court, affirmed by High Court - Held: A judgment must show proper application of mind by Presiding Officer of the court, that there was proper evaluation of all the evidence on record, and that the conclusion is based on appreciation/ evaluation of evidence - Every court is duty bound to state reasons for its conclusions - In the instant case, trial court did not decide the case giving adherence to provisions of s. 354 CrPC - It did not record any sound reasoning for acquittal, though it had been the case of prosecutrix that she remained hospitalized - She had deposed in court that she had been subjected to the crime stated - High Court was also swayed by reasoning recorded by trial court without making much effort to find out the truth in the case - Courts below have dealt with the matter in a very summary fashion - The statements of reasons, for the conclusion reached by them, which could have been more enlightening, are missing - Judgments of courts below do not comply with requirement of statutory provisions as laid down in Cr.P.C - The view taken by courts below is manifestly unreasonable and has resulted in miscarriage of justice - Courts below ought not to have given the defective and cryptic judgment - In fact it is no judgment in the eyes of the law -

The Court is not in a position to judge the correctness, legality and propriety of findings recorded by courts below - Absence of sound reasons is not a mere irregularity, but a patent illegality - Judicial insensitiveness shown by trial court, and High Court is disturbing - Whether the allegation is correct or not, has to be examined on the basis of the evidence on record and such an issue cannot be decided merely by observing that it is improbable - The manner in which courts below have dealt with the case, cannot be approved - Judgments of courts below are set aside and the case is remanded to trial court to decide afresh on the basis of the evidence/material on record - In light of the facts and circumstances of the case, trial court will hear the arguments advanced from both sides, and deal with each and every piece of evidence, taking into consideration the defence taken by the accused persons, in their respective statements u/s 313 Cr.P.C., and record findings, in accordance with law - Code of Criminal Procedure, 1973 - s. 354 - Judgments.

CRIMES AGAINST WOMEN:

Sexual assault - Sensitiveness to be shown by courts while dealing with the case - Penal Code, 1860.

H.B. Gandhi & Ors. v. Gopi Nath & Sons, **1992 Supp. (2) SCC 312;** *Triveni Rubber & Plastics v. Collector of Central Excise, Cochin,* **AIR 1994 SC 1341;** *Kuldeep Singh v. Commissioner of Police & Ors.*, **1998 (3) Suppl. SCR 594 = AIR 1999 SC 677** *Gaya Din & Ors. v. Hanuman Prasad & Ors* **AIR 2001 SC 386** *Rajinder Kumar Kindra v. Delhi Administration,* **1985 (1) SCR 866 = AIR 1984 SC 1805;** *Satyavir Singh v. State of Uttar Pradesh,* **2010 (2) SCR 729 = (2010) 3 SCC 174;** *State of Punjab v. Jagir Singh Baljit Singh & Karam Singh,* **1974 (1) SCR 328 = AIR 1973 SC 2407;** *Mukhtiar Singh & Anr. v. State of Punjab,* **1995 (1) SCR 38 = AIR 1995 SC 686 - referred to.**

Case Law Reference:

1992 Supp. (2) SCC 312	**referred to**	**para 11**
AIR 1994 SC 1341	**referred to**	**para 12**
1998 (3) Suppl. SCR 594	**referred to**	**para 13**
AIR 2001 SC 386	**referred to**	**para 14**
1985 (1) SCR 866	**referred to**	**para 15**
2010 (2) SCR 729	**referred to**	**para 16**
1974 (1) SCR 328	**referred to**	**para 19**
1995 (1) SCR 38	**referred to**	**para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1364 of 2008.

From the Judgment and Order dated 21.08.2006 of the High Court of Punjab & Haryana at Chandigarh in Crl. Revision No. 392 of 2001.

D.K. Thakur,Dr. V.P. Appan, D. Jha for the Appellant.

V. Madhukar AAG, Shivani Mahipal, Rajat Kapoor, Anis Ahmed Khan, Anvita Cowshish, S. Rajita Mathur (for Kuldip Singh) for the Respondents.

The following order of the Court was delivered

O R D E R

1. This appeal has been preferred against the judgment and order dated 21.8.2006 in Criminal Revision No. 392 of 2001 passed by the High Court of Punjab and Haryana at Chandigarh, by way of which it has dismissed the revision petition and affirmed the judgment and order of acquittal of respondents-accused in Sessions Case No. 9 of 1995/2000 dated 7.6.2000 of the charges punishable under Sections 148,

323, 149, 363, 376, 342 and 506 of Indian Penal Code, 1860 (hereinafter referred to as the 'IPC').

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

A. On 7.2.1995, the appellant, a labourer by occupation was dragged by the respondents-accused into their car and taken to Dera Khushian Dass at village Thatha. She was beaten by the respondents and was forced to keep mum and sign certain papers. Baba Jagir Singh (now dead) raped the appellant. Thereafter, she was raped by respondent Nos. 3 and 4 herein, also. The appellant was mal-treated to the extent that one lady at Dera, namely Sawinder Kaur put chilly powder in her private parts and she was detained in the room.

B. On 8.2.1995, appellant's husband came with several persons and rescued her from the Dera. She was taken to the Civil Hospital, Tarn Taran in unconscious state and the police was informed.

C. The appellant regained consciousness only on 9.2.1995. Her statement was recorded by the Sub-Inspector, Kabala Singh (PW-13) on the same day. The appellant was then pressurised by the respondents to compromise and they tried to hush up the matter and even produced a signed agreement of compromise. In view thereof, the police refused to register the FIR on 9.2.1995. It was only at the instance of the appellant that an FIR could be lodged on 10.2.1995 at Tarn Taran Police Station.

D. After investigation, the chargesheet was submitted against the respondents-accused for the offences punishable under sections referred to hereinabove, and the case was committed to the Sessions Court. The Trial Court vide its judgment and order dated 7.6.2000 acquitted all the accused persons on the ground that there was delay in lodging the FIR and the prosecution could not explain the same, though the

compromise deed was filed but the court could not consider it, as the offences were not compoundable. The Trial Court was swayed by the fact that the father and son cannot rape a woman together.

E. Aggrieved, the appellant preferred the Criminal Revision No. 392 of 2001 before the High Court and the same stood dismissed vide its judgment and order dated 21.8.2006.

Hence, this appeal.

3. This Court was not satisfied with the judgments and orders of the courts below. Since the appellant could not furnish the copies of the statements of all the witnesses, this court vide order dated 2.4.2013 directed the counsel appearing for the State to file two sets of the depositions of the prosecution witnesses and defence witnesses, if any. However, the said order has not been complied with for the reasons best known to the State authorities.

4. The Trial Court recorded a finding that the prosecution had failed to explain the inordinate delay in lodging the FIR, as the incident occurred on 7.2.1995, three days before the FIR was lodged. The appellant-prosecutrix herself had given a version, furnishing complete explanation for the delay. The so-called compromise deed was also placed on record. Appellant had also deposed that when she regained her consciousness, her statement was recorded by the Sub-Inspector on 9.2.1995. The same had been admitted by Shri Kabala Singh (PW-13).

5. The Trial Court took note of the contentions raised by the learned counsel for the parties upto paragraph 9, and thereafter dealt with the entire case in just one paragraph i.e. paragraph 10. In that paragraph also, the learned Trial Court, made a passing reference to the statement of the prosecutrix, or to those of any other witness but failed to appreciate the same properly.

6. The Trial Court took note of the statement of Dr.

Tejwinder Singh (PW-1), with respect to the injuries that were found on the person of the prosecutrix, which read as under:

"1. An abrasion 5x5 inch on the right iliac bone, radish blue in colour. No fresh bleeding was seen.

2. A defused swelling 3x3 inch on the head in the region of right parietal bone. Underlying bone was found intact. Injury was kept under observation.

3. An abrasion 5x5 inch on the outer side of left elbow joint.

4. Complaint of pain in the abdomen, injury was kept under observation.

5. Complaint of difficulty in swallowing and speech allegedly due to attempt to strangulate. For opinion of ENT specialist.

6. As alleged by the complainant that she had been raped, so opinion of the Gynecologist was sought."

Dr. Karnail Kaur (PW-9), who had also examined the appellant observed:

"(i) Dirty blood stained discharge was coming out of vagina.

(ii) The introitus was tender and at 6'o clock position there was present a small laceration.

(iii) The examining fingers were stained with blood stained discharge.

(iv) In my opinion I cannot rule out the possibility of sexual intercourse."

7. The Trial Court further referred to the statement of the Doctor (PW-9) as under:

"Dr. Karnail Kaur (PW-9) who medically examined Prem Kaur on 9.2.95, found abrasion 5x5 cm on the outer side of the left iliac rest…the vagina of the prosecutrix admitted two fingers. Dirty blood stained discharge was coming out of the vagina."

The Trial Court acquitted all the accused giving reasons as under:

"There is no cogent evidence that the prosecutrix was raped by the accused, Baba Jagir Singh and his son Karaj Singh and Jagtar Singh. **It is not possible that father and son will commit the rape at the same time."**

(Emphasis added)

8. When the matter came up before the High Court, the High Court also did not show any sensitivity, and did not consider the gravity of the charges levelled against the accused persons. It was thus persuaded only by the circumstance, that the State had not filed the appeal against the order of acquittal passed by the Trial Court. No other reasons were given by the High Court, while dealing with the revision. Further, the High Court had without examining any medical report, gone to the extent of stating that the prosecutrix had no injury upon her person whatsoever, though the finding is admittedly contrary to the evidence on record.

9. We have considered the rival submissions made by learned counsel for the parties, but had no occasion or opportunity to examine the evidence, as the State for the reasons best known to it, did not ensure compliance of the order passed by this court on 2.4.2013, nor the State had preferred any appeal in the High Court against the order of acquittal by the Trial Court, nor it has rendered any assistance before this Court. Thus, the State authorities have taken a complete indifferent attitude towards the appellant, for the reasons best known to it.

10. The findings recorded by the courts below may be perverse for the reasons that the Trial Court did not record any sound reasoning for acquittal, though it had been the case of the prosecutrix that she remained hospitalised. She had deposed in court that she had been subjected to the aforesaid crime. The High Court had also been swayed by the reasoning recorded by the Trial Court without making much effort to find out the truth in the case.

11. In *H.B. Gandhi & Ors. v. Gopi Nath & Sons,* 1992 Supp. (2) SCC 312, this Court held that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

12. In *Triveni Rubber & Plastics v. Collector of Central Excise, Cochin,* AIR 1994 SC 1341, this Court held that an order suffers from perversity, if relevant piece of evidence has not been considered or if certain inadmissible material has been taken into consideration or where it can be said that the findings of the authorities are based on no evidence at all or if they are so perverse that no reasonable person would have arrived at those findings.

13. In *Kuldeep Singh v. Commissioner of Police & Ors.,* AIR 1999 SC 677, this Court while re-iterating the same view added that, if there is some evidence on record which is acceptable and which could be relied upon, howsoever, compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with.

14. In *Gaya Din & Ors. v. Hanuman Prasad & Ors.,* AIR 2001 SC 386, this Court further added that an order is perverse, if it suffers from the vice of procedural irregularity.

15. In *Rajinder Kumar Kindra v. Delhi Administration,* AIR

1984 SC 1805, the Court while dealing with a case of disciplinary proceedings against an employee considered the issue and held as under-

> "It is equally well-settled that where a quasi-judicial tribunal or arbitrator records findings based on no legal evidence and the findings are either his ipse dixit or based on conjectures and surmises, the enquiry suffers from the additional infirmity of non-application of mind and stands vitiated. ….they disclose total non-application of mind…. The High Court, in our opinion, was clearly in error in declining to examine the contention that the findings were perverse on the short, specious and wholly untenable ground that the matter depends on appraisal of evidence."

16. This Court in *Satyavir Singh v. State of Uttar Pradesh,* (2010) 3 SCC 174, held :

> "'Perverse' was stated to be behaviour which most of the people would take as wrong, unacceptable, unreasonable and a 'perverse' verdict may probably be defined as one that is not only against the weight of the evidence but is altogether against the evidence. Besides, a finding being 'perverse', it could also suffer from the infirmity of distorted conclusions and glaring mistakes."

17. If the judgments of the courts below are examined in the light of the aforesaid settled legal proposition, the same have to be lebelled as suffering from perversity.

18. The Trial Court did not decide the case giving adherence to the provisions of Section 354 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.'). The said provisions provide for a particular procedure and style to be followed while delivering a judgment in a criminal case and such format includes a reference to the points for determination, the decision thereon, and the reasons for the decision, as pronouncing a final order without a reasoned

judgment may not be valid, having sanctity in the eyes of the law. The judgment must show proper application of the mind of the Presiding Officer of the court, and that there was proper evaluation of all the evidence on record, and the conclusion is based on such appreciation/evaluation of evidence. Thus, every court is duty bound to state reasons for its conclusions.

19. In *State of Punjab v. Jagir Singh Baljit Singh & Karam Singh,* AIR 1973 SC 2407, this Court held as under:

> "A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."

