HEMA
v.
STATE, THR. INSPECTOR OF POLICE, MADRAS
(Criminal Appeal No. 31 of 2013)

JANUARY 7, 2013

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

Penal Code, 1860 – ss. 120B and 420 r/w. ss. 511, 465 and 471 – Prosecution under – For offence of criminal conspiracy to cheat Passport Office, in order to obtain passports on the basis of ante-dated passport applications with duplicate file numbers accompanied by forged enclosures – Conviction by courts below – Held: Prosecution proved its case – Supreme Court not to interfere with concurrent findings of facts by courts below except where there is serious infirmity in the appreciation of evidence and the findings are perverse – Conviction confirmed – However, in view of the fact that the accused has a small child, sentence reduced to six months from two years – Constitution of India, 1950 – Article 136.

Investigation – Parallel investigation – By State Police and by CBI – Permissibility – Held: In the instant case investigation was initiated by State Police and subsequently taken over by CBI considering the volume and importance of offence – There is no infirmity in continuing the investigation by CBI in view of s. 5 (3) of Delhi Special Police Establishment Act – Delhi Special Police Establishment Act, 1946 – s. 5(3).

Criminal Trial – Defective investigation – Effect of – Held: Mere defect in investigation and lapse on the part of Investigating Officer cannot be a ground for acquittal – It is

for the Court to scrutinize the prosecution evidence de hors such lapses.

Appellant-accused No. 5, alongwith four other accused persons i.e. A-1 to A-4 was prosecuted u/ss. 120B, 420, 465 and 471 IPC. It was alleged that A-5, an employee of a travel agency run by A-3, along with other accused persons entered into a criminal conspiracy to cheat the Regional Passport office to obtain 42 passports on the basis of ante-dated passport applications with duplicate file numbers and forged enclosures such as police verification certificates etc. Initially the case was investigated by the State Police, but subsequently the investigation was taken up by CBI. Thereafter the Special court for CBI cases convicted the appellant-accused No.5 u/ss. 120B, 420 r/w ss. 511, 465 and 471 IPC. She was sentenced to R1 for 2 years with a default clause. A-1 to A-3 were also convicted. High Court confirmed the order of the Special Court.

Instant appeal was filed by A-5. She contended that the entire investigation needed to be thrown out, as the parallel proceedings by the State Police and the CBI are not permissible; that original seals and rubber stamps were not produced to prove that the seals and stamps were forged; that prosecution failed to exhibit the FSL report with regard to the impression of seals of MOs. 1 to 3 recovered at the instance of A-3; that specimen signatures of PW-16 and PW-29 were not sent to the hand-writing expert; that the seal and specimen signatures of attesting officer (PW 18) was not collected by CBI to prove them to be forged; that there was no document or indication in Ex. P-3 to P-43 to show that they were sent by the travel agency of A-3; and that certificates issued by Village Administrative Officers that the applicants were not the residents of the place mentioned in the

application form, have no legal sanctity in the absence of certification by Tehsildar.

Disposing of the appeal, the Court

HELD: 1.1 It is settled law that not only fair trial, but fair investigation is also part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Accordingly, investigation must be fair, transparent and judicious and it is the immediate requirement of rule of law. In the instant case, though the State Crime Branch initiated investigation, subsequently, the same was taken over by the CBI considering the volume and importance of the offence. [Para 8] [12-B-E]

Babubhai vs. State of Gujarat and Ors. **2010 (12) SCC 254: 2010 (10) SCR 651 – distinguished.**

1.2. Mere defects in the investigation and lapse on the part of the I.O., cannot be a ground for acquittal. Further, even if there had been negligence on the part of the investigating agency or omissions etc., it is the obligation on the part of the court to scrutinize the prosecution evidence *de hors* such lapses to find out whether the said evidence is reliable or not and whether such lapses affect the object of finding out the truth. [Para 13] [21-B-C]

C. Muniappan and Ors. vs. State of Tamil Nadu **2010 (9) SCC 567: 2010 (10) SCR 262;** *Dayal Singh and Ors. vs. State of Uttaranchal* **2012 (8) SCC 263: 2012 (10) SCR 157;** *Gajoo vs. State of Uttarakhand* **2012 (9) SCC 532: 2012 (7) SCR 1033 – relied on.**

2.1. It is not correct to say that the prosecution has not proved that the travel agency was purported to have been run by A-3 for the purpose of submitting passport applications. It is clear from the evidence of PWs 11, 13

and 9 that A-3 was occupying the premises pertaining to PW-11 during the relevant period and he was running a travel agency in that place. [Para 14] [21-E; 22-A-B]

2.2. It is also wrong to say that there was no evidence to show that Exh.P-2 to P-43 had been presented by the travel agency of A-3. A-5, who was working as a clerk in the said travel agency of A-3, has admitted in her statement u/s. 313 Cr.P.C. that at the relevant time she was working with that travel agency and she used to submit the passport applications in the passport office and receive the passports from the office. The above statement makes it clear that she was assisting A-3 in preparing applications and filing them before the passport office and dealing the affairs connected therewith. This fact is also evident from Exh. P-2. [Para 15] [22-B-D]

2.3. The admissible portion of the confessional statement of A-3 which is marked as Exh.P-215 and which led to the recovery of forged/fabricated rubber stamp seals, M.Os 1 to 3 seized at his behest under Exh.P-216, the Mazahar, in the presence of Village Administrative Officer (PW-15) and Village Menial also prove the prosecution case and disprove the stand of the appellant. [Para 16] [22-E-F]

2.4. The plea that the police verification forms, namely, Exh.128 to 136 and 161 to 202 were not proved to have been forged in the light of the fact that the subsequent signatures of PWs 16 and 29 were not sent to PW-28, the hand writing expert, for his opinion, is not acceptable. In view of the categorical statement of PW-26, PW-16, and PW-29, it is clear from their statements and assertions that the verification forms of the said 42 applications have not been dealt with by the concerned officials and the trial Judge was right in concluding that

they were forged. Mere non-production of registers maintained in the office of DSP, DCRB, cannot be construed to be an infirmity in this case in the light of the evidence of PWs 16, 26 and 29 who are relevant officers concerned with those documents. [Para 18] [23-B-C, G-H; 24-A]

2.5. The specimen signatures of PW-18 and PW-20, who are all independent witnesses, were forged in the applications. This is evident from their evidence. There is no reason to disbelieve their evidence and the trial Judge has rightly accepted the same. [Para 19] [24-B-C]

2.6. There is no legal infirmity regarding the evidence of Village Administrative Officers and the certificates issued by them. The documents were properly marked through Village Administrative Officers of the villages concerned and also by the officers who made a field enquiry for the same. [Para 20] [24-C-D]

2.7. There is no infirmity in recoveries of M.Os 1 to 3. The evidence of the concerned Village Administrative Officers, Deputy Superintendent of Police, Civil Surgeon (PW-18), Government Hospital, Executive Officer (Retired) of Town Panchayat (PW-20) are sufficient to establish that the forged attested documents were created and enclosed for the purpose of getting passports in support of false addresses given in the applications by the appellant. The above fact is also evident from the evidence of PW-15, the confessional statement given by A-3 which was recorded under Section 27 of the Evidence Act in his presence and M.Os 1 to 3 which were recovered under a cover of mazahar (Exh. P-216) at the behest of A-3 and the admissible portion of the evidence leading to recovery which is marked as Exh. 215. The contradictions as pointed out by the appellant are only trivial in nature as found by the trial court as well as the High Court, accordingly, it cannot be construed to be a material one so as to affect the version of the prosecution. [Para 21] [24-E-H; 25-A]

2.8. PWs 16, 26 and 29 DSPs and S.I. of Police have categorically denied the genuineness of the seals M.Os. 1 to 3, and thus the absence of expert opinion by itself does not absolve the liability of the appellant. The failure of the prosecution to exhibit the report of FSL, with regard to the impression of the above seals is not fatal to the prosecution. [Para 22] [25-B-C]

2.9. The evidence of PW-14, who identified the writings available in Exhs.P-2 to P-43 as that of A-5 is admissible u/s. 47 of the Evidence Act. The same was rightly acted upon by the trial court and the High Court while holding the charge against the accused-appellant as proved to have committed in pursuance of the conspiracy. [Para 23] [25-E-F]

2.10. Simply because the applications were filled up by a person does not automatically lead to the inference that a person is a party to the conspiracy. But, in the instant case, it is very well established by the prosecution that the filled up passport applications were submitted by A-5 on behalf of her employer A-3. Further, in majority of passport applications (Exh. P-2 to P-43), bogus particulars were filled by her. The prosecution has also established that A-5 has given false particulars regarding the place of residence of applicants' in the passport applications in view of her admission in 313 statement that she was working in the travel agency of A-3 and assisting him in preparing applications and filing them before the Passport Office as well as handling the affairs connected therewith which clearly prove that A-5 has filled up the said passport applications (Exh.P-2 to P-43). Thus, the prosecution has clearly established that false documents were made for the purpose of cheating and

those documents were used as genuine for obtaining passports. [Para 24] [25-F-H; 26-A-C]

2.11. In the light of the overwhelming evidence placed by the prosecution, analyzed by the trial court and affirmed by the High Court, interference by this Court with concurrent findings of fact by the courts below is not warranted except where there is some serious infirmity in the appreciation of evidence and the findings are perverse. Further, this Court will not ordinarily interfere with appreciation of evidence by the High Court and re-appreciation is permissible only if an error of law or procedure and conclusion arrived are perverse. [Para 25] [26-C-E]

3. However, taking note of the fact that the appellant is having a small child, while confirming the conviction, the sentence is reduced to six months from two years. [Para 26] [26-E]

Case Law Reference:

2010 (10) SCR 651	**Distinguished**	**Para 8**
2010 (10) SCR 262	**Relied on**	**Para 10**
2012 (10) SCR 157	**Relied on**	**Para 11**
2012 (7) SCR 1033	**Relied on**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 31 of 2013.

From the Judgment & Order dated 29.04.2011 of the High Court of judicature at Madurai Bench of Madras High Court in Crl. A. (MD) No. 37 of 2004.

S. Prabhakaran, S. Palanikumar, P. Soma Sundaram, Rajakumar, R.S. Krishna Kumar, Mahadevan for the Appellant.

H.P. Raval, ASG, Shriniwas Khalap, Anando Mukherji, Prakriti Purnima, B.V. Balram Das, Arvind Kumar Sharma for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final judgment and common order dated 29.04.2011 passed by the Madurai Bench of the Madras High Court in Criminal Appeal (MD) No. 37 of 2004 whereby the High Court dismissed the appeal filed by the appellant herein (A-5 therein) while confirming the judgment dated 28.07.2004, passed by the Court of Principal Special Judge for CBI Cases, Madurai.

3. **Brief facts:**

(a) According to the prosecution, during the year 1992, the appellant herein (A-5), along with other accused persons (A-1 to A-4 therein) had entered into a criminal conspiracy to cheat the Regional Passport Office, Trichy in order to obtain passports on the basis of creating ante-dated passport applications with duplicate file numbers, so as to make them appear as old cases, accompanied by forged enclosures such as police verification certificates etc. In pursuance of the said conspiracy, A-2 being the Lower Division Clerk in the Regional Passport Office, Trichy fraudulently received and processed 42 forged passport applications filed by one Goodluck Travels, Trichy run by A-3 with the assistance of A-4 and A-5 (the appellant herein) and made false endorsement of reference numbers, fee certifications etc. and A-1, being the Superintendent of the Regional Passport Office, Trichy, by abusing his official position, granted orders for the issue of passports in respect of the said 42 applications.

(b) In pursuance of the same, on 09.02.1993, the District Crime Branch at Ramanathapuram, Tamil Nadu received a letter from Deputy Superintendent of Police (DSP), DCRB Ramanad, containing a complaint given by the Passport Officer,

Trichy. On the basis of the same, a case was registered by the District Crime Branch, Ramanad as Criminal Case No. 1 of 1993 under Sections 419, 420, 465 and 467 of the Indian Penal Code, 1860 (in short 'the IPC').

(c) When the Inspector of Police, DCB, took up the investigation, the CBI intervened and filed a First Information Report being RC-21(A)/93 on 11.05.1973 under Section 120-B read with Sections 420, 467, 468 and 471 of the IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (in short 'the PC Act'). After investigation, the case was committed to the Special Court for CBI Cases, Madurai and numbered as CC No. 38 of 1996. On 01.08.1996, the Special Court, framed charges under Section 120-B of IPC against A-1 to A-5 and under Sections 420, 465 and 471 of IPC against the appellant herein (A-5) and specific charges under Section 13(1)(d) read with Section 13(2) of the PC Act against A-1 and under Sections 420, 467, 468 and 471 of IPC and under Section 13(1)(d) read with Section 13(2) of the PC Act against A-2 and under Sections 420, 465 and 471 of IPC against A-3.

(d) By order dated 28.07.2004, the Principal Special Judge convicted and sentenced A-1 to A-3 and A-5. In the present appeal, we are concerned only with A-5 who was convicted and sentenced to undergo RI for 2 years along with a fine of Rs.5,000/-, in default, to further undergo RI for 6 months for each of the offences under Sections 120-B, 420 read with Sections 511, 465 and 471 of IPC. (Total fine of Rs. 15,000/-).

(e) Aggrieved by the said order of conviction and sentence, the appellant herein filed Criminal Appeal No. 37 of 2004 before the Madurai Bench of the Madras High Court. By impugned order dated 29.04.2011, the High Court dismissed the same along with other set of appeals filed in respect of other accused and confirmed their conviction and sentence awarded by the trial Court. Being aggrieved by the judgment of the High

Court, A-5 alone has preferred this appeal by way of special leave before this Court.

4. Heard Mr. S. Prabhakaran, learned counsel for the appellant and Mr. H.P. Rawal, learned Additional Solicitor General for the respondent-CBI.

Contentions:

5. Mr. S. Prabhakaran, learned counsel for the appellant, after taking us through the entire materials including the order of the trial Court and the High Court submitted that the initial proceedings by the State Crime Branch and the subsequent proceedings by the CBI cannot be permitted, hence, the entire investigation is to be thrown out. In other words, according to him, parallel proceedings by the State Crime Branch and the CBI are not permissible. In addition to the same, he submitted that the original seals and rubber stamps have not been seized from the police officials and those were not produced by the I.O. to prove that the seals and stamps were forged. He further submitted that the prosecution has failed to exhibit the FSL report with regard to the impression of seals of M.Os 1 to 3 alleged to have been recovered by the prosecution at the instance of A-3 despite the same were being sent by Shri Madavanan (PW-30), Inspector of Police. According to him, the specimen signatures of Shri Natarajan (PW-16), DSP, and R. Muniyandi (PW-29), Sub-Inspector of Police, have not been sent to the hand writing expert for his opinion. Further, the seal and specimen signature of attesting officer, viz., Dr. Muthu (PW-18) were not collected by the CBI to prove that the seal and specimen signature were forged. There is no document or indication found in Exh.P-3 to P-43 to show that they were sent by M/s Goodluck Travels to the Passport Office at Trichy. Finally, he submitted that inasmuch as the certificates issued by the Village Administrative Officers that the applicants were not the residents of the place mentioned in the application form, their reports have no legal sanctity in the absence of certification by the Tahsildar.

6. Mr. Rawal, learned ASG appearing for the CBI, met all the contentions. He submitted that the claim that parallel proceedings by the District Crime Branch (DCB) and the CBI, though not urged before the trial Court, High Court and even in the grounds of appeal, however, there is no legal basis for such claim. Even otherwise, according to him, if there is any defect in the investigation, the accused cannot be acquitted on this ground. By taking us through the evidence relied on by the prosecution, findings by the trial Court and the High Court, learned ASG submitted that in view of concurrent decision of two courts, in the absence of any perversity, interference by this Court exercising jurisdiction under Article 136 is not warranted.

Discussion:

7. With regard to the main objection as to parallel proceedings as claimed by Mr. Prabhakaran, learned counsel for the appellant, as stated earlier, this objection was not raised either before the trial Court or before the High Court and even in the grounds of appeal before this Court, however, considering the fact that we are dealing with a matter pertaining to criminal prosecution, we heard the counsel on this aspect. He pointed out that the first FIR dated 09.02.1993 was registered at the instance of the complaint by Shri V.A. Britto, Passport Officer, Trichy. The said FIR has been marked as Exh.P-214. He also pointed out that the second FIR, at the instance of the Special Police Establishment, Madras Branch, was lodged on 11.05.1993 against three persons, namely, (1) P. Durai, Superintendent, Passport Office, Trichy (2) P.M. Rajendran, LDC, Passport Office, Trichy and (3) M/s Goodluck Travels, Thiruvadanai, Ramanad District, Tamil Nadu. By taking us through the said reports, particularly, the second FIR, the counsel for the appellant has pointed out that the said report proceeds on the basis of credible information from a reliable source. The same was entertained and registered as R.C.No. 21(A)/93 by S. Arulnadu, Inspector of Police,

SPE:CBI:ACB:Madras. By pointing out these details, it is contended by the counsel for the appellant that the course adopted by the prosecution in examining certain persons by the DCB, namely, the State Police and the remaining persons by the CBI is not permissible.

8. It is settled law that not only fair trial, but fair investigation is also part of constitutional rights guaranteed under Articles 20 and 21 of the Constitution of India. Accordingly, investigation must be fair, transparent and judicious and it is the immediate requirement of rule of law. As observed by this Court in *Babubhai vs. State of Gujarat and Others,* 2010 (12) SCC 254, the Investigating Officer cannot be permitted to conduct an investigation in a tainted and biased manner. It was further observed that where non-interference of the Court would ultimately result in failure of justice, the Court must interfere. Though reliance was placed on the above decision by the appellant, it is not in dispute that in that case, the High Court has concluded by giving detailed reasons that the investigation has been totally one-sided based on malafide. Further, in that case, the charge-sheets filed by the Investigating Agency in both the cases were against the same set of accused. This was not the situation in the case on hand. Though the State Crime Branch initiated investigation, subsequently, the same was taken over by the CBI considering the volume and importance of the offence.

9. In this regard, Mr. Rawal, learned ASG by drawing our attention to the relevant provisions of the Delhi Special Police Establishment Act, 1946 submitted that the course adopted by the CBI is, undoubtedly, within the ambit of the said Act and legally sustainable. Section 5 of the said Act speaks about extension of powers and jurisdiction of special establishment to other areas. Section 5 of the Act is relevant for our purpose which reads as under:-

"**5. Extension of powers and jurisdiction of special police establishment to other areas.—**(1) The Central

Government may by order extend to any area (including Railway areas), in a State, not being a Union Territory the powers and jurisdiction of members of the Delhi Special Police Establishment for the investigation of any offences or classes of offences specified in a notification under Section 3.

(2) When by an order under sub-section (1) the powers and jurisdiction of members of the said police establishment are extended to any such area, a member thereof may, subject of any orders which the Central Government may make in this behalf, discharge the functions of a police officer in that area and shall, while so discharging such functions, be deemed to be a member of a police force of that area and be vested with the powers, functions and privileges and be subject to the liabilities of a police officer belonging to that police station.

(3) where any such order under sub-section (1) is made in relation to any area, then, without prejudice to the provisions of sub-section (2) any member of the Delhi Special Police Establishment of or above the rank of Sub-Inspector may subject to any orders which the Central Government may make in this behalf, exercise the powers of the officer in charge of a police station in that area and when so exercising such powers, shall be deemed to be an officer in charge of a police station discharging the functions of such an officer within the limits of his station."

Sub-section (3) which was inserted with effect from 18.12.1964 by Act 40 of 1964 makes it clear that on the orders of the Central Government, any member of the Delhi Special Police Establishment is permitted to exercise the powers of the officer in charge of a police station in that area and while exercising such powers, he shall be deemed to be an officer in charge of a police station concerned discharging the functions of such officer within the limits of his station. In the light of the mandates as provided in sub-section (3), we are of the view that learned

ASG is right in contending that there is no infirmity or flaw in continuing the investigation by the officers of the CBI in spite of the fact that the State Crime Branch registered a complaint and proceeded with the investigation to a certain extent.

10. It is also settled law that for certain defects in investigation, the accused cannot be acquitted. This aspect has been considered in various decisions. In *C. Muniappan and Others vs. State of Tamil Nadu,* 2010 (9) SCC 567, the following discussion and conclusion are relevant which are as follows:-

"**55.** There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation.

11. In *Dayal Singh and Others vs. State of Uttaranchal,* 2012 (8) SCC 263, while reiterating the principles rendered in *C. Muniappan* (supra), this Court held thus:

"18. … Merely because PW 3 and PW 6 have failed to perform their duties in accordance with the requirements of law, and there has been some defect in the investigation, it will not be to the benefit of the accused persons to the extent that they would be entitled to an order of acquittal on this ground. …"

12. In *Gajoo vs. State of Uttarakhand,* 2012 (9) SCC 532, while reiterating the same principle again, this Court held that defective investigation, unless affects the very root of the prosecution case and is prejudicial to the accused should not be an aspect of material consideration by the Court. Since, the Court has adverted to all the earlier decisions with regard to defective investigation and outcome of the same, it is useful to refer the dictum laid down in those cases:

20. In regard to defective investigation, this Court in *Dayal Singh v. State of Uttaranchal* while dealing with the cases of omissions and commissions by the investigating officer, and duty of the court in such cases, held as under: (SCC pp. 280-83, paras 27-36)

"27. Now, we may advert to the duty of the court in such cases. In *Sathi Prasad v. State of U.P* this Court stated that it is well settled that if the police records become suspect and investigation perfunctory, it becomes the duty of the court to see if the evidence given in court should be relied upon and such lapses ignored. Noticing the possibility of investigation being designedly defective, this Court in *Dhanaj Singh v. State of Punjab,* held: (SCC p. 657, para 5)

'5. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the

investigating officer if the investigation is designedly defective.'

28. Dealing with the cases of omission and commission, the Court in *Paras Yadav v. State of Bihar* enunciated the principle, in conformity with the previous judgments, that if the lapse or omission is committed by the investigating agency, negligently or otherwise, the prosecution evidence is required to be examined dehors such omissions to find out whether the said evidence is reliable or not. The contaminated conduct of officials should not stand in the way of evaluating the evidence by the courts, otherwise the designed mischief would be perpetuated and justice would be denied to the complainant party.

29. In *Zahira Habibullah Sheikh (5) v. State of Gujarat,* the Court noticed the importance of the role of witnesses in a criminal trial. The importance and primacy of the quality of trial process can be observed from the words of Bentham, who states that witnesses are the eyes and ears of justice. The court issued a caution that in such situations, there is a greater responsibility of the court on the one hand and on the other the courts must seriously deal with persons who are involved in creating designed investigation. The Court held that: (SCC p. 398, para 42)

'42. *Legislative measures to emphasise prohibition against tampering with witness, victim or informant have become the imminent and inevitable need of the day.* Conducts which illegitimately affect the presentation of evidence in proceedings before the courts have to be seriously and sternly dealt with. There should not be any undue anxiety to only protect the interest of the accused. That would be unfair, as noted above, to the needs of the society. On the contrary, efforts should be to ensure a fair trial where the accused

and the prosecution both get a fair deal. Public interest in the proper administration of justice must be given as much importance, if not more, as the interest of the individual accused. In this courts have a vital role to play.' (emphasis in original)

30. With the passage of time, the law also developed and the dictum of the court emphasised that in a criminal case, the fate of proceedings cannot always be left entirely in the hands of the parties. Crime is a public wrong, in breach and violation of public rights and duties, which affects the community as a whole and is harmful to the society in general.

31. *Reiterating the above principle, this Court in* NHRC *v.* State of Gujarat *held as under: (SCC pp. 777-78, para 6)*

'6. … "35. … The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice—often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary

for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the Judges as impartial and independent adjudicators." (Zahira Habibullah case, SCC p. 395, para 35)'

32. In *State of Karnataka v. K. Yarappa* Reddy this Court occasioned to consider the similar question of defective investigation as to whether any manipulation in the station house diary by the investigating officer could be put against the prosecution case. This Court, in para 19, held as follows: (SCC p.720)

'19. But can the above finding (that the station house diary is not genuine) have any inevitable bearing on the other evidence in this case? If the other evidence, on scrutiny, is found credible and acceptable, should the court be influenced by the machinations demonstrated by the investigating officer in conducting investigation or in preparing the records so unscrupulously? It can be a guiding principle that as investigation is not the solitary area for judicial scrutiny in a criminal trial, the conclusion of the court in the case cannot be allowed to depend solely on the probity of investigation. It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinised independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-

> eminence in criminal trials over the action taken by the investigating officers. The criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case.'

33. In *Ram Bali v. State of U.P. the judgment in Karnel Singh v. State of M.P.* was reiterated and this Court had observed that: (Ram Bali case[15], SCC p. 604, para 12)

> '12. … In case of defective investigation the court has to be circumspect [while] evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the investigation officer if the investigation is designedly defective.'

34. Where our criminal justice system provides safeguards of fair trial and innocent till proven guilty to an accused, there it also contemplates that a criminal trial is meant for doing justice to all, the accused, the society and a fair chance to prove to the prosecution. Then alone can law and order be maintained. The courts do not merely discharge the function to ensure that no innocent man is punished, but also that a guilty man does not escape. Both are public duties of the Judge. During the course of the trial, the learned Presiding Judge is expected to work objectively and in a correct perspective. Where the prosecution attempts to misdirect the trial on the basis of a perfunctory or designedly defective investigation, there the court is to be deeply cautious and ensure that despite such an attempt, the determinative process is not

subverted. For truly attaining this object of a 'fair trial', the court should leave no stone unturned to do justice and protect the interest of the society as well.

35. This brings us to an ancillary issue as to how the court would appreciate the evidence in such cases. The possibility of some variations in the exhibits, medical and ocular evidence cannot be ruled out. But it is not that every minor variation or inconsistency would tilt the balance of justice in favour of the accused. Of course, where contradictions and variations are of a serious nature, which apparently or impliedly are destructive of the substantive case sought to be proved by the prosecution, they may provide an advantage to the accused. The courts, normally, look at expert evidence with a greater sense of acceptability, but it is equally true that the courts are not absolutely guided by the report of the experts, especially if such reports are perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution. In *Kamaljit Singh v. State of Punjab,* the Court, while dealing with discrepancies between ocular and medical evidence, held: (SCC p. 159, para 8)

> '8. It is trite law that minor variations between medical evidence and ocular evidence do not take away the primacy of the latter. Unless medical evidence in its term goes so far as to completely rule out all possibilities whatsoever of injuries taking place in the manner stated by the eyewitnesses, the testimony of the eyewitnesses cannot be thrown out.'\

36. Where the eyewitness account is found credible and trustworthy, medical opinion pointing to alternative possibilities may not be accepted as conclusive.