20. In *Mukhtiar Singh & Anr. v. State of Punjab,* AIR 1995 SC 686, this Court emphasised on the compliance of the statutory requirement of Section 354 Cr.P.C., observing as under:

> "…..same is far from satisfactory. Both, the order of acquittal as well as the order of conviction, have been made by the trial Court in a most perfunctory manner without even noticing much less, considering and discussing the evidence led by the prosecution or the arguments raised at the bar….It was in paragraphs 28 to 32, noticed above, that the orders of acquittal and

conviction were made. The trial Court was dealing with a serious case of murder. It was expected of it to notice and scrutinize the evidence and after considering the submissions raised at the bar arrive at appropriate findings….. There is no mention in the judgment as to what various witnesses deposed at the trial, except for the evidence of the medical witness. The judgment does not disclose as to what was argued before it on behalf of the prosecution and the defence. **The judgment is so infirm…..The trial Court appears to have been blissfully ignorant of the requirements of Section 354(i)(b) Cr. P.C.** Since, the first appeal lay to this Court, the trial Court should have reproduced and discussed at least the essential parts of the evidence of the witnesses besides recording the submissions made at the bar to enable the appellate Court to know the basis on which the 'decision' is based. A 'decision' does not merely mean the 'conclusion' - it embraces / within its fold the reasons which form the basis for arriving at the 'conclusions'. The judgment of the trial Court contains only the 'conclusions' and nothing more. The judgment of the trial Court cannot, therefore, be sustained. The case needs to be remanded to the trial Court for its fresh disposal by writing a fresh judgment in accordance with law." (Emphasis added)

21. Thus, in view of the above, the law can be laid down that the court must give reasons for reaching its conclusions. The courts below have dealt with the matter in a very summary fashion. The statements of reasons, for the conclusion reached by them, which could have been more enlightening, are missing. The judgments of the courts below do not comply with the requirement of the statutory provisions as laid down in Cr.P.C. The view taken by the courts below is manifestly unreasonable and has resulted in miscarriage of justice. The courts ought not to have given the defective and cryptic judgment. In fact it is no judgment in the eyes of the law. We are not in a position to judge the correctness, legality and propriety of the findings

recorded by the courts below. The absence of sound reasons is not a mere irregularity, but a patent illegality.

22. We are aghast at the judicial insensitiveness shown by the Trial Court, and we find it no less, at the level of the High Court. The view taken by the Trial Court, that the father and son cannot rape a victim together, may in itself cannot be a ground of absolute improbability, however, it may fall within the realm of rarest of rare cases. Whether the allegation is correct or not, has to be examined on the basis of the evidence on record and such an issue cannot be decided merely by observing that it is improbable.

23. We cannot approve the manner in which the courts below dealt with the case. The appeal succeeds and is allowed. Thus, the judgments of the courts below are set aside and the case is remanded to the Trial Court to decide afresh on the basis of the evidence/material on record.

24. In light of the facts and circumstances of the case, the Trial Court will hear the arguments advanced from both sides, and deal with each and every piece of evidence, taking into consideration the defence taken by the accused persons, in their respective statements under Section 313 Cr.P.C., and record findings, in accordance with law. The case shall be decided by the Trial Court within a period of 3 months from the receipt of the certified copy of this order.

However, before parting with the case, we make it clear that no observation made in this order shall be taken into consideration by the Trial Court, as we have expressed no opinion on the merits of the case.

R.P. Appeal allowed.

GUIRAM MONDAL
v.
STATE OF WEST BENGAL
(Criminal Appeal No. 1268 of 2007)

APRIL 26, 2013

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

PENAL CODE, 1860:

ss.148 and 302/149- Double murder - Conviction of one accused only by trial court for causing death of one of the deceased- High Court convicting the appellant and four others - Held: High Court has correctly appreciated the evidence rendered by witnesses - It rightly came to the conclusion that trial court was completely in error by over-looking some crucial and important evidence and placing much reliance on non-mention of name of accused persons in inquest report - High Court has rightly held the appellant guilty u/s 302 read with s.148 and awarded him sentence of life imprisonment - Evidence - Evidence of related witnesses - Investigation - Delay in despatch of special report to Magistrate.

INVESTIGATION:

Inquest - Purpose of - Explained.

The appellant and other accused persons were prosecuted for causing death of two persons, namely, 'AD' and 'SK'. The prosecution case was that the accused persons took alongwith them the two victims and assaulted them with deadly weapons causing their death. PW1, the brother of 'AD', and other witnesses tried to save the victims but in vain and in the process PW1 was shot by a pipe gun and he sustained injuries. The trial court convicted A-3 for causing the death of 'AD' and acquitted all other accused. However, on appeal, the High

Court convicted the appellant alongwith four others while maintaining the acquittal of others.

In the instant appeal, two other convicts had also joined the appellant, but as they did not comply with court's order for surrendering, the appeal with regard to them was dismissed.

Dismissing the appeal, the Court

HELD: 1.1 PW 1, the brother of deceased 'AD', who is also an injured eye-witness, has clearly and unequivocally supported the prosecution case and deposed about the manner in which the accused had done away with the two deceased and his version is fully corroborated by other eye-witnesses, PWs 2, 3, 4, 8 and 11. The specific part played by the various accused persons, including the appellant, has been narrated by these witnesses. The High Court has correctly appreciated the evidence. [paras 7 and 8] [1113-D-E, H; 1114-A-B]

1.2 The High Court has held that the trial court was completely in error by over-looking some crucial and important evidence and in placing much reliance on non-mention of name of accused persons in the inquest report. The basic purpose of holding an inquest is to report regarding the cause of death, namely whether it is suicidal, homicidal, accidental etc. and non-mention of few accused persons therein is of no consequence. [paras 9 and 10] [1114-D-G]

Pedda Narayana and others v. State of Andhra Pradesh **1975 Suppl. SCR 84 = (1975) 4 SCC 153;** *Amar Singh v. Balwinder Singh and Others* **2003 (1) SCR 754 = (2003) 2 SCC 518;** *Radha Mohan Singh @ Lal Saheb and Others v. State of U.P.* **2006 (1) SCR 519 = (2006) 2 SCC 450 - referred to.**

1.3 Merely because the FIR was placed before the Magistrate three days after registration of FIR, it cannot be said that the FIR was anti timed, anti dated and fabricated. In fact, no question was put to the Investigating Officer as to the cause of delay in sending FIR to the Magistrate.[para 11] [1115-E-F]

State of Jammu and Kashmir v. S. Mohan Singh and Another **(2006) 9 SCC 272 - referred to.**

1.4 Further, merely because a witness is a relative of the deceased is not a reason for discarding his evidence. Evidence of relatives can be acted upon if the court finds that the evidence of such a witness is reliable and trustworthy. Besides, PW2 was not a relative of deceased 'AD'. A close scrutiny of the evidence rendered by the eye-witnesses clearly establishes the involvement of the accused. Further, in their cross examination, there is no serious contradiction, omission, infirmity, defect or lacuna which can make their evidence unbelievable and to make them untrustworthy witnesses. Their statements have been fully corroborated by PW 12, the autopsy surgeon, relating to the nature of injuries and places of injuries on the person of the deceased. [para 13-14] [1116-B-C, E-G]

Seeman @ Veeranam v. State by Inspector of Police **(2005) 11 SCC 142;** *Alamgir v. State (NCT, Delhi)* **2002 (4) Suppl. SCR 88 = (2003) 1 SCC 21;** *Dalbir Kaur and Others v. State of Punjab* **1977 (1) SCR 280 = (1976) 4 SCC 158;** *State of U.P. v. Jodha Singh and Others* **(1989) 3 SCC 465;** *Labh Singh and Others v. State of Punjab* **(1976) 1 SCC 181;** *Visveswaran v. State represented by SDM* **2003 (3) SCR 978 = (2003) 6 SCC 73 - referred to.**

1.5 Considering the totality of the evidence and circumstances of the case, this court is of the view that the High Court has rightly held the appellant guilty u/s 302 read with s.148 of IPC for the murder of 'AD' and awarded him the sentence of life imprisonment. [para 15] [1117-B]

Case Law Reference:

1975 Suppl. SCR 84	**referred to**	**para 10**
2003 (1) SCR 754	**referred to**	**para 10**
2006 (1) SCR 519	**referred to**	**para 10**
(2006) 9 SCC 272	**referred to**	**para 12**
(2005) 11 SCC 142	**referred to**	**para 13**
2002 (4) Suppl. SCR 88	**referred to**	**para 13**
1977 (1) SCR 280	**referred to**	**para 13**
1989 (3) SCC 465	**referred to**	**para 13**
1976 (1) SCC 181	**referred to**	**para 13**
2003 (3) SCR 978	**referred to**	**para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1268 of 2007.

From the Judgment and order dated 28.11.2006 of the High Court at Calcutta in G.A. No. 22 of 1987.

Rupali S. Ghosh, Sanjoy Kumar Ghosh, Deba Prasad Mukherjee for the Appellant.

Chanchal Kr. Ganguli, Soumi Jundu, Avijit Bhattacharjee for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. The appellant, the 10th accused in Sessions Case No.20 of 1986, was charge-sheeted along with others for the offences punishable under Section 147, 148, 149, 323 and 302 of the Indian Penal Code and

Section 25/27 of the Arms Act. The Trial Court, after appreciation of the oral and documentary evidence vide its judgment dated 22.4.1987 acquitted all the accused persons, except Accused No.3 Tarun Mondal, who was convicted for the offences punishable under Section148 and 302 of IPC for causing the murder of Amrita Dome and sentenced him to suffer imprisonment for life under Section 302 IPC.

2. The State of West Bengal, aggrieved by the order of acquittal, preferred G.A. No.22 of 1987 before the High Court of Calcutta. The High Court vide its judgment dated 28.11.2006 partly allowed the appeal and convicted the appellant along with four others, while maintaining the order of acquittal passed by the trial Court, in respect of rest of the accused persons. Tarun Mondal, 3rd accused, was further found guilty of the murder of Sultan Khan.

3. We are, in this case, concerned only with the appeal filed by Guiram Mondal, 10th accused. The prosecution case, in short, is that on 26.4.1984 at about 12 hours the accused persons formed an unlawful assembly with deadly weapons and took along with them Amrita Dome and Sultan Khan through a kuchha road in village Pechaliya and, in the process, assaulted both Amrita Dome and Sultan Khan. Some of the witnesses, who are relatives of the deceased Amrita Dome, tried to save him but they were also assaulted by the accused persons and the informant Sadananda Dome (PW1) was shot at by a pipe-gun and he sustained injuries. While the accused persons were proceeding as such, Amrita Dome managed to escape from their clutches and took shelter in the house of Monohar Mondal @ Manu Mondal (PW2). The accused persons, however, chased Amrita Dome and brought him out of the house of Manu Mondal and killed him in the passage or pathway lying between the house of Manu Mondal and his nephew Sahadeb Mondal. Accused persons after murdering Amrita Dome left the spot to chase Sultan Khan, who was left injured in front of Durga temple which was close to the house

of Monohar Mondal. Sultan Khan was also murdered by them and they carried away his death body to the grazing field and left it there.

4. Sadananda Dome (PW1) then passed this information, which was recorded in writing by PW 15 on 26.4.1984 at 6.05 PM and the same was treated as the FIR. The same was sent to the police station and was received there at 7.25 PM and on the basis of that FIR a case was registered against the accused persons and they were charge-sheeted for the offences, already mentioned earlier. PW 15, the Investigating Officer visited the place of occurrence and prepared the sketch map and conducted the inquest in the presence of PW 10, the Pradhan of the Gram Panchayat and sent both the dead bodies for post-mortem examination through constable PW 13.

5. PW 12 Dr. S. Nath, conducted the post-mortem on both the dead bodies and opined that the death was due to effect of head injury and associated injuries which were anti mortem and homicidal in nature. PW 15 on 13.5.1984 arrested various accused persons including the appellant and were brought before the trial court. On the side of the prosecution 16 witnesses were examined. PW 1 Sadananda Dome, the first informant is the brother of the deceased Amrita Dome. Monohar Mondal, in whose house the deceased Amrita Dome took shelter, was examined as PW2. Menoka Dome, wife of deceased Amrita Dome, was also examined as PW 3 and Sankar Dome, the father of the deceased Amrita Dome was also examined as PW 5. On the side of the defence, Joydev Garian DW1 was examined.

6. Dr. S. Nath was examined as PW12, who conducted the post-mortem on the dead bodies on 27.4.1984 deposed that on the dead body of Amrita Dome he found (1) one incised wound on right lateral aspect of forehead 2.5" x 2" x .5" (2) one incised wound in mid-region of forehead 3" x 2" x .5" (3) one incised would 3" below the midpoint of chin 4" x 2" x 2.5" laryns

and tranches cut off. He also noticed fracture of 4th, 5th ^ 6th ribs on the right side (2) fracture of 4th and 5th ribs on the right side (3) right lung was found ruptured. Further, it was also noticed a fracture of frontal bone. PW 12 has opined that the death was due to the effects of head injury and associated injury was ante mortem and homicidal in nature. PW12 conducted the post-mortem over the dead body of Sultan Khan and found (1) one incised would 3" x 2" x 1" on back portion of head (2) one incised would on left lateral aspect of neck 2" x 1.5" x 1" and (3) one incised would 4" x 3" x 5" x4" aspect of neck 2" x 1.5" x 1". He also found fracture of 4th, 5th, 6th and 7th rib of the right side and fracture of 4th, 5th and 6th ribs of the left side. He found fracture of occipital bone and both the lungs were ruptured. In his opinion, death was due to head injury and associated injury ante mortem and homicidal in nature.

7. PW 1, the brother of the deceased Amrita Dome, who is also an injured witness, had clearly and unequivocally supported the prosecution case and stated that he had seen the accused persons armed with deadly weapons like bhojali, axe, pipe gun and dragger etc. catching hold of his brother Amrita Dome and one Sultan Khan. Amrita Dome had managed to escape from the clutches of the accused persons and took shelter in the house of Monohar Mondal. PW1 also deposed that Sultan Khan in that process was half dead and lying in front of Durga Temple. PW 1 deposed that the accused persons took Amrita Dome out of the house of Monohar Mondal and assaulted with lathi, dagger, bhojali etc. PW 1 stated that he tried to save his elder brother but was shot at by a pipe-gun which caused injury on his shoulder. PW 1 also noticed that Kristo Gorain cut the throat of Sultan Khan and thereafter brought Sultan Khan to a grazing field and left the body there.

8. We have also gone through the evidence of the eye-witnesses PWs 2, 3, 4, 8 and 11 and their versions corroborate fully the version of PW 1, the first informant and eye-witness,

relating to the incident of assault and murder of Amrita Dome and Sultan Khan. The specific part played by the various accused persons, including the appellant, has been narrated by those witnesses. PW 2 had deposed that on the date of the incident he was in the cow-shed and as soon as he heard a hue and cry, he came out and found that some persons, including the appellant, forcibly taking away Amrita Dome from the house of Manu Mondal. PW 2 had also requested the accused persons to not to assault Amrita Dome but was pushed away by the accused persons. Later he found Amrita Dome dead and the body was lying on the path-way between his house and the house of Sadananda Mondal.

9. PW 3, the wife of Amrita Dome, also fully supported the prosecution case and also PW8, the mother of the deceased Amrita Dome and P.W.11, the wife of the brother of the deceased. The High Court has correctly appreciated the evidence rendered by those witnesses. The High Court after examining the oral and documentary evidence came to the conclusion that the trial court was completely in error by over-looking some crucial and important evidence and placed much reliance on non-mention of name of accused persons in the inquest report. The High Court, in our view, correctly applied the legal principle that non-mention of name of the few accused persons in the inquest report is of no consequence.

10. The inquest report normally would not contain the manner in which the incident took place or the names of eye-witnesses as well as names of accused persons. The basic purpose of holding an inquest is to report regarding the cause of death, namely whether it is suicidal, homicidal, accidental etc. Reference may be made to the Judgment of this Court in *Pedda Narayana and Others v. State of Andhra Pradesh* (1975) 4 SCC 153 and *Amar Singh v. Balwinder Singh and Others* (2003) 2 SCC 518. In *Radha Mohan Singh @ Lal Saheb and Others v. State of U.P.* (2006) 2 SCC 450, this Court held that the scope of inquest is limited and is confined

to ascertainment of apparent cause of death. Inquest is concerned with discovering whether in a given case the death was accident, suicidal or homicidal, and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted. The details of overt acts need not be recorded in the inquest report. The High Court has rightly held that the manner and approach of the trial court in disbelieving the prosecution story by placing reliance on the inquest report was erroneous and bad in law.

11. We also fully agree with the views expressed by the High Court that the FIR was not anti dated, anti timed or was subsequently created. The verbal submission of PW 1 was reduced into writing by PW 15 and the same was treated as the FIR (Ext.3). The formal FIR was marked ext.3/3. Those documents would clearly indicate that the incident took place on 26.4.1984 at about 12 hrs and the FIR was recorded at village Pechaliya at 6.05 PM and after it was sent to the Khairasole police station which was registered as Khairasole P.S. Case No.10 dated 26.4.1984 at 7.25 P.M. There is nothing to show that the FIR was anti dated, anti timed or fabricated. Merely because the FIR was placed before the learned Magistrate on 30.4.1984, three days after registration of FIR, it cannot be said that the FIR was anti timed, anti dated and fabricated. In fact, no question was put to the Investigating Officer as to the cause of delay in sending FIR to the Magistrate.

12. This Court in *State of Jammu and Kashmir v. S. Mohan Singh and Another* (2006) 9 SCC 272 held that the mere delay in sending the First Information Report to a Magistrate cannot be a ground to throw out prosecution case if the evidence adduced is otherwise found credible and trustworthy. We are of the view that the High Court has rightly held that there is no reason to hold that the FIR was a fabricated document or anti dated or anti timed.

13. We are also not impressed by the argument of Ms. Rupali S Ghose, learned counsel appearing for the appellant, that not much reliance could be placed on the evidence of eye-witnesses as most of them are relatives of Amrita Dome and not a single independent witness was examined by the prosecution. In our view, merely because a witness is a relative of the deceased is not a reason for discarding his evidence. Many a time, strangers will not come forward depose as witnesses, even if they have witnessed the crime. Further, possibility of influencing such witnesses is also not uncommon. Evidence of relatives can be acted upon if the court finds that the evidence of such a witness is reliable and trustworthy. In this connection reference may be made to the Judgments of this Court in *Seeman @ Veeranam v. State by Inspector of Police* (2005) 11 SCC 142, *Alamgir v. State (NCT, Delhi)* (2003) 1 SCC 21, *Dalbir Kaur and Others v. State of Punjab* (1976) 4 SCC 158, *State of U.P. v. Jodha Singh and Others* (1989) 3 SCC 465, *Labh Singh and Others v. State of Punjab* (1976) 1 SCC 181, *Visveswaran v. State represented by SDM* (2003) 6 SCC 73.

14. PW2, Monohar @ Manu Mondal, it may be noted, was not a relative of Amrita Dome. A close scrutiny of the evidence rendered by the eye-witnesses, some of which are relative of the deceased, clearly establishes the involvement of the accused. Further, in the cross examination of the eye witnesses, we have not noticed any serious contradiction, omission, infirmity, defect or lacuna which can make their evidence unbelievable and to make them untrustworthy witnesses. Further, the evidence of eye-witnesses have been fully corroborated by the evidence of PW 12, the autopsy surgeon relating to the nature of injuries and places of injuries on the person of the deceased. We notice that, earlier, the appeal was filed by Guiram Mondal along with Kisto Gorain and Madhusudan Mondal. Appeal was initially dismissed on 17.9.2007 since they had not complied with the orders of this Court dated 19.4.2007 for surrendering. Later, the appellant

herein was arrested and his case was restored on 28.11.2008 by this Court.

15. Considering the totality of the evidence and circumstances of the case, we are of the view that the High Court has rightly reversed the judgment of the trial court after finding the appellant guilty under Section 302 read with Section 148 of IPC for the murder of Amrita Dome and awarded the sentence of life imprisonment. We, therefore, find no reason to interfere with the judgment of the High Court. The appeal lacks merit and the same is dismissed.

R.P. Appeal dismissed.

LITTA SINGH & ANR.
v.
STATE OF RAJASTHAN
(Criminal Appeal No. 805 of 2009)

APRIL 26, 2013

[P. SATHASIVAM AND M.Y. EQBAL, JJ.]

PENAL CODE, 1860:

s.304 (part II)/34 - Accused causing injuries to victim - Death of victim the following day - Conviction u/s 302/34 and sentence of life imprisonment, affirmed by High Court - Held: The instant case falls u/s 304 (part II) - Although appellants had no intention to cause death but it can safely be inferred that they knew that such bodily injury was likely to cause death - Therefore, appellants are guilty of culpable homicide not amounting to murder - Accordingly judgments of courts below are modified and conviction u/s 302 is converted to 304(part-II) - Appellants are sentenced to ten years' imprisonment.

WORDS AND PHRASES:

Expression, 'maro maro' - Connotation of.

The appellants along with their father were prosecuted for causing death of the brother of PW1. The prosecution case was that two days prior to the incident a quarrel took place between the deceased and the father of the appellants. On the date of incident at about 7 p.m. the appellants and their father assaulted the deceased with sticks and 'gandasi'. He succumbed to his injuries the following day in the hospital. The trial court convicted both the appellants u/s 302/34 IPC and sentenced them to imprisonment for life. Their father was acquitted giving him benefit of doubt. The High Court affirmed the conviction and the sentence.

Disposing of the appeal, the Court

HELD: 1.1 There is no evidence from the side of the prosecution that the accused persons pre-planned to cause death and with that intention they were waiting for the deceased coming from the field and then with an intention to kill the deceased they assaulted him. The trial court noticed the evidence of PWs 1, 2 and 3 who alleged to have heard the noise "MARO MARO", which can only mean to beat or to cause assault and not 'to kill'. The High Court has wrongly mentioned the term as 'kill'. However, considering the nature of the injury caused to the deceased and the weapons i.e. 'lathi' and 'gandasi' (sickle) used by them, it cannot be ruled out that they assaulted the deceased with the knowledge that the injury may cause death. [paras 13 and 16 -17] [1129-C; 1131-A-B, D-E]

1.2 It is well settled proposition of law that the intention to cause death with the knowledge that the death will probably be caused, is very important consideration for coming to the conclusion that death is indeed a murder with intention to cause death or the knowledge that death will probably be caused. From the testimonies of the witnesses, it does not reveal that the accused persons intended to cause death and with that intention they started inflicting injuries on the body of the deceased. Even more important aspect is that while they were beating the deceased the witnesses reached the place and shouted whereupon the accused persons immediately ran away instead of inflicting more injuries with intent to kill the deceased. [para 18] [1131-F-G]

Gurdip Singh & Anr. vs. State of Punjab, **(1987) 2 SCC 14 relied on.**

1.3 In the instant case, after analyzing the entire evidence, it becomes evidently clear that the occurrence

took place suddenly and there was no premeditation on the part of the appellants. There is no evidence that the appellants made special preparation for assaulting the deceased with the intent to kill him. There is no dispute that the appellants assaulted deceased in such a manner that the deceased suffered grievous injuries which was sufficient to cause death, but this Court is convinced that the injury was not intended by the appellants to kill the deceased. [para 20] [1133-C-E]

1.4 In the considered opinion of the Court the instant case falls u/s 304 (part II) IPC. Although the appellants had no intention to cause death but it can safely be inferred that they knew that such bodily injury was likely to cause death. Therefore, the appellants are guilty of culpable homicide not amounting to murder. Accordingly, the judgments of the courts below are modified and the conviction u/s 302 is converted to 304 (part-II) IPC. The appellants are sentenced to ten years' imprisonment. [paras 21-22] [1133-E-G]

Ishwar Singh vs. State of U.P., **(1976) 4 SCC 355 and** *State of U.P. vs. Madan Mohan & Ors.,* **AIR 1989 SC 1519 - cited.**

Case Law Reference:

(1976) 4 SCC 355	**cited**	**para 10**
1989 AIR 1519	**cited**	**para 10**
1987 (2) SCC 14	**referred to**	**para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 805 of 2009.

From the Judgment and order dated 08.05.2008 of the High Court of Judicature for Rajasthan at Jodhpur in D.B. Criminal Appeal No. 239 of 2002.

Sushil Kr. Jain, Puneet Jain, Anurag Gohil, Pratibha Jain for the Appellants.

Dr. Manish Singhvi, AAG, Amit Lubhaya, Milind Kumar for the Respondent.

The Judgment of the Court was delivered by

M.Y. EQBAL, J. 1. The present appeal by special leave arises out of the judgment and order dated 8th May, 2008 of the High Court of Judicature for Rajasthan at Jodhpur in D.B. Criminal Appeal No. 239 of 2002 whereby the appeal of the appellants herein was dismissed upholding the judgment and order dated 23rd January, 2002 of the Additional Sessions Judge in Sessions Case No. 16 of 2001 whereby the appellants were convicted under Section 302/34 IPC and sentenced to imprisonment for life and a fine of rupees one thousand each and in default in payment of fine to further undergo rigorous imprisonment for one month each in addition.

2. During the pendency of this appeal, appellant No.2 Kalla Singh was granted bail by this Court on 3rd February, 2010.

3. The case of the prosecution in brief is that complainant Baltej Singh (PW-1) submitted a written report on 7th February, 2001 (Ex.P/1) in the police station Sadulshahar upon which FIR (Ex. P/17) was drawn and a case under Section 307, 341, 323/34 was registered. It is alleged in the said report Ex.P/1 that to pass time the villagers and complainant and his family members used to sit near the fire during the time of winter and cold in front of house of Mukund Singh. Boga Singh, co-accused was not liking sitting of brother of complainant Hansraj Singh and, therefore, two days before the date of incident quarrel took place between Hansraj Singh and Boga Singh. On 7th February, 2001 at about 7.00 p.m., hearing the voice MARO MARO coming from the side of lane in front of the house of Mukund Singh, the complainant, Yadvinder Singh, Mukund Singh and Gurjant Singh ran towards the place from

where the voice was coming. There they saw that accused Boga Singh and his two sons Litta Singh and Kalla Singh (appellants herein) were beating Hansraj Singh with *lathis* and *gandasi*. Kalla Singh had *gandasi* with him who inflicted injury by *gandasi* on the head of Hansraj Singh and others gave beating by *lathis*. The complainant, Mukund Singh, Yadvinder Singh and Gurjant Singh shouted upon which the accused ran away. The complainant took the victim to the hospital and got him admitted. He lodged report Ex. P/1 in the police station Sadulshahar at 10.00 p.m. on the basis of which FIR No. 29/2001 (Ex.P/17) was registered under Sections 307, 341, 323/34 IPC. The victim died on 8th February, 2001 during treatment in the hospital on which Section 302 IPC was added. During investigation, site was inspected on 8th February, 2001 and blood soil and sample soil were collected. All the three accused were arrested. The weapons of offence were also recovered. The seized articles were sent to Forensic Science Laboratory (FSL) for report. After recording the statements of the witnesses and obtaining opinion of the FSL (report Ex.P/24) and post mortem report (Ex.P/14), the challan was filed against the accused persons under Section 302/34 IPC. The accused denied the charges and sought trial. In support of its case, the prosecution examined as many as nine witnesses out of whom PW-1 Baljet Singh, PW-2 Yadvinder Singh and PW-3 Mukund Singh are stated to be eye-witnesses, PW-6 Dr. B.B. Gupta & PW-7 Dr. Manish Ahuja are witnesses regarding treatment of the deceased and post mortem report, PW-8 Chandra Prakash Parick as Investigating Officer and the other witnesses i.e. PW-4 Sewa Singh, PW-5 Lakharam & PW-9 Haranarayan are witnesses to prove the recovery/seizure of the articles and sending them to the FSL. Each of the accused denied the incriminating circumstances put to them and stated that they have been falsely implicated. The accused Boga Singh took further stand that the deceased Hansraj Singh had illicit relation with wife of Gurjant Singh and the same being objected by him he has been wrongly implicated in the case of

murder. However, none of the accused led any evidence in defence.