> '34. … The expert witness is expected to put before the court all materials inclusive of the data which induced him to come to the conclusion and

enlighten the court on the technical aspect of the case by [examining] the terms of science so that the court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion, because once the expert's opinion is accepted, it is not the opinion of the medical officer but [that] of the court.'"

13. It is clear that merely because of some defect in the investigation, lapse on the part of the I.O., it cannot be a ground for acquittal. Further, even if there had been negligence on the part of the investigating agency or omissions etc., it is the obligation on the part of the Court to scrutinize the prosecution evidence de hors such lapses to find out whether the said evidence is reliable or not and whether such lapses affect the object of finding out the truth. In the light of the above principles, as noticed, we reject the main contention of the learned counsel for the appellant, however, as observed in the above decisions, let us examine the material relied on by the prosecution and find out whether a case has been made out against the appellant.

Discussion as to the merits of the prosecution case:

14. It is the claim of the appellant that the prosecution has not proved that the travel agency was purported to have been run by S. Rajendran (A-3) for the purpose of submitting passport applications. According to the appellant, Exh.P-2 to P-43 is incorrect. The said contention is liable to be rejected since Palaniappan (PW-11), who is the owner of the building bearing No.48/9, MCT Building, near Bus Stand, Karaikudi has leased out the first floor of the said building to S. Rajendran (A-3) for the purpose of running a travel agency in the name and style of Goodluck Travels. Even in the cross-examination, PW-11, the owner of the said building, admitted that A-3 was a tenant under him. In addition to the same, it is also clear from the evidence of one Dawood (PW-13) that Rajendran (A-3) was running a travel agency at Karaikudi in the name and style of

Goodluck Travels. It is also relevant to point out that as per the evidence of Assistant Registrar, Ramanad District (PW-9), Goodluck Travels was registered as a firm in the Office of the District Registrar, Karaikudi. It is clear from the above materials that A-3 was occupying the said premises pertaining to PW-11 during the period from 1991-93 and he was running a travel agency in that place.

15. The claim of the appellant that there is no evidence to show that Exh.P-2 to P-43 had been presented by the Goodluck Travels is incorrect since Hema (A-5), who was working as a clerk in the said travel agency of A-3 has admitted in the statement under Section 313 of the Code of Criminal Procedure that at the relevant time she was working with the Goodluck Travels and she used to submit the passport applications in the passport office and receive the passports from the office. The above statement makes it clear that she was assisting S. Rajendran (A-3) in preparing applications and filing them before the passport office and dealing the affairs connected therewith. This fact is also evident from Exh. P-2, which is a folder marked on the side of the prosecution and captioned as "Goodluck Travels".

16. The other relevant aspect is the admissible portion of the confessional statement of A-3 which is marked as Exh.P-215 and which led to the recovery of forged/fabricated rubber stamp seals, M.Os 1 to 3 seized at his behest under Exh.P-216, the Mazahar, in the presence of Village Administrative Officer (PW-15) and Village Menial also prove the prosecution case and disprove the stand of the appellant.

17. The trial Court, on verification and perusal of Exh.P-2 to P-43, passport applications, noted that the same were filed by Goodluck Travels. It is pointed out that the applicant concerned in Exh.P-2 (passport application) namely, Shri Rasool, authorized M/s Goodluck Travels to deal with the matter relating to his passport and to receive the same on his behalf. The evidence of PW-12 and PW-13 also lends credence

to the above aspect. Further, we have already noted that the appellant (A-5) has admitted in her examination under Section 313 that she was working with Goodluck Travels and she used to submit the applications in the passport office and receive the passports from the office.

18. Next, it is contended by the appellant that the police verification forms, namely, Exh.128 to 136 and 161 to 202 were not proved to have been forged in the light of the fact that the subsequent signatures of PWs 16 and 29 were not sent to PW-28, the hand writing expert, for his opinion. The said contention is liable to be rejected in view of the categorical statement of Shri Selvin (PW-26), DSP, DCRB, Ramanad who has stated that as soon as the personal particulars, forms of passport applications were received from the Passport Office for police verification, they were entered in the register maintained for the purpose and each application was given a number and all the applications were sent to the respective Police Stations for report. He further explained that after verification by the officials concerned, the paper would again come to the office of DSP, DCRB for forwarding the same to the concerned Passport Offices. He asserted that 42 application forms, viz., Exh. P-2 to P-43 were not received at the office of DSP, DCRB, Ramanad. He also highlighted that these forms were neither sent to the sub-Inspector of Police Thiruvadanai for verification nor received back from the S.I. Police and not dispatched to the Passport Office, Trichy for recommendation for issue of passports. A perusal of the evidence of Shri Natarajan (PW-16), DSP, R. Muniyadi (PW-29), Sub-Inspector of Police clearly shows that they did not sign the verification forms. PW-29 specifically stated that during the relevant time, passport applications (Exh.P-2 to 43) were not received by his office and he did not sign the verification forms Exh.P-161 to P-202. It is clear from their statements and assertions that the verification forms of the said 42 applications have not been dealt with by the concerned officials and the trial Judge was right in concluding that they were forged. Mere non-production of

registers maintained in the office of DSP, DCRB, Ramanad cannot be construed to be an infirmity in this case in the light of the evidence of PWs 16, 26 and 29 who are relevant officers concerned with those documents.

19. Regarding the contention that the specimen signatures of Dr. Muthu (PW-18), Civil Surgeon, Government Hospital and Shri Vairavan (PW-20), Executive Officer (Retired), Town Panchayat, Thondi in Ramanad District, who are all independent witnesses, were not forged, it is very much clear from their evidence that their signatures were forged in the applications. There is no reason to disbelieve their evidence and the trial Judge has rightly accepted the same.

20. Regarding the evidence of Village Administrative Officers and the certificates issued by them, it is relevant to point out that those documents were properly marked through Village Administrative Officers of the villages concerned and also by the officers who made a field enquiry for the same. We are satisfied that there is no legal infirmity as claimed.

21. Insofar as the contention relating to recoveries of M.Os 1 to 3 – Seals of Superintendent of Police, Ramanad, as rightly concluded by the trial Court, the evidence of the concerned Village Administrative Officers, Deputy Superintendent of Police, Civil Surgeon (PW-18), Government Hospital, Executive Officer (Retired) of Town Panchayat (PW-20) are sufficient to establish that the forged attested documents were created and enclosed for the purpose of getting passports in support of false addresses given in the applications by the appellant. The above fact is also evident from the evidence of Village Administrative Officer (PW-15), Thiruvadanani, the confessional statement given by A-3 which was recorded under Section 27 of the Evidence Act in his presence and M.Os 1 to 3 which were recovered under a cover of mazahar (Exh. P-216) at the behest of A-3 and the admissible portion of the evidence leading to recovery which is marked as Exh. 215. The contradictions as pointed out by the learned counsel for the appellant are only

trivial in nature as found by both the trial Court and the High Court, accordingly, it cannot be construed to be a material one so as to affect the version of the prosecution. We are satisfied that there is no infirmity in the recovery and reject the argument of the learned counsel for the appellant.

22. Coming to the next contention, namely, the failure of the prosecution to exhibit the report of FSL, Chennai with regard to the impression of seals M.Os 1 to 3 is fatal to the prosecution, it is relevant to note that PWs 16, 26 and 29 DSPs and S.I. of Police have categorically denied the genuineness of the above seals since the same were recovered pursuant to the confessional statement of A-3 and the absence of expert opinion by itself does not absolve the liability of the appellant.

23. The contention that the evidence of Sundaram (PW-14), who was examined for the purpose of proving the handwriting of the appellant and whose competency to identify the writing of the appellant itself is doubtful, as rightly pointed out by the respondent that it was admitted by A-5 (appellant herein), while questioning under Section 313 that she had been working in Sugir Tours and Travels run by PW-14 during 1987-91 and, hence, the evidence of PW-14, who identified the writings available in Exhs.P-2 to P-43 as that of A-5 is admissible under Section 47 of the Indian Evidence Act. We are satisfied that the same was rightly acted upon by the trial Court and the High Court while holding the charge against the accused-appellant as proved to have committed in pursuance of the conspiracy.

24. Finally, the contention of the appellant that simply because the applications were filled up by a person does not automatically lead to the inference that a person is a party to the conspiracy. In the case on hand, it is very well established by the prosecution that the filled up passport applications were submitted by A-5 (appellant herein) on behalf of her employer A-3. Further, in majority of passport applications (Exh. P-2 to P-43), bogus particulars were filled by A-5 (appellant herein),

A B C D E F G H

at Trichy. The prosecution has also established that A-5 has given false particulars regarding the place of residence of applicants' in the passport applications in view of her admission in 313 statement that she was working in Goodluck Travels and assisting Rajendran (A-3) in preparing applications and filing them before the Passport Office as well as handling the affairs connected therewith which clearly prove that A-5 has filled up the said passport applications (Exh.P-2 to P-43). We are also satisfied that the prosecution has clearly established that false documents were made for the purpose of cheating and those documents were used as genuine for obtaining passports.

25. In the light of the overwhelming evidence placed by the prosecution, analyzed by the trial Court and affirmed by the High Court, interference by this Court with concurrent findings of fact by the courts below is not warranted except where there is some serious infirmity in the appreciation of evidence and the findings are perverse. Further, this Court will not ordinarily interfere with appreciation of evidence by the High Court and re-appreciation is permissible only if an error of law or procedure and conclusion arrived are perverse.

26. Taking note of the fact that the appellant is having a small child, while confirming the conviction we reduce the sentence to six months from two years.

27. With the above modification i.e., reduction of sentence, the appeal stands disposed of.

K.K.T. Appeal disposed of.

A B C D E F

M/S. UNIWORTH TEXTILES LTD.
v.
COMMISSIONER OF CENTRAL EXCISE, RAIPUR
(Civil Appeal No.6060 of 2003)

JANUARY 22, 2013

[D.K. JAIN AND MADAN B. LOKUR, JJ.]

Customs Act, 1962 – s.28 r/w the proviso thereto and s.112 – Levy of customs duty and penalty – Challenge to – Plea of assessee-appellant that the demand of duty along with the penalty was barred by limitation turned down by Tribunal – Held: Conclusion of the Tribunal that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is untenable – S.28 contemplates two situations, viz. inadvertent non-payment and deliberate default – The former is canvassed in the main body of s.28 and is met with a limitation period of six months, whereas the latter, finds abode in the proviso to the section and faces a limitation period of five years – For the operation of the proviso, the intention to deliberately default is a mandatory prerequisite – In the present case, from the evidence adduced by the appellant, an inference of bona fide conduct is drawn in favour of the appellant – Evidently the appellant made efforts in pursuit of adherence to the law rather than its breach – Moreover, the proviso to s.28 finds application only when specific and explicit averments challenging the fides of the conduct of the assessee are made in the show cause notice, a requirement that the show cause notice in the present case fails to meet – On account of the fact that the burden of proof of proving mala fide conduct under the proviso to s.28 lies with the Revenue; that in furtherance of the same, no specific averments find a mention in the show cause notice which is a mandatory requirement for commencement of action under the said proviso; and that

nothing on record displays a willful default on the part of the appellant, the extended period of limitation under the said provision could not be invoked against the appellant.

Burden of proof – Lies on whom – Held: The burden of proving any form of mala fide lies on the shoulders of the one alleging it.

The appellant, an Export Oriented Unit ("EOU"), is engaged in the manufacture of all wool and poly-wool worsted grey fabrics. The sister unit of appellant, Uniworth Ltd., another EOU, engaged in the generation of power from a captive power plant, obtained permission for usage of electricity generated by the captive power plant by both, Uniworth Ltd. and the appellant. The appellant purchased electricity from Uniworth Ltd. under an agreement which continued till 1999. Prior to January-February, 2000, the sister unit i.e. Uniworth Ltd. procured furnace oil required for running the captive power plant. This purchase of furnace oil was exempted from payment of customs duty under Notification No. 53/97-Cus. In January-February, 2000, Uniworth Ltd. exhausted the limit of letter of credit opened by it for the duty-free import of furnace oil. Thereafter, Uniworth Ltd. informed the appellant that it would require the arrangement for running the captive power plant for its own use, and hence, would be compelled to stop the supply of electricity to the appellant. Consequently, as a temporary measure, for overcoming this difficulty, the appellant, while availing the benefit of Notification No. 53/97-Cus, procured furnace oil from Coastal Wartsila Petroleum Ltd., a Foreign Trade Zone unit. It supplied the same to Uniworth Ltd. for generation of electricity, which it continued to receive as before.

Subsequently, the appellant received a show cause notice from the Commissioner of Customs, demanding duty for the period during which the appellant imported

furnace oil on behalf of Uniworth Ltd. The show cause notice was issued on 02.08.2001, more than six months after the appellant had imported furnace oil on behalf of Uniworth Ltd. in January, 2001.

By the impugned order, the Tribunal upheld the levy of customs duty on the import of furnace oil as also the penalty under Section 112 of the Customs Act, 1962, rejecting the plea of the appellant that demand of the duty along with the penalty was barred by limitation.

Allowing the appeal, the Court

HELD: 1.1. Section 28 of the Customs Act, 1962 imposes a limitation period of six months within which the concerned authorities must commence action against an importer/assessee in case of duties not levied, short-levied or erroneously refunded. It allows the said limitation period to be read as five years only in some specific circumstances, viz. collusion, willful misstatement or suppression of facts. Since in the instant case, the said show-cause notice was issued after lapse of six months, the revenue, for its action to be legal in the eyes of law, can only take refuge under the proviso to the section. [Para 10] [39-D-E]

1.2. The conclusion of the Tribunal that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is untenable. Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. The main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or willful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the

applicability of the proviso. If non- disclosure of certain items assessable to duty does not invite the wrath of the proviso, one fails to understand how the non-payment of duty on disclosed items, after inquiry from the concerned department meets, with that fate. [Paras 12, 16] [40-E-G; 44-F-G]

1.3. Section 28 of the Customs Act, 1962 clearly contemplates two situations, viz. inadvertent non-payment and deliberate default. The former is canvassed in the main body of Section 28 of the Act and is met with a limitation period of six months, whereas the latter, finds abode in the proviso to the section and faces a limitation period of five years. For the operation of the proviso, the intention to deliberately default is a mandatory prerequisite. [Para 19] [47-G]

1.4. In the present case, from the evidence adduced by the appellant, one will draw an inference of *bona fide* conduct in favour of the appellant. The appellant laboured under the very doubt which forms the basis of the issue before this Court and hence, decided to address it to the concerned authority, the Development Commissioner, thus, in a sense offering its activities to assessment. The Development Commissioner answered in favour of the appellant and in its reply, even quoted a letter by the Ministry of Commerce in favour of an exemption the appellant was seeking, which anybody would have found satisfactory. Only on receiving this satisfactory reply did the appellant decide to claim exemption. Even if one were to accept the argument that the Development Commissioner was perhaps not the most suitable repository of the answers to the queries that the appellant laboured under, it does not take away from the *bona fide* conduct of the appellant. It still reflects the fact that the appellant made efforts in pursuit of adherence to the law rather than its breach. [Para 23] [49-B-E]

Pushpam Pharmaceuticals Company Vs. Collector of Central Excise, Bombay **1995 Supp(3) SCC 462;** *Sarabhai M. Chemicals Vs. Commissioner of Central Excise, Vadodara* **(2005) 2 SCC 168: 2004 (6) Suppl. SCR 1010** *Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise, Meerut* **(2005) 7 SCC 749: 2005 (3) Suppl. SCR 413;** *Collector of Central Excise Vs. H.M.M. Ltd.* **1995 Supp (3) SCC 322;** *Easland Combines, Coimbatore Vs. The Collector of Central Excise, Coimbatore* **(2003) 3 SCC 410: 2003 (1) SCR 98;** *Associated Cement Companies Ltd. Vs. Commissioner of Customs* **(2001) 4 SCC 593: 2001 (1) SCR 608;** *Aban Loyd Chiles Offshore Limited and Ors. Vs. Commissioner of Customs, Maharashtra* **(2006) 6 SCC 482: 2006 (4) Suppl. SCR 290 – referred to.**

Black'sLaw Dictionary, **Sixth Edition – referred to.**

2. Further, this Court is not convinced with the finding of the Tribunal which placed the onus of providing evidence in support of *bona fide* conduct, by observing that "the appellants had not brought anything on record" to prove their claim of *bona fide* conduct, on the appellant. It is a cardinal postulate of law that the burden of proving any form of *mala fide* lies on the shoulders of the one alleging it. [Para 24] [49-E-F]

Union of India Vs. Ashok Kumar & Ors. **(2005) 8 SCC 760: 2005 (4) Suppl. SCR 317 – referred to.**

3. Moreover, the proviso to Section 28 of the Act finds application only when specific and explicit averments challenging the *fides* of the conduct of the assessee are made in the show cause notice, a requirement that the show cause notice in the present case fails to meet. [Para 25] [49-H; 50-A]

4. On account of the fact that the burden of proof of proving *mala fide* conduct under the proviso to Section

28 of the Act lies with the Revenue; that in furtherance of the same, no specific averments find a mention in the show cause notice which is a mandatory requirement for commencement of action under the said proviso; and that nothing on record displays a willful default on the part of the appellant, it is held that the extended period of limitation under the said provision could not be invoked against the appellant. [Para 26] [51-E-F]

Case Law Reference:

1995 Supp(3) SCC 462	**referred to**	**Para 13, 15**
2004 (6) Suppl. SCR 1010	**referred to**	**Para 14**
2005 (3) Suppl. SCR 413	**referred to**	**Para 15**
1995 Supp (3) SCC 322	**referred to**	**Para 16**
2003 (1) SCR 98	**referred to**	**Para 17**
2001 (1) SCR 608	**referred to**	**Para18**
2006 (4) Suppl. SCR 290	**referred to**	**Para 20, 25**
2005 (4) Suppl. SCR 317	**referred to**	**Para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6060 of 2003.

From the Judgment & Order dated 18.02.2003 of the Customs, Excise & Gold (Control) Appellate Tribunal at New Delhi in Appeal No. C/482/2002-D.

R.P. Bhatt, Rupesh Kumar, Tara Chandra Sharma, Narendra M. Sharma for the Appellant.

Mukul Gupta, Vikas Malhotra, N.K. Karhail, Nishant Patil (For B. Krishna Prasad) for the Respondent.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. This appeal under Section 130-E of the Customs Act, 1962 (for short "the Act") arises from the final Order No. 142/03-B dated 18.02.2003, passed by the Customs, Excise & Gold (Control) Appellate Tribunal, New Delhi (for short "the Tribunal"). By the impugned order, the Tribunal has upheld the levy of customs duty on the import of furnace oil as also the penalty under Section 112 of the Act, rejecting the plea of the appellant that demand of the duty along with the penalty was barred by limitation.

2. The appellant, an Export Oriented Unit (for short "EOU"), is engaged in the manufacture of all wool and poly-wool worsted grey fabrics. It was granted the status of EOU by the Government of India, Ministry of Industry, Department of Industrial Development by way of a Letter of Permission (for short "the LOP") dated 31.08.1992 as amended by letter dated 4.5.1993. The appellant applied for a license for private bonded warehouse, which was granted to it under C. No. V (Ch.51) 13-01/92/100%EOU dated 30.09.1992 by the Assistant Collector, Central Excise Division- Raipur for storing inputs, raw materials, etc. either imported duty-free by availing concessions available for 100% EOU or procured locally without payment of duty for use in manufacture of all wool, poly-wool and other fabrics.

3. For interaction with the appellant, its sister unit, Uniworth Ltd., another EOU, engaged in the generation of power from a captive power plant, obtained another LOP dated 1.11.1994. The said LOP, dated 1.11.1994, permitted usage of electricity generated by the captive power plant by both, Uniworth Ltd. and the appellant Uniworth Textiles Ltd. The appellant purchased electricity from Uniworth Ltd. under an agreement which continued till 1999.

4. Prior to January-February, 2000, the sister unit i.e. Uniworth Ltd. procured furnace oil required for running the captive power plant. This purchase of furnace oil was exempted from payment of customs duty under Notification No. 53/97-

Cus., the relevant portion of which reads as follows: -

"**Notification No. 53/97-Cus., dated 3-6-1997**

Exemption to specified goods imported for production of goods for export or for use in 100% Export-Oriented Undertakings — New Scheme — Notification No. 13/81-Cus. rescinded

In exercise of the powers conferred by sub-section (1) of section 25 of the Customs Act, 1962 (52 of 1962), the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts goods specified in the Table below (hereinafter referred to as the goods), when imported into India, for the purpose of manufacture of articles for export out of India, or for being used in connection with the production or packaging or job work for export of goods or services out of India by hundred per cent Export Oriented units approved by the Board of Approvals for hundred per cent Export Oriented Units appointed by the notification of Government of India in the Ministry of Industry, Department of Industrial Policy and Promotion for this purpose, (hereinafter referred to as the said Board), from the whole of duty of customs leviable thereon under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty, if any, leviable thereon under section 3 of the said Customs Tariff Act..."

Entry 11 of the said notification at the relevant time read as follows: -

"11. Captive power plants including captive generating sets and their spares for such plants and sets as recommended by the said Board of Approvals."

5. In January-February, 2000, Uniworth Ltd. exhausted the limit of letter of credit opened by it for the duty-free import of furnace oil. It made an alternative arrangement of procuring

duty free furnace oil under Notification No. 01/95 titled "Specified goods meant for manufacture and packaging of articles in 100% EOU or manufacture or development of electronic hardware and software in EHTP or STP" dated 04.01.1995. The said notification reads as follows :-

> "**Notification No. 1/95-Central Excise**
>
> In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excises and Salt Act/ 1944 (1 of 1944), read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957), the Central Government being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods, specified in Annexure I to this notification (hereinafter referred to as the said goods), when brought in connection with -
>
> (a) the manufacture and packaging of articles, or for production or packaging or job work for export of goods or services out of India into hundred percent export oriented undertaking (hereinafter referred to as the user industry); or;
>
> XXX XXX XXX
>
> from the **whole of,**
>
> (i) **the duty of excise** leviable thereon under section 3 of the Central Excise Act, 1944 (1 of 1944), and
>
> (ii) the **additional** duty **of excise** leviable thereon under sub-section (1) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957),
>
> XXX XXX XXX

> **ANNEXURE I**
>
> 3. Captive power plants including captive generating sets and transformers as recommended by the Development Commissioner/Designated Officer.
>
> 3B. Spares, fuel, lubricants, consumables and accessories for captive power plants including captive generating sets and spares, consumables and accessories for transformers as approved by the Assistant Commissioner or Deputy Commissioner of Central Excise.
>
> 3C. Furnace oil required for the boilers as approved by the Assistant Commissioner of Customs or Central Excise on the recommendation of the Development Commissioner."

6. Therefore, Uniworth Ltd. informed the appellant that it would require the arrangement for running the captive power plant for its own use, and hence, would be compelled to stop the supply of electricity to the appellant. Consequently, as a temporary measure, for overcoming this difficulty, the appellant, while availing the benefit of Notification No. 53/97-Cus, procured furnace oil from Coastal Wartsila Petroleum Ltd., a Foreign Trade Zone unit. It supplied the same to Uniworth Ltd. for generation of electricity, which it continued to receive as before.

7. Since the appellant was procuring furnace oil for captive power plant of another unit, it wrote to the Development Commissioner seeking clarification that whether duty on the supply and receipt of furnace oil and electricity respectively was required to be paid. The Development Commissioner, referring to a circular dated 12.10.1999 of the Ministry of Commerce, said as follows: -

> "They are procuring surplus power from their sister concern M/s. Uniworth Ltd. (Unit- 1, LOP dated 31.01.1989) under Permission No. 248(93) dated 01.11.1994 and the unit

transferred 2590.30 KL of furnace oil to M/s. Uniworth Ltd. (Unit- 1) for their captive power consumption. *No permission is required from this office for duty free import/ procurement of POL products for captive power consumption. It is further to clarify as per the Exim Policy provision, one EOU may sell/ transfer surplus power to another EOU duty free in terms of Ministry of Commerce Letter No. 1/1/98-EP dated 12.10.1999 (sic)*"

[Emphasis supplied]

The relevant portion of the Ministry of Commerce Letter No.1/98-EP is extracted below:

"2. No duty is required to paid (*sic*) on sale of surplus power from an EOU/EPZ unit to another EOU/EPZ unit. Development Commissioner of EPZ concerned would be informed in writing for such supply and proper account of consumption of raw material would be maintained by the supplying unit for calculation of NFEP."

8. Yet, the appellant received a show cause notice from the Commissioner of Customs, Raipur, demanding duty for the period during which the appellant imported furnace oil on behalf of Uniworth Ltd. It gave the following reason for the same: -

"1.1. M/s. Uniworth Ltd. (Power Division), Raipur, is engaged in the generation of power. M/s. Uniworth Textiles Ltd. and M/s. Uniworth Ltd. both are distinct companies having different LOP Central Excise Registration No. and different board of directors. They are different companies as per Companies Act and they prepare separate balance sheet…

4.2. Therefore it appears that the noticees had not received 742.5 KL of furnace oil … from M/s. Coastal Wartsila Petroleum Ltd… in their factory at all as neither they had storing facility to store the furnace oil so procured nor they had any power plant to utilize the said furnace oil to generate electricity. They also did not have LOP from Government of India… to procure and use furnace oil to generate electricity as they did not have any power plant in their factory… Considering the above fact it is clear that the procurement of 742.5 KL of furnace oil under shipping bill, without payment of customs duty, is against the provisions of Customs Act, 1962 and rules made hereunder (sic)."

9. The show cause notice was issued on 02.08.2001, more than six months after the appellant had imported furnace oil on behalf of Uniworth Ltd. in January, 2001. This time period of more than six months is significant due to the proviso to Section 28 of the Act. The Section, at the relevant time, read as follows: -

"**28. Notice for payment of duties, interest, etc.**

(1) When any duty has not been levied or has been short-levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may,-

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged or which has been so short-levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

Provided that where any duty has not been levied or has been short-levied or the interest has not been charged or has been part paid or the duty or interest has been

erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub-section shall have effect as if for the words "one year" and "six Months", the words "five years" were substituted.

Explanation.— Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be."

[Emphasis supplied]

10. The Section imposes a limitation period of six months within which the concerned authorities must commence action against an importer/assessee in case of duties not levied, short-levied or erroneously refunded. It allows the said limitation period to be read as five years only in some specific circumstances, viz. collusion, willful misstatement or suppression of facts. Since the said show-cause notice was issued after the elapse of six months, the revenue, for its action to be legal in the eyes of law, can only take refuge under the proviso to the section.

11. Both the appellate authorities, viz. the Commissioner of Customs and Central Excise (Appeals) and the Tribunal, rejected the claims of the appellant and affirmed payment of duty and penalty. They reasoned that since the appellant procured the furnace oil not for its own captive power plant, but for that of another, it could not claim exemption from payment of duty; entitlement of duty free import of fuel for its captive power plant lies with the owner of the captive power plant, and not the consumer of electricity generated from that power plant. Little or no attention was paid to the issue of limitation, which in our opinion, is the primary question for consideration in this case. The Tribunal only made the following observations in this regard:

"2. … He however, submitted that the demand of duty is barred by limitation as the show cause notice was issued on 02.08.2001 by demanding the duty for the period January/February 2001; that the Department was aware that the appellants do not have power plant and as such furnace oil could not have been used by them captively; that this is evident from letter dated 17.07.2001…

4… The appellants have also not brought on record any material in support of their contention that the Department was aware of the fact that the appellants did not have captive power plant. In view of this the demand cannot be held to be hit by the time limit."

Hence, the appellant is before us in this appeal.

12. We have heard both sides, Mr. R.P. Bhatt, learned senior counsel, appearing on behalf of the appellant, and Mr. Mukul Gupta, learned senior counsel appearing on behalf of the Revenue. We are not convinced by the reasoning of the Tribunal. The conclusion that mere non-payment of duties is equivalent to collusion or willful misstatement or suppression of facts is, in our opinion, untenable. If that were to be true, we fail to understand which form of non-payment would amount to ordinary default? Construing mere non-payment as any of the three categories contemplated by the proviso would leave no situation for which, a limitation period of six months may apply. In our opinion, the main body of the Section, in fact, contemplates ordinary default in payment of duties and leaves cases of collusion or willful misstatement or suppression of facts, a smaller, specific and more serious niche, to the proviso. Therefore, something more must be shown to construe the acts of the appellant as fit for the applicability of the proviso.

13. This Court, in *Pushpam Pharmaceuticals Company Vs. Collector of Central Excise, Bombay*[1], while interpreting the

1. 1995 Supp (3) SCC 462.

proviso of an analogous provision in Section 11A of The Central Excise Act, 1944, which is *pari materia* to the proviso to Section 28 discussed above, made the following observations:

> "4. Section 11A empowers the Department to re-open proceedings if the levy has been short-levied or not levied within six months from the relevant date. But the proviso carves out an exception and permits the authority to exercise this power within five years from the relevant date in the circumstances mentioned in the proviso, one of it being suppression of facts. The meaning of the word both in law and even otherwise is well known. In normal understanding it is not different that what is explained in various dictionaries unless of course the context in which it has been used indicates otherwise. *A perusal of the proviso indicates that it has been used in company of such strong words as fraud, collusion or wilful default. In fact it is the mildest expression used in the proviso. Yet the surroundings in which it has been used it has to be construed strictly. It does not mean any omission. The act must be deliberate. In taxation, it can have only one meaning that the correct information was not disclosed deliberately to escape from payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression.*"

[Emphasis supplied]

14. In *Sarabhai M. Chemicals Vs. Commissioner of Central Excise, Vadodara*[2], a three- judge bench of this Court, while referring to the observations extracted above, echoed the following views:

> "23. Now coming to the question of limitation, at the outset, we wish to clarify that there are two concepts which are required to be kept in mind for the purposes of deciding this case. Reopening of approvals/assessments is different from raising of demand in relation to the extended period of limitation. Under section 11A(1) of the Central Excise Act, 1944, a proper officer can reopen the approvals/ assessments in cases of escapement of duty on account of non-levy, non-payment, short-levy, short- payment or erroneous refund, subject to it being done within one year from the relevant date. On the other hand, the demand for duty in relation to extended period is mentioned in the proviso to section 11A(1). Under that proviso, in cases where excise duty has not been levied or paid or has been short-levied or short-paid or erroneously refunded on account of fraud, collusion or wilful mis-statement or suppression of facts, or in contravention of any provision of the Act or Rules with the intent to evade payment of duty, demand can be made within five years from the relevant date. In the present case, we are concerned with the proviso to section 11A(1).
>
> 24. In the case of *Cosmic Dye Chemical v. Collector of Central Excise, Bombay* (1995) 6 SCC 117, this Court held that intention to evade duty must be proved for invoking the proviso to section 11A(1) for extended period of limitation. It has been further held that intent to evade duty is built into the expression "fraud and collusion" but mis-statement and suppression is qualified by the preceding word "wilful". Therefore, it is not correct to say that there can be suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for invoking the proviso to section 11A.
>
> 25. In case of Pushpam Pharmaceuticals Company v. C.C.E. [1995 (78) ELT 401(SC)], this Court has held that the extended period of five years under the proviso to section 11A(1) is not applicable just for any omission on the part of the assessee, unless it is a deliberate attempt to escape from payment of duty. Where facts are known

2. (2005) 2 SCC 168.

A

to both the parties, the omission by one to do what he might have done and not that he must have done does not constitute suppression of fact."

15. In *Anand Nishikawa Co. Ltd. Vs. Commissioner of Central Excise, Meerut*[3], while again referring to the observations made in *Pushpam Pharmaceuticals Company* (supra), this Court clarified the requirements of the proviso to Section 11- A, as follows:-

B

"26…This Court in the case of *Pushpam Pharmaceuticals Company v. Collector of Central Excise, Bombay* (supra), while dealing with the meaning of the expression "suppression of facts" in proviso to Section 11A of the Act held that the term must be construed strictly, <u>it does not mean any omission and the act must be deliberate and willful to evade payment of duty.</u> The Court, further, held :-

C

D

'In taxation, it ("suppression of facts") can have only one meaning that <u>the correct information was not disclosed deliberately to escape payment of duty. Where facts are known to both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression.</u>'

E

27. Relying on the aforesaid observations of this Court in the case of *Pushpam Pharmaceutical Co. v. Collector of Central Excise, Bombay* [1995 Suppl. (3) SCC 462], we find that "suppression of facts" can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty. When facts were known to both the parties, the omission by one to do what he might have done and not that he must have done, would not render it suppression. It is settled law that mere failure to declare does not amount to willful suppression. There must be

F

G

3. (2005) 7 SCC 749.

H

A

some positive act from the side of the assessee to find willful suppression. Therefore, in view of our findings made herein above that there was no deliberate intention on the part of the appellant not to disclose the correct information or to evade payment of duty, it was not open to the Central Excise Officer to proceed to recover duties in the manner indicated in the proviso to Section 11A of the Act."

B

16. *In Collector of Central Excise Vs. H.M.M. Ltd.*[4], this Court held that mere non- disclosure of certain items assessable to duty does not tantamount to the *mala fides* elucidated in the proviso to Section 11A(1) of the Central Excise Act, 1944. It enunciated the principle in the following way: -

C

D

"*The mere non-declaration of the waste/by-product in their classification list cannot establish any wilful withholding of vital information for the purpose of evasion of excise duty due on the said product. There could be, counsel contended, bonafide belief on the part of the assessee that the said waste or by-product did not attract excise duty and hence it may not have been included in their classification list. But that per se cannot go to prove that there was the intention to evade payment of duty or that the assessee was guilty of fraud, collusion, mis-conduct or suppression to attract the proviso to Section 11A(1) of the Act.* There is considerable force in this contention.

E

F

Therefore, if non- disclosure of certain items assessable to duty does not invite the wrath of the proviso, we fail to understand how the non-payment of duty on disclosed items, after inquiry from the concerned department meets, with that fate.

G

17. In fact, the Act contemplates a positive action which betrays a negative intention of willful default. The same was

H

4. 1995 Supp (3) SCC 322

held by *Easland Combines, Coimbatore Vs. The Collector of Central Excise, Coimbatore*[5] wherein this Court held:-

> "31.It is settled law that for invoking the extended period of limitation duty should not have been paid, short levied or short paid or erroneously refunded because of either fraud, collusion, wilful misstatement, suppression of facts or contravention of any provision or rules. *This Court has held that these ingredients postulate a positive act and, therefore, mere failure to pay duty and/or take out a licence which is not due to any fraud, collusion or willful misstatement or suppression of fact or contravention of any provision is not sufficient to attract the extended period of limitation.*"

[Emphasis supplied]

18. We are in complete agreement with the principle enunciated in the above decisions, in light of the proviso to Section 11A of the Central Excise Act, 1944. However, before extending it to the Act, we would like to point out the niceties that separate the analogous provisions of the two, an issue which received the indulgence of this Court in *Associated Cement Companies Ltd. Vs. Commissioner of Customs*[6] in the following words:-

> "**53**...Our attention was drawn to the cases of *CCE v. Chemphar Drugs and Liniments (1989) 2 SCC 127*, *Cosmic Dye Chemical v. CCE (1995) 6 SCC 117*, *Padmini Products v. CCE (1989) 4 SCC 275*, *T.N. Housing Board v. CCE 1995 Supp (1) SCC 50 and CCE v. H. M. M. Ltd.* (supra). In all these cases the Court was concerned with the applicability of the proviso to Section 11-A of the Central Excise Act which, like in the case of the Customs Act, contemplated the increase in the period of limitation for issuing a show-cause notice in the case of non-levy or short-levy to five years from a normal period of six months...
>
> **54.** While interpreting the said provision in each of the aforesaid cases, it was observed by this Court that for proviso to Section 11-A to be invoked, the intention to evade payment of duty must be shown. This has been clearly brought out in *Cosmic Dye Chemical case* where the Tribunal had held that so far as fraud, suppression or misstatement of facts was concerned the question of intent was immaterial. While disagreeing with the aforesaid interpretation this Court at p. 119 observed as follows: (SCC para 6)
>
>> '*6*. Now so far as fraud and collusion are concerned, it is evident that the requisite intent, i.e., intent to evade duty is built into these very words. So far as misstatement or suppression of facts are concerned, they are clearly qualified by the word 'wilful' preceding the words 'misstatement or suppression of facts' which means with intent to evade duty. The next set of words 'contravention of any of the provisions of this Act or Rules' are again qualified by the immediately following words 'with intent to evade payment of duty'. It is, therefore, not correct to say that there can be a suppression or misstatement of fact, which is not wilful and yet constitutes a permissible ground for the purpose of the proviso to Section 11-A. Misstatement or suppression of fact must be wilful.'
>
> The aforesaid observations show that the words "with intent to evade payment of duty" were of utmost relevance while construing the earlier expression regarding the misstatement or suppression of facts contained in the proviso. Reading the proviso as a whole the Court held that intent to evade duty was essentially before the proviso

5. (2003) 3 SCC 410.
6. (2001) 4 SCC 593, at page 619.

could be invoked.

55. Though it was sought to be contended that Section 28 of the Customs Act is in pari materia with Section 11-A of the Excise Act, we find there is one material difference in the language of the two provisions and that is the words "with intent to evade payment of duty" occurring in proviso to Section 11-A of the Excise Act which are missing in Section 28(1) of the Customs Act and the proviso in particular…

56. The proviso to Section 28 can inter alia be invoked when any duty has not been levied or has been short-levied by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter, his agent or employee. Even if both the expressions "misstatement" and "suppression of facts" are to be qualified by the word "wilful", as was done in the Cosmic Dye Chemical case while construing the proviso to Section 11-A, the making of such a wilful misstatement or suppression of facts would attract the provisions of Section 28 of the Customs Act. In each of these appeals it will have to be seen as a fact whether there has been a non-levy or short-levy and whether that has been by reason of collusion or any wilful misstatement or suppression of facts by the importer or his agent or employee."

[Emphasis supplied]

19. Thus, Section 28 of the Act clearly contemplates two situations, viz. inadvertent non-payment and deliberate default. The former is canvassed in the main body of Section 28 of the Act and is met with a limitation period of six months, whereas the latter, finds abode in the proviso to the section and faces a limitation period of five years. For the operation of the proviso, the intention to deliberately default is a mandatory prerequisite.

20. This Court in *Aban Loyd Chiles Offshore Limited and*

Ors. Vs. Commissioner of Customs, Maharashtra[7] observed:-

"The proviso to Section 28(1)can be invoked where the payment of duty has escaped by reason of collusion or any willful misstatement or suppression of facts. So far as "misstatement or suppression of facts" are concerned, they are qualified by the word "willful". The word "willful" preceding the words "misstatement or suppression of facts" clearly spells out that there has to be an intention on the part of the assessee to evade the duty."

21. The Revenue contended that of the three categories, the conduct of the appellant falls under the case of "willful misstatement" and pointed to the use of the word "misutilizing" in the following statement found in the order of the Commissioner of Customs, Raipur in furtherance of its claim:

"The noticee procured 742.51 kl of furnace oil valued at Rs. 54,57,357/- without payment of customs duty by misutilizing the facility available to them under Notification No. 53/97-Cus. dt. 3.6.1997"

22. We are not persuaded to agree that this observation by the Commissioner, unfounded on any material fact or evidence, points to a finding of collusion or suppression or misstatement. The use of the word "willful" introduces a mental element and hence, requires looking into the mind of the appellant by gauging its actions, which is an indication of one's state of mind. *Black's Law Dictionary, Sixth Edition (pp 1599)* defines "willful" in the following manner: -

"**Willful.** Proceeding from a conscious motion of the will; voluntary; knowingly; deliberate. Intending the result which actually comes to pass…

An act or omission is "willfully" done, if done voluntarily and intentionally and with the specific intent to do something

7. (2006) 6 SCC 482.

the law forbids, or with the specific intent to fail to do something the law requires to be done…"

23. In the present case, from the evidence adduced by the appellant, one will draw an inference of *bona fide* conduct in favour of the appellant. The appellant laboured under the very doubt which forms the basis of the issue before us and hence, decided to address it to the concerned authority, the Development Commissioner, thus, in a sense offering its activities to assessment. The Development Commissioner answered in favour of the appellant and in its reply, even quoted a letter by the Ministry of Commerce in favour of an exemption the appellant was seeking, which anybody would have found satisfactory. Only on receiving this satisfactory reply did the appellant decide to claim exemption. Even if one were to accept the argument that the Development Commissioner was perhaps not the most suitable repository of the answers to the queries that the appellant laboured under, it does not take away from the *bona fide* conduct of the appellant. It still reflects the fact that the appellant made efforts in pursuit of adherence to the law rather than its breach.

24. Further, we are not convinced with the finding of the Tribunal which placed the onus of providing evidence in support of *bona fide* conduct, by observing that "the appellants had not brought anything on record" to prove their claim of *bona fide* conduct, on the appellant. It is a cardinal postulate of law that the burden of proving any form of *mala fide* lies on the shoulders of the one alleging it. This Court observed in *Union of India Vs. Ashok Kumar & Ors.*[8] that "it cannot be overlooked that burden of establishing *mala fides* is very heavy on the person who alleges it. The allegations of *mala fides* are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility."

25. Moreover, this Court, through a catena of decisions, has held that the proviso to Section 28 of the Act finds application only when specific and explicit averments

challenging the *fides* of the conduct of the assessee are made in the show cause notice, a requirement that the show cause notice in the present case fails to meet. In *Aban Loyd Chiles Offshore Limited and Ors.* (supra), this Court made the following observations:

"21. This Court while interpreting Section 11-A of the Central Excise Act in *Collector of Central Excise v. H.M.M. Ltd.* (supra) has observed that in order to attract the proviso to Section 11-A(1) it must be shown that the excise duty escaped by reason of fraud, collusion or willful misstatement of suppression of fact with intent to evade the payment of duty. It has been observed:

'…Therefore, in order to attract the proviso to Section 11-A(1) it must be alleged in the show-cause notice that the duty of excise had not been levied or paid by reason of fraud, collusion or willful misstatement or suppression of fact on the part of the assessee or by reason of contravention of any of the provisions of the Act or of the Rules made thereunder with intent to evade payment of duties by such person or his agent. There is no such averment to be found in the show cause notice. There is no averment that the duty of excise had been intentionally evaded or that fraud or collusion had been practiced or that the assessee was guilty of wilful misstatement or suppression of fact. In the absence of any such averments in the show-cause notice it is difficult to understand how the Revenue could sustain the notice under the proviso to Section 11-A(1) of the Act.'

It was held that the show cause notice must put the assessee to notice which of the various omissions or commissions stated in the proviso is committed to extend the period from six months to five years. That unless the

assessee is put to notice the assessee would have no opportunity to meet the case of the Department. It was held:

...There is considerable force in this contention. If the department proposes to invoke the proviso to Section 11-A(1) , the show-cause notice must put the assessee to notice which of the various commissions or omissions stated in the proviso is committed to extend the period from six months to 5 years. Unless the assessee is put to notice, the assessee would have no opportunity to meet the case of the department. The defaults enumerated in the proviso to the said sub-section are more than one and if the Excise Department places reliance on the proviso it must be specifically stated in the show-cause notice which is the allegation against the assessee falling within the four corners of the said proviso...."

(Emphasis supplied)

26. Hence, on account of the fact that the burden of proof of proving *mala fide* conduct under the proviso to Section 28 of the Act lies with the Revenue; that in furtherance of the same, no specific averments find a mention in the show cause notice which is a mandatory requirement for commencement of action under the said proviso; and that nothing on record displays a willful default on the part of the appellant, we hold that the extended period of limitation under the said provision could not be invoked against the appellant.

27. In view of the afore-going discussion, the appeal is allowed and the decisions of the authorities below are set aside, leaving the parties to bear their own costs.

B.B.B. Appeal allowed

RAJIV THAPAR & ORS.
v.
MADAN LAL KAPOOR
(Criminal Appeal No. 174 of 2013)

JANUARY 23, 2013

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

Code of Criminal Procedure, 1973 – s.482 – Quashing of proceedings –Scope – Death of married woman – Complaint by deceased's father –Magistrate summoned the accused-husband and in-laws and committed the case to the Court of Sessions – Sessions Judge discharged the accused-appellants – High Court quashed the discharge order – Justification – Held: On facts, not justified – Post-mortem report, the Central Forensic Science Laboratory's report, as also the inquest report, sufficient to exculpate the appellants from the allegations levelled in the complaint – Merely because the body of the deceased wife had turned blue, not a sufficient basis to infer that she had been poisoned to death – Respondent-complainant himself was uncertain about the manner in which his daughter had allegedly died – Respondent had continued to represent before the SDM, Delhi, that he would produce the mother of the deceased, who knew the facts best of all – Despite that, the mother of the deceased did not appear in the inquest proceedings to record her statement – Telephone bills and other documentary evidence demonstrated that contrary to the allegations made in the complaint, relationship between the two families was cordial and affectionate even at the time of the illness of the wife – The matter needed to have been evaluated, on the basis of one of the parameters laid down in Bhajan Lal case, namely, whether the criminal proceedings initiated by respondent-complainant were actuated by malice and ulterior motive for wreaking vengeance on the accused with a view to

spite him due to some private/personal grudge – Judicial conscience of the High Court ought to have persuaded it, on the basis of the material examined by it, to quash the criminal proceedings initiated against the appellants-accused – Criminal proceedings against appellants-accused accordingly set aside – Penal Code, 1860 – ss.498A, 304B r/w s.120-B.

Code of Criminal Procedure, 1973 – s.482 – Jurisdiction of the High Court u/s.482, if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges – Discussed – Steps delineated to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court u/s.482.

The wife of appellant no.1 had two bouts of illness. In the first episode, she was diagnosed as suffering from Malaria. She was treated for the same and discharged. Thereafter, she was diagnosed with a large hole in her heart, on the basis of an echo-cardiography. While at a hospital at Surat, she died of a massive heart attack. The body of the deceased was transported by rail to Delhi. The immediate family of appellant no.1's wife including her father (respondent) were present at the time of arrival of the body at Delhi.

The respondent filed a criminal complaint before the Metropolitan Magistrate, Delhi alleging unnatural death of his daughter, by poisoning. Based on the statements made by the respondent-complainant and his son, the Metropolitan Magistrate, Delhi, summoned the accused-husband and in-laws and having formed an opinion, that there was sufficient material to proceed against the accused under Sections 498, 496, 304B read with Sections 120-B of IPC, committed the case to the Court of Sessions. The Additional Sessions Judge, Delhi

concluded, that no prima facie case was made out against the appellants/accused either under Section 304B of IPC or under Section 498 IPC and accordingly discharged the appellants/accused. Dissatisfied, the respondent-complainant filed Criminal Revision Petition in the High Court which set aside the order passed by the Additional Sessions Judge, Delhi, and therefore the instant appeal.

Allowing the appeal, the Court

HELD: 1.1. The High Court, in exercise of its jurisdiction under Section 482 of the Cr.P.C., must make a just and rightful choice. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 CrPC, at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution /complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations

levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice. [Paras 21, 22] [81-B and F-H; 82-A-F]

1.2. The following steps may be delineated to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Cr.P.C.:-

(i) Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

(ii) Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

(iii) Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?

(iv) Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused. [Para 23] [82-F-H; 83-A-F]

1.3. In the instant case, the material in the nature of the post-mortem report, the Central Forensic Science Laboratory's report, as also the inquest report, would be sufficient to exculpate the appellants from the allegations and accusations levelled in the complaint. From the documents/material relied upon by the appellants, for exactly the same reasons as have been projected on behalf of the appellants, this Court is satisfied to conclude, that the death of Dr. Monica Thapar was not caused by poisoning. Merely because her body had turned blue, when it arrived at Delhi, is not a sufficient basis to infer that she had been poisoned to death. In fact material relied upon by the appellants is sufficient to condemn the factual basis of the accusation as false. [Paras 26, 27] [85-E-G]

1.4. It also needs to be noticed, that Madan Lal Kapoor (the respondent-complainant) took a

summersault before the Additional Sessions Judge, Delhi by alleging, that Dr. Monica Thapar had been strangulated by the appellants, (even though the assertion in the complaint was, that she had been poisoned to death). To determine the veracity of the allegation of strangulation, as the cause of her death, the Additional Sessions Judge, Delhi summoned Dr. L.T. Ramani, Chief Medical Officer, Civil Hospital, New Delhi and Dr. Amit Banerjee, Professor, Cardiothoracic Surgery, G.B. Pant Hospital, New Delhi (members of the Medical Board which had conducted the post-mortem examination) to clarify the altered accusation levelled by Madan Lal Kapoor. The aforesaid doctors, as is apparent from the order dated 7.8.1999 passed by the Additional Sessions Judge, Delhi, opined in the negative. They affirmed, that the death of Dr. Monica Thapar had not been caused by strangulation. This Court is therefore satisfied to affirm, that the death of Dr. Monica Thapar has not been shown to have been caused by strangulation. [Para 28] [85-H; 86-A-E]

1.5. Telephone bills demonstrate, that phone calls were regularly made from the residence of Rajiv Thapar (appellant no. 1), to the maternal family of Dr. Monica Thapar. The family of the husband of Dr. Monica Thapar was in consistent and regular contact with the other family members also. This relationship is shown to have been subsisting even at the time of the illness of Dr. Monica Thapar which proved to be fatal. Of utmost importance is a letter written by Rajiv Kapoor (the brother of the deceased, and the son of Madan Lal Kapoor, the respondent-complainant). In a letter dated 22.9.1992, just four days before the death of Dr. Monica Thapar (on 26.9.1992), Rajiv Kapoor showered praise on the immediate family of Rajiv Thapar residing at Delhi. His letter to his sister describes her in-laws in Delhi, as "very affectionate and very caring". The telephone bills, as

also the letter addressed by Rajiv Kapoor to his sister (Dr. Monica Thapar), are materials of sterling quality. Neither of the said materials has been controverted, either on veracity or on truthfulness. All this, would undoubtedly and inevitably result in concluding, that the relationship between the two families was cordial and affectionate. Clearly contrary to what has been alleged in the complaint. [Para 29] [86-F-H; 87-A-C]

1.6. It is conclusive from the facts and circumstances of the case exhaustively discussed in the foregoing paragraphs, that all the steps delineated in the paragraph 1.2 above, can be answered in the affirmative, on the basis of the material relied by the accused, more particularly, the post-mortem examination report dated 28.9.1992 conducted by a Medical Board comprising of four doctors, whose integrity has not been questioned by the respondent-complainant; the chemical analysis findings contained in the Central Forensic Science Laboratory's report dated 9.2.1993 which has not been disputed by the respondent-complainant; the inquest report of the SDM, Delhi, dated 6.7.1993, findings whereof have been painstakingly recorded by involving the respondent-complainant; the letter of Rajiv Kapoor (the brother of the deceased) dated 22.9.1992 addressed to Dr. Monica Thapar just four days before her death, the contents and authenticity whereof are not subject matter of challenge at the hands of the respondent-complainant; and finally, the telephone bills produced by the appellants-accused substantiating consistent and regular contact between the rival families, which have not been questioned. This Court, therefore, has no hesitation in concluding, that the judicial conscience of the High Court ought to have persuaded it, on the basis of the material examined by it, to quash the criminal proceedings initiated against the appellants-accused. [Para 31] [87-F-H; 88-A-C]

1.7. From the narration of the facts recorded above, it emerges, that even though the respondent-complainant Madan Lal Kapoor, in his complaint dated 6.7.1993, adopted a clear and categoric stance, that his daughter Dr. Monica Thapar had been poisoned to death, before the Additional Sessions Judge, Delhi, the respondent-complainant ventured to suggest, that the appellants-accused had strangulated her. The Additional Sessions Judge, Delhi, summoned two of the doctors who were members of the Medical Board which had conducted the post-mortem examination, and sought clarifications from them. He also recorded the statement of one of the said doctors. The Additional Sessions Judge, thereupon, ruled out the plea of strangulation. When the respondent-complainant himself was uncertain about the manner in which his daughter had allegedly died, the High Court should have viewed the matter keeping in mind the likelihood of the hurt caused to a father who had lost his daughter within one year of her marriage. The matter needed to have been evaluated, on the basis of one of the parameters laid down in *Bhajan Lal case*, namely, whether the criminal proceedings initiated by Madan Lal Kapoor (the respondent-complainant) were actuated by malice and ulterior motive for wreaking vengeance on the accused with a view to spite him due to some private/personal grudge. There is yet another reason emerging from the facts of the case which needed to be kept in mind. Madan Lal Kapoor (the respondent-complainant) had continued to represent before the SDM, Delhi, that he would produce the mother of the deceased, who knew the facts best of all. Despite that, the mother of the deceased did not appear in the inquest proceedings to record her statement, even though a number of opportunities were afforded to the respondent-complainant to produce her. The permissible inference is that he was himself not privy to the facts. The fact that the mother of the deceased had not appeared to record

a statement against the appellants-accused has to have some reason/justification. Would a mother who believes that her daughter had been poisoned/strangulated, restrain herself from recording her statement, despite the persuasion of her husband? Probably not. In a factual situation not as clear as the one in hand, facts such as these, could be taken into consideration by a High Court for recording its satisfaction, on the parameters formulated above. [Para 32] [88-E-H; 89-B-F]

1.8. The criminal proceedings against the appellants-accused are accordingly set aside. The order of the High Court is accordingly also set aside, but on grounds different from those taken into consideration by the High Court. [Para 33] [89-F-G]

Satish Mehra v. Delhi Administration **(1996) 9 SCC 766: 1996 (4) Suppl. SCR 197;** *State of Orissa Vs. Debendra Nath Padhi* **(2005) 1 SCC 568: 2004 (6) Suppl. SCR 460:** *Suresh Kumar Tekriwal Vs. State of Jharkhand,* **(2005) 12 SCC 278;** *State of Maharashtra Vs. Som Nath Thapa,* **(1996) 4 SCC 659: 1996 (1) Suppl. SCR 189;** *State of M.P. Vs. Mohanlal Soni* **(2000) 6 SCC 338;** *State of A.P. Vs. Golconda Linga Swamy* **(2004) 6 SCC 522: 2004 (3) Suppl. SCR 147;** *Rukmini Narvekar Vs. Vijaya Satardekar & Ors.* **(2008) 14 SCC 1: 2008 (14) SCR 271;** *State of Haryana & Ors. Vs. Bhajan Lal & Ors.* **1992 Supp. (1) SCC 335: 1990 (3) Suppl. SCR 259 – referred to.**

Case Law Reference:

1996 (4) Suppl. SCR 197	**referred to**	**Para 17, 18**
2004 (6) Suppl. SCR 460	**referred to**	**Para 17, 18, 20**
(2005) 12 SCC 278	**referred to**	**Para 17**
1996 (1) Suppl. SCR 189	**referred to**	**Para 17**

(2000) 6 SCC 338	**referred to**	**Para 17**
2004 (3) Suppl. SCR 147	**referred to**	**Para 17**
2008 (14) SCR 271	**referred to**	**Para 20**
1990 (3) Suppl. SCR 259	**referred to**	**Para 32**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 174 of 2013.