4. The following injuries were found on the body of the deceased on performing post mortem:

1. Incised wound 4 cm x 1/5 cm x bone deep was on left forearm. The bones of lower side were fractured.

2. Incised wound 20 cm x 1/4 cm x skin deep was on the right forearm.

3. Abrasion 5 cm x 1/8 cm on right shoulder.

4. Abrasion 5 cm x 1/8 cm on right shoulder.

5. Abrasion 7 cm x ½ cm was present on the waist.

6. Abrasion 7 cm x ½ cm was present on the waist.

7. Cyanosed mark with swelling. There was 8 cm abrasion within the injury on left temple which 1 cm x 1 cm on central part.

8. Cyanosed and swelled 7 cm x 7 cm on right temple 1 cm x 1 cm abrasion was present inside the same injury.

9. Cyanosed and swelled 6 cm x 8 cm clotted blood was present under the skin on cutting back side of head which was extending from injury No. 7 upto the lower part of injury No. 9. On cutting the bone blood had coagulated which duramatter was in the brain which was in the left parietal region, occipital region and right tempo-parietal region.

10. Cyanosed 10 cm x 1 cm on right knee.

5. According to the doctor (PW-6), all the injuries were ante mortem and the deceased died due to shock and coma arising out of head injury Nos. 7, 8 and 9. Injury Nos. 7 and 8 was the cause of death in ordinary course of nature.

6. The trial court on the basis of statement of PW-6 made on the basis of post mortem report (Ex.P/14) held that the death of deceased Hansraj Singh was homicidal. As regards credibility of the testimony of eye-witnesses (PW-1, PW-2 and PW-3), the trial court observed (in para 18) that it may be true that the place where all these three witnesses were standing seeing the accused directly from there is not at all possible but their statement is that they heard the call MARO MARO and then they rushed there; there may be exaggeration in the statements of PW-1 and PW-2 regarding seeing the accused because both of them are close relatives of the deceased and they have made statement of seeing the accused directly that they wanted to give conclusive evidence on this point that they saw accused while assaulting from the very beginning but on the basis of their statement that they have seen the accused from that place where they were standing, on this basis it cannot be agreed that they did not hear the call MARO MARO; and since there was a call of MARO MARO, therefore all these three witnesses rushed there and they saw that the accused were assaulting the deceased Hansraj Singh, cannot be disbelieved. As regards discrepancies and shortcomings in the statements, the trial court held (in para 19) that on this ground the entire prosecution case cannot be treated untrue because there is no such case in which such discrepancies of general nature do not exist and the court has to see that how much prosecution evidence is reliable in respect of chief statement of the occurrence. On the argument that PW-1 and PW-2 being close relatives of the deceased their statements cannot be believed, the trial court did not accept the same observing that their arrival at the spot of occurrence was natural because they made statement of reaching the place of occurrence on hearing the call of MARO MARO and the place of occurrence is not very far from their house. On the argument that Gurjant Singh being the eye-witness has not been examined by the prosecution, the trial court held that it is for the prosecution as to which witnesses are to be examined and when the same fact is proved through reliable witness then for

corroboration of it on the same point by getting examined more than one witnesses is not required.

7. Ultimately, the trial court held that the accused Litta Singh and Kalla Singh caused fatal injuries to the deceased Hansraj Singh by assaulting him with sickle (gandasi) and lathi with the motive of causing his death as a result of which he died but the fact of any participation of accused Boga Singh in the said offence is not found to be proved beyond reasonable doubt and therefore, giving benefit of the doubt accused Boga Singh was acquitted. The appellants herein were convicted under Section 302/34 IPC and sentenced as stated above.

8. Aggrieved by the judgment of the trial court, the appellants preferred an appeal before the High Court. The High Court after analyzing the facts of the case and re-appreciating the testimonies of the witnesses, affirmed the findings recorded by the trial court and dismissed the appeal. Hence, this appeal by special leave.

9. Mr. Sushil Kumar Jain, learned counsel for the appellants assailed the impugned judgment and order of conviction as being contrary to the facts and evidence on record. Learned counsel firstly submitted that the courts below have erred in placing reliance on the statements of the PW-1 Baltej Singh, PW-2 Yadvinder Singh, PW-3 Mukund Singh, who were ex facie interested witnesses inasmuch as PW-1 and PW-2 are brother and son of the deceased and Mukund Singh was inimical towards the appellants. Learned counsel submitted that since the statements of these witnesses had been disbelieved qua Boga Singh, the High Court has gravely erred in placing reliance on the statements of these witnesses without any corroboration by independent witnesses. Learned counsel drew our attention to the judgment of the trial court and submitted that the High Court ought to have considered the findings recorded by the trial court in para 22 of the judgment. Para 22 of the trial court judgment reads as under:-

"As far as there is the question of the accused Boga Singh though statements are also against him similar to PW.1, PW.2 and PW.3 that he also beat the deceased with lathi but our opinion in this regard is that PW.1 and PW.2 have made statements regarding the accused Boga Singh that accused Boga Singh raised the call of MARO MARO but in the statement under Section 161 Cr.P.C. of all these three there is no such statement that who gave a call of MARO MARO was the accused Boga Singh. It is revealed from this that the statement made by PW.1 and PW.2 regarding giving a call of MARO MARO by accused Boga Singh has been made for ensuring that accused Boga Singh be also fully included in this case. PW.3 Mukand Singh does not make such statement in his statement in the court that accused Boga Singh raised a call of MARO MARO and it was natural for him that he only heard the call did not see the accused because at that time he was feeding bread to the dogs in front of his house. PW.1 and PW.2 have made this excess statement in the court regarding Boga Singh due to which doubt is created that whether in fact call of MARO MARO was made by Boga Singh only because the place where these people were standing and in the time of occurrence it was not possible to see for them that the call was given by him. In addition to this there was no blood on the lathi which accused Boga Singh got recovered on his information. Therefore, this also creates doubt that the lathi which was seized was used in causing injuries to the deceased. There is one more practical fact that when his two young sons in which the age of accused Kala Singh is 20 years and accused Leeta Singh is 25 years old as has been told by them in their statements under Section 313 Cr.P.C, and both have sufficient capacity of causing injuries to the deceased then this accused was having the necessity that he also cause injuries to the deceased. His presence may be at the spot of occurrence because the manner in which PW.1, PW.2 and PW.3 came on hearing MARO MARO then he may

have also come there but neither he gave a call of MARO MARO and instigated both his sons in any manner and nor he took any part in causing injuries to the deceased. Therefore, the statements of PW.1, PW.2 and PW.3 concerning him cannot be believed and giving benefit of doubt to him is justified."

10. Learned counsel submitted that the allegation in the FIR made against all the three accused persons and the evidence adduced by the prosecution cannot be segregated. Since one of the accused Boga Singh has been acquitted, then there is no reason why the appellants may not be acquitted from the charges. Learned counsel further submitted that the genesis of the incident has not been established as to which injuries were fatal. Learned counsel referred the decisions of this Court in the case of *Ishwar Singh vs. State of U.P.,* (1976) 4 SCC 355 and *State of U.P. vs. Madan Mohan & Ors.,* AIR 1989 SC 1519. Learned counsel submitted that the non-examination of Gurjant Singh and the persons of the locality is fatal in the instant case as no explanation has been given for their non-examination. Lastly, learned counsel made an alternative argument and submitted that there was no common intention of the appellants to kill the victim. It may be that because of some dispute and quarrel between the appellants and the victim, the appellants might have tried to teach lesson to the victim and in that they have allegedly inflicted injuries which have caused the death of the victim. And in the said premises, the conviction of the appellant may be altered from Section 302 IPC to Section 304 Part II IPC or at the most under Section 304 Part-I IPC.

11. On the other hand, Dr. Manish Singhvi, learned counsel appearing for the prosecution side submitted that there are direct evidence in the form of eye-witnesses, namely, PW-2 and PW-3. Learned counsel submitted that the weapons used by the appellants were recovered and blood found on the said weapons. Learned counsel submitted that the head injuries i.e.

injury Nos. 7, 8 and 9 are independently sufficient to cause the death. Learned counsel submitted that Gurjant Singh may not be called as best witness but one of the witnesses. Since the evidence of PWs 1, 2 and 3 was sufficient to establish the case, non-examination of Gurjant Singh is not in any way fatal to the prosecution side.

12. We have carefully examined the evidence adduced by the prosecution and also the complaint lodged by the complainant on the basis of which the case was registered against the appellant Boga Singh who has been acquitted in the case. Much stress and emphasis has been given to the word "MARO MARO" coming from the side of lane in front of the house of Mukund Singh. Hearing the voice, the accused person alleged to have run towards the place and saw that the accused Boga Singh and his two sons Litta Singh and Kalla Singh were beating the deceased with lathi and gandasi. In the FIR (English translation of the same has been annexed as Annexure P-1), it appears that the informant alleged that when he along with two others ran in front of the house of Mukund Singh, a loud voice "MARO MARO" was heard. On hearing the turmoil, the complainant and PWs 2 and 3 rushed and saw that the accused persons were assaulting the deceased. When the complainant and PWs 2 and 3 raised commotion, then the accused persons ran away. PW-1, who is the complainant, in his evidence, has deposed otherwise. According to his evidence, there was hue and cry, Boga Singh was saying "KILL KILL". Hearing the hue and cry, he went running there and saw that the accused persons were beating the deceased. PW-2 Yadvinder Singh in his deposition has said that on hearing the sound of "MARO MARO" he saw that Boga Singh was saying "MARO MARO", then they went there and saw that three accused persons were beating his father. When they reached nearby, then these persons fled away. PW-3 Mukund Singh has said that the incident was of about six months before. While he was feeding bread to the dogs, then sound of "MARO

MARO" reached. He reached there running and saw that the accused persons were beating Hansraj Singh.

13. The trial court proceeded on the basis of written report (Ex. P/1) submitted in the police station wherein the allegation was that the deceased while coming home from the field at about 7 O'clock and when he reached in the lane in front of the house of Mukund Singh a loud voice "MARO MARO" was heard. In the judgment, the word "MARO MARO" was described as "MAR DO MAR DO". The trial court further noticed the evidence of PWs 1, 2 and 3 who alleged to have heard the noise "MARO MARO". The trial court recorded its opinion which is quoted hereinbelow:-

" …… My opinion in this regard is that it may be true the place where all these three witnesses were standing seeing the accused from there is not at all possible because the occurrence is about quarter to seven - seven O'clock evening on 7th February 2001 and on this day sun sets at almost 6½ O'clock and the dark after half an hour after sun set is that much in which it is not possible to see the accused directly but their statement is that they heard the call MARO MARO then they rushed there. There may be exaggeration in the statements of PW-1 and PW-2 regarding seeing the accused because both of them are close relatives of the deceased and they have made statement of seeing the accused directly that they wanted to give conclusive evidence on this point that they saw accused while assaulting from the very beginning but on the basis of their statement that they have seen the accused from that place where they were standing, on this basis it cannot be agreed that they did not hear the call of MARO MARO. The statement of PW.1, PW.2 and PW.3 that they had gone there on hearing MARO MARO and among them the statement of PW.1 and PW.2 is certain that Banga Singh was giving a call of MARO MARO but in it their evidence may be doubtful that in fact Bonga Singh

made a call of MARO MARO but since there was a call of MARO MARO therefore all these three witnesses rushed there and they saw that the accused were assaulting deceased Hansraj Singh. The place of all these witnesses is though not very far from the place of occurrence hence, their going to the place of occurrence on hearing the sound of MARO MARO and having gone there evidence of seeing the accused assaulting Hansraj Singh cannot be disbelieved. Though the Advocate for the accused have given the argument in their arguments that the Investigation Officer has not shown that place wherefrom they were seeing the accused by standing but it does not have any adverse effect because it was necessary for the Investigation Officer that he would show the spot of occurrence and the place in the vicinity not that place wherefrom any witness may have seen occurrence. Had all the three witnesses would have made the statement of not going at the place of occurrence on hearing the sound of MARO MARO and would have made the statement of seeing the occurrence standing only at that place then this argument was having the importance that how they had seen the occurrence while standing at the place where they were standing. When they reached the place of occurrence on hearing the call then the state of their being standing or place becomes secondary. Therefore, the argument given by the learned Advocate for the accused does not have any force."