From the Judgment & Order dated 08.05.2008 of the High Court of Delhi at New Delhi in Criminal Revision Petition No. 42 of 2000.

Suryakant Singla, Ajay Veer Singh, R.K. Verma, Atul Agarwal, Shagun Bhatnagar, U.R. Bokadia, Ashish Saini, Mohd. Irshad Hanif for the Appellant.

Shree Pal Singh, Rahul Singh, K. Sita Rama Rao for the Respondent.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Leave granted.

2. Rajiv Thapar (appellant no. 1 herein) married Dr. Monica Kapoor on 30.11.1991. After her marriage, Dr. Monica Thapar got admission in a Post Graduate Diploma course in Gynaecology (DGO) at Medical College, Surat, in June 1992. Accordingly, she started working as a Resident at the aforesaid Medical College. At his own request, Rajiv Thapar, who was (and still is) a member of the Indian Revenue Services, was transferred from Ahmedabad to Surat. On 16.9.1992, while the husband and wife were living at Surat, Dr. Monica Thapar fell ill. For her treatment, she was admitted to Mahavir Hospital, Surat. She was diagnosed as suffering from Malaria. Having been treated for the same, she was discharged on 20.9.1992. Two days thereafter, Dr. Monica Thapar again fell ill on

22.9.1992. This time, she was taken to Medical College, Surat i.e., the hospital where she was herself working as a Resident. She was first examined by a radiologist, and thereafter, by Dr. Girish Kazi, a cardiologist. It was suspected, that she has a hole in her heart. Based on the aforesaid diagnosis, Dr. Dumaswala, another cardiologist, conducted Doppler echo-cardiography. The said echo-cardiography confirmed the presence of a large hole in her heart. On the advice of doctors who attended on Dr. Monica Thapar at Medical College, Surat, she was shifted to Urmil Heart and Lung Centre, Surat, on 24.9.1992. While at Urmil Heart and Lung Centre, Surat, Dr. Monica Thapar allegedly suffered a massive heart attack on 26.9.1992. The same supposedly proved fatal.

3. The factum of death of Dr. Monica Thapar was conveyed to the immediate family of Rajiv Thapar, as well as to the family of the deceased. A decision was taken to cremate the dead body at Delhi. Accordingly, after embalming the body of Dr. Monica Thapar, it was transported by rail to Delhi on 27.9.1992. The immediate family of Dr. Monica Thapar including her father Madan Lal Kapoor (respondent-complainant herein) were present at the time of arrival of the body at Delhi.

4. Madan Lal Kapoor made a complaint to the Police Control Room alleging, that he suspected that his daughter had been poisoned. This suspicion was based on the fact, that the body had turned blue. On the aforesaid complaint, the Sub-Divisional Magistrate, Delhi, in exercise of powers vested in him under Section 176 of the Code of Criminal Procedure (hereinafter referred to as, the Cr.P.C.), initiated inquest proceedings. In the first instance, the body of the deceased was subjected to a post-mortem examination, for which the following Medical Board was constituted:-

(i) Dr. Bharat Singh, Medical Superintendent, Civil Hospital, Delhi.

A

(ii) Dr. L.T. Ramani, Chief Medical Officer, Civil Hospital, Delhi.

(iii) Dr. Beena Malhotra, Professor, Pathology, G.B. Pant Hospital, New Delhi.

B

(iv) Dr. Amit Banerjee, Professor, Cardiothoracic Surgery, G.B. Pant Hospital, New Delhi.

C

The Medical Board came to the conclusion, that Dr. Monica Thapar had died of cardiac decomposition. The final opinion of the Medical Board, was recorded in a report dated 28.9.1992, in the following words:-

D

> "**OPINION** In view of the clinical reports submitted and post mortem findings observed, the Board of Direcors is of the opinion that, death is consequent to cardiac decompensation due to enlarged atrial septal defect & pulmonary hypertension. No definite opinion can be given about falciparm Malaria, histopathological assessment.
>
> E
>
> Viscera is preserved for chemical analysis as desired by SDM. Time since death is about 48 hours and is consistent with the history."

(emphasis is ours)

F

During the post-mortem examination, samples from the stomach, intestine, liver, spleen, kidney and blood of the deceased's body were taken. These samples were sent for chemical examination to the Central Forensic Science Laboratory, New Delhi. The report of the Forensic Laboratory dated 9.2.1993, recorded the following conclusions:-

G

> "SPECIFICATION OF THE ARTICLE CONTAINED IN THE PARCEL
>
> 1. Parcel contained:

H

A

> (a) One wide-mouth bottle containing stomach, intestine with contents, Exhbt 1a.
>
> (b) One wide mouth bottle containing liver, spleen & kidney, Exhbt 1b.
>
> B
>
> (c) One phial containing few drops blood, Exhbt 1c.
>
> xxx xxx xxx
>
> RESULTS OF ANALYSIS
>
> C
>
> The Exhibit nos. 1a, 1b and 1c gave negative tests for common poisons."

D

It is therefore apparent, that the Central Forensic Science Laboratory, New Delhi, having analysed the samples from the stomach, intestine, liver, spleen, kidney and blood, concluded that the same did not contain any "common poison".

E

5. Insofar as the inquest proceedings initiated by the Sub-Divisional Magistrate, Delhi (hereinafter referred to as the SDM, Delhi) are concerned, it would be relevant to mention, that Madan Lal Kapoor (the respondent-complainant herein) the father of the deceased, in the first instance, refused to record any statement before the SDM, Delhi, on the ground that he would record his statement only after the receipt of the post-mortem report. Even on the receipt of the post-mortem report, F the said Madan Lal Kapoor and even his son Rajiv Kapoor, refused to record their statements before the SDM, Delhi, on the assertion, that the mother of the deceased knew the facts best of all, and as such, her statement needed to be recorded first of all. It was pointed out, that her statement could not be G recorded immediately because she was in a state of shock. It may be noted, that neither the mother nor the brother of Dr. Monica Thapar appeared before the SDM, Delhi, to record their statements. Madan Lal Kapoor had sought time thrice, from the SDM, Delhi, to get the statement of his wife recorded. H Madan Lal Kapoor, father of the deceased, however, eventually

recorded his statement before the SDM, Delhi, even though the mother of the deceased had not appeared before the Magistrate to record her statement.

6. The SDM, Delhi, during the course of inquest proceedings, recorded the statements of the following accused persons:-

(i) Rajiv Thapar (husband of the deceased; appellant no. 1 herein).

(ii) Kusum Thapar (mother-in-law of the deceased; appellant no. 5 herein).

(iii) Sangeeta Thapar (wife of the brother-in-law of the deceased; appellant no. 4 herein).

In addition, the SDM, Delhi, recorded the statement of Dr. Pritu Dhalaria (a colleague of the deceased at Medical College, Surat). Insofar as the accusations and counter allegations are concerned, it is not essential to refer to the statements of any of the rival parties. It is however, appropriate to refer to the statement of Dr. Pritu Dhalaria. Since the same is not available on the record of the case, reference thereto in the inquest report, is being extracted hereunder:-

"Statement of Mr. Pritu Dhalaria

Sh. Pritu Dhalaria stated that Monika Thapar was known to him from the date she got admission in the Medical College in June, 92. And he regards her as his elder sister. He further stated that both Monika and Rajeev were happy and living a happy married life. On 17th September, 1992, he came to know that Monika was ill and admitted in the Mahavir Hospital. In the evening of 17.9.1992, when he met Monika he came to know that she was suffering from Malaria. And on 24.9.1992, he came to know that she was admitted in the Urmil Heart Hospital. He further stated after Echo-Cardiography doctor declared that Monika was suffering from A.S.D. (Larger Hole in Heart) and pulmonary Hypertension. He stated that on 26.9.1992, at about 2.00-2.15 p.m., Monika's situation became serious. And inspite of all attempts of doctors, she got heart attack and died on 3.30 p.m. He also stated that the MS of Civil Hospital, Surat, Dr. Khanna was present alongwith the other doctors at that time."

(emphasis is ours)

7. The statement of Dr. Pritu Dhalaria fully coincides with the version expressed by the appellants-accused. That Dr. Monica Thapar had two bouts of illness. In the first episode, she was diagnosed as suffering from Malaria. She was treated for the same and discharged. Thereafter, she was diagnosed with a large hole in her heart, on the basis of an echo-cardiography. She died of a massive heart attack on 26.9.1992. At the time of her death, Dr. Khanna and other doctors of the Civil Hospital, Surat, were present.

8. The SDM, Delhi, in his inquest report dated 6.7.1993, recorded the following conclusions:-

"Conclusion

Allegation levelled by Shri Madan Lal Kapoor, father of the deceased regarding harassment and dowry death, it appears that allegation are not correct in the light of the fact of Natural death in the statements the husband and in laws of the deceased produced photocopies of letters written by Sh. Madan Lal Kapoor and Rajiv Kapoor. Perusal of the letter shows that both the families enjoyed a normal happy relationship and not an abnormal and strained relation till the death of Monika.

Sh. Rajeev Thapar has produced copy of telephone Bill of residential phone shows the Telephone Cells are made to Madan lal phone No.574390 at Mohali Chandigarh on 17.09.92, 21.09.92, 24.09.92 and 25.09.92

during the course of illness of Monika

Sh. Rajeev Kapoor, the brother of the deceased well aware of the situation of Monika as per his letter dated 22nd September, 92 and at that time the families are enjoying a very good relationship. So it is not possible in these circumstances that Monkka was harassed by her in-laws. The few lines as under:-

> "How are you Now? I hope by now you will have recovered from Malaria. We should have faith in God. Please give top priority to your health.
>
> Off and on I go to Janakpuri, all are very nice there, very affectionate and very caring. You must be knowing that Sanjay Bhai Saheb have been promoted to the rank of Squadron Leader..

The brother is no likely to praise the family of his sister's in-laws in case his sister is being harassed for dowry.

Statement of Sh. Pritu, Colleague of Mrs. Monika, also shows that Monika and Rajiv enjoyed a very happy and cordial relationship, which also shows that allegations of harassment does not appear to be correct. According to the statements given before me Monika stayed with her in-laws in Delhi only for 4-5 days. Hence the charged of harassment levelled does not appear to be correct. From the statement and evidence produced before me, it does not appear that she was being harassed. Report of Sh. S.K. Pathi M.d. Radiologist during the treatment of Monika.

"Mild Cardiac enlargement with dilated pulmonary vessels and evidence of Pulmonary Dedema. Advise: Echocardiography."

Report of Dr. J.C. Damaswala M.D. during the treatment of Monika.

"Large osteum secundum ASD Measuring 3.0 cm with Ltd. To Rt. Shunt on colour flow and conventional Doppler."

Death certificate issued by Urmil Heart and Lung Centre:-

Cause of Death: Cardio-Respiratory arrest due to Malaria ASD C Pulmonary Hypertension.

The post-mortem of the dead body revels that death is due to Cardiac de-compensation due to enlarged atrial Septal Defect and pulmonary Hypertension (As per board of doctors)

The CFSL report of the viscera reveals negative tests for common poison.

Inquest proceedings started on 27.09.1992 and till now mother of the deceased has not come forward to give her statement. Father of the deceased visited SDM office three times but never brought his wife for recording statement. Now there is no point in waiting for her statement when death is proved natural and beyond any doubt.

The case of the death is clearly determined to be natural inquest proceedings under Section 176 Cr.PC may be closed as foul play in the death of Smt. Monika Thapar is completely ruled out and the allegation made in the PCR called on 29.09.1992 have not been turned out by the evidence on record.

Sd/-
Sub-Divisional Magistrate, Kotwali, Delhi.

6.7.1993"

A perusal of the inquest report reveals that the SDM, Delhi, concluded that "… foul play in the death of Smt. Monika Thapar is completely ruled out…" The SDM, Delhi, also held "…death

is proved natural and beyond any doubt…"

9. On 29.9.1992, Madan Lal Kapoor (the respondent-complainant), father of the deceased Dr. Monica Thapar, filed a complaint before the Commissioner of Police, Delhi. Prior thereto, on the same issue, he had filed similar complaints before the Police Commissioner, Surat, Police Officer Incharge, Umra Police Station, Athwa Lines, Surat and Dy. Commissioner, Athwa, Crime Women Cell, South Moti Bagh, Nanakpura, New Delhi. The aforesaid complaints had been filed by the father of the deceased praying for registration of a First Information Report, interalia, under Sections 304B and 498A of the Indian Penal Code. Since the complaints filed by Madan Lal Kapoor did not bear any fruitful result, he filed a criminal complaint before the Metropolitan Magistrate, Delhi on 6.7.1993 alleging unnatural death of Dr. Monica Thapar, by poisoning. Relevant portion of the complaint made by Madan Lal Kapoor (the respondent-complainant) is being extracted hereunder:-

> "10. That in the second week of September, 1992, accused no.1 Rajiv Thapar called his mother from Delhi, on the false pretext that Monika was pregnant and needed care. As a matter of fact, it was in the pursuance of the conspiracy hatched by the accused themselves to do away with the life of Monika in some mysterious manner and on the pretext the mother of Rajiv Thapar accused no.1 was called from Delhi, and sometimes thereafter on that pretext she was admitted in some hospital of their choice, where the conspiracy could be implemented.
>
> 11. That on 26.9.1992 the complainant enquired on telephone from accused no.2 about the welfare of his daughter but now she was quite alright and there was nothing worry about her. The complainant enquired from him about the details of her illness and hospital where she was admitted, but accused no.2 did not disclose as the voice of Mr. Thapar accused no.2 was some what in co-

> herent on the phone, the complainant suspected something wrong, when the complainant told him that he along with his wife was going to Surat, accused no.2 told him that there was no need of going and everything was alright, but when the complainant told him in clear term that he apprehended something wrong regarding the illness of his daughter, on which accused no.2 told the complainant on phone that Monika had expired.
>
> 12. That accused no.2 in conspiracy with his co-accused did not disclosed the kind of illness, of the treatment she was given with a criminal intention that the complainant and his wife may not able to see their daughter and give her proper treatment. Mrs. Monika was not suffering from any disease. Of course, due to constant harassment, torture, physical and violent and mental torture, her health had broken down and she fell ill. Her death was due to constant torture for not meeting the illegal demand of a Maruti Car.
>
> 13. That the dead body of Monika was brought to Delhi under mysterious circumstances, no permission was obtained for taking dead body from Surat to Delhi in the train.
>
> 14. That the complainant and his wife reached Delhi and saw some poisonous substance had been administered to her, on this report of the complainant, the post-mortem was conducted at Delhi.
>
> 15. That the complainant was moved hell and earth in the matter. He has given complaint to police Commissioner, Surat. Deputy Commissioner, Athwa Crime Women Cell, South, Moti Bagh, Nanakpura, New Delhi, Police Officer Incharge, Umra , Police Station, Athwa Lines, Surat and another authority; but no action has been taken, even the copy of the Post Mortem Report has not been supplied to the complainant.

16. <u>That the death of Mrs. Monika took place within a year of her marriage under mysterious circumstances on account of demand of dowry which demand was not met and thereafter she was tortured mentally and physically and leading to her illness and in that condition she was administered some poisonous matter. The accused have committed serious offences under Sections 304B/120B/498A/109 I.P.C. They be tried according to law and convicted.</u>

Sd/-
Dated 6.7.93 Madan Lal Kapoor
Complainant"
(emphasis is ours)

10. The complaint extracted above, reveals mere aspersions, based on suspicion. The complaint did not express any concrete fact disclosing how the appellants-accused were responsible for having taken his daughter's life. In fact, the narration of facts hereafter reveal, the shifting stance of the father of the deceased, about the cause of his daughter's death. On 24.5.1995, Madan Lal Kapoor (the respondent-complainant) examined himself and his son Rajiv Kapoor before the Metropolitan Magistrate, Delhi in order to substantiate the allegations levelled by him in respect of the unnatural death of his daughter Dr. Monica Thapar. Based on the statements made by Madan Lal Kapoor (the respondent-complainant) and his son Rajiv Kapoor, the Metropolitan Magistrate, Delhi, vide order dated 24.8.1995, summoned the accused. The Metropolitan Magistrate, Delhi, while summoning the accused, recorded the following observations:-

"It is further alleged that at the time of her death she was doing Diploma in Gynaecology in territories at Surat where his son in law was employed. The complainant did not receive any telephone call either from his daughter or son

in law and he therefore rang up to Ramesh Thapar at Delhi to enquire about the welfare of his daughter and Ramesh Thapar told him on telephone that his wife Kusum Thapar had been called to Surat to look after his daughter as she was said to be pregnant but subsequently she was aborted. The complainant enquired from him as to the particulars of the hospital where she was admitted and what was the ailment she was suffering from, she replied that her daughter was quite all right and he should not worry about her welfare again insisted to given particulars of the hospital and the complainant suspected that her in-laws were not behaving with her properly and were harassing, therefore, he insisted that he himself and his wife shall go to Surat and he told him that he suspected some foul play in the matter on which Ramesh Thapar told him from Delhi that his daughter Monika has already expired, and he enquired as to where she will be cremated. The accused brought the dead body of his daughter from Surat to Delhi but they did not allow him and his family members to see the dead body but on their insistence, they saw the dead body of his daughter and he saw that the face and mouth of his daughter was blue. He suspected that her daughter has been given some poisonous matter, as a result of which she had died. He informed the police and the police came and got the post mortem of the dead body conducted, but thereafter nothing was done by police in this matter. He sent a registered letter to the Police Commissioner, Delhi and he went to Surat and filed a complaint before the Police Commissioner but nothing was done. The complainant suspect that his daughter has been admitted because his daughter had not brought sufficient dowry according to the status and had also failed to fulfill the demands of above named accused persons of bringing dowry and Maruti Car and cash.

I have carefully considered the argument put forward

by Ld. Counsel for complainant. I have also carefully gone through the complaint and have carefully considered the preliminary evidence adduced by the complainant in support of his case, and from the material on record in my considered opinion, there are sufficient grounds for proceedings against all the accused persons for committing offence punishable u/s. 304B/498A/406/120B IPC.

Accordingly, I order that accused Rajiv Thapar, Ramesh Thapar, Sangeet Thapar and Mrs. Kusum Thapar be summoned for 19.12.1995 on filing of PF."

11. The appellants assailed the aforesaid summoning order dated 24.8.1995, by filing a petition under Section 482 of the Cr.P.C. before the High Court of Delhi (hereinafter referred to as, the High Court). The challenge raised was primarily on the ground, that Madan Lal Kapoor (the respondent- complainant) had suppressed vital material, in his complaint. It was alleged, that the complainant did not disclose the particulars of the post-mortem examination, the report of the Central Forensic Science Laboratory, as also, the inquest report. The High Court dismissed the aforesaid petition summarily on the premise, that the same had been prematurely filed. Accordingly, liberty was granted to the appellants to move the trial Court, if they were so advised, for seeking a recall of the summoning order (dated 24.8.1995). Immediately, on the disposal of the petition by the High Court, the appellants moved an application before the Metropolitan Magistrate, Delhi, praying for a recall of the summoning order dated 24.8.1995. The aforesaid application was dismissed by the Metropolitan Magistrate, Delhi on 23.5.1998 by observing that "… I am of the opinion that at this stage, there is no ground to review or recall the order dated 24.8.1995 passed by my L.D. Predecessor, whereby he summoned the accused for the above stated offences after taking cognizance…"

12. Thereupon, the Metropolitan Magistrate, Delhi,

recorded preliminary evidence. Based thereon, and having formed an opinion, that there was sufficient material to proceed against the accused under Sections 498, 496, 304B read with Sections 120-B of the Indian Penal Code, the Metropolitan Magistrate, Delhi, committed the case to the Court of Sessions, as the offence under Section 304B is exclusively triable by a Court of Sessions.

13. While examining the matter further, with the pointed object of either discharging the accused (under Section 227 of the Cr.P.C.) or framing charges against them (under Section 228 of the Cr.P.C.), the Additional Sessions Judge, Delhi took notice of the fact that Madan Lal Kapoor (the respondent-complainant) had not brought the following record/material/ documents to the notice of the Metropolitan Magistrate, Delhi:-

(i) The post-mortem report dated 28.9.1992.

(ii) The inquest report dated 6.4.1993.

(iii) The correspondence made by the respondent and his son.

The Additional Sessions Judge, Delhi also felt, that the Metropolitan Magistrate, Delhi, had not fully complied with the provisions of Section 202 of the Cr.P.C. (requiring him to enquire into the case himself). Therefore, the Additional Sessions Judge, Delhi examined the allegations made in the complaint in conjunction with all of the aforesaid material.

14. Since the learned counsel representing Madan Lal Kapoor (the respondent-complainant) had raised an additional plea (before the Additional Sessions Judge, Delhi), that the deceased was also suspected of having been strangulated to death, the Additional Sessions Judge, Delhi summoned Dr. L.T. Ramani and Dr. Amit Banerjee (who were members of the Medical Board, which had conducted the post-mortem examination). The Additional Sessions Judge, Delhi, sought

clarifications on the allegations of strangulation, from the two doctors. The Court also recorded the statement of Dr. Amit Banerjee.

15. The Additional Sessions Judge, Delhi then heard detailed arguments on charge. Upon consideration, the Additional Sessions Judge, Delhi, recorded detailed findings, which are being summarized hereunder:-

(i) The inquest proceedings conducted by the SDM, Delhi, which interalia contained the broad facts of the married life of the deceased, were inconsistent with the theory of harassment extracted in the complaint.

(ii) The accused Rajiv Thapar, husband of Dr. Monica Thapar (deceased) had been seeking medical advice, and had been getting the deceased's medical treatment at Surat, whereupon it came to be discovered, that she had a large hole in her heart.

(iii) The Medical Board which conducted the post-mortem examination on the body of the deceased, confirmed the conclusion certified by Urmil Heart and Lung Centre, Surat, that her death occurred because of cardiac de-compensation, and that Dr. Monica Thapar had died a natural death.

(iv) The plea of strangulation raised on behalf of the complainant was held to be unsubstantiated consequent upon the clarification rendered by Dr. L.T. Ramani and Dr. Amit Banerjee.

(v) The post-mortem report and the Central Forensic Science Laboratory's report, which recorded a negative opinion on poisoning, were taken into consideration to conclude, that the death of Dr. Monica Thapar was not due to poisoning.

(vi) The statement made by Dr. Pritu Dhalaria, a colleague of the deceased at the Medical College, Surat, referred to in the inquest proceedings (relevant portion extracted above), was relied upon to disbelieve the theory of foul play, in the death of Dr. Monica Thapar.

(vii) Based on the facts recorded in the inquest report, as also in the statement of Dr. Pritu Dhalaria, that Dr. Monica Thapar had died after her admission and treatment in the Urmil Heart and Lung Centre, Surat, it was deduced, that Rajiv Thapar, the husband of the deceased could have neither strangulated nor poisoned the deceased, while she was admitted for treatment at the Urmil Heart and Lung Centre, Surat.

Based, interalia, on the aforesaid evaluation of the complaint filed by Madan Lal Kapoor (the respondent-complainant), the Additional Sessions Judge, Delhi concluded, that no prima facie case was made out against the appellants/accused either under Section 304B of the Indian Penal Code or under Section 498 of the Indian Penal Code. The Additional Sessions Judge, Delhi, accordingly discharged the appellants/accused by an order dated 7.8.1999.

16. Dissatisfied with the order dated 7.8.1999 passed by the Additional Sessions Judge, Delhi, Madan Lal Kapoor (the respondent-complainant) filed a Criminal Revision Petition (bearing no. 42 of 2000) in the High Court. The aforesaid Criminal Revision Petition was dismissed in default on 11.8.2005. The order dated 11.8.2005 was assailed through a Special Leave Petition (bearing no. SLP (Crl.) no. 3303 of 2006) before this Court. The aforesaid Special Leave Petition was allowed by this Court on 31.8.2007. The matter was remanded back to the High Court for adjudication on merits. It is thereupon, that the High Court passed the impugned order dated 8.5.2008, setting aside the order dated 7.8.1999 passed

by the Additional Sessions Judge, Delhi. The instant order dated 8.5.2008 is the subject matter of challenge in the present appeal.

17. A perusal of the order of the High Court would reveal that the Additional Sessions Judge, Delhi, had primarily relied on certain observations made in the judgment rendered by this Court in *Satish Mehra Vs. Delhi Administration,* (1996) 9 SCC 766:-

> "15. But when the Judge is fairly certain that there is no prospect of the case ending in conviction the valuable time of the Court should not be wasted for holding a trial only for the purpose of formally completing the procedure to pronounce the conclusion on a future date. We are mindful that most of the Sessions Courts in India are under heavy pressure of work-load. If the Sessions Judge is almost certain that the trial would only be an exercise in futility or a sheer waste of time it is advisable to truncate or snip the proceedings at the stage of Section 227 of the Code itself"

Madan Lal Kapoor (the respondent-complainant), before the High Court, had relied upon the judgment in *State of Orissa Vs. Debendra Nath Padhi* (2005) 1 SCC 568, to contend that the judgment relied upon by the Additional Sessions Judge, Delhi, having been overruled, had resulted in an erroneous conclusion. For the same proposition, reliance was placed on the judgment of this Court in *Suresh Kumar Tekriwal Vs. State of Jharkhand,* (2005) 12 SCC 278. On behalf of the complainant, reliance was also placed on the decision in *State of Maharashtra Vs. Som Nath Thapa,* (1996) 4 SCC 659, to contend, that only the material placed on record by the prosecution, could be gone into at the time of framing charges. And if, on the basis of the said material, the commission of the alleged offence was prima facie made out, the charge(s) was/were to be framed. At the stage of framing of charges, it was submitted, that the requirement was not to determine the sufficiency (or otherwise)

of evidence to record a conviction. For this, reliance was placed on *State of M.P. Vs. Mohanlal Soni* (2000) 6 SCC 338, wherein this Court had concluded, that the requirement was a satisfaction, that a prima facie case was made out. On behalf of Madan Lal Kapoor, reliance was also placed on *State of A.P. Vs. Golconda Linga Swamy* (2004) 6 SCC 522, to contend that at this stage, meticulous examination of the evidence was not called for.

18. As against the submission advanced on behalf of Madan Lal Kapoor (the respondent-complainant), the appellants/accused contended, that the Court was justified in considering the material on the record of the case, and on the basis thereof, to arrive at a just and reasonable conclusion. In this behalf, it was averred that the post-mortem report, the report of the Central Forensic Science Laboratory, the inquest proceedings recorded by the SDM, Delhi, and the letters addressed by the family members of the complainant (duly noticed in the inquest proceedings), were a part of the record of the case, and as such, were to be taken into consideration while passing the orders contemplated under Sections 227 and 228 of the Cr.P.C. The submission advanced on behalf of Madan Lal Kapoor (the respondent-complainant) before the High Court, was accepted. The High Court arrived at the conclusion, that the Additional Sessions Judge, Delhi had erroneously placed reliance on the decision rendered by this Court in *Satish Mehra Vs. Delhi Administration* (supra), which had already been overruled by the judgment rendered by a larger Bench in *State of Orissa Vs. Debendra Nath Padhi* (supra).

19. While considering the contention advanced on behalf of the appellants/accused, the High Court concluded, that the material/documents/record which the complainant was placing reliance on, did not fall within the ambit and scope of the term "record of the case" contained in Section 227 of the Cr.P.C. According to the High Court, the record of the case referred to

in Section 227 of the Cr.P.C. was only such record, documents and articles which, on consideration by the Magistrate, are sent to the Court of Sessions, consequent upon passing an order of commitment. The material and documents relied upon by the appellants/accused in the present controversy would, therefore, not fall within the zone of consideration at the hands of the Court of Session under Section 227 of the Cr.P.C. Accordingly, the submissions advanced at the behest of the appellants/accused were declined. For the aforesaid reasons, the High Court accepted the Criminal Revision Petition filed by Madan Lal Kapoor (the respondent-complainant). The order dated 7.8.1999 passed by the Additional Sessions Judge, Delhi was accordingly quashed. The parties were accordingly directed to participate in the further proceedings before the Court of Sessions.

20. We have considered the submissions advanced at the behest of the rival parties. We are of the view, that in the facts and circumstances of this case, the High Court had before it an exhaustive and detailed order passed by the Additional Sessions Judge, Delhi, it ought to, therefore, have examined the controversy, while keeping in mind the inherent power vested in it under Section 482 of the Cr.P.C. specially because the Additional Sessions Judge in his order dated 7.8.1999, had concluded, on the basis of the material relied upon by the accused, that no case was made out against the accused. This according to learned counsel, was permissible in view of the inherent jurisdiction vested in the High Court under Section 482 of the Cr.P.C. Section 482 of the Cr.P.C. is being extracted hereunder:-

> "482. Saving of inherent power of High Court
>
> Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice."

The discretion vested in a High Court under Section 482 of the Cr.P.C. can be exercised suo-moto to prevent the abuse of process of a court, and/or to secure the ends of justice. This Court had an occasion to examine the matter in *State of Orissa Vs. Debendra Nath Padhi,* (supra) (incidentally the said judgment was heavily relied upon by the learned counsel for the respondent-complainant), wherein it was held thus:-

> "29. Regarding the argument of accused having to face the trial despite being in a position to produce material of unimpeachable character of sterling quality, the width of the powers of the High Court under Section 482 of the Code and Article 226 of Constitution of India is unlimited whereunder in the interests of justice the High Court can make such orders as may be necessary to prevent abuse of the process of any Court or otherwise to secure the ends of justice within the parameters laid down in Bhajan Lal's case."

(emphasis is ours)

Recently, this Court again had an occasion to examine the ambit and scope of Section 482 of the Cr.P.C. in *Rukmini Narvekar Vs. Vijaya Satardekar & Ors.,* (2008) 14 SCC 1, wherein in the main order it was observed, that the width of the powers of the High Court under Section 482 of the Cr.P.C. and under Article 226 of the Constitution of India, was unlimited. In the instant judgment, this Court held that the High Court could make such orders as may be necessary to prevent abuse of the process of any court, or otherwise to secure the ends of justice. In a concurring separate order passed in the same case, it was additionally observed, that under Section 482 of the Cr.P.C., the High Court was free to consider even material, that may be produced on behalf of the accused, to arrive at a decision whether the charge as framed could be maintained. The aforesaid parameters shall be kept in mind while we examine whether the High Court ought to have exercised its

inherent jurisdiction under Section 482 of the Cr.P.C. in the facts and circumstances of this case.

21. The High Court, in exercise of its jurisdiction under Section 482 of the Cr.P.C., must make a just and rightful choice. This is not a stage of evaluating the truthfulness or otherwise of allegations levelled by the prosecution/complainant against the accused. Likewise, it is not a stage for determining how weighty the defences raised on behalf of the accused is. Even if the accused is successful in showing some suspicion or doubt, in the allegations levelled by the prosecution/complainant, it would be impermissible to discharge the accused before trial. This is so, because it would result in giving finality to the accusations levelled by the prosecution/complainant, without allowing the prosecution or the complainant to adduce evidence to substantiate the same. The converse is, however, not true, because even if trial is proceeded with, the accused is not subjected to any irreparable consequences. The accused would still be in a position to succeed, by establishing his defences by producing evidence in accordance with law. There is an endless list of judgments rendered by this Court declaring the legal position, that in a case where the prosecution/complainant has levelled allegations bringing out all ingredients of the charge(s) levelled, and have placed material before the Court, prima facie evidencing the truthfulness of the allegations levelled, trial must be held.

22. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would

have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

23. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Cr.P.C.:-

(i) Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

(ii) Step two, whether the material relied upon by the

accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

(iii) Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/ complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/ complainant?

(iv) Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?

If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused.

24. The complaint made by Madan Lal Kapoor (the respondent-complainant) proceeds on the assumption, that his daughter Dr. Monica Thapar was administered poison. The said assumption was based on the fact, that the respondent-complainant, (as also the members of his family), found the body of their daughter had turned blue when they laid their eyes on it for the first time after her death. The motive disclosed in the complaint is non-cordiality of relations between the deceased Dr. Monica Thapar, and the family members of her husband (the appellants herein), on account of non-fulfillment

of dowry demands. Insofar as the allegation, that the appellants had poisoned Dr. Monica Thapar to death is concerned, the appellants have placed reliance on the post-mortem report dated 28.9.1992, chemical analysis findings recorded in the Central Forensic Science Laboratory's report dated 9.2.1993, the inquest report dated 6.7.1993, and the order passed by the Additional Sessions Judge, Delhi, dated 7.8.1999. It is clear, that Madan Lal Kapoor (the respondent-complainant), was associated with the investigative process from the very moment the body of Dr. Monica Thapar arrived at Delhi. It was at his instance, that the post-mortem examination was conducted. The body of the deceased, after the same was subjected to the post-mortem examination, was handed over jointly to Madan Lal Kapoor (the father of the deceased) and to Rajiv Thapar (the husband of the deceased). The cremation of the body of Dr. Monica Thapar was carried out jointly by the two families. A high level Medical Board, constituted for conducting the post-mortem examination, in unequivocal terms returned a finding, that "cardiac decompensation due to enlarged atrial septal defect & pulmonary hypertension" was the cause of Dr. Monica Thapar's death. It would be pertinent to notice, that samples from the stomach, intestine, liver, spleen, kidney and blood of the deceased's body were taken for forensic examination in order to verify the allegation of poisoning levelled by Madan Lal Kapoor. The Central Forensic Science Laboratory, New Delhi, in its report dated 9.2.1993 negatived the aforesaid allegation by concluding, that the samples did not indicate the presence of any common poisoning substance. Relying on the inquest report dated 6.7.1993, rendered by the SDM, Delhi, it was sought to be asserted, that echo-cardiography conducted at the Urmil Heart and Lung Centre, Surat, disclosed the presence of a large hole in Dr. Monica Thapar's heart. Even according to the Urmil Heart and Lung Centre, Surat, Dr. Monica Thapar had suffered a massive heart attack, and had died at the said hospital on 26.9.1992. It was the submission of the learned counsel for the appellants, that the aforesaid material is evidence of sterling quality which was sufficient to demonstrate,

that there was not the remotest possibility, that the trial against the appellants would lead to their conviction.

25. The evidence, relied upon by the appellant has not been contested or refuted by Madan Lal Kapoor (the respondent-complainant), even though he was aware of the same when he filed the complaint. During the course of the proceeding before the committing Magistrate, and even before Sessions Court and the High Court, the appellants had placed emphatic reliance on the material referred to above. The same remained unrefuted in the pleadings filed on behalf of Madan Lal Kapoor. During the course of hearing at the stages referred to above, the veracity of the documents/material referred to above was not contested. The aforesaid position has subsisted even before this Court. It was accordingly submitted on behalf of the appellants, that even if trial is allowed to proceed against the appellants, at the culmination thereof, it would be impossible to return a finding of guilt against any of the accused.

26. According to the learned counsel for the appellants, the material in the nature of the post-mortem report, the Central Forensic Science Laboratory's report, as also the inquest report, would be sufficient to exculpate the appellants from the allegations and accusations levelled in the complaint.

27. We are one with the aforesaid submission. From the documents/material relied upon by the appellants, for exactly the same reasons as have been projected on behalf of the appellants, we are satisfied to conclude, that the death of Dr. Monica Thapar was not caused by poisoning. Merely because her body had turned blue, when it arrived at Delhi, in our view, is not a sufficient basis to infer that she had been poisoned to death. In fact material relied upon by the appellants is sufficient to condemn the factual basis of the accusation as false.

28. It also needs to be noticed, that Madan Lal Kapoor (the respondent-complainant) took a summersault before the Additional Sessions Judge, Delhi by alleging, that Dr. Monica

Thapar had been strangulated by the appellants, (even though the assertion in the complaint was, that she had been poisoned to death). To determine the veracity of the allegation of strangulation, as the cause of her death, the Additional Sessions Judge, Delhi summoned Dr. L.T. Ramani, Chief Medical Officer, Civil Hospital, New Delhi and Dr. Amit Banerjee, Professor, Cardiothoracic Surgery, G.B. Pant Hospital, New Delhi (members of the Medical Board which had conducted the post-mortem examination) to clarify the altered accusation levelled by Madan Lal Kapoor. The aforesaid doctors, as is apparent from the order dated 7.8.1999 passed by the Additional Sessions Judge, Delhi, opined in the negative. They affirmed, that the death of Dr. Monica Thapar had not been caused by strangulation. We are therefore satisfied to affirm, that the death of Dr. Monica Thapar has not been shown to have been caused by strangulation. On an overall examination of the matter, we have no other option, specially in the absence of any submission to the contrary, but to conclude, that the material relied upon by the appellants would lead to the indubitable conclusion, that Dr. Monica Thapar had not died on account of having been strangulated.

29. We shall now advert to the allegation made in the complaint by Madan Lal Kapoor, that there was non-cordiality of relations between the deceased Dr. Monica Thapar, and her in-laws. Telephone bills demonstrate, that phone calls were regularly made from the residence of Rajiv Thapar (appellant no. 1), to the maternal family of Dr. Monica Thapar. The family of the husband of Dr. Monica Thapar was in consistent and regular contact with the other family members also. This relationship is shown to have been subsisting even at the time of the illness of Dr. Monica Thapar which proved to be fatal. Of utmost importance is a letter written by Rajiv Kapoor (the brother of the deceased, and the son of Madan Lal Kapoor, the respondent-complainant). In a letter dated 22.9.1992, just four days before the death of Dr. Monica Thapar (on 26.9.1992), Rajiv Kapoor showered praise on the immediate

family of Rajiv Thapar residing at Delhi. His letter to his sister describes her in-laws in Delhi, as "very affectionate and very caring". The telephone bills, as also the letter addressed by Rajiv Kapoor to his sister (Dr. Monica Thapar), are materials of sterling quality. Neither of the said materials has been controverted, either on veracity or on truthfulness. All this, in our opinion, would undoubtedly and inevitably result in concluding, that the relationship between the two families was cordial and affectionate. Clearly contrary to what has been alleged in the complaint.

30. Even though the statement of Dr. Pritu Dhalaria has been relied upon by the SDM, Delhi in the inquest report, which completely knocks out all the pleas advanced by Madan Lal Kapoor (the respondent-complainant), we are of the view, that it would be improper to make any reference thereto in deciding the present controversy. Reliance on the statement of Dr. Pritu Dhalaria would be permissible only after the same is recorded by a court on oath, whereupon, he has to be subjected to cross-examination. Only then, his statement would acquire credibility for reliance. Any fact situation based on the oral testimony, by one or the other party, cannot be the basis of a determination, akin to the one in hand.

31. We are persuaded to conclude from the facts and circumstances of the case exhaustively discussed in the foregoing paragraphs, that all the steps delineated in the paragraph 23 above, can be answered in the affirmative, on the basis of the material relied by the accused, more particularly, the post-mortem examination report dated 28.9.1992 conducted by a Medical Board comprising of four doctors, whose integrity has not been questioned by the respondent-complainant; the chemical analysis findings contained in the Central Forensic Science Laboratory's report dated 9.2.1993 which has not been disputed by the respondent-complainant; the inquest report of the SDM, Delhi, dated 6.7.1993, findings whereof have been painstakingly recorded by involving the respondent-complainant; the letter of Rajiv Kapoor (the brother of the deceased) dated 22.9.1992 addressed to Dr. Monica Thapar just four days before her death, the contents and authenticity whereof are not subject matter of challenge at the hands of the respondent-complainant; and finally, the telephone bills produced by the appellants-accused substantiating consistent and regular contact between the rival families, which have not been questioned. We, therefore, have no hesitation in concluding, that the judicial conscience of the High Court ought to have persuaded it, on the basis of the material examined by it, to quash the criminal proceedings initiated against the appellants-accused. We, therefore, hereby quash the aforesaid proceedings.

32. Despite the conclusion recorded hereinabove, we are of the view, that in the facts and circumstances of this case, there should have been no difficulty whatsoever for the High Court to have exercised its judicial conscience for invoking the power vested in it under Section 482 of the Cr.P.C. From the narration of the facts recorded above, it emerges, that even though the respondent-complainant Madan Lal Kapoor, in his complaint dated 6.7.1993, adopted a clear and categoric stance, that his daughter Dr. Monica Thapar had been poisoned to death, before the Additional Sessions Judge, Delhi, the respondent-complainant ventured to suggest, that the appellants-accused had strangulated her. The Additional Sessions Judge, Delhi, summoned two of the doctors who were members of the Medical Board which had conducted the post-mortem examination, and sought clarifications from them. He also recorded the statement of one of the said doctors. The Additional Sessions Judge, thereupon, ruled out the plea of strangulation. When the respondent-complainant himself was uncertain about the manner in which his daughter had allegedly died, the High Court should have viewed the matter keeping in mind the likelihood of the hurt caused to a father who had lost his daughter within one year of her marriage. The matter needed to have been evaluated, on the basis of one of the

parameters laid down in *State of Haryana & Ors. Vs. Bhajan Lal & Ors.,* 1992 Supp. (1) SCC 335, namely, whether the criminal proceedings initiated by Madan Lal Kapoor (the respondent-complainant) were actuated by malice and ulterior motive for wreaking vengeance on the accused with a view to spite him due to some private/personal grudge. There is yet another reason emerging from the facts of the case which needed to be kept in mind. Madan Lal Kapoor (the respondent-complainant) had continued to represent before the SDM, Delhi, that he would produce the mother of the deceased, who knew the facts best of all. Despite that, the mother of the deceased did not appear in the inquest proceedings to record her statement, even though a number of opportunities were afforded to the respondent-complainant to produce her. The permissible inference is that he was himself not privy to the facts. The fact that the mother of the deceased had not appeared to record a statement against the appellants-accused has to have some reason/justification. Would a mother who believes that her daughter had been poisoned/strangulated, restrain herself from recording her statement, despite the persuasion of her husband? Probably not. The instant factual position has been recorded hereinabove, not for the sake of determination of the present controversy. In a factual situation not as clear as the one in hand, facts such as these, could be taken into consideration by a High Court for recording its satisfaction, on the parameters formulated above.

33. For the reasons recorded hereinabove, criminal proceedings against the appellants-accused are hereby set aside. The order of the High Court is accordingly also set aside, but on grounds different from those taken into consideration by the High Court. The instant appeal, accordingly succeeds.

B.B.B. Appeal allowed.

MOHINDER SINGH
v.
STATE OF PUNJAB
(Criminal Appeal Nos. 1278-1279 of 2010)

JANUARY 28, 2013

[P. SATHASIVAM AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Code of Criminal Procedure, 1973 – ss.366, 432 and 433A – Double murder – Appellant-accused committed murder of his wife and daughter in the background of inimical relationship between them on account of criminal cases registered against him by his wife for committing rape on the said daughter, for which he was sentenced to rigorous imprisonment for 12 years, and for attacking her after release on parole for which an FIR was registered against him – Appellant had committed the offence with a deadly weapon i.e. 'Kulhara' (Axe) – Trial court convicted the appellant u/ s.302 IPC and sentenced him to death – High Court affirmed the conviction and confirmed the death sentence – Held: In the peculiar facts and circumstances, the case did not fall within the category of 'rarest of rare case' though it called for stringent punishment – Appellant was feeling frustrated because of the attitude of his wife and children – It was thirst for retaliation, which became the motivating factor in this case – Appellant not such a dangerous person that sparing his life will endanger the community – He did not harm his other daughter, namely, PW-2 even though he had a good chance for the same – Moreover, probability of appellant's rehabilitation and reformation not foreclosed – Therefore, his sentence modified from one of death penalty to that of life imprisonment till the end of his life – Appellant to undergo rigorous imprisonment for life meaning thereby the end of his life subject, however, subject to remission granted by the

appropriate Government satisfying the conditions prescribed in s.432 CrPC and further substantiate check u/s.433A CrPC by passing appropriate speaking orders.

According to the prosecution, the appellant-accused committed murder of his wife and daughter-'G' in the background of inimical relationship between them on account of criminal cases registered against him by his wife for committing rape on 'G', for which he was sentenced to rigorous imprisonment for 12 years, and for attacking her after release on parole for which an FIR was registered against him. The appellant had entered the scene of occurrence to commit the said offence carrying a deadly weapon i.e. 'Kulhara' (Axe) which was used in the commission of both the killings. The appellant committed the offence in the presence of his youngest daughter (PW-2). The trial court convicted the appellant under Section 302 IPC and sentenced him to death. By the impugned judgment, the High Court dismissed the appeal of the appellant and confirmed the death sentence imposed on him by the trial court.

Disposing of the appeals, the Court

Per Sathasivam, J. [for himself and Kalifulla, J.]

HELD: 1. In terms of Section 366(1) of CrPC, when the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court. The scope and application of the above section is only in cases where a sentence of death has been passed by the Court of Session. The Court of Session should refer the proceedings to the High Court and the High Court can only deal with them as a Court of reference. It is the practice of the High Court to be satisfied on the facts as well as the law of the case, that the conviction is right, before it proceeds to confirm that

sentence. In other words, the High Court has to come to its own independent conclusion as to the guilt or innocence of the accused, independently of the opinion of the Judge. In a reference for confirmation of death sentence, the High Court must examine the entire evidence for itself independent of the Session Court's views. While confirming the capital sentence, the High Court is under an obligation to itself consider what sentence should be imposed and not be content with the trial Court's decision on the point unless some reason is shown for reducing the same. Where, in addition to an appeal filed by an accused sentenced to death, the High Court has to dispose of the reference for confirmation of death sentence under Section 366 of the Code, the High Court, while dealing with reference, should consider the proceedings in all its aspects and come to an independent conclusion on the material on record apart from the views expressed by the Sessions Judge. The confirmation of death sentence cannot be based only on the precedents and or aggravating facts and circumstances of any other case. [Para 5] [101-G-H; 102-A-E]

2.1. In the instant case, the accused-appellant had earlier committed rape on his deceased daughter-'G' in 1999 and in that case, his deceased wife was a witness wherein the accused was convicted under Sections 376 and 506 IPC and sentenced to RI for 12 years. It is also subsequently taken on record that his deceased wife sent the accused out of his house and as a consequence, he had to live separately in a rented house with no means of livelihood. It was thirst for retaliation, which became the motivating factor in this case. The case of the accused does not come within the category of "rarest of rare" case to award death penalty. [Para 15] [106-G-H; 107-A-B]

2.2. The doctrine of "rarest of rare" confines two aspects and when both the aspects are satisfied only then the death penalty can be imposed. Firstly, the case must clearly fall within the ambit of "rarest of rare" and secondly, when the alternative option is unquestionably foreclosed. Bachan Singh case suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose. [Para 16] [107-C-D]

2.3. In life sentence, there is a possibility of achieving deterrence, rehabilitation and retribution in different degrees. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore, puts an end anything to do with the life. This is the big difference between two punishments. Thus, before imposing death penalty, it is imperative to consider the same. [Para 17] [107-E-F]

2.4. "Rarest of rare" dictum hints at this difference between death punishment and the alternative punishment of life imprisonment. Life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second aspect to the "rarest of rare" doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. [Para 18] [107-G-H; 108-A]

2.5. Treating the instant case on the touchstone of the guidelines laid down in Bachan Singh, Machhi Singh **and other decisions and balancing the aggravating and mitigating circumstances emerging from the evidence on record, the instant case cannot appropriately be called**

the "rarest of rare" case warranting death penalty. Also it is difficult to hold that the appellant is such a dangerous person that sparing his life will endanger the community. Also it cannot be said that the circumstances of the crime are such that there is no other alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances in favour of the accused. This case is the one in which humanist approach must be taken in the matter of awarding punishment. [Para 19] [108-B-D]

2.6. It is well settled law that awarding of life sentence is a rule and death is an exception. Life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years or even 30 years, rather it always means the whole natural life. This Court has always clarified that the punishment of a fixed term of imprisonment so awarded would be subject to any order passed in exercise of clemency powers of the President of India or the Governor of the State, as the case may be. Pardons, reprieves and remissions under Article 72 or Article 161 of the Constitution of India are granted in exercise of prerogative power. There is no scope of judicial review of such orders except on very limited grounds such as the non-application of mind while passing the order, non-consideration of relevant material, or if the order suffers from arbitrariness. The power to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly, reasonably and in terms of restrictions imposed in several provisions of the Code. A convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under Section 432 of the Code which in turn is subject to the procedural checks mentioned in the said provision and further substantive check in Section 433-A of the Code. [Paras 20, 21 and 22] [108-E-H; 109-A-C-H; 110-A-B]

2.7. One significant factor in this case, which we should not loose sight of is that he did not harm his other daughter, namely, PW-2 even though he had a good chance for the same. Further, it was highlighted that he being a poor man and unable to earn his livelihood since he was driven out of his house by his deceased wife. It is also his claim that if he was allowed to live in the house, he could easily meet both his ends and means, as the money which he was spending by paying rent would have been saved. It is his further grievance that his deceased wife was adamant that he should live outside and should not lead a happy married life and that was the reason that their relations were strained. This also shows that the accused was feeling frustrated because of the attitude of his wife and children. Moreover, the probability of the offender's rehabilitation and reformation is not foreclosed in this case. Likewise, it is seen from the affidavit filed by the sister of the accused that his family has not totally renounced as yet. Hence, there is a possibility for reformation in the present appellant. For the reasons aforementioned, this is not a case where death penalty should be imposed. The appellant-accused, therefore, instead of being awarded death penalty, is sentenced to undergo rigorous imprisonment for life, meaning thereby, the end of his life but subject to any remission granted by the appropriate Government satisfying the conditions prescribed in Section 432 CrPC further substantiate check under Section 433-A CrPC by passing appropriate speaking orders. [Paras 23, 24] [110-B-G; 111-A-B]

Bachan Singh vs. State of Punjab **(1980) 2 SCC 684 and** *Machhi Singh and Ors. vs. State of Punjab* **(1983) 3 SCC 470: 1983 (3) SCR 413 – relied on.**

State of Uttar Pradesh vs. Sanjay Kumar **(2012) 8 SCC 537;** *Sangeet and Anr. vs. State of Haryana* **2012 (11) Scale 140 and** *Panchhi & Ors. vs. State of U.P.* **(1998) 7 SCC 177: 1998 (1) Suppl. SCR 40 – referred to.**

Case Law Reference:

1998 (1) Suppl. SCR 40	**referred to**	**Para 11**
(1980) 2 SCC 684	**relied on**	**Para 12**
1983 (3) SCR 413	**relied on**	**Para 13**
(2012) 8 SCC 537	**referred to**	**Para 21**
2012 (11) Scale 140	**referred to**	**Para 22**

Per Kalifulla, J. [Supplementing]