14. However, with regard to the accused Boga Singh, the trial court recorded the reasoning in para 22 of the judgment while acquitting him.

15. Curiously enough, the High Court while narrating the incident as contained in Ex. P/1, has wrongly mentioned that the witnesses have heard the voice "KILL KILL" and hearing the shout, the witnesses reached the spot and saw the accused persons beating the deceased.

16. The word "MARO MARO" can never mean "KILL KILL". The word "KILL" means to cause the death of a person or animal. It also means to put some one to death, to murder, to slaughter. On the other hand, the word "MARO MARO" means to beat, to cause assault. Here the thin line of distinction lies between the two words. If the voice is "KILL KILL", it means to cause death of the person and to finish him. Had the intention of the person been to make such call or voice "KILL KILL" and on the basis of such call the accused persons had assaulted the deceased, then the intention would have been clearly to kill and murder the deceased. Here on hearing the call "MARO MARO", the accused persons with Boga Singh started beating the deceased.

17. Considering the nature of the injury caused to the deceased and the weapons i.e. lathi and gandasi (sickle) used by them, it cannot be ruled out that they assaulted the deceased with the knowledge that the injury may cause death of the person. Moreover, there is no evidence from the side of the prosecution that the accused persons pre-planned to cause death and with that intention they were waiting for the deceased coming from the field and then with an intention to kill the deceased they assaulted him.

18. It is well settled proposition of law that the intention to cause death with the knowledge that the death will probably be caused, is very important consideration for coming to the conclusion that death is indeed a murder with intention to cause death or the knowledge that death will probably be caused. From the testimonies of the witnesses, it does not reveal that the accused persons intended to cause death and with that intention they started inflicting injuries on the body of the deceased. Even more important aspect is that while they were beating the deceased the witnesses reached the place and shouted whereupon the accused persons immediately ran away instead of inflicting more injuries with intent to kill the deceased.

19. In the case of *Gurdip Singh & Anr. vs. State of Punjab,*

(1987) 2 SCC 14, this Court came across a similar type of incident, where the prosecution case was that one Maya Bai had two sons and two brothers. She was the mother of accused Nos. 1 and 2 and sister of accused Nos. 3 and 4. The deceased was one Kishore Singh. The accused suspected that Mayabai had illicit relations with the deceased. Hence one day when the deceased was returning from village and when he reached the field of Kashmiri Lal, the accused came out of the wheat field. The first appellant had a kirpan and the second appellant had kappa. It was alleged that the four accused took deceased on wheat field and threw him on the ground. One of the acquitted accused Jit Singh caught hold of arms of the deceased and the two appellants caused injuries with the weapons in their hands. There was an alarm created by Lachhman Singh, PW-3, which had attracted PW-4 and Mohinder Singh. When they reached the spot, the accused ran away with their weapons. The deceased had seven injuries on his body. Injury No.7 was fatal according to the doctor, who examined him. It was argued that the prosecution had not come forward with true case as to how the incident happened. The trial Judge found two accused Jit Singh and Teja Singh not guilty, since the case against them was not proved beyond the reasonable doubt. The appellants were convicted because they had weapons with them unlike the acquitted accused. This Court on consideration of the entire evidence did not interfere with the findings that the appellants were responsible for the death of the deceased by attacking him with the weapons in their hands, but on reappraisal of the entire evidence, the Court found it difficult to agree with the trial court that the appellants were guilty of the offence under Section 302 IPC. Hence, converting the offence under Section 304 Part I, this Court observed:-

> "6. The trial Judge was not wholly justified in observing that there was no evidence about the so-called illicit relationship between Maya Bai and Kishore Singh, the deceased. The materials available create considerable doubt in our mind as to whether the

appellants really intended to kill Kishore Singh or whether his misconduct pushed them to wreak revenge against the deceased and in this pursuit attacked him. We are not unmindful of the fact that the 7th injury noted in the post-mortem certificate is in the ordinary course sufficient to cause the death of the deceased. But we are not fully satisfied that the appellants intended to kill the deceased. The correct approach on the evidence and other circumstances in this case, would according to us, be to find the accused guilty under Section 304 Part I, and to sentence them under that section."

20. After analyzing the entire evidence, it is evidently clear that the occurrence took place suddenly and there was no premeditation on the part of the appellants. There is no evidence that the appellants made special preparation for assaulting the deceased with the intent to kill him. There is no dispute that the appellants assaulted deceased in such a manner that the deceased suffered grievous injuries which was sufficient to cause death, but we are convinced that the injury was not intended by the appellants to kill the deceased.

21. In the facts and circumstances of the case, in our considered opinion, the instant case falls under Section 304 Part II IPC as stated above. Although the appellants had no intention to cause death but it can safely be inferred that the appellants knew that such bodily injury was likely to cause death, hence the appellants are guilty of culpable homicide not amounting to murder and are liable to be punished under Section 304 Part II IPC.

22. Accordingly, we modify the judgment of the trial court and the High Court and convert the conviction under Section 302 to 304 Part II IPC, and sentence the appellants to ten years' imprisonment. The appeal is, therefore, disposed of with the modification in the conviction and sentence as indicated above.

R.P. Appeal disposed of.

ARUNACHAL PRADESH PUBLIC SERVICE COMMISSION & ANR.

v.

TAGE HABUNG & ORS.

(Civil Appeal No. 4168 of 2013)

MAY 1, 2013

[P. SATHASIVAM AND M.Y. EQBAL, JJ.]

ARUNACHAL PRADESH PUBLIC SERVICE COMBINED COMPETITIVE EXAMINATION RULES, 2001:

r.11 read with r. 12 - Fixing of minimum qualifying marks subsequent to the advertisement - Held: Rule does not mandate the Commission to fix and to disclose minimum qualifying marks in Preliminary Examination and Main Examination either in the advertisement or before conducting the examination - After the two examinations, Commission is empowered to shortlist the candidates and to summon them for an interview for personality and other tests - Power exercised by the Commission under r.11 fixing the qualifying marks in the written examination in the process of conducting the recruitment test cannot be interfered with by the Court - However, the Rule does not empower the Commission to fix qualifying marks in viva voce test which has rightly not been done by it.

The appellant State Public Service Commission issued an advertisement dated 25.7.2006 inviting applications through Combined Competitive Examination to various Group A and Group B posts under the State Government. Prior to completion of main examination, the State by O.M. dated 7.1.2008 declared the cut-off marks as 33% or more for all subjects in each written examination. The Commission adopted the OM by its

decision/Notification dated 16.4.2008. The Division Bench of the High Court, held that OM dated 7.1.2008 and the Notification dated 16.4.2008 could not be made operative in the midst of continuation of the selection process which was initiated pursuant to advertisement dated 25.7.2006.

In the instant appeal filed by the Commission, the question for consideration before the Court was: whether after commencement of recruitment process, the appellants were justified in fixing the minimum 33% qualifying marks in all the subjects in order to appear in the viva voce test.

Allowing the appeal, the Court

HELD: 1.1 On perusal of r. 11 of Arunachal Pradesh Public Service Combined Competitive Examination Rules, 2001, it is manifest that the Commission reserves its right to fix at its discretion the minimum qualifying marks both in the Preliminary Examination and the Main Written Examination. It empowers the Commission to fix minimum qualifying marks for the purpose of shortlisting the candidates for interview. The Rule does not mandate the Commission to fix and to disclose the minimum qualifying marks in the Preliminary Examination and Main Examination either in the advertisement or before conducting the examination. After the two examinations, the Commission is empowered to shortlist the candidates and to summon them for an interview for personality and other tests. However, the Rule does not empower the Commission to fix qualifying marks in viva voce test which has rightly not been done by it. As per r. 12, after the interview the candidates will be arranged by the Commission in order of merit as disclosed by the aggregate marks finally awarded to each candidate in the main examination (written examination and interview put

together). [para 14 and 29] [1148-F-H; 1149-A-B; 1159-F-G]

1.2 It is now well settled that fixing the qualifying marks in the viva voce test after the commencement of the process of selection is not justified but fixing some criteria for qualifying a candidate in the written examination is necessary in order to shortlist the candidates for participating in the interview. [para 28] [1159-D-E]

A.A. Calton vs. The Director of Education & Anr. **1983 (2) SCR 598 = AIR 1983 SC 1143;** *K.H. Siraj vs. High Court of Kerala & Ors.,* **2006 (2) Suppl. SCR 790 =(2006) 6 SCC 395;** *Hemani Malhotra Etc. vs. High Court of Delhi,* **2008 (5) SCR 1066 = (2008) 7 SCC 11; and** *Union of India & Ors. vs. S. Vinodh Kumar & Ors.,* **2007 (10) SCR 41 = (2007) 8 SCC 100 - referred to.**

Sushil Kumar Ghosh vs. State of Assam & Others **1993 I1) GLR 315 - held inapplicable.**

1.3 Fixation of qualifying marks as 33% in the written examination cannot be held to be an illegal or arbitrary action of the Commission merely because it was notified in the process of conducting recruitment tests. It was stated on behalf of the appellant-Commission that it has in the past conducted written examination fixing the cut-off marks in exercise of power under r. 11 of 2001 Rules. The High Court has lost sight of the fact that pursuant to the directions of the Single Judge in his order dated 30.9.2008, the result was declared applying the qualifying marks as notified in O.M. dated 7.1.2008 and the same was adopted by the Commission. [para 29] [1160-A-C]

1.4 In the considered opinion of the Court, the power exercised by the Commission under r.11 of 2001 Rules, fixing the qualifying marks in the written examination in

the process of conducting the recruitment test cannot be interfered with by the Court. It is reiterated that there must be some yardstick to be followed by the Commission for the purpose of shortlisting the candidates after the written examination. [para 29] [1159-G-H; 1160-A]

1.5 Although it is desirable that the Commission should fix the minimum qualifying marks in each written examination, but in the instant case the power exercised by the Commission in recruiting the candidates to secure qualifying marks cannot be interfered with. [para 30] [1160-D]

Inder Parkash Gupta vs. State of J&K & Others, **2004 (1) Suppl. SCR 453 = 2004 (6) SCC 786 - referred to.**

Case Law Reference:

1983 (2) SCR 598	**referred to**	**para 5**
1993 I1) GLR 315	**held inapplicable**	**para 20**
2006 (2) Suppl. SCR 790	**referred to**	**para 24**
2008 (5) SCR 1066	**referred to**	**para 25**
2004 (1) Suppl. SCR 453	**referred to**	**para 26**
2007 (10) SCR 41	**referred to**	**para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4168 of 2013.

From the Judgment and order dated 07.01.2009 of the High Court of Guwahati, Assam in WPC No. 4902 of 2008.

Ginny J. Rautray, Kanchan Kaur Dhodi, Chetna Bhardwaj, Avijit Bhattacharjee, Sarbani Kar, Anil Srivastav, Rituraj Biswas 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 judgment and order dated 7th January, 2009 passed by a Division Bench of the Gauhati High Court on a reference made to it by the Hon'ble Chief Justice pursuant to the order dated 19th November, 2008 of a learned Single Judge to answer the question as to whether the Office Memorandum dated 7th January, 2008 issued by the Government of Arunachal Pradesh and adopted by the Arunachal Pradesh Public Service Commission on 16th April, 2008 prescribing cut-off marks of 33% or more to be secured in each written examination papers in the Arunachal Pradesh Public Service Combined Competitive Examination (Main) 2006-07 (in short, "the Main Examination") conducted by the Arunachal Pradesh Public Service Commission for recruitment into various posts in Grade-A and Grade-B under the Government of Arunachal Pradesh, is permissible after commencement of the recruitment process and applicable to the candidates who already took the Main Examination initiated in pursuance of the advertisement dated 25th July, 2006 for such recruitment.

3. The facts of the case are that the Arunchal Pradesh Public Service Commission (in short, "the Commission") issued an advertisement dated 25th July, 2006 inviting applications for admission to the Arunachal Pradesh Public Service Combined Competitive Examination (Preliminary) 2006-07 for recruitment to Group-A and Group-B posts under the Government of Arunachal Pradesh. A decision was taken by the Commission on 13th June, 2007 fixing a minimum cut-off marks at 40% in English as qualifying marks or as would be decided by the Commission in every written examination for recruitment to the posts and a notification to that effect was issued on 2nd July, 2007. The Main Examination commenced on 26th December, 2007 and the Commission vide its Notification dated 11th July, 2008 published a list of candidates who had qualified in General English by securing 40% marks.

However, prior to the completion of the Main Examination, an Office Memorandum dated 7th January, 2008 (in short, "the O.M.") had been issued by the State Government declaring the cut-off marks as 33% or more for all subjects in each written examination.