1.1. The conduct of the appellant, if analyzed, based on the previous crimes committed by him, it is found that in the year 1999 as found by the courts below the appellant committed rape on his deceased daughter 'G' when she was minor and that too after beating her. To which beastly action, unfortunately the other deceased (viz) his wife, was an eye-witness. The conduct of the appellant in the commission of the said offence was not only bordering on immorality of the highest order but would be extremely difficult for anyone to lightly brush aside such a conduct by stating that either it was committed in a fit of anger or rage or such other similar situation. When the father himself happens to be the assailant in the commission of such beastly crime, one can visualize the pathetic situation in which the girl would have been placed and that too when such a shameless act was committed in the presence of her own mother. When the daughter and the mother were able to get their grievances redressed by getting the appellant convicted for the said offence of rape one would have in the normal course expected the appellant to have displayed a conduct of remorse. Unfortunately, the subsequent conduct of the appellant when he was on parole

disclosed that he approached the victims in a far more vengeful manner by assaulting the hapless victims which resulted in filing of an FIR once in the year 2005 and subsequently when he was on parole in the year 2006. The monstrous mindset of the appellant appears to have not subsided by mere assault on the victims who ultimately displayed his extreme inhuman behaviour by eliminating his daughter and wife in such a gruesome manner in which he committed the murder by inflicting the injuries on the vital parts of the body of the deceased and that too with all vengeance at his command in order to ensure that they met with instantaneous death. The nature of injuries as described in the postmortem report speaks for itself as to the vengeance with which the appellant attacked the hapless victims. He was not even prepared to spare his younger daughter (viz) PW-2 who, however, escaped the wrath of the appellant by bolting herself inside a room after she witnessed the grotesque manner in which the appellant took away the life of his wife and daughter. [Para 9] [116-F-H; 117-A-H]

1.2. However, the case still does not fall within the category of 'rarest of rare case' though it calls for a stringent punishment. Therefore, the sentence is modified from one of death penalty to that of life imprisonment till the end of his life. The appellant deserves to be sentenced to undergo rigorous imprisonment for life meaning thereby the end of his life subject, however, to remission granted by the appropriate Government satisfying the conditions prescribed in Section 432 of the Code of Criminal Procedure and further substantiate check under Section 433A of the Code by passing appropriate speaking orders. [Paras 10, 11] [118-B-C, F-G]

Bachan Singh Vs. State of Punjab **(1980) 2 SCC 684;** *Machhi Singh and others Vs. State of Punjab* **(1983) 3 SCC 470: 1983 (3) SCR 413;** *Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka* **(2008) 13 SCC 767: 2008 (11) SCR 93;** *Santosh Kumar Satishbhushan Bariyar Vs. State of Maharashtra* **(2009) 6 SCC 498: 2009 (9) SCR 90;** *Mohd. Farooq Abdul Gafur & Anr. Vs. State of Maharashtra* **(2010) 14 SCC 641: 2009 (12) SCR 1093;** *Haresh Mohandas Rajput Vs. State of Maharashtra* **(2011) 12 SCC 56: 2011 (14) SCR 921;** *State of Maharashtra Vs. Goraksha Ambaji Adsul* **AIR 2011 SC 2689: 2011 (9) SCR 41;** *Mohammed Ajmal Mohammadamir Kasab @ Abu Mujahid Vs. State of Maharashtra* **JT 2012 (8) SC 4;** *Gopal Vinayak Godse Vs. State of Maharashtra & Ors.* **AIR 1961 SC 600: 1961 SCR 440 and** *Mohd. Munna Vs. Union of India and Ors.* **(2005) 7 SCC 417: 2005 (3) Suppl. SCR 233 – relied on.**

Ravji @ Ram Chandra Vs. State of Rajasthan **(1996) 2 SCC 175: 1995 (6) Suppl. SCR 195;** *Shivaji @ Dadya Shankar Alhat Vs. State of Maharashtra* **(2008) 15 SCC 269: 2008 (13) SCR 81;** *Mohan Anna Chavan Vs. State of Maharashtra* **(2008) 7 SCC 561: 2008 (8) SCR 1072;** *Bantu Vs. State of Uttar Pradesh* **(2008) 11 SCC 113: 2008 (11) SCR 184;** *Surja Ram Vs. State of Rajasthan* **(1996) 6 SCC 271: 1996 (6) Suppl. SCR 783;** *Dayanidhi Bisoi Vs. State of Orissa* **(2003) 9 SCC 310 and** *State of Uttar Pradesh Vs. Sattan @ Satyendra & Ors.* **(2009) 4 SCC 736: 2009 (3) SCR 643 – referred to.**

Case Law Reference:

(1980) 2 SCC 684	relied on	Para 5
1983 (3) SCR 413	relied on	Para 5
2008 (11) SCR 93	relied on	Para 8
2009 (9) SCR 90	relied on	Para 8
2009 (12) SCR 1093	relied on	Para 8
2011 (14) SCR 921	relied on	Para 8
2011 (9) SCR 41	relied on	Para 8

JT 2012 (8) SC 4	**relied on**	**Para 8**
1995 (6) Suppl. SCR 195	**referred to**	**Para 8**
2008 (13) SCR 81	**referred to**	**Para 8**
2008 (8) SCR 1072	**referred to**	**Para 8**
2008 (11) SCR 184	**referred to**	**Para 8**
1996 (6) Suppl. SCR 783	**referred to**	**Para 8**
(2003) 9 SCC 310	**referred to**	**Para 8**
2009 (3) SCR 643	**referred to**	**Para 8**
1961 SCR 440	**relied on**	**Para 10**
2005 (3) Suppl. SCR 233	**relied on**	**Para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1278-1279 of 2010.

From the Judgment & Order dated 30.05.2008 of the High Court of Punjab and Haryana at Chandigarh in Murder Reference No. 8 of 2007 and Criminal Appeal No. 1033-DB of 2007.

Tripurari Raj, B.S. Bilowria, M.S. Khan, Vishnu Sharma for the Appellant.

V. Madhukar, AAG, Srajita Mathur, Anvita Cowshish, Kuldip Singh for the Respondent.

The Judgments of the Court was deliverd by

P. SATHASIVAM,J. 1. These appeals are filed against the common final judgment and order dated 30.05.2008 passed by the High Court of Punjab and Haryana at Chandigarh in Murder Reference No. 8 of 2007 and Criminal Appeal No. 1033-DB of 2007 whereby the High Court accepted the murder reference and confirmed the death sentence imposed on the appellant herein by the Sessions Judge, Ludhiana by order dated 22.11.2007 in Session Case No. 32 of 2006 and dismissed the appeal filed by him.

2. **Brief facts:**

(a) According to the prosecution, on 08.01.2006, the appellant-accused has committed murder of his wife-Veena Verma and daughter-Geetu Verma in the background of inimical relationship between them on account of criminal cases registered against him by his wife for committing rape on his minor daughter–Geetu Verma, for which he was sentenced to rigorous imprisonment for 12 years, and for attacking her after release on parole in January, 2005 for which an FIR was registered against him.

(b) On the date of incident, i.e., 08.01.2006, at around 06:30 p.m., when Shalu Verma-the complainant, daughter of the appellant-accused was present along with her mother-Veena Verma and sister-Geetu Verma in their house at village Partap Singh Wala, Haibowal, Ludhiana, at that time, the appellant-accused, who was living separately in a rented accommodation, came to the said place carrying a Kulhara (axe) in his hand. The complainant informed her mother about the same. When Veena Verma came to the lobby of the house, the appellant-accused gave an axe blow on her head. She fell on the ground and, thereafter, he gave two more blows using axe on her neck and hand. Immediately after that, he stepped towards Geetu Verma and gave 3 repeated blows on her head. Both of them smeared with blood and died on the spot. When he approached Shalu, she went into the room and bolted the same from inside. The appellant-accused fled away leaving the axe at the spot. After sometime, she came outside the room and raised hue and cry.

(c) On the basis of the statement of Shalu (PW-2), a First Information Report (FIR) being No. 6 was registered against the appellant-accused under Section 302 of the Indian Penal Code, 1860 (in short “the IPC”) at P.S. Haibowal, Ludhiana. On the same day, the appellant-accused was arrested from his rented house and the case was committed to the Court of Session, Ludhiana and numbered as Session Case No. 32 of 2006

(d) The Sessions Judge, Ludhiana, by order dated 22.11.2007, convicted the appellant under Section 302 of IPC and sentenced him to death.

(e) Against the said order, the appellant preferred an appeal before the High Court and the State filed a reference under Section 366 of the Code of Criminal Procedure, 1973 (in short 'the Code') for confirmation of death sentence. By a common impugned order dated 30.05.2008, the High Court while accepting the murder reference confirmed the death reference imposed by the trial Court and dismissed the appeal filed by the appellant-accused.

(f) Aggrieved by the said judgment, the appellant preferred these appeals by way of special leave before this Court.

(g) This Court, by order dated 20.07.2009, issued notice on the special leave petitions confining to sentence only. Even on 16.07.2010 when this Court granted leave, nothing has been stated about the above said initial notice. Hence, in these appeals, we are concerned about the quantum of sentence imposed on the appellant.

3. Heard Mr. Tripurari Raj, learned counsel for the appellant and Mr. V. Madhukar, learned Additional Advocate General for the respondent-State.

4. Though at the outset, learned counsel for the appellant insisted us to go into the entire merits of the case including the circumstances relied on by the prosecution and accepted by the Courts below, in view of the fact that this Court has issued notice confining to sentence only, we rejected his plea.

5. We are conscious of the fact that in terms of Section 366(1) of the Code, when the Court of Session passes a sentence of death, the proceedings shall be submitted to the High Court, and the sentence shall not be executed unless it is confirmed by the High Court. The scope and application of the above section is only in cases where a sentence of death

has been passed by the Court of Session. The Court of Session should refer the proceedings to the High Court and the High Court can only deal with them as a Court of reference. It is the practice of the High Court to be satisfied on the facts as well as the law of the case, that the conviction is right, before it proceeds to confirm that sentence. In other words, the High Court has to come to its own independent conclusion as to the guilt or innocence of the accused, independently of the opinion of the Judge. In a reference for confirmation of death sentence, the High Court must examine the entire evidence for itself independent of the Session Court's views. While confirming the capital sentence, the High Court is under an obligation to itself consider what sentence should be imposed and not be content with the trial Court's decision on the point unless some reason is shown for reducing the same. Where, in addition to an appeal filed by an accused sentenced to death, the High Court has to dispose of the reference for confirmation of death sentence under Section 366 of the Code, the High Court, while dealing with reference, should consider the proceedings in all its aspects and come to an independent conclusion on the material on record apart from the views expressed by the Sessions Judge. The confirmation of death sentence cannot be based only on the precedents and or aggravating facts and circumstances of any other case.

6. Keeping the above principles in mind, let us analyze the materials placed before the trial Judge as well as the confirmation order of the High Court. In view of the limited notice and in the light of the mandates provided under Section 366 of the Code relating to confirmation of death sentence by the High Court, we are of the view that considering two earlier orders passed by this Court on 20.07.2009 and 16.07.2010 confining to the sentence, we intend to concentrate only to the question, namely, acceptability or otherwise of the "sentence" hereunder.

7. No doubt, it is a case of double murder by the appellant-

accused who murdered his wife and daughter in a gruesome manner in the background of inimical relationship between the family on account of criminal cases registered against the appellant-accused at the instance of his deceased wife – Veena Verma and deceased daughter- Geetu Verma for which he was sentenced to rigorous imprisonment for 12 years' for committing rape on his daughter-Geetu Verma. In that case his deceased wife was a witness. It is seen that after release on parole in January, 2005, he attacked on his wife and an FIR was registered against him for violating the conditions of release. It is further seen that the accused committed the offence in the presence of his youngest daughter Shalu (PW-2). It is also proved that the appellant had entered the scene of occurrence to commit the said offence carrying a deadly weapon i.e. 'Kulhara' (Axe) which was used in the commission of both the killings. The members present in the house were his family members, viz., wife and two daughters.

8. We noticed the following special reasons given by the trial Court for warranting the death sentence and the High Court for confirming the same which are as follows:

(i) The appellant-accused had earlier committed rape on his deceased daughter – Geetu Verma in the year 1999 when she was a minor after giving beatings and threat to her and in that case his wife-Veena Verma (since deceased) was a witness and that a case under Sections 376 and 506 IPC was registered against him which finally resulted in rigorous imprisonment for 12 years.

(ii) While on parole in January 2005, the appellant-accused having violated the conditions of release, attacked his wife-Veena Verma and an FIR being No. 58 dated 06.04.2005 was registered against him under Sections 323, 324 and 506 IPC which is pending in the Court of JMIC, Ludhiana on the date of alleged occurrence.

(iii) The appellant-accused entered into the house with a deadly weapon 'Kulhara' (Axe) and caused unprovoked brutal attacks on the victims.

(iv) The appellant-accused caused repeated blows on the vital parts of the body of his wife and daughter resulting in instantaneous deaths in the presence of his youngest daughter of tender age, who by running into a room and bolting its from inside, saved herself when the accused proceeded towards her.

(v) The appellant-accused gave first blow to his wife – Veena Verma from behind with Kulhara (axe) on her head and when she fell down on the ground he caused successive blows on her neck and the head and, thereafter, he attacked his daughter–Geetu Verma and caused repeated Kulhara blows till her death. Thereafter, he proceeded towards his youngest daughter Shalu (PW-2) and showed Kulhara to her, who ran into a room and bolted it from inside.

(vi) In the case of the deceased - Veena Verma, out of 4 incised wounds, Injury Nos. 1 & 2 were caused on head, Injury No.3 on neck and Injury No. 4 resulted in partial amputation of left index finger from 1/3rd with clean cut margins. Regarding the deceased - Geetu Verma, who had been earlier subjected to diabolical act of rape by the appellant-accused during her minority in 1999, as many as 9 injuries were caused, out of which 7 were incised wounds and 2 were abrasions. Further, out of 7 incised wounds 3 had been caused on head region itself, 1 on the left mastoid and rest 3 on left and right elbow and fingers. In both the cases, the victims died instantaneous death.

(vii) Apart from taking revenge for his conviction and sentence, the appellant-accused has committed the offence for personal gain as he wanted the house, being occupied by his deceased wife and children, to be vacated for his personal use.

9. The crime of double murder of his wife and daughter in a gruesome and diabolical manner will irrefutably be taken into consideration as aggravating circumstance. However, for some

reasons, the High Court did not find any mitigating circumstance in favour of the accused for the purpose of balancing aggravating against mitigating. Even, the High Court recorded at page 38 of the impugned order as under:-

> "… In this background, looking for a strong mitigating circumstance, may not yield any result and this offence has in fact, ceased to remain a simple case of murder. This has rather acquired an enormity to the extent of rushing into the category of the "rarest of rare case."

It is pertinent to mention that in spite of the onerous duty bestowed on the reference court to balance the aggravating and mitigating circumstances, the High Court evaded the same.

10. On the other hand, the Sessions Court had attempted to draw a balance of aggravating and mitigating circumstances by stating two mitigating circumstances as follows:

1. Firstly, his age at the time of commission of crime i.e. 41 years.

2. Secondly, that the accused is a poor man, who had no livelihood.

While it is true that the above two circumstances alone will not make good for commuting the death sentence to life sentence, however, before we move on to enumerate the other mitigating circumstances in this case, it is necessary to consider few case laws which reiterate that brutality is not the sole criterion of determining whether a case falls under the "rarest of rare" categories.

11. In *Panchhi & Ors. vs. State of U.P.,* (1998) 7 SCC 177, this Court held that brutality is not the sole criterion of determining whether a case falls under the "rarest of rare" categories, thereby justifying the commutation of a death sentence to life imprisonment. This Court observed:

> "No doubt brutality looms large in the murders in this case particularly of the old and also the tender age child. It may be that the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the "rarest of rare cases" as indicated in Bachan Singh's case."

12. The Constitution Bench of this Court, by a majority, upheld the constitutional validity of death sentence in *Bachan Singh vs. State of Punjab,* (1980) 2 SCC 684. This Court took particular care to say that death sentence shall not normally be awarded for the offence of murder and that it must be confined to the "rarest of rare" cases when the alternative option is foreclosed. In other words, the Constitution Bench did not find death sentence valid in all cases except in the aforesaid cases wherein the lesser sentence would be wholly inadequate.

13. In *Machhi Singh and Ors. vs. State of Punjab,* (1983) 3 SCC 470, a three-Judge Bench of this Court while following the ratio in *Bachan Singh* (supra) laid down certain guidelines amongst which the following is relevant in the present case:

> "A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

14. We have extracted the above reasons of the two courts only to point out that, in a way, every murder is brutal, and the difference between the one from the other may be on account of mitigating or aggravating features surrounding the murder.

15. In the instant case, as already mentioned, the accused had earlier committed rape on his deceased daughter-Geetu Verma in 1999 and in that case, his deceased wife - Veena Verma was a witness wherein the accused was convicted under

Sections 376 and 506 IPC and sentenced to RI for 12 years. It is also subsequently taken on record that his deceased wife sent the accused out of his house and as a consequence, he had to live separately in a rented house with no means of livelihood. It was thirst for retaliation, which became the motivating factor in this case. In no words are we suggesting that the motive of the accused was correct rather we feel it does not come within the category of "rarest of rare" case to award death penalty.

16. The doctrine of "rarest of rare" confines two aspects and when both the aspects are satisfied only then the death penalty can be imposed. Firstly, the case must clearly fall within the ambit of "rarest of rare" and secondly, when the alternative option is unquestionably foreclosed. *Bachan Singh* (supra) suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose.

17. In life sentence, there is a possibility of achieving deterrence, rehabilitation and retribution in different degrees. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore, puts an end anything to do with the life. This is the big difference between two punishments. Thus, before imposing death penalty, it is imperative to consider the same.

18. "Rarest of rare" dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment would be pointless and completely devoid of any reason in the facts and circumstances of the case. As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the

second aspect to the "rarest of rare" doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme.

19. Treating the case on the touchstone of the guidelines laid down in *Bachan Singh* (supra), *Machhi Singh* (supra) and other decisions and balancing the aggravating and mitigating circumstances emerging from the evidence on record, we are not persuaded to accept that the case can appropriately be called the "rarest of rare" case warranting death penalty. We also find it difficult to hold that the appellant is such a dangerous person that sparing his life will endanger the community. We are also not satisfied that the circumstances of the crime are such that there is no other alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances in favour of the accused. In our considered view, this case is the one in which humanist approach must be taken in the matter of awarding punishment.

20. It is well settled law that awarding of life sentence is a rule and death is an exception. The application of the "rarest of rare" case principle is dependant upon and differs from case to case. However, the principles laid down and reiterated in various decisions of this Court show that in a deliberately planned crime, executed meticulously in a diabolic manner, exhibiting inhuman conduct in a ghastly manner, touching the conscience of everyone and thereby disturbing the moral fiber of the society, would call for imposition of capital punishment in order to ensure that it acts as a deterrent. While we are convinced that the case of the prosecution based on the evidence adduced confirms the commission of offence by the appellant, however, we are of the considered opinion that still the case does not fall within the four corners of the "rarest of rare" case.

21. Life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years or even 30 years, rather it always means the whole natural life. This Court has always

clarified that the punishment of a fixed term of imprisonment so awarded would be subject to any order passed in exercise of clemency powers of the President of India or the Governor of the State, as the case may be. Pardons, reprieves and remissions under Article 72 or Article 161 of the Constitution of India are granted in exercise of prerogative power. As observed in *State of Uttar Pradesh vs. Sanjay Kumar,* (2012) 8 SCC 537, there is no scope of judicial review of such orders except on very limited grounds such as the non-application of mind while passing the order, non-consideration of relevant material, or if the order suffers from arbitrariness. The power to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly, reasonably and in terms of restrictions imposed in several provisions of the Code.

22. In order to check all arbitrary remissions, the Code itself provides several conditions. Sub-sections (2) to (5) of Section 432 of the Code lay down basic procedure for making an application to the appropriate Government for suspension or remission of sentence either by the convict or someone on his behalf. We are of the view that exercise of power by the appropriate Government under sub-section (1) of Section 432 of the Code cannot be suo motu for the simple reason that this is only an enabling provision and the same would be possible subject to fulfillment of certain conditions. Those conditions are mentioned either in the Jail Manual or in statutory rules. This Court in various decisions has held that the power of remission cannot be exercised arbitrarily. In other words, the decision to grant remission has to be well informed, reasonable and fair to all concerned. The statutory procedure laid down in Section 432 of the Code itself provides this check on the possible misuse of power by the appropriate Government. As rightly observed by this Court in *Sangeet and Anr. vs. State of Haryana,* 2012 (11) Scale 140, there is misconception that a prisoner serving life sentence has an indefeasible right to release on completion of either 14 years or 20 years imprisonment. A convict undergoing life imprisonment is

expected to remain in custody till the end of his life, subject to any remission granted by the appropriate Government under Section 432 of the Code which in turn is subject to the procedural checks mentioned in the said provision and further substantive check in Section 433-A of the Code.

23. One significant factor in this case, which we should not loose sight of is that he did not harm his other daughter, namely, Shallu (PW-2) even though he had a good chance for the same. Further, it was highlighted that he being a poor man and unable to earn his livelihood since he was driven out of his house by his deceased wife. It is also his claim that if he was allowed to live in the house, he could easily meet both his ends and means, as the money which he was spending by paying rent would have been saved. It is his further grievance that his deceased wife was adamant and he should live outside and should not lead a happy married life and that was the reason that their relations were strained. This also shows that the accused was feeling frustrated because of the attitude of his wife and children. Moreover, the probability of the offender's rehabilitation and reformation is not foreclosed in this case. Likewise, we can see from the affidavit filed by the sister of the accused that his family has not totally renounced as yet. This is also clear that pending the above appeals, the appellant-accused, through his sister – Pramjit Kaur, filed an application for modification of earlier orders of this Court dated 20.07.2009 and 16.07.2010 for widening the scope of the appeals and sought permission to raise all available grounds. For this application, only his sister – Pramjit Kaur has filed an affidavit strengthening the above points. As mentioned above, the affidavit of his sister shows that his family has not totally renounced him. Hence, there is a possibility for reformation in the present appellant. Keeping in mind all these materials, we do not think that the present case warrants the award of the death penalty.

24. For the reasons aforementioned, we are of the opinion

that this is not a case where death penalty should be imposed. The appellant-accused, therefore, instead of being awarded death penalty, is sentenced to undergo rigorous imprisonment for life, meaning thereby, the end of his life but subject to any remission granted by the appropriate Government satisfying the conditions prescribed in Section 432 of the Code and further substantiate check under Section 433-A of the Code by passing appropriate speaking orders. The appeals are disposed of on the above terms.

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. I had the opportunity of reading the judgment of my learned brother Justice P. Sathasivam who has dealt with the issue *in extenso* while modifying the death sentence to one of imprisonment for life i.e. till the end of his life. I only wish to supplement my views while fully endorsing and concurring with the judgment of His Lordship Justice P. Sathasivam. Since, the facts have been elaborately stated in the judgment of His Lordship Justice P. Sathasivam, I do not refer the same in detail. For the purpose of my reasoning, in toeing with the conclusion of His Lordship Justice P. Sathasivam, I only wish to refer to certain factors to support our conclusions.

2. These appeals were entertained on 20.07.2009, however, while issuing notice, the appeals were confined to sentence only. The appellant was found guilty of the offence under Section 302 IPC and was sentenced to death for committing the murder of his wife Veena Verma and his daughter Geetu Verma on 08.01.2006 in the area of Pratap Singh Wala, Ludhiana. The above appeals arose out of the confirmation of death sentence in Murder Reference No.8/2007 as well as the connected Criminal Appeal No.1033-DB of 2007 filed by the appellant.

3. It is necessary to state that the appellant indulged in grotesque crime of murdering his wife and daughter one after another on 08.01.2006. The motive for such a heinous crime was that there was a dispute between him and his wife Veena

Verma as regards the house which he owned and that he was deprived of having access to his own house. In fact it was a matter of record that in the year 1999 there was an FIR against the appellant in FIR No.27 wherein the appellant was charged for offences under Sections 376 and 506 IPC for having committed rape on his deceased daughter Geetu Verma which ended in a conviction of 12 years rigorous imprisonment by judgment dated 15.05.2001. There was yet another FIR No.58 dated 06.04.2005 against the appellant for offences under Sections 323 and 506 IPC for having assaulted and for having given threat to his wife Veena Verma which was also proved as per Ex.PAA. There was yet another record of criminal case No.2531 dated 01.08.2005 (FIR No.58 of 2005) again for offences under Sections 323 and 324 IPC which was pending in the Court of JMIC, Ludhiana. In fact, the present offence of murder of his wife and daughter was committed by the appellant when he was on parole while undergoing rigorous imprisonment of 12 years for the conviction of the offence of rape of his daughter committed in the year 1999. It was also relevant to keep in mind that for holding the appellant guilty of the charge of murder of his wife and daughter apart from the other evidence, the evidence of his own minor daughter Shalu PW.2 who was an eye-witness to the occurrence weighed to very great extent along with the evidence of his own son Malkiat Singh PW.7.

4. The trial Court having noted the above factors held that having regard to his involvement in various criminal cases in the past as well as the gravity of the offence of murder of his own wife and daughter, whom the appellant felt were responsible for his conviction for the offence of rape committed on his own minor daughter, took the view by stating elaborate reasons as to why the case fell within the principles of 'rarest of rare cases' for the award of death sentence and inflicted the same on him.

5. The High Court after setting out the principles laid down

in the celebrated Constitution Bench decisions of this Court in *Bachan Singh Vs. State of Punjab* – (1980) 2 SCC 684 and the subsequent judgment in *Machhi Singh and others Vs. State of Punjab* – (1983) 3 SCC 470 held that the murder reference deserved to be accepted and the death sentence was, therefore, confirmed. The Division Bench of the High Court took into account the circumstances which are to be kept in mind for applying the 'rarest of the rare case' theory based on the above referred two decisions and noted the same as under:

"I. Manner of commission of murder.

II. Motive for commission of murder.

III. Anti-social or socially abhorrent nature of the crime.

IV. Magnitude of crime

V. Personality of victim of murder."

6. The High Court has also noted the injuries found on the body of the deceased insofar as it related to Veena Verma, the wife of the appellant, who suffered four incised wounds of which injury No. 1 was on the right lateral side and upper part of the neck and injury No.2 was on the head, third one was on the neck and fourth one resulted in partial amputation of left index finger from its lower one-third with clean cut margins. As far as the deceased daughter Geetu Verma is concerned, there were as many as nine injuries out of which seven were incised wounds and two were abrasions. Out of the seven incised wounds three were caused on the head region itself, fourth was on the left mastoid and the remaining three were on left and right elbow and fingers. Both the victims had instantaneous death. The basic grievance of the appellant was nothing but his desire to occupy his house which was occupied by none else than his own wife, daughters and son.

7. By noting the special reasons, the Division Bench held

that the conduct of the appellant in causing the murder of his wife and daughter acquired enormity to the extent that the case was fully governed by the principle of 'rarest of rare cases' and ultimately held that the imposition of death sentence by the trial Court was fully justified.

8. In this context we analyzed the various principles laid down in the subsequent decisions reported in *Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka* - (2008) 13 SCC 767, *Santosh Kumar Satishbhushan Bariyar Vs. State of Maharashtra* -(2009) 6 SCC 498, *Mohd. Farooq Abdul Gafur & Anr. Vs. State of Maharashtra* -(2010) 14 SCC 641, *Haresh Mohandas Rajput Vs. State of Maharashtra* -(2011) 12 SCC 56, *State of Maharashtra Vs. Goraksha Ambaji Adsul* - AIR 2011 SC 2689 and the recent decision reported in *Mohammed Ajmal Mohammadamir Kasab @ Abu Mujahid Vs. State of Maharashtra* - JT 2012 (8) SC 4. From conspectus consideration of the above decisions apart from the four principles laid down in *Bachan Singh* (supra) and also the requirement of a balance sheet of aggravating and mitigating circumstances, the following principles are required to be borne in mind:

(i) A conclusion as to the 'rarest of rare' aspect with respect to a matter shall entail identification of aggravating and mitigating circumstances relating both to the crime and the criminal.

(ii) The expression 'special reasons' obviously means ('exceptional reasons') founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal.

(iii) The decision in *Ravji @ Ram Chandra Vs. State of Rajasthan* – (1996) 2 SCC 175 which was subsequently followed in six other cases, namely, *Shivaji @ Dadya Shankar Alhat Vs. State of Maharashtra* - (2008) 15 SCC

269, *Mohan Anna Chavan Vs. State of Maharashtra* - (2008) 7 SCC 561, *Bantu Vs. State of Uttar Pradesh* - (2008) 11 SCC 113, *Surja Ram Vs. State of Rajasthan* - (1996) 6 SCC 271, *Dayanidhi Bisoi Vs. State of Orissa* - (2003) 9 SCC 310 and *State of Uttar Pradesh Vs. Sattan @ Satyendra & Ors.* - (2009) 4 SCC 736 wherein it was held that it is only characteristics relating to crime, to the exclusion of the ones relating to criminal, which are relevant to sentencing in criminal trial, was rendered per *incuriam qua Bachan Singh* (supra) in the decision reported in *Santosh Kumar Satishbhushan Bariyar* (supra) at 529.

(iv) Public opinion is difficult to fit in the 'rarest of rare' matrix. People's perception of crime is neither an objective circumstance relating to crime nor to the criminal. Perception of public is extraneous to conviction as also sentencing, at least in capital sentencing according to the mandate of *Bachan Singh* (supra). (2009) 6 SCC 498 at p.535.

(v) Capital sentencing is one such field where the safeguards continuously take strength from the Constitution. (2009) 6 SCC 498 at 539.

(vi) The Apex Court as the final reviewing authority has a far more serious and intensive duty to discharge and the Court not only has to ensure that award of death penalty does not become a perfunctory exercise of discretion under Section 302 after an ostensible consideration of 'rarest of rare' doctrine, but also that the decision-making process survives the special rigours of procedural justice applicable in this regard. (2010) 14 SCC 641 at 692.

(vii) The 'rarest of rare' case comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of "the rarest of the rare case". There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. 2011 (12) SCC 56 at p.63 para 20.

(viii) Life sentence is the rule and the death penalty is the exception. The condition of providing special reasons for awarding death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable.

(ix) The circumstances and the manner of committing the crime should be such that it pricks the judicial conscience of the Court to the extent that the only and inevitable conclusion should be awarding of death penalty.(AIR 2011 SC 2689)

(x) When the case falls under the category of 'rarest of rare' case penalty of death is clearly called for and any leniency shown in the matter of sentence would not only be misplaced but will certainly give rise to and foster a feeling of private revenge among the people leading to destabilization of the society.(AIR 1983 SC 585)

(xi) Death penalty has been held to be constitutionally valid. The test is what case would attract death penalty if not the case of the appellant. JT (2012) 8 SC 4.

9. Keeping the above settled principles in mind, when we examine the case on hand, it is needless to state that the conduct of the appellant, if analyzed, based on the previous crimes committed by him, we find that in the year 1999 as found by the courts below the appellant committed rape on his deceased daughter Geetu Verma when she was minor and that too after beating her. To which beastly action, unfortunately the other deceased (viz) his wife, was an eye-witness. One cannot comprehend to visualize a situation of such nature in which father himself committed rape on his own minor daughter in the presence of her own mother. The conduct of the appellant in

the commission of the said offence was not only bordering on immorality of the highest order but would be extremely difficult for anyone to lightly brush aside such a conduct by stating that either it was committed in a fit of anger or rage or such other similar situation. If such grotesque offence of rape had been committed by anyone, other than the father himself, the victim would have had every opportunity to cry for solace in her father or mother. In this context, we are only reminded of the Tamil proverb which means in English "*When the fence eats the crops*". When the father himself happens to be the assailant in the commission of such beastly crime, one can visualize the pathetic situation in which the girl would have been placed and that too when such a shameless act was committed in the presence of her own mother. When the daughter and the mother were able to get their grievances redressed by getting the appellant convicted for the said offence of rape one would have in the normal course expected the appellant to have displayed a conduct of remorse. Unfortunately, the subsequent conduct of the appellant when he was on parole disclosed that he approached the victims in a far more vengeful manner by assaulting the hapless victims which resulted in filing of an FIR once in the year 2005 and subsequently when he was on parole in the year 2006. The monstrous mindset of the appellant appears to have not subsided by mere assault on the victims who ultimately displayed his extreme inhuman behaviour by eliminating his daughter and wife in such a gruesome manner in which he committed the murder by inflicting the injuries on the vital parts of the body of the deceased and that too with all vengeance at his command in order to ensure that they met with instantaneous death. The nature of injuries as described in the postmortem report speaks for itself as to the vengeance with which the appellant attacked the hapless victims. He was not even prepared to spare his younger daughter (viz) PW-2 who, however, escaped the wrath of the appellant by bolting herself inside a room after she witnessed the grotesque manner in which the appellant took away the life of his wife and daughter.

10. Be that as it may when we come to the question of applying the various principles culled out from the decisions right from the Constitution Bench decision in *Bachan Singh* (supra) right up to the case *Mohammed Ajmal Mohammadamir Kasab* (supra) as held by my learned brother Justice P. Sathasivam for the various reasons referred to therein, we find that the case still does not fall within the category of 'rarest of rare case' though it calls for a stringent punishment. Therefore, while modifying the sentence from one of death penalty to that of life imprisonment till the end of his life we apply the earliest decision of this Court reported in *Gopal Vinayak Godse Vs. State of Maharashtra & Ors.* - AIR 1961 SC 600 wherein this Court held in paragraph 5 as under:

> "It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words 'imprisonment for life' for 'transportation for life' enable the drawing of any such all-embracing fiction. 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."

11. The said principle was followed subsequently in *Mohd. Munna Vs. Union of India and Ors.* - (2005) 7 SCC 417. Applying the above decisions, we have no hesitation in holding that the appellant deserves to be sentenced to undergo rigorous imprisonment for life meaning thereby the end of his life subject, however, to remission granted by the appropriate Government satisfying the conditions prescribed in Section 432 of the Code of Criminal Procedure and further substantiate check under Section 433A of the Code by passing appropriate speaking orders.

B.B.B. Appeals disposed of.

HIRAMAN
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 1288 of 2008)

JANUARY 31, 2013

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

Evidence Act, 1872 – s.32 – Relevance of dying declarations – Approach to be adopted by the Courts with respect thereto – Held: By enacting s.32(1) in the Evidence Act, the legislature has accorded a special sanctity to the statement made by a dying person as to the cause of his own death – This is by virtue of the solemn occasion when such statement is made – Besides, when such statement is made at the earliest opportunity without any influence being brought on the dying person, there is absolutely no reason to take any other view for the cause of his or her death – Absence of any corroboration cannot take away its relevance – Exaggerated doubts, on account of absence of corroboration, will only lead to unmerited acquittals, causing grave harm to the cause of justice and ultimately to the social fabric – On facts, the dying declarations of the appellant's wife gave the real cause of her burn injuries – The victim having suffered 91% burn injuries, there was hardly any time to secure the presence of competent magistrate or to record her statement in a detailed question-answer form – Absence of these factors itself did not take away the evidentiary value of the recorded statement – There were two dying declarations recorded at the earliest opportunity – They contained the motive for the crime, and the reasons as to why the deceased suffered the burn injuries viz., the greed of the appellant to which the deceased had refused to succumb – As far as her statements viz., that the appellant had poured kerosene and set her on fire is concerned, there is no reason to discard it considering the fact that it was made

at the earliest opportunity and on a solemn occasion – The defence put up a story which was totally inconsistent with the facts on record, and is a clear afterthought and therefore unacceptable – The prosecution proved its case beyond any reasonable doubt.

The appellant's wife died an unnatural death, having suffered 91% burn injuries. The trial court held the appellant responsible for the same, principally on the basis of her dying declarations, and convicted him for cruelty and murder under Sections 498-A and 302 of IPC. The conviction u/s 302 of IPC was confirmed by the High Court in Criminal Appeal, though the one under Section 498-A of IPC was set-aside for the lack of sufficient evidence. The Courts below accepted the two dying declarations of deceased 'C' as giving the correct cause for the burn injuries viz. that they were caused by the appellant. They rejected the defence of the appellant that he was nowhere near the deceased at the time of the incident and that he was not responsible for the same. The judgment of the High Court was challenged before this Court for being rendered solely on the basis of dying declarations.

The instant appeal thus raises question about the relevance of dying declarations, and the approach to be adopted by the Courts with respect thereto.

Dismissing the appeal, the Court

HELD: 1.1. The dying declarations of the appellant's wife gave the real cause of her burn injuries. The victim 'C' having suffered 91% burn injuries, there was hardly any time to secure the presence of competent magistrate or to record her statement in a detailed question-answer form. Absence of these factors itself will not take away the evidentiary value of the recorded statement. [Para 8] [131-F-G]

1.2. By enacting Section 32 (1) in the Evidence Act, 1872, the legislature has accorded a special sanctity to the statement made by a dying person as to the cause of his own death. This is by virtue of the solemn occasion when the statement is made. Besides, when the statement is made at the earliest opportunity without any influence being brought on the dying person, there is absolutely no reason to take any other view for the cause of his or her death. The statement has to be accepted as the relevant and truthful one, revealing the circumstances which resulted into his death. Absence of any corroboration can not take away its relevance. Exaggerated doubts, on account of absence of corroboration, will only lead to unmerited acquittals, causing grave harm to the cause of justice and ultimately to the social fabric. With the incidents of wives being set on fire, very unfortunately continuing to occur in our society, it is expected from the Courts that they approach such situations very carefully, giving due respect to the dying declarations, and not being swayed by fanciful doubts. [Para 17] [138-G-H; 139-A-C]

1.3. In the present case there are two dying declarations recorded at the earliest opportunity. They contained the motive for the crime, and the reasons as to why the deceased suffered the burn injuries viz., the greed of the appellant to which the deceased had refused to succumb. As far as her statements viz., that the appellant had poured kerosene and set her on fire is concerned, there is no reason to discard it considering the fact that it was made at the earliest opportunity and on a solemn occasion. The defence put up a story which is totally inconsistent with the facts which have come on record, and is a clear afterthought and therefore unacceptable. In fact this case clearly shows an attempt to put up a totally false defence. The prosecution has undoubtedly proved its case beyond any reasonable doubt. [Para 18] [139-D-F]

1.4. In view of the above legal position and facts on record, there is no reason to interfere in the judgment and order rendered by the trial court as modified and confirmed by the High Court. [Para 19] [139-G]

Khushal Rao Vs. State of Bombay **AIR 1958 SC 22: 1958 SCR 552;** *Mannu Raja Vs. State of Madhya Pradesh* **1976 (3) SCC 104: 1976 (2) SCR 764;** *Gulam Hussain Vs. State of Delhi* **2000 (7) SCC 254: 2000 (2) Suppl. SCR 141;** *Kanaksingh Raisingh Vs. State of Gujarat* **AIR 2003 SC 691;** *Babu Lal Vs. State of State of Madhya Pradesh* **AIR 2004 SC 846: 2003 (5) Suppl. SCR 54;** *Shivaji Sahebrao Bobade Vs. State of Maharashtra* **AIR 1973 SC 2622:1974 (1) SCR 489;** *State of U.P. Vs. Krishna Gopal* **AIR 1988 SC 2154: 1988 (2) Suppl. SCR 391;** *Gurbachan Singh Vs. Satpal Singh* **AIR 1990 SC 209: 1989 (1) Suppl. SCR 292;** *Gangadhar Behera Vs. State of Orissa* **AIR 2002 SC 3633;** *Sucha Singh Vs. State of Punjab* **2003 (7) SCC 643: 2003 (2) Suppl. SCR 35;** *Lakhan Vs. State of Madhya Pradesh* **2010 (8) SCC 514: 2010 (9) SCR 705 – relied on.**

P. Mani Vs. State of Tamil Nadu **2006 (3) SCC 161: 2006 (2) SCR 486 – referred to.**

Case Law Reference:

2006 (2) SCR 486	**referred to**	**Para 7**
1958 SCR 552	**relied on**	**Para 7**
1976 (2) SCR 764	**relied on**	**Para 10**
2000 (2) Suppl. SCR 141	**relied on**	**Para 11**
AIR 2003 SC 691	**relied on**	**Para 12**
2003 (5) Suppl. SCR 54	**relied on**	**Para 12**
1974 (1) SCR 489	**relied on**	**Para 13**

1988 (2) Suppl. SCR 391	**relied on**	**Para 14**
1989 (1) Suppl. SCR 292	**relied on**	**Para 15**
AIR 2002 SC 3633	**relied on**	**Para 16**
2003 (2) Suppl. SCR 35	**relied on**	**Para 16**
2010 (9) SCR 705	**relied on**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1288 of 2008.

From the Judgment & Order dated 28.06.2005 of the High Court of Judicature at Bombay Bench at Aurangabad in Criminal Appeal No. 31 of 2005.

Javed Mahmud Rao for the Appellant.

Sanjay V. Kharde, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. This Criminal Appeal raises the question about the relevance of dying declarations, and the approach to be adopted by the Courts with respect thereto. The appellant's wife, Chandrakala Hiraman Murkute, died an unnatural and a very painful death at about 2 a.m. on 7.4.2000 in a village in Jamkhed Taluka of District Ahmednagar, State of Maharashtra, having suffered 91% burn injuries in the previous night leading to cardio-respiratory failure. The First Adhoc Addl. Sessions Judge, Ahmednagar held the appellant responsible for the same, principally on the basis of her dying declarations, and convicted him for cruelty and murder under Sections 498-A and 302 of the Indian Penal Code (I.P.C. for short) by his judgment and order dated 16.8.2004 in Sessions Case No.103 of 2000. The conviction U/s 302 of IPC was confirmed by the Aurangabad Bench of the High Court of Judicature at Bombay in Criminal Appeal No.31 of 2005, though the one under Section 498-A of I.P.C was set-aside for the lack

of sufficient evidence. The Courts below have accepted the two dying declarations of deceased Chandrakala as giving the correct cause for the burn injuries viz. that they were caused by the appellant. They have rejected the defence of the appellant that he was nowhere near the deceased at the time of the incident and that he was not responsible for the same. In view of this conviction under Section 302 I.P.C., the appellant is required to undergo imprisonment for life, and to pay a fine of Rs.500/-, in default suffer a rigorous imprisonment for three months. This judgment of the High Court dated 28.6.2005 in Crl. Appeal No. 31/2005 is being challenged for being rendered solely on the basis of dying declarations.

The facts leading to the present appeal are as follows:-

2. Deceased Chandrakala had been married to the appellant since a long time, and had three children from the marriage viz., Bapu, aged about 20-22 years and married at the time of the incident, Ramesh aged about 14 years, and daughter Shobha (whose age has not been mentioned). As per the charge-sheet, the appellant is stated to have poured kerosene on Chandrakala and set her on fire at about 8 p.m. on 6.4.2000. She was admitted in the rural hospital, Jamkhed immediately at 9:15 p.m. One Dr. Eknath Mundhe (PW-5) was on duty at that time, and he recorded the history of injuries (exhibit 33) at about the same time in the following words –

> *"H/o Homicidal burns by husband as she was not willing to perform his marriage with her sister and he was also demanding gold on 6.4.2000 at about 8 p.m."*

Thus as per this writing, the appellant was insisting that Chandrakala bring gold from her parents, and that he be permitted to marry her sister. Chandrakala refused to acquiesce to either of these demands, and, therefore, she was given serious burn injuries by the appellant on that fateful night. According to their younger son Ramesh (DW-1) the deceased was taken to the hospital by her family members. That being

so, this recording by the doctor assumes significance since it must have been made in their presence. After Head Constable Dagadu Baba Kharat (PW-4) came for duty to that hospital, the above duty doctor informed him about the incident, and also that Chandrakala was still in a position to make a statement. PW-4 recorded the second statement of Chandrakala (exhibit 28) in the presence of PW-5 and the staff nurse after PW-5 certified that she was in a position to give a statement. Chandrakala stated that the appellant poured kerosene on her from a ten liter drum, and then set her on fire since she declined to accept his demand of a golden ring of one tola, and transfer of the land belonging to her maternal uncle to him. According to this statement one neighbour Baba Saheb Vitekar had extinguished the fire, and then she was brought to the hospital. Thereafter, her thumb impression was obtained on the statement after reading it to her. This second dying declaration was treated as the First Information Report (F.I.R.) and was registered at 10:10 p.m. as Crime No. 44/2000 under Section 307 I.P.C. for attempt to murder. Chandrakala was very much in a position to make a statement at that time, and was not under the influence of any drug since she was injected with sedatives only at about 10:30 p.m. At the time of recording of this statement her two sons as well as the appellant were present since, as stated by Ramesh (DW-I), all the family members had taken her to the hospital. The Appellant has also stated in his statement under Section 313 of Cr.P.C that he too had gone to the hospital. Mother and brother of Chandrakala were however not present at that time as they could reach the hospital only after she had passed away. After her death the charge was altered from the one under Section 307 to the one under Section 302 I.P.C.

3. During the trial, the prosecution examined five witnesses. PW-1 Dr. Abhijit Boralkar who performed the post-mortem gave the cause of death as follows:-

"Death due to cardio-respiratory failure (due) to shock due to extensive burns 91% superficial to deep."

Thus, there is no dispute over the cause of death. The question is as to how she received the burn injuries. The mother (PW-2) and brother (PW-3) of Chandrakala supported her version as to why, she suffered the burn injuries viz., that appellant was insisting that she fetch a golden ring, and also to transfer her maternal uncle's land to him for last about two months, and that her refusal has led to this gruesome act by him. The defence of the appellant in this behalf was, however, inconsistent. In his statement under Section 313 of Cr.PC he indicated the probability of accidental death due to bursting of the stove. The investigating officer P.I. Kandre, however categorically stated that during examination of the place of occurrence no furnace, stove or cooking articles were found over there. The appellant examined three witnesses in his defence. Their younger son Ramesh (DW-1) stated on the other hand that his mother had committed suicide. The cause for committing the suicide as stated by Ramesh was however very flimsy viz., that he had asked his mother to give him Rs.2 for watching a movie, which she had declined. This had led the appellant to scold her, because of which she went inside the house and bolted the door. Later on when Ramesh was playing outside the house, and when his elder brother and father were also outside the house, his sister Shobha who was playing at the neighbour's house raised the alarm that Chandrakala had set herself on fire. According to Ramesh the appellant climbed on the roof, removed one of the tin sheets and jumped inside, to remove the bolt of the door when it was found that the deceased was lying on the floor in a burnt condition. A close relative of the appellant viz., Mhase Nagu Vitkar (DW-2) was examined who also gave similar evidence. As far as the statement of Ramesh (DW-1) is concerned, the same was discarded for the reason that it was a hearsay based on the statement allegedly made by Shobha to him and Shobha was not examined. Besides, the house of the neighbour where Shobha was supposed to have been playing, was at a distance

of about 150 feet from the house of deceased, and there were many houses in between the two houses. Therefore, her statement of coming to know that Chandrakala had set herself on fire could not be accepted, since Shobha would not have been able to know the same from such a distance. Similarly, the statement of Ramesh that his father had jumped into the house after removing the tin sheet of the roof could not be accepted for the reason that though he is claimed to have suffered an injury in the process, at the time of his arrest in the night of 6.4.2000, the appellant declined to go to any hospital (as the arrest panchnama records) when asked whether he suffered from any pain or injury. This leads to the discarding of the statement of Dr. Satpute (DW-3) also, who is said to have examined the accused two days subsequent to the incident, on 8.4.2000, and noticed abrasions on his left elbow and arm, and a burn injury on left elbow. The statement of DW-2 was also not accepted for the reasons that he was a person of 70 years of age who accepted that he could not see beyond 15-20 feet. He would not have come to know of the incident when his house is situated at a distance of 150 feet from the place of occurrence.

Consideration of the submissions on facts:

4. The question before us is as to how Chadrakala received the burn injuries. There are two versions before us viz., that the appellant poured the kerosene on her, and the other that the deceased poured it on herself. The version given by the deceased is contained in her statements recorded at the earliest opportunity by two different persons who had no reason to record what they have recorded, unless she had stated so. And considering the solemn occasion when she was making the statements, there was no reason to discard the same as being untrue. The first statement was recorded at 9:15 p.m., i.e. just one hour and fifteen minutes after the incident when she was brought to the hospital. The second statement was also recorded within an hour thereafter at about 10:10 p.m.

Chandrakala was fully conscious at that time and was required to be given sedatives only at about 10:30 p.m. This statement assumes significance since it was recorded when her family members including the appellant were present. Besides, her brother and mother have subsequently confirmed her statement that her husband was greedy and used to harass her for his demands. There was no occasion of their tutoring her since they reached the hospital only after her death. It was submitted on behalf of the appellant that the failure of the prosecution to examine Baba Saheb Vitekar (who extinguished the fire) was fatal. In this connection, we must note that this Baba Saheb was not present when kerosene was poured on Chandrakala and the fire started. He came lateron to extinguish the fire and could not have thrown any light as to how the incident took place.

5. The learned Counsel for the appellant principally submitted that as far as the two dying declarations of Chandrakala are concerned, there was no corroboration to the same, and the uncorroborated dying declarations could not be accepted. It was contended that there is a variation between the two dying declarations with respect to the reasons for setting her on fire. Now as far as this variation between the two statements is concerned, it is only this much that in her first statement Chandrakala had stated that the appellant used to harass and ill-treat her because he was demanding gold from her, and was asking her to marry her sister to him for which she was not agreeable. In the second dying declaration she had once again stated that he was demanding gold from her, but had also added that he had sought the transfer of the land belonging to her maternal uncle to him. This time she has not stated about his insisting to marry her sister. The demand for gold is the common factor in both the statements. In the first statement she has additionally referred to his insisting on marrying her sister, whereas in the second one she has referred to his demand for the agricultural land of her maternal uncle. The Sessions Court and the High Court have not given any

importance to this variation, and in our view rightly so. This is because one must understand that Chandrakala had suffered 91% burn injuries. Earlier, the duty-doctor had asked her as to how the incident had occurred, and later on the Head Constable on duty had repeated the query. Any person in such a condition will state only that much which he or she can remember on such an occasion. When asked once again, the person concerned can not be expected to repeat the entire statement in a parrot-like fashion. One thing is very clear in both the statements viz., the greed of the appellant and her being harassed on that count. Besides, it is relevant to note that her mother and brother have both corroborated her statement that the appellant was demanding gold and land from her. Initially Chandrakala spoke about this demand for gold and later also for the land. This cannot in any way mean an attempt to improve. Similarly, the non-mention on the second occasion of his insistence to marry her sister cannot mean an omission to discredit her statements.

6. As against that, as far as the version put up by the appellant is concerned, it is based on the hearsay version of his daughter Shobha who was supposed to be playing at a house at a distance of 150 feet from appellant's house. She has not been examined and her version as reproduced by Ramesh is pressed into service, and an attempt is thus made to put up a probable parallel story though the story is highly improbable bordering on falsehood. It is not placed on record that Chandrakala was suffering from any psychological disorder either. The Courts below rightly rejected this parallel version as there is no foundation to the same. This is as against the one which is propounded by the prosecution, which in the circumstances is the only acceptable version. Initially, the appellant took the defence on 19.8.2002 that Chandrakala perhaps died due to an accident. This can be seen from his answer to Question No.20 in the course of statement U/s 313 of Cr.PC, where he stated as follows:-

> *"I had done nothing. Electricity was off. I was not present at the house. She might be doing cooking at stove. Whether there was outburst of stove is not known to me. My son had told me that his mother had been injured and then I went at the hospital. Thereafter, Police caught me and took me to jail. Thereafter, I was there inside. I had nothing to say more."*

Thus at that stage he did not state that he jumped into the house to rescue his wife. Besides, he stated that he did not want to lead any defence witness. Nearly, two years later he examined defence witnesses on 15.7.2004 to raise the plea of suicide, which was clearly an afterthought. It is very clear that Ramesh (DW-1) was put up to save the appellant from the accusation. It is also relevant to note that the appellant was absconding for a period of over 20 months during the trial from 26.6.2002 to 14.4.20014, and it was much later that he surrendered himself. There was no reason for him to abscond if he had not indulged in the act of pouring kerosene on his wife.

Submissions on Law

7. The learned Counsel for the appellant relied upon the judgment of a bench of two judges of this Court in *P. Mani Vs. State of Tamil Nadu* reported in [2006 (3) SCC 161] to canvass that uncorroborated dying declaration must not be accepted. In this connection, it must be firstly noted that in that case the son and daughter of the deceased lady (who had died due to burn injuries) had categorically stated that she was suffering from depression and she had made an attempt to commit suicide a week prior to the date of the incident. Besides, there was no material to show that the appellant was absconding or he could not be arrested despite attempts having been made therefor. Even in that matter the Court specifically observed as follows:-

> "**14.** *Indisputably conviction can be recorded on the*

basis of the dying declaration alone but therefore the same must be wholly reliable."