4. The unqualified candidates filed a writ petition being W.P. No. 271 (AP) of 2008 on 25th July, 2008 challenging the decision dated 13th June, 2007 of the Commission and the Notification dated 11th July, 2008 publishing the list of candidates who had qualified in General English by securing 40% marks. The learned Single Judge of the High Court vide order dated 30th September, 2008 while allowing the writ petition held that the power for fixing the minimum qualifying marks both in Preliminary Examination and Main Examination is in respect of all the subjects/papers and no power has been given under the provision of Rule 11 of Arunachal Pradesh Public Service Combined Civil Service Examination Rules, 2001 to the Commission to fix a minimum qualifying marks in respect of a particular subject/paper. It was directed by the learned Single Judge that the Commission shall evaluate the marks secured by the candidates in all the papers/subjects of Main Examination on the basis of cut-off marks fixed by the State Government by way of policy decision reflected in the aforesaid O.M. and on the basis of evaluation of answer scripts of all the papers/subjects, shall call the candidates for the viva voce test on merit and prepare a final seniority list on merit on the basis of marks secured in the Main Examination consisting written and viva voce tests. In para 12 of the order, the learned Judge observed:-

> "The impugned decision was taken by the commission on 13.06.2007, i.e. after about 4(four) months from the date of conducting the preliminary examination on 02.02.2007 and respondent commission claimed that it has the power to do so under the provision of rule 11 of the rules of 2001. Rule 11 of the aforesaid rules is quoted below:-

> "Candidates who obtain such minimum qualifying marks in the preliminary examination as may be fixed by the commission at their discretion shall be admitted to the main examination and candidates who obtain such minimum marks in the main (written) examination as may be fixed by the commission at their discretion shall be summoned by them for an interview for personality and others tests"

The rule contemplates that the commission has to fix minimum qualifying marks in the preliminary examination and those candidates who secure the minimum qualifying marks shall be admitted to the main examination. The commission under the aforesaid rule is also required to fix the minimum qualifying marks in the mains (written) examination and the candidates who secure such marks shall be called for in the interview for personality and other tests (viva-voce test). The power for fixing the minimum qualifying marks both in the preliminary examination and main examination is in respect of all the subject/papers. No power has been given under the provision of the aforesaid rule to the commission to fix a minimum qualifying mark in respect of a particular subject/paper. This rule contemplates that the commission is required to fix the minimum qualifying marks before it holds the preliminary examination. In this case, the commission took the decision admittedly after the preliminary examination was conducted which is not at all contemplated under the said rule. In my considered view, the commission is not authorized to take the impugned decision after the preliminary examination was conducted i.e. long after the recruitment process had already been set in motion. It is immaterial whether or not the petitioners appeared in the main examination are fully aware of about the decision of the commission requiring the candidates to secure minimum 40% marks in General English paper, the

principle of estoppel sought to be applied by the commission to the petitioners is not tenable under the law as the commission sought to implement the decision which is not authorized under the rules."

5. At this stage, it is worth to mention here that another writ petition being W.P. No. 101 of 2008 had been filed relating to the appointment on the post of Veterinary Officer pursuant to the advertisement dated 19th December, 2006 published by the Commission. The candidates appeared in the written test held in the month of June 2007. However, before declaring the result of the written test, the Government came with a Memorandum dated 7th January, 2008 prescribing that the candidate must secure minimum 33% marks in each written examination and 45% marks in aggregate to be eligible for viva voce test. As the petitioners failed to secure 33% marks in English subject, they were not selected for the oral interview. The main contention of the petitioners' counsel was that the selection criteria cannot be made applicable with retrospective effect. The petitioners relied upon the decision of this Court in *A.A. Calton vs. The Director of Education & Anr.,* AIR 1983 SC 1143. The question that came up for consideration before the High Court was whether the O.M. dated 7th January, 2008 can at all be applied. The High Court vide order dated 24th June, 2008 held that:-

"9. Be that as it may, the established legal position is that the amendment is always prospective. On the basis of this settled legal position, I hold that the additional criteria evolved under O.M. dated 07.01.2008 shall not be applicable for calling the present Writ Petitioners for viva voce test provided they are otherwise eligible for the interview as per the guidelines and criteria of selection prevailing as on the date of advertisement, i.e. 19.12.2006.

10. In the result, the Writ Petition stands allowed. The Respondents more particularly, Respondent No.2, Secretary, APPSC is directed to declare the result of the

Writ Petitioners taking into consideration the criteria of selection that was applicable on or before 19.12.2006 and if they fulfill the criteria, they should be called for viva voce test."

6. However, in compliance of Court's order dated 30th September, 2008 passed in W.P. No. 271 of 2008, the Commission vide Notification dated 14th October, 2008 published the list of candidates who had secured a minimum of 33% marks in each written examination paper and who had secured 45% marks out of the aggregate total marks in the written examination papers. Thereafter, the respondents herein filed a writ petition being No. 417 of 2008 (renumbered at Principal Seat as Writ Petition (C) No. 4902 of 2008) challenging the O.M. dated 7th January, 2008. Meanwhile, the Commission completed the selection process and declared the results of viva voce test vide Notification dated 17th January, 2009 pursuant to which 100 candidates were selected for the posts.

7. In the above-mentioned W.P. No.417 of 2008 as stated above, the petitioners challenged the O.M. dated 7th January, 2008 on the ground inter alia that the condition to secure 33% in each individual paper to be qualified for the viva voce test unreasonably restricted the right of the petitioners of being tested in the interview. Further case of the petitioners was that while in the advertisement for the Combined Competitive Examination dated 25th July, 2006 there was no restriction nor there was any restriction in the rule, then such restriction cannot be imposed by the O.M. dated 7th January, 2008. The learned Single Judge, while hearing the writ petition (W.P. No. 417 of 2008) felt that the issue raised can only be resolved after determining the conflicting views taken in the earlier two writ petitions (W.P. No. 101 of 2008 and W.P. No. 271 of 2008) by the coordinate benches. The learned Single Judge, therefore, requested the Chief Justice to refer the matter to Division Bench. The matter was, accordingly, referred to the Division Bench.

8. The Division Bench formulated the question as to whether the Office Memorandum dated 7th January, 2008 issued by the Government of Arunachal Pradesh and adopted by the Public Service Commission on 16th April, 2008 prescribing the cut-off marks of 33% or more to be secured in each written examination paper in the Arunachal Pradesh Service Combined Competitive Examination (Main) 2006-07 conducted by the Commission for recruitment into various posts in Grade-A and Grade-B under the Government of Arunachal Pradesh, is permissible after commencement of the recruitment process and applicable to the candidates who already took the Main Examination initiated in pursuance of the advertisement dated 25th July, 2006 for such recruitment. The Division Bench vide impugned judgment and order dated 7th January, 2009 answered the reference as under:-

"33. From careful consideration of the extensive arguments so advanced on behalf of the parties narrated herein above and also having gone thoroughly the entire material available on record. It is seen that significantly the impugned O.M. dated 07.01.2008 was not published by the APPSC as required under rule 11 of the rules but it was issued by the Government of Arunachal Pradesh itself and the same has also only been adopted by the APPSC vide Notification dated 16.04.2008 and that too after completion of the entire selection process.

34. Having read and considered both the impugned O.M. dated 07.01.2008 and the notification dated 16.04.2008 which were published after the completion of the main examination and also having regard to the ratio laid down in *A.A. Calton's* case (supra) and *Sushil Kumar Ghosh's* case (supra) we have no hesitation to say that the impugned O.M. dated 07.01.2008 and subsequent adoption of the same vide notification dated 16.04.2008 cannot be made operative in the midst of continuation of selection process which has been initiated pursuant to the advertisement dated 25.072006.

35. Situated thus, we do agree with the view expressed in W.P. (C) No. 101(AP) of 2008 disposed of on 24.06.2008 as well as in paragraph 12 of the judgment and order dated 30.09.2008 recorded in W.P. (C) No. 271 (AP) of 2008. We do hold that the impugned O.M. dated 07.01.2008 shall not come in way of selection of the Writ Petitioners."

9. Before deciding the issue, we would like to refer to the advertisement dated 25th July, 2006, the 2001 Rules, the O.M. dated 7th January, 2008 and the Notification dated 16th April, 2008.

10. By the advertisement dated 25th July, 2006, applications were invited by Arunachal Pradesh Public Service Commission for admission to the Combined Competitive Examination (Preliminary) 2006-07 for recruitment to Group A and Group B posts/services of the Government of Arunachal Pradesh. In the said advertisement, the required criteria like eligibility i.e. age limit, educational qualifications, physical standard, physical fitness and other requirements had been prescribed. Indisputably, there is no mention of minimum marks to be obtained in the Preliminary Examination for being qualified to appear in the Main Examination.

11. In exercise of power conferred by the proviso to Article 309 of the Constitution of India, the Governor of Arunachal Pradesh made the Rules regulating the recruitment to certain posts/services, namely, Arunachal Pradesh Public Service Combined Competitive Examination Rules, 2001. Rule 2(a) defines the term 'Combined Competitive Examination' which means the examination conducted by the Arunachal Pradesh Public Service Commission for recruitment to the services and posts mentioned in Schedule-I and includes both the Preliminary Examination and the Main Examination. Rule 3 of the said Rules dealing with Combined Competitive Examination reads as under:-

"3(1) Notwithstanding anything contained in the Arunachal Pradesh Civil Service Rules, 1995 the Arunachal Pradesh Police Service Rules, 1989, the Arunachal Pradesh Labour Service Rules, 1991 and any other service Rules relating to services and posts mentioned in Schedule-I, the Commission shall hold Combined Competitive Examination every year for selection of candidate for recruitment to the services in accordance with procedure laid down in the Schedule-II.

(2) The Commission shall, after the main examination, prepare a merit list of candidates and forward such list to the Government for appointment to different services under the respective services Rules."

12. Schedule-II of the Rules provides the procedure for holding the Competitive Examination under the Arunachal Pradesh Public Service Commission Examination Rules, 2001. Rules 11 and 12 which are relevant are quoted hereinbelow:-

"11. Candidates who obtain such minimum qualifying marks in the Preliminary Examination as may be fixed by the Commission at their discretion shall be admitted to the Main Examination, and candidates who obtain such minimum marks in the Main (Written) Examination as may be fixed by the Commission at their discretion shall be summoned by them for an interview for personality and other tests.

(emphasis given)

Provided that the candidates belonging to APST may be summoned for an interview for a Test as stated above by the Commission by applying relaxed standard of less marks upto 10% if it is found by the Commission that sufficient number of candidates from these communities are not likely to be summoned for interview on the basis of general standard in order to fill up

vacancies reserved for them.

It is further provided that if inspite of relaxed standard sufficient number of candidates of APST Communities is not available the Commission may decide to raise the percentage of relaxation even higher to the extent considered fair by the Commission if the cut-off marks of general standard is 55% or above.

It is further provided that the candidates applying for the post of Arunachal Pradesh Service and called to the interview shall be required to undergo physical standard test as prescribed in Appendix-III.

12. After the interview the candidates will be arranged by the Commission in order of merit as disclosed by the aggregate marks finally awarded to each candidate in the Main Examination (Written Examination and the Interview put together) and in that order so many candidates as are found to be qualified by the Commission at the Examination shall be recommended for appointment upto such number as may be decided by the Commission keeping in view the number of vacancies.

Provided that the candidates belonging to APST shall be recommended in accordance with provision of Govt. Order No.OM-12/20 dated 10/10/2000."

13. The O.M. dated 7th January, 2008 which is relevant reads as under:-

"GOVERNMENT OF ARUNACHAL PRADESH
DEPARTMENT OF PERSONNEL, ADMINISTRATIVE REFORMS & TRAINING.

ADMINISTRATIVE REFORMS

No. OM-54/2006 Dated: Itanagar, the 7th January, 2008.

OFFICE MEMORANDUM

Subject:- Selection of candidates for appearing in Viva-Voce test on the basis of Recruitment Examination - procedure thereof.

It has been brought to the notice of the Government that various appointing authorities are selecting candidates for viva-voce test on the basis of one or two subject of written examination ignoring other equally important papers and without following a uniform pattern. As a result, the ratio of candidates selected per vacancy varies from one examination to other without maintaining common practice on prescription of ratio or cut-off marks even the candidates are selected in the ratio of 1:2:3. The issue was under examination of the Administrative Reforms Department and has found that no such procedure had been laid down earlier nor such procedures have been prescribed in the relevant Recruitment Rules.

After careful examination of the issue and in modification of point No. 2 & 3 of the OM dated 28.08.2006, the Government of Arunachal Pradesh has decided to prescribe the following procedures for all direct recruitment examinations for appointment to Group-A, B & C posts/services under the Government of Arunachal Pradesh -

1) For appearing in the viva-voce test, candidates shall be selected in the ratio of 1:3 (meaning 3 candidates shall be selected for each vacancy or 3 times of the number of vacancies) on the basis of written examination papers. However, ratio of 1:3 shall not apply in case of candidates appearing the written examination is less than 3 times of the number of vacancies. In case of the candidates appearing in the written examination is less than 3 times of the number of vacancies, all the candidates securing

33% of marks in each written examination papers shall be eligible for appearing viva-voce test.

2) The candidates securing a minimum of 33% or more marks in each written examination papers and has secured 45% of marks out of aggregate total marks in the written examination papers shall be eligible for viva-voce test. On the other, it will further mean that selection for viva-voce test shall be based on the aggregate total marks secured in the written examination papers and subject to ratio of 1:3. The candidates securing less than 33% of marks in any written examination paper shall not be eligible for appearing in the viva-voce test.

3) The Selection Committee or Commission may lower 'the cut of marks' of 45% to certain extent, in case of non-availability of Arunachal Pradesh Scheduled Tribes candidates securing the 'cut off marks'.

Therefore, all the appointing authorities are requested to comply with the above guidelines while conducting recruitment examination for appointment to Group 'A' 'B' & 'C' level of posts/services.

(Y.D. Thongehi)
Secretary (AR)
Government of Arunchal Pradesh"

14. On perusal of Rule 11 of Arunachal Pradesh Public Service Combined Competitive Examination Rules, 2001 (in short, "the Rule") it is manifest that the Commission reserve its right to fix at their discretion the minimum qualifying marks both in the Preliminary Examination and the Main Written Examination. The Rule does not mandate the Commission to fix and to disclose the minimum qualifying marks in the Preliminary Examination and Main Examination either in the advertisement or before conducting the examination. After the aforesaid two examinations, the Commission is empowered to

shortlist the candidates and to summon them for an interview for personality and other tests. However, the Rule does not empower the Commission to fix qualifying marks in viva voce test which has rightly not been done by the Commission. As per Rule 12, after the interview the candidates will be arranged by the Commission in order of merit as disclosed by the aggregate marks finally awarded to each candidate in the main examination (written examination and interview put together).

15. On the basis of the aforesaid O.M. dated 7th January, 2008, a Notification dated 16th April, 2008 was issued by the Commission adopting the said O.M. The said Notification dated 16th April, 2008 is quoted hereinbelow:-

"NOTIFICATION

It is for information of all aspiring candidates that the Govt. Notification No. OM 24-2006 dated 7th January, 2008 under which the criteria for qualifying in any written examination is prescribed as below is accepted and stands enforced for all future examinations to be conducted by this Commission including the written examinations already conducted with immediate effect.

1. For appearing in the viva-voce test candidates shall be selected in the ratio of 1:3 (meaning 3 candidates shall be selected for each vacancy or 3 (three) times of the number of vacancies) on the basis of written examination papers.

However, ratio of 1:3 shall not apply in case the candidates appearing the written examination is less than 3 times of the number of vacancies. In case of the candidates appearing in the written examination is less than 3 (three) times of the number of vacancies, all the candidates securing 33% of marks in each written examination papers shall be eligible for appearing viva-voce test.

2. The candidates securing a minimum of 33% or more marks in each written examination papers and has secured 45% of marks out of aggregate total marks in the written examination papers shall be eligible for viva-voce test. On the other, it will further mean that selection for viva voce test shall be based on the aggregate total marks secured in the written examination papers and subject to ratio of 1:3. The candidates securing less than 33% of marks in any of written examination paper shall not be eligible for appearing in the viva-voce test.

3. The Selection Committee or Commission may lower the 'cut-off marks' of 45% to certain extent, in case of non-availability of Arunachal Pradesh Scheduled Tribe candidates securing the 'cut-off marks'"

Sd/- (R. Ronya)
Secretary"

16. In the meantime, as noticed above, the aforementioned O.M. dated 7th January, 2008 issued by the State Government was challenged in Writ Petition No.101 of 2008 on the ground that the writ petitioners appeared in the written examination held in June 2007 in pursuance of advertisement dated 19th December, 2006 for the post of Veterinary Officers but were not selected for the interview as they could not obtain the qualifying marks of 33% prescribed in the said O.M. dated 7th January, 2008. The learned Single Judge by judgment dated 24th June, 2008 allowed the writ petition and held that the O.M. dated 7th January, 2008 shall have the prospective effect and shall not apply to the recruitment process initiated prior to 7th January, 2008.

17. On 11th July, 2008 the Commission after conclusion of the Main Examination published a list of candidates who had been found qualified in General English paper by securing 40%

marks. The candidates who did not secure 40% marks filed a writ petition being W.P. No.271 of 2008 challenging the result declared on 11th July, 2008 and also the decision of the Commission fixing 40% marks in English subject for the purpose of appearing in the Main Examination. Learned Single Judge in terms of judgment dated 13th September, 2008 allowed the writ petition and quashed the decision dated 13th June, 2007 and directed the Commission to evaluate the marks secured by the candidates in all the papers of Main Examination on the basis of cut-off marks fixed by the State Government in the O.M. dated 7th January, 2008 which subsequently got adopted by the Commission vide Notification dated 16th April, 2008.

18. In compliance of the aforesaid order, result of the Main Examination was declared by the Commission on 14th October, 2008 on the basis of the O.M. dated 7th January, 2008 as per the direction of the Single Judge made in Writ Petition No.271 of 2008.

19. Those candidates who did not even secure 33% marks and whose results were not published filed a writ petition being Writ Petition No.417 of 2008 challenging the O.M. dated 7th January, 2008 on the ground inter alia that the condition to secure 33% in each individual paper to be qualified for the viva voce test unreasonably restricted their right for appearing in the viva voce test. The said writ petition was ultimately referred to the Division Bench for deciding the issue in view of the conflicting decisions taken by the coordinate benches of the High Court in W.P.No.101 of 2008 and W.P. No.271 of 2008. As noticed above, the Division Bench in the impugned order relied upon the decision of this Court in *Calton's* case (supra) and its own decision in *Sushil Kumar Ghosh vs. State of Assam & Others,* 1993 (1) GLR 315 and held that the impugned O.M. dated 7th January, 2008 and its subsequent adoption vide Notification dated 16th April, 2008 cannot be made operative in the midst of the selection process which has

been initiated pursuant to the advertisement dated 25th July, 2006. The Division Bench consequently held that the impugned O.M. dated 7th January, 2008 shall not come in the way of the writ petitioners.

20. Before appreciating the view taken by the Division Bench, we would like to refer the ratio decided in *Calton's* case and *Sushil Kumar Ghosh's* case (supra).

21. In Calton's case, the validity of the appointment of respondent No.2 as the Principal of a College which was a minority institution was challenged mainly on the ground that the power of the Director to make an appointment had been taken away by reason of the amendment made in the U.P. Intermediate Education Act. Further, the Director could not have appointed respondent No.2 for the post since his selection had been disapproved earlier by the Deputy Director. This Court although dismissed the appeal observed as under :-

> "5. It is no doubt true that the Act was amended by U.P. Act 26 of 1975 which came into force on August 18, 1975 taking away the power of the Director to make an appointment under Section 16-F(4) of the Act in the case of minority institutions. The amending Act did not, however, provide expressly that the amendment in question would apply to pending proceedings under Section 16-F of the Act. Nor do we find any words in it which by necessary intendment would affect such pending proceedings. The process of selection under Section 16-F of the Act commencing from the stage of calling for applications for a post up to the date on which the Director becomes entitled to make a selection under Section 16-F(4) (as it stood then) is an integrated one. At every stage in that process certain rights are created in favour of one or the other of the candidates. Section 16-F of the Act cannot, therefore, be construed as merely a procedural provision. It is true that the legislature may pass laws with

retrospective effect subject to the recognised constitutional limitations. But it is equally well settled that no retrospective effect should be given to any statutory provision so as to impair or take away an existing right, unless the statute either expressly or by necessary implication directs that it should have such retrospective effect. In the instant case admittedly the proceedings for the selection had commenced in the year 1973 and after the Deputy Director had disapproved the recommendations made by the Selection Committee twice the Director acquired the jurisdiction to make an appointment from amongst the qualified candidates who had applied for the vacancy in question. At the instance of the appellant himself in the earlier writ petition filed by him the High Court had directed the Director to exercise that power. Although the Director in the present case exercised that power subsequent to August 18, 1975 on which date the amendment came into force, it cannot be said that the selection made by him was illegal since the amending law had no retrospective effect. It did not have any effect on the proceedings which had commenced prior to August 18, 1975. Such proceedings had to be continued in accordance with the law as it stood at the commencement of the said proceedings. We do not, therefore, find any substance in the contention of the learned counsel for the appellant that the law as amended by the U.P. Act 26 of 1975 should have been followed in the present case."

22. In *Sushil Kumar Ghosh's* Case, the High Court reiterated the principles laid down in Calton's Case holding that after the commencement of selection process if the amendment of the rules was made prospectively changing the eligibility criteria, amending the rules would not affect the selection and appointment as the selection process which had already commenced had to be completed in accordance with law as it stood at the time of commencement of the selection.

23. With due respect, in our opinion the ratio decided by this Court in Calton's case and reiterated in Sushil Kumar Ghosh's case will not apply in the facts and circumstances of the present case. At the very outset, we agree with the view taken in the instant case that the decision taken by the Commission vide Notification dated 13th June, 2007 fixing the cut-off marks as 40% in English as qualifying marks was un-reasonable and unjustified. However, the decision dated 13th June, 2007 was not given effect because of the subsequent O.M. issued by the State Government dated 7th January, 2008 and adopted by the Commission vide Notification dated 16th April, 2008. The only question, therefore, that falls for consideration is as to whether the appellants were justified in fixing the minimum 33% qualifying marks in all the subjects in order to appear in the viva voce test. Indisputably, no separate qualifying marks were prescribed for qualifying in the viva voce test.

24. In the case of *K.H. Siraj vs. High Court of Kerala & Ors.,* (2006) 6 SCC 395, the High Court of Kerala by its Notification dated 26th March, 2001 invited applications for the appointment to the post of Munsiff Magistrate in the Kerala Judicial Services. Some of the candidates were not selected as they had not secured the prescribed minimum marks in the interview. They challenged the said selection on the ground that in the absence of specific legislative mandate under Rule 7(i) of the Kerala Judicial Service Rules, 1991 prescribing cut-off marks in the oral examination, the fixing of separate minimum cut-off marks in the interview for further elimination of candidates after a comprehensive written test was violative of the statute. While answering the question, this Court held:-

"50. What the High Court has done by the notification dated 26-3-2001 is to evolve a procedure to choose the best available talent. It cannot for a moment be stated that prescription of minimum pass marks for the written examination or for the oral examination is in any manner

irrelevant or not having any nexus to the object sought to be achieved. The merit of a candidate and his suitability are always assessed with reference to his performance at the examination and it is a well-accepted norm to adjudge the merit and suitability of any candidate for any service, whether it be the Public Service Commission (IAS, IFS, etc.) or any other. Therefore, the powers conferred by Rule 7 fully justified the prescription of the minimum eligibility condition in Rule 10 of the notification dated 26-3-2001. The very concept of examination envisaged by Rule 7 is a concept justifying prescription of a minimum as benchmark for passing the same. In addition, further requirements are necessary for assessment of suitability of the candidate and that is why power is vested in a high-powered body like the High Court to evolve its own procedure as it is the best judge in the matter. It will not be proper in any other authority to confine the High Court within any limits and it is, therefore, that the evolution of the procedure has been left to the High Court itself. When a high-powered constitutional authority is left with such power and it has evolved the procedure which is germane and best suited to achieve the object, it is not proper to scuttle the same as beyond its powers. Reference in this connection may be made to the decision of this Court in *Union of India v. Kali Dass Batish* (2006) 1 SCC 779, wherein an action of the Chief Justice of India was sought to be questioned before the High Court and it was held to be improper."

25. In the case of *Hemani Malhotra Etc. vs. High Court of Delhi,* (2008) 7 SCC 11, an advertisement was made for appointment in the Higher Judicial Service. The advertisement inter alia prescribed the procedure, specially in the matter of securing 55% marks in the written examination for the general candidates and 50% for the reserved category. The written examination was conducted, but the result was not declared. However, the petitioners received letter for appearing in the

interview. Since the result of the examination was not declared, no merit list of the successful candidates who had passed the written test was displayed and, therefore, the petitioners' case was that they were not in a position to find out the details about the number of candidates who were declared successful in the written examination. Meanwhile, the Selection Committee met and resolved to prescribe minimum marks for the viva voce test and the same was approved by the Full Court. Allowing the writ petitions, this Court held :-

"15. There is no manner of doubt that the authority making rules regulating the selection can prescribe by rules the minimum marks both for written examination and viva voce, but if minimum marks are not prescribed for viva voce before the commencement of selection process, the authority concerned, cannot either during the selection process or after the selection process add an additional requirement/qualification that the candidate should also secure minimum marks in the interview. Therefore, this Court is of the opinion that prescription of minimum marks by the respondent at viva voce test was illegal.

16. The contention raised by the learned counsel for the respondent that the decision rendered in *K. Manjusree* (2008) 3 SCC 512 did not notice the decisions in *Ashok Kumar Yadav v. State of Haryana* (1985) 4 SCC 417 as well as in *K.H. Siraj v. High Court of Kerala* (2006) 6 SCC 395 and, therefore, should be regarded either as decision per incuriam or should be referred to a larger Bench for reconsideration, cannot be accepted. What is laid down in the decisions relied upon by the learned counsel for the respondent is that it is always open to the authority making the rules regulating the selection to prescribe the minimum marks both for written examination and interview. The question whether introduction of the requirement of minimum marks for interview after the entire selection process was completed was valid or not, never fell for consideration of this Court in the decisions referred to by the

learned counsel for the respondent. While deciding the case of K. Manjusree the Court noticed the decisions in: (1) *P.K. Ramachandra Iyer v. Union of India;* (1984) 2 SCC 141, (2) *Umesh Chandra Shukla v. Union of India* (1985) 3 SCC 721; and (3) *Durgacharan Misra v. State of Orissa,* (1987) 4 SCC 646 and has thereafter laid down the proposition of law which is quoted above. On the facts and in the circumstances of the case this Court is of the opinion that the decision rendered by this Court in *K. Manjusree* can neither be regarded as judgment per incuriam nor good case is made out by the respondent for referring the matter to the larger Bench for reconsidering the said decision."

26. In the case of *Inder Parkash Gupta vs. State of J&K & Others* 2004 (6) SCC 786, this Court held as under:-

> "28. The Jammu & Kashmir Medical Education (Gazetted) Services Recruitment Rules, 1979 admittedly were issued under Section 124 of the Jammu and Kashmir Constitution which is in pari materia with Article 309 of the Constitution of India. The said Rules are statutory in nature. The Public Service Commission is a body created under the Constitution. Each State constitutes its own Public Service Commission to meet the constitutional requirement for the purpose of discharging its duties under the Constitution. Appointment to service in a State must be in consonance with the constitutional provisions and in conformity with the autonomy and freedom of executive action. Section 133 of the Constitution imposes duty upon the State to conduct examination for appointment to the services of the State. The Public Service Commission is also required to be consulted on the matters enumerated under Section 133. While going through the selection process the Commission, however, must scrupulously follow the statutory rules operating in the field. It may be that for certain purposes, for example, for the purpose of

> shortlisting, it can lay down its own procedure. The Commission, however, must lay down the procedure strictly in consonance with the statutory rules. It cannot take any action which per se would be violative of the statutory rules or makes the same inoperative for all intent and purport. Even for the purpose of shortlisting, the Commission cannot fix any kind of cut-off marks. (See *State of Punjab v. Manjit Singh* (2003) 11 SCC 559)."

27. In the case of *Union of India & Ors. vs. S. Vinodh Kumar & Ors.,* (2007) 8 SCC 100, the appellant Railways, while making recruitment for the post of Gangman fixed cut-off marks separately for general category and reserved category candidates (para 3 of the judgment). However, some of the vacancies remained unfilled because the Railways could not get requisite number of candidates within the cut-off marks. The competent authority took a specific decision not to lower the cut-off marks because it was not considered to be conducive to general merit of candidates. The question was whether this decision was arbitrary in view of the fact that some of the vacancies remained unfilled. This Court held as under:

> "10. … The fact that the Railway administration intended to fix the cut-off marks for the purpose of filling up the vacancies in respect of the general category as also reserved category candidates is evident from the fact that different cut-off marks were fixed for different categories of candidates. It is therefore not possible to accept the submission that the cut-off marks fixed was wholly arbitrary so as to offend the principles of equality enshrined under Article 14 of the Constitution of India. The power of the employer to fix the cut-off marks is neither denied nor disputed. If the cut-off marks were fixed on a rational basis, no exception thereto can be taken.
>
> 11. … Once it is held that the appellants had the requisite jurisdiction to fix the cut-off marks, the necessary corollary

thereof would be that it could not be directed to lower the same. It is for the employer or the expert body to determine the cut-off marks. The court while exercising its power of judicial review would not ordinarily intermediate therewith. The jurisdiction of the court in this behalf is limited. The cut-off marks fixed will depend upon the importance of the subject for the post in question. It is permissible to fix different cut-off marks for different categories of candidates. "

28. There cannot be any dispute that the merit of a candidate and his suitability is always assessed with reference to his performance at the examination. For the purpose of adjudging the merit and suitability of a candidate, the Commission has to fix minimum qualifying marks in the written examination in order to qualify in the viva voce test. It is now well settled that fixing the qualifying marks in the viva voce test after the commencement of the process of selection is not justified but fixing some criteria for qualifying a candidate in the written examination is necessary in order to shortlist the candidates for participating in the interview.

29. As noticed above, cut-off marks of 33% fixed as qualifying marks in all subjects for the purpose of interview cannot by any stretch of imagination be held illegal or unjustified merely because such criteria for securing minimum 33% marks was notified for the Preliminary Examination and Main Examination. Rule 11 of Arunachal Pradesh Public Service Combined Civil Service Examination Rules, 2001 empowers the Commission to fix minimum qualifying marks for the purpose of shortlisting the candidates for interview. In our considered opinion, the power exercised by the Commission under Rule 11 of 2001 Rules fixing the qualifying marks in the written examination in the process of conducting the recruitment test cannot be interfered with by this Court. We reiterate that there must be some yardstick to be followed by the Commission for the purpose of shortlisting the candidates after the written

examination. The fixation of qualifying marks as 33% in the written examination cannot be held to be illegal or arbitrary action of the Commission merely because it was notified in the process of conducting recruitment tests. It was argued from the side of the Appellant-Commission that the Commission has in the past conducted written examination fixing the cut-off marks in exercise of power under Rule 11 of 2001 Rules. The High Court has lost sight of the fact that pursuant to the directions of the learned Single Judge in his order dated 30th September, 2008, the result was declared applying the qualifying marks as notified in O.M. dated 7th January, 2008 and the same was adopted by the Commission.

30. Although it is desirable that the Commission should fix the minimum qualifying marks in each written examination, but in the instant case the power exercised by the Commission in recruiting the candidates to secure qualifying marks cannot be interfered with.

31. For all these reasons, we allow the appeal and set aside the order passed by the Division Bench of the High Court.

R.P. Appeal allowed.

MANOHAR LAL SHARMA
v.
UNION OF INDIA AND ANOTHER
(Writ Petition (C) No. 417 of 2012)

MAY 1, 2013

[R.M. LODHA, MADAN B. LOKUR AND KURIAN JOSEPH, JJ.]

ADMINISTRATIVE LAW:

Policy of Foreign Direct Investment in Multi-Brand Retail Trading - Held: Under the Constitution, executive has been accorded primary responsibility for formulation of governmental policy - The executive function comprises both determination of policy as well as carrying it into execution - If Government after due reflection, consideration and deliberation feels that by allowing FDI up to 51% in Multi-Brand Retail Trading, country's economy will grow and it will facilitate better access to market for producer of goods and will enhance employment potential, then, it is not open for Court to go into merits and demerits of such policy - On matters of policy, Court does not interfere unless the policy is unconstitutional or contrary to statutory provisions or arbitrary or irrational or in abuse of power - Impugned policy that allows FDI up to 51% in Multi-Brand Retail Trading does not appear to suffer from any of these vices.

Policy of FDI - Competence of Central Government - Held: Department of Industrial Policy and Promotion (DIPP) as per Allocation of Business Rules, 1961 is allocated the subject of 'Direct foreign and non-resident investment in industrial and service projects, excluding functions entrusted to the Ministry of Overseas Indian Affairs' - Thus, DIPP is empowered to make policy pronouncements on FDI - Competence of Central Government to formulate a policy

relating to investment by a non-resident entity/person resident outside India, in the capital of an Indian company is beyond doubt - Reserve Bank of India is empowered to prohibit, restrict or regulate various types of foreign exchange transactions, including FDI, in India by means of necessary regulations - RBI Regulates foreign investment in India in accordance with Government of India's policy - Allocation of Business Rules, 1961 - Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 - Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Third Amendment) Regulations, 2012 - Foreign Exchange Management Act, 1999 - ss. 6(3) and 47.

Policy of FDI in Multi-Brand Retail Trading - Held: Impugned policy is only an enabling policy and State Governments/Union Territories are free to take their own decisions in regard to implementation of policy in keeping with local conditions - It is, thus, left to choice of State Governments/Union Territories whether or not to implement the policy to allow FDI up to 51% in Multi-Brand Retail Trading.

Policy of FDI in Multi-Brand Retail Trading - Objectives of - Discussed.

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 417 of 2012.

Under Article 32 of the Constitution of India.

G.E. Vahanvati, AG, Siddharth Luthra, ASG, Anoopam Prasad, Supriya Juneja, Nitam Pasha, J. Narula (for B. Krishna Prasad), Vikramjeet Banerjee, P.S. Sudheer, S.S. Shamshery, R.C. Kohli, for the appearing parties and Manohar Lal Sharma Petitioner-in-person.

The following order of the Court was delivered by

O R D E R

1. We have heard Mr. Manohar Lal Sharma - petitioner in

person and Mr. Goolam E. Vahanvati, learned Attorney General. We have also heard Mr. Vikramjit Banerjee, learned counsel for the intervenor - Swadeshi Jagaran Foundation in I.A. No. 2 of 2012.

2. Mr. Manohar Lal Sharma - petitioner in person prays for withdrawal of the rejoinder-affidavit in its entirety in view of the objectionable statements contained therein. We allow him to do so. It is directed that no part of the rejoinder-affidavit shall be treated as part of the record.

3. In the Writ Petition, the petitioner has prayed for quashing Press Note Nos. 4,5,6,7 and 8 of (2012 Series) dated 20th September, 2012 being unconstitutional and without any authority of law.

4. By these Press Notes, the policy of Foreign Direct Investment (FDI) in Single-Brand Product Retail Trading, Multi-Brand Retail Trading, Air Transport Services, Broadcasting Carriage Services and Power Exchanges has been reviewed. In the forwarding circular, it is mentioned in para 5 that necessary amendments to Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) Regulations, 2000 (for short "Regulations, 2000) are being notified separately.

5. When the matter came up for consideration on 15.10.2012, learned Attorney General submitted that the process for necessary amendments to Regulations 2000 by the Reserve Bank of India was on and that necessary amendments in Regulations 2000 would be made soon.

6. On 5.11.2012, learned Attorney General placed for consideration of the Court, a copy of the Foreign Exchange Management (Transfer or Issue of Security by a Person Resident Outside India) (Third Amendment) Regulations, 2012 (for short "2012 Regulations") published in the Gazette of India - Extraordinary on October 30, 2012.

7. By the 2012 Regulations, Reserve Bank of India in exercise of the powers conferred by clause (b) of sub-section (3) of Section 6 and Section 47 of the Foreign Exchange Management Act, 1999 (for short "FEMA"), has made amendments to the 2000 Regulations.

8. There is no challenge to the 2012 Regulations. In the absence of any challenge to the 2012 Regulations, the contention of the petitioner that Press Note Nos. 4,5,6,7 & 8 (2012 Series) dated 20th September, 2012 have no force of law, does not survive for any scrutiny.

9. Be that as it may. We have carefully considered the submissions of the petitioner and intervenor that the impugned FDI Policy is not founded on any material obtained from the government agency and no extensive consultation was made before formulation of the impugned Policy.

10. In the Counter-affidavit filed by the Union of India, the benefits of FDI in Multi-Brand Retail have been enumerated. The impugned FDI policy have twin objectives, (one) benefit the consumer by enlarging the choice of purchase at more affordable prices; and (two) eradicating the traditional trade intermediaries/middlemen to facilitate better access to the market (ultimate retailer) for the producer of goods.

11. It is stated that the amended FDI policy will generate employment, improve infrastructure and provide better quality products. The farmers will benefit significantly from the option of direct sales to organized retailers. In this regard, the Central Government has relied upon the study commissioned by the World Bank indicating that profit realization for farmers selling directly to organized retailers is about 60% higher than that received from selling in the Mandi. The views in the study commissioned by the World Bank are said to be supported by the findings of a study instituted by the Government of India on the subject of "Impact of Organized Retailing on the Unorganized Sector" through the Indian Council for research on

International Economic Relations (ICRIER) submitted in May, 2008. According to ICRIER report, unorganized and organized retail not only co-exist, but also grow substantially in size.

12. The salient features of the FDI Policy on Multi-Brand Retail Trading are also indicated in the counter-affidavit. The policy mandates at least 30% of the value of procurement of manufactured/processed products purchased shall be sourced from Indian 'small industries' which have a total investment in plant & machinery not exceeding US $ 1.00 million. It also provides that retail sales outlets may be set up only in cities with a population of more than 10 lakhs as per 2011 Census and may also cover an area of 10 Kms around the municipal/ urban agglomeration limits of such cities. In States/Union Territories not having cities with population of more than 10 lakhs as per 2011 Census, retail sales outlets may be set up in the cities of their choice, preferably the largest city and may also cover an area of 10 Kms around the municipal/urban agglomeration limits of such cities.

13. We find that impugned policy is only an enabling policy and the State Governments/Union Territories are free to take their own decisions in regard to implementation of the policy in keeping with local conditions. It is , thus, left to the choice of the State Governments/Union Territories whether or not to implement the policy to allow FDI up to 51% in Multi-Brand Retail Trading.

14. The views on the efficacy of a government policy and the objectives such policy seeks to achieve may differ. The counter-view(s) may have some merit but under our Constitution, the executive has been accorded primary responsibility for the formulation of governmental policy. The executive function comprises both the determination of policy as well as carrying it into execution. If the Government of the day after due reflection, consideration and deliberation feels that by allowing FDI up to 51% in Multi-Brand Retail Trading, the country's economy will grow and it will facilitate better access

to the market for the producer of goods and enhance the employment potential, then in our view, it is not open for the Court to go into merits and demerits of such policy.

15. On matters affecting policy, this Court does not interfere unless the policy is unconstitutional or contrary to the statutory provisions or arbitrary or irrational or in abuse of power. The impugned policy that allows FDI up to 51% in Multi-Brand Retail Trading does not appear to suffer from any of these vices.

16. Notably, the Department of Industrial Policy and Promotion (DIPP) as per the Allocation of Business Rules, 1961 is allocated the subject of 'Direct foreign and non-resident investment in industrial and service projects, excluding functions entrusted to the Ministry of Overseas Indian Affairs'. Seen thus, the DIPP is empowered to make policy pronouncements on FDI. There is no merit in the submission of the petitioner that Central Government has no authority or competence to formulate FDI Policy. The competence of the Central Government to formulate a policy relating to investment by a non-resident entity/person resident outside India, in the capital of an Indian company is beyond doubt. The Reserve Bank of India (RBI) is empowered to prohibit, restrict or regulate various types of foreign exchange transactions, including FDI, in India by means of necessary regulations. RBI Regulates foreign investment in India in accordance with Government of India's policy.

17. Writ Petition is dismissed with no order as to costs. Interlocutory Applications stand disposed of.

R.P. Writ Petition dismissed.