Thus it must be noted that this decision was rendered in the facts of that case where the dying declaration was not found to be wholly reliable. The judgment does not in any way deviate from the well settled proposition that a dying declaration can be the sole basis for conviction.

8. A ground has been raised in this appeal by pointing out the defect with respect to the statement recorded by the doctor that there is absence of time of recording it, but the time can be ascertained from the marginal endorsement made thereon. A further ground has been raised in this appeal that the second statement of the deceased recorded by Head Constable Kharat (PW-4) can also not be treated as a dying declaration and cannot be read as an evidence since it was neither recorded by the gazetted officer i.e. Chief Judicial Magistrate nor in question-answer form. The appellant has relied upon observation of this Court in sub-para (5) of para 16 of the judgement of a bench of three judges in *Khushal Rao Vs. State of Bombay* reported in [AIR 1958 SC 22] in this behalf. The submission is misconceived for the reason that the proposition in sub-para (5) of para 16 cannot be cut off from the other propositions in this para which lay down the other parameters governing the approach towards the relevance of the dying declarations. When we look to those parameters, there is no reason not to accept that the dying declarations of Chandrakala gave the real cause of her burn injuries. Chandrakala having suffered 91% burn injuries, there was hardly any time to secure the presence of competent magistrate or to record her statement in a detailed question-answer form. Absence of these factors itself will not take away the evidentiary value of the recorded statement. The parameters from this paragraph are as follows:-

"**16**. *On a review of the relevant provisions of the Evidence Act and of the decided cases in the different*

High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties."

9. In this behalf we may as well profitably refer to

paragraph 11 of this very judgment with respect to the rationale in accepting the version contained in the dying declaration. This Court (per B.P. Sinha, J. as he then was) observed in this para 11 as follows:-

> "**11.** *The legislature in its wisdom has enacted in Section 32(1) of the Evidence Act that "When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question", such a statement written or verbal made by a person who is dead (omitting the unnecessary words) is itself a relevant fact. This provision has been made by the legislature, advisedly, as a matter of sheer necessity by way of an exception to the general rule that hearsay is no evidence and that evidence which has not been tested by cross-examination, is not admissible. The purpose of cross-examination is to test the veracity of the statements made by a witness. In the view of the legislature, that test is supplied by the solemn occasion when it was made, namely, at a time when the person making the statement was in danger of losing his life. At such a serious and solemn moment, that person is not expected to tell lies; and secondly, the test of cross-examination would not be available. In such a case, the necessity of oath also has been dispensed with for the same reasons. Thus, a statement made by a dying person as to the cause of death, has been accorded by the legislature, a special sanctity which should, on first principles, be respected unless there are clear circumstances brought out in the evidence to show that the person making the statement was not in expectation of death, not that that circumstance would affect the admissibility of the statement, but only its weight. It may also be shown by evidence that a dying declaration is not reliable because it was not made at the earliest opportunity, and, thus, there was a reasonable ground to believe its having been put into the mouth of the dying man, when his power of resistance against telling a falsehood, was ebbing away; or because the statement has not been properly recorded, for example, the statement had been recorded as a result of prompting by some interested parties or was in answer to leading questions put by the recording officer, or, by the person purporting to reproduce that statement. These may be some of the circumstances which can be said to detract from the value of a dying declaration. But in our opinion, <u>there is no absolute rule of law, or even a rule of prudence which has ripened into a rule of law, that a dying declaration unless corroborated by other independent evidence, is not fit to be acted upon, and made the basis of a conviction</u>."*

(emphasis supplied)

10. The judgment in *Khushal Rao* has been consistently referred to and followed. Thus, after referring to the propositions in Khushal Rao, this Court observed in para 7 of *Mannu Raja Vs. State of Madhya Pradesh* reported in [1976 (3) SCC 104] to the following effect:-

> "**7.** *It was contended by the learned Counsel for the appellants that the oral statement which Bahadur Singh made cannot, in the eye of law, constitute a dying declaration because he did not give a full account of the incident or of the transaction which resulted in his death. There is no substance in this contention because in order that the Court may be in a position to assess the evidentiary value of a dying declaration, what is necessary is that the whole of the statement made by the deceased must be laid before the Court, without tampering with its terms or its tenor. <u>Law does not require that the maker of the dying declaration must cover the whole incident or narrate the case history.</u> Indeed, quite often, all that the victim may be able to say is that he was*

A *beaten by a certain person or persons. That may either be due to the suddenness of the attack or the conditions of visibility or because the victim is not in a physical condition to recapitulate the entire incident or to narrate it at length. In fact, many a time, dying declarations which* B *are copiously worded or neatly structured excite suspicion for the reason that they bear traces of tutoring.”*

(emphasis supplied)

11. *Khushal Rao and Mannu Raja* have been referred to C and followed in *Gulam Hussain Vs. State of Delhi* reported in [2000 (7) SCC 254]. In para 8 thereof, this Court observed as follows:-

“**8.** *Section 32 of the Evidence Act is an exception* D *to the general rule of exclusion of hearsay evidence and the statement made by a person, written or verbal, of relevant facts after his death is admissible in evidence if it refers to the cause of his death or any circumstances of the transactions which resulted in his death. To attract* E *the provisions of Section 32, the prosecution is required to prove that the statement was made by a person who is dead or who cannot be found or whose attendance cannot be procured without any amount of delay or expense or he is incapable of giving evidence and that* F *such statement had been made under any of the circumstances specified in sub-sections (1) to (8) of Section 32 of the Evidence Act...........”*

12. In a case almost identical to the present one, in *Kanaksingh Raisingh Vs. State of Gujarat* reported in [AIR G 2003 SC 691], this Court upheld the conviction in the case of pouring kerosene and setting the wife on fire by holding that so long as the dying declaration is voluntary and truthful, there was no reason why it should not be accepted. In *Babu Lal Vs. State of State of Madhya Pradesh* reported in [AIR 2004 SC

H

A 846], this Court had following to say with respect to dying declaration in para 7 which is as follows:-

“**7**..........*A person who is facing imminent death, with even a shadow of continuing in this world practically* B *non-existent, every motive of falsehood is obliterated. The mind gets altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person because a person on the verge of death is not likely to tell lies or to* C *concoct a case so as to implicate an innocent person. The maxim is “a man will not meet his maker with a lie in his mouth” (Nemo moriturus praesumitur mentire). Mathew Arnold said, “truth sits on the lips of a dying man”. The general principle on which the species of evidence is admitted is that they are declarations made in* D *extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced and mind induced by the most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an* E *obligation equal to that which is imposed by a positive oath administered in a court of justice (See R.V. Woodcock 1 Leach 500).”*

13. The appellant had sought to create a doubt about the F prosecution case. In this behalf we must note that a doubt sought to be raised has to be a credible and consistent one and must be one which will appeal to a reasonable mind. We may profitably refer to what this Court has said in this behalf in some of the leading judgments. Thus, in *Shivaji Sahebrao* G *Bobade Vs. State of Maharashtra* reported in [AIR 1973 SC 2622] Krishna Iyer, J. observed for a bench of three judges in paragraph 6 as follows:-

“6........The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence H and to the soothing sentiment that all acquittals are always

good regardless of justice to the victim and the community, demand especial emphasis in the contemporary context of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles or golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt......"

"………The evil of acquitting a guilty person light-heartedly as a learned author Glanville Williams in 'Proof of Guilt' has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicated 'persons' and more severe punishment of those who are found guilty. Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless…..."

"………a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent…….."

14. The propositions in *Shivaji Sahebrao Bobade* were quoted with approval in *State of U.P. Vs. Krishna Gopal* reported in [AIR 1988 SC 2154], and further this Court observed as follows in paragraph 13 (per M.N. Venkatachaliah, J. as he then was):-

"13……… *Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an over emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common-sense. It must grow out of the evidence in the case……..*"

15. In *Gurbachan Singh Vs. Satpal Singh* reported in [AIR 1990 SC 209], this Court observed at the end of para 4 as follows:-

"4…….There is a higher standard of proof in criminal cases than in civil cases, but there is no absolute standard in either of the cases. See the observations of Lord Denning in Bater v. Bater, (1950) 2 All ER 458 at p.459, but the doubt must be of a reasonable man. The standard adopted must be the standard adopted by a prudent man which, of course, may vary from case to case, circumstances to circumstances. Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape than punish an innocent. Letting guilty escape is not doing justice, according to law."

16. These propositions have been consistently followed by this Court in *Gangadhar Behera Vs. State of Orissa* reported in [AIR 2002 SC 3633], *Sucha Singh Vs. State of Punjab* reported in [2003 (7) SCC 643] and *Lakhan Vs. State of Madhya Pradesh* reported in [2010 (8) SCC 514].

Hence, the Conclusion:

17. Thus as can be seen, by enacting Section 32 (1) in the Evidence Act, the legislature has accorded a special sanctity to the statement made by a dying person as to the cause of his own death. This is by virtue of the solemn occasion when the statement is made. Besides, when the statement is made at the earliest opportunity without any

influence being brought on the dying person, there is absolutely no reason to take any other view for the cause of his or her death. The statement has to be accepted as the relevant and truthful one, revealing the circumstances which resulted into his death. Absence of any corroboration can not take away its relevance. Exaggerated doubts, on account of absence of corroboration, will only lead to unmerited acquittals, causing grave harm to the cause of justice and ultimately to the social fabric. With the incidents of wives being set on fire, very unfortunately continuing to occur in our society, it is expected from the Courts that they approach such situations very carefully, giving due respect to the dying declarations, and not being swayed by fanciful doubts.

18. In the present case there are two dying declarations recorded at the earliest opportunity. They contained the motive for the crime, and the reasons as to why the deceased suffered the burn injuries viz., the greed of the appellant to which the deceased had refused to succumb. As far as her statements viz., that the appellant had poured kerosene and set her on fire is concerned, there is no reason to discard it considering the fact that it was made at the earliest opportunity and on a solemn occasion. The defence put up a story which is totally inconsistent with the facts which have come on record, and is a clear afterthought and therefore unacceptable. In fact this case clearly shows an attempt to put up a totally false defence. The prosecution has undoubtedly proved its case beyond any reasonable doubt.

19. In view of the above legal position and facts on record, we see no reason to interfere in the judgment and order rendered by the learned Sessions Judge as modified and confirmed by the High Court.

20. The appeal is, therefore, dismissed.

B.B.B. Appeal dismissed.

BANGALORE DEVELOPMENT AUTHORITY
v.
M/S VIJAYA LEASING LTD. & ORS.
(Civil Appeal No. 7141 of 2005)

APRIL 1, 2013

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

Land Acquisition Act, 1894 – s.48(1) – Acquisition de-notified by de-notification dated 05.10.1999 – Single Judge of High Court set aside the de-notification – Order overturned by Division Bench – On appeal, held: While exercising extraordinary jurisdiction u/Article 226 of the Constitution, the Single Judge came across incongruities in the proceedings of the Hon'ble Minister which resulted in the issuance of de-notification dated 05.10.1999 – Order of the Single Judge in setting aside such a patent illegality cannot be held to be beyond the powers vested in the Constitutional Court – The Division Bench failed to take note of the gross illegality committed by the Hon'ble Minister while directing the issuance of the de-notification dated 05.10.1999 inspite of the fact that possession had already been handed over to the State as early as on 09.12.83 and that the decree of the Civil Court did not in any way create any fetters on the authorities concerned to take steps for possession by resorting to appropriate legal means – The Civil Court decree to that effect was dated 15.12.1981 and the possession was taken by taking necessary steps under the provisions of the Land Acquisition Act under the Mahazar dated 09.12.83 which was never challenged by any party much less the first respondent – The Division Bench completely omitted to take note of the relevant facts while interfering with the order of the Single Judge – Order of the Single Judge restored – Constitution of India, 1950 – Article 226 – Power of the writ court to correct errors apparent on the face of the record.

Dwarakanath v. Income Tax Officer **1965 (2) SCJ 296;** *Gujarat Steel Tubes Ltd & Ors. v. Gujarat Steel Tubes Mazdoor Sabha & Ors.* **1980 (2) SCC 593: 1980 (2) SCR 146** and *Meera Sahni v. Lt. Governor of Delhi and Others* **2008 (9) SCC 177: 2008 (10) SCR 1012 – referred to.**

Case Law Reference:

1965 (2) SCJ 296	**referred to**	**Para 14**
1980 (2) SCR 146	**referred to**	**Para 14, 15**
2008 (10) SCR 1012	**referred to**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7141 of 2005.

From the Judgment & Order dated 29.03.2005 of the High Court of Karnataka at Bangalore in Writ Appeal No. 4947 of 2002(LA-RES).

WITH

C.A. No. 7142 of 2005

Altaf Ahmed, P.V. Shetty, S.K. Kulkarni, M. Gireesh Kumar, Ankur S. Kulkarni, V.N. Raghupathy, C.B. Gururaj, Sanjay R. Hegde, Aman Vachher, Ashutosh Dubey, T.S. Shanti, Abhishek Chauhan, Harsh Sharma, P.N. Puri, Vijay Kumar Paradesi for the appearing parties.

The following Order of the Court was delivered

O R D E R

1. These two appeals arise out of the common judgment of the Division Bench of the Karnataka High Court at Bangalore dated 29.3.2005 in Writ Appeal No.4947 of 2002. Though the issue lies in a narrow compass as to the power of writ court under Article 226 of the Constitution to correct certain errors which is quite apparent on the face of the record though not

specifically challenged by a party, in order to appreciate the order of the learned Single Judge dated 26.8.2002 which sought to remedy the manifest injustice by setting aside a notification passed under Section 48 (1) of the Land Acquisition Act dated 27.6.2000 without any specific challenge to the said Notification.

2. By the impugned judgment the Division Bench set aside the order of the learned Single Judge on the sole ground that there was no specific challenge to the Notification dated 27.6.2000. To appreciate the points raised, it is necessary to refer to the basic facts in a brief account.

3. There was a preliminary Notification dated 21.9.1967 under the provisions of Bangalore Improvement Act, 1945 (Mysore Act V of 1945) which is analogous to Section 4 of the Land Acquisition Act. By the said notification, there was a proposal to acquire survey No.57 of Thippasandra Village, K.R. Puram Hobli by the Government for the formation of a layout called HAL, second stage layout by the appellant herein. The final notification was issued on 15.7.1971 under the same Act purported to be one under Section 6 of the Land Acquisition Act.

4. Award was, however, passed by the Acquisition Authority on 21.11.1983 and the same was approved on 29.11.1983 for Rs.58,426,25. Compensation was paid under the Mahazar dated 09.12.1983 and the possession was taken and handed over to the Engineering Section on the same date. After the final notification dated 15.7.1971 and six months prior to the award dated 21.11.1983, the land was sold by the original owners, namely, A. Thimma Reddy and Muniswamappa on 27.5.1983 to the vendors of the contesting respondent. The petitioner therein (respondent No.1 herein) purchased the land in question under two sale deeds on 28.1.1995. The acquisition was stated to have been de-notified under Section 48 (1) of the Land Acquisition Act by notification dated 05.10.1999. By order dated 27.6.2000 impugned in the writ

petition, the said de-notification dated 05.10.1999 was recalled. The said order dated 27.6.2000 was the subject matter of challenge of the writ petition filed by the first respondent herein in WP 2565/2001.

5. By the order dated 26.8.2002, the learned Single Judge, after holding that there is no provision in the Land Acquisition Act for recalling the order passed under Section 48(1) of the Act also proceeded to hold that in any event the Notification dated 05.10.1999 for certain specified reasons had to be declared as *non est* in law and struck down the said notification which sought to de-notify the acquisition which became final and conclusive as on 09.12.1983 (i.e.), sixteen years after the acquisition became final.

6. In the appeal preferred by the appellant, the Division Bench while affirming the order of the learned Single Judge, insofar as it related to the setting aside of the recalling of the de-notification dated 27.6.2000, however, held that the Single Judge was not legally justified in setting aside the de-notification itself dated 05.10.1999.

7. We heard Mr. Altaf Ahmad learned senior counsel for the appellant, Mr. P.V. Shetty, learned senior counsel for the first respondent and learned counsel for the parties. We also perused the judgment of the learned Single Judge, as well as, that of the Division Bench and we are convinced that the judgment of the Division Bench impugned in this appeal deserves to be set aside.

8. As the facts are not in dispute, as stated in the opening paragraph the short question for consideration is, in the absence of a challenge to the de-notification dated 05.10.1999 whether the Single Judge was justified in setting aside the same even after holding that the subsequent recalling of the said notification by order dated 27.6.2000 was without jurisdiction.

9. A perusal of the order of the learned Single Judge would

disclose that before issuing the de-notification dated 05.10.1999, the Hon'ble Minister dealing with the appropriate subject stated to have made a spot inspection along with the officials of the appellant and recorded a statement that possession was not delivered to the Government or the appellant and that it continued with the owner of the land. The said statement was recorded on 13.7.1998. One other statement found in the said proceeding was that even if possession had been handed over in the year 1983, as no layout was formed till the time of inspection i.e. in the year 1998, it was more probable that the possession continued with the owner and was not handed over to the appellant. A further reference was made to a decree of permanent injunction by the Civil Court dated 15.12.1981 in O.S. 10300/1980 against the appellant restraining the appellant from interfering with the possession of the land owner Krishna Reddy.

10. The learned Single Judged has noted the above factors after perusing the original records. The learned Judge further found that though the proceedings of the Hon'ble Minister stated that possession continued to remain with the owner and not handed over to the appellant, the Mahazar drawn on 09.12.1983 clearly disclosed that possession was handed over to the Assistant Executive Engineer on that date, that the survey had shown the boundary of the land which was acquired while handing over possession to the Executive Engineer and that the said Mahazar was attested by four witnesses apart from the signature affixed by the Revenue Officer in proof of delivery of possession in his presence.

11. The learned Judge also went through the judgment of the Civil Judge dated 15.12.1981 and found that the decree of permanent injunction granted was to the limited effect that the defendant/appellant was restrained by way of permanent injunction from interfering with the plaintiff's possession of the suit property except in accordance with law. One other factor which was found in the proceedings of the Hon'ble Minister's

inspection was that the name board of the first respondent was found in a small house located in the scheduled property and, therefore, the possession with the owner should have been continued till that date. Though the Hon'ble Minister concerned was of the view that based on the above factors the acquisition had to be de-notified, a three-men Committee which considered the proceedings of the Hon'ble Minister rejected those observations and recommended that there was no necessity for de-notification of the land. Unfortunately, superseding the above decision of the Committee, the concerned Hon'ble Minister appeared to have ordered for de-notification and that is how the said notification came to be issued on 05.10.1999.

12. The learned Judge after referring to the proceedings of the Hon'ble Minister, the decision of the three-men Committee and the reasons which prevailed upon the Hon'ble Minister to issue the de-notification held that none of the reasons mentioned for issuing de-notification were legally sustainable and, therefore, it called for an interference. The learned Judge specifically referred to the Mahazar dated 09.12.1983 wherein, after following the required formalities possession was duly handed over to the Government through the concerned Assistant Executive Engineer in the presence of the witnesses, that the Civil Court decree dated 15.12.1981 passed in OS 10300/1980 empowered the authorities concerned to resort to possession in accordance with law and, therefore, steps taken for taking possession under the Land Acquisition Act cannot be held to be in violation of the Civil Court decree and that issuance of the de-notification dated 05.10.1999 was, therefore, in gross violation of the authority vested in the Hon'ble Minister and was patently illegal and unjustified.

13. In the abovesaid background, the question for consideration is, therefore, whether such a conclusion of the learned Single Judge and the ultimate order passed by him can

be held to be justified in exercise of his power and jurisdiction under Article 226 of the Constitution.

14. To appreciate the legal position we only wish to refer to two of the decisions of this Court reported in *Dwarakanath v. Income Tax Officer* -1965 (2) SCJ 296 and *Gujarat Steel Tubes Ltd & Ors. v. Gujarat Steel Tubes Mazdoor Sabha & Ors.* - 1980 (2) SCC 593. In *Dwarakanath case* the Supreme Court stated as under:

"This article is couched incomprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression 'nature', for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of Government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the Article itself."

(Emphasis added)

15. Similarly in *Gujarat Steel Tubes* Case (supra), the

relevant principles can be culled out from paragraphs 73 and 81.

> "73.While the remedy under Article 226 is extraordinary and is of Anglo-Saxon vintage, it is not a carbon copy of English processes. Article 226 is a sparing surgery but the lancet operates where injustice suppurates. While traditional restraints like availability of alternative remedy hold back the court, and judicial power should not ordinarily rush in where the other two branches fear to tread, judicial daring is not daunted where glaring injustice demands even affirmative action. The wide words of Article 226 are designed for service of the lowly numbers in their grievances if the subject belongs to the court's province and the remedy is appropriate to the judicial process. There is a native hue about Article 226, without being anglophilic or anglophobic in attitude. Viewed from this jurisprudential perspective, we have to be cautious both in not overstepping as if Article 226 were as large as an appeal and not failing to intervene where a grave error has crept in. Moreover, we sit here in appeal over the High Court's judgment. And an appellate power interferes *not* when the order appealed is not right but only when it is clearly wrong. The difference is real, though fine.
>
> 81……………………..Broadly stated, the principle of law is that the jurisdiction of the High Court under Article 226 of the Constitution is limited to holding the judicial or quasi-judicial tribunals or administrative bodies exercising the quasi-judicial powers within the leading strings of legality and to see that they do not exceed their statutory jurisdiction and correctly administer the law laid down by the statute under which they act. So long as the hierarchy of officers and appellate authorities created by the statute function within their ambit the manner in which they do so can be no ground for interference……………………….."

(emphasis added)

16. We are of the view that the above principles when applied to the case on hand, it can be safely concluded that the order of the learned Single Judge in the light of the peculiar facts noted therein cannot be faulted. We also wonder as to why the Hon'ble Minister concerned should have taken upon himself the extraordinary effort of making an inspection for which no special reasons were adduced in the report. That apart none of the reasons which weighed in the report of the Hon'ble Minister reflected the true facts. The conclusion of the Hon'ble Minister that the possession continued to remain with the owner was contrary to what was found on records. The Mahazar dated 09.12.1983 as noted by learned Single Judge from the original file reveal that the conclusion of the Hon'ble Minister was *ex facie* illegal and untrue. The said conclusion obviously appeared to have been made with some ulterior motive and purpose and with a view to show some undue favour to the first respondent herein. The acquisition became final and conclusive as far back as on 15.7.1971 when Section 6 declaration came to be issued. At no point of time there was any challenge to either preliminary notification dated 21.9.1967 or the final declaration notified on 15.7.1971. Even the award dated 21.11.1983 approved on 29.11.1983 was not the subject matter of challenge in any proceedings.

17. In this context, reliance placed upon by Mr. Altaf Ahmad in the decision reported in *Meera Sahni v. Lt. Governor of Delhi and others* - 2008 (9) SCC 177 wherein this Court has held that transfer of land in respect of which acquisition proceedings had been initiated under Sections 4 and 6 would be final and not bind the Government and that a challenge to said proceedings by a subsequent purchaser was impermissible in law. The relevant part of the said decision has been set out in paras 17 and 21 which are as under:

> "17. When a piece of land is sought to be acquired, a notification under Section 4 of the Land Acquisition Act is required to be issued by the State Government strictly in

accordance with law. The said notification is also required to be followed by a declaration to be made under Section 6 of the Land Acquisition Act and with the issuance of such a notification any encumbrance created by the owner, or any transfer made after the issuance of such a notification would be deemed to be void and would not be binding on the Government. A number of decisions of this Court have recognised the aforesaid proposition of law wherein it was held that subsequent purchaser cannot challenge acquisition proceedings and also the validity of the notification or the irregularity in taking possession of the land after the declaration under Section 6 of the Act.

21. In view of the aforesaid decisions it is by now well-settled law that under the Land Acquisition Act, the subsequent purchaser cannot challenge the acquisition proceedings and that he would be only entitled to get the compensation."

18. Therefore, while exercising the extraordinary jurisdiction under Article 226 of the Constitution, the learned Single Judge came across the above incongruities in the proceedings of the Hon'ble Minister which resulted in the issuance of de-notification dated 05.10.1999. We fail to note as to how the ultimate order of the learned Single Judge in setting aside such a patent illegality can be held to be beyond the powers vested in the Constitutional Court. The conclusion of this Court in *Gujarat Steel Tubes* Case (supra) that judicial daring is not daunted when glaring injustice demands even affirmative action and that authorities exercising their powers should not exceed the statutory jurisdiction and correctly administer the law laid down by the statute under which they act are all principles which are to be scrupulously followed and when a transgression of their limits is brought to the notice of the Court in the course of exercise of its powers under Article 226 of the Constitution, it cannot be held that interference in such an extraordinary situation to set right an illegality was unwarranted.

19. In our considered opinion, the Division Bench failed to take note of the above gross illegality committed by the Hon'ble Minister while directing the issuance of the de-notification dated 05.10.1999 inspite of the fact that possession had already been handed over to the State as early as on 09.12.83 and that the decree of the Civil Court did not in any way create any fetters on the authorities concerned to take steps for possession by resorting to appropriate legal means. At the risk of repetition, it will have to be stated that the Civil Court decree to that effect was dated 15.12.1981 and that the possession was taken by taking necessary steps under the provisions of the Land Acquisition Act under the Mahazar dated 09.12.83 which was never challenged by any party much less the first respondent herein. The Division Bench unfortunately completely omitted to take note of the relevant facts while interfering with the order of the learned Single Judge. The appeals, therefore, stand allowed. The order of the Division Bench is set aside and the order of the learned Single Judge dated 26.8.2002 passed in WP No.2565 of 2001 stands restored by this common judgment.

B.B.B. Appeals allowed.

BHANWAR KANWAR
v.
R.K. GUPTA & ANR.
(Civil Appeal No. 8660 of 2009)

APRIL 5, 2013

[G.S. SINGHVI AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Consumer Protection Act, 1986 – s.14(1)(f) – Medical treatment – Deceit – Appellant's son suffering from convulsions/fits – Respondent no.1, an Ayurvedic practitioner, had claimed through advertisement that he had total cure for such convulsions/fits – Allegation of deceptive practice by respondent no.1 – that he administered Allopathic medicines passing them off as ayurvedic medicines – Held: The respondents relied on a letter dated 24th February, 2003 issued by the Medical Education Department, Government of U.P. to suggest that the Aurvedic/Unani Practitioners practicing Ayurvedic System are also authorised to use allopathic medicines under U.P. Indian Medical Council Act, 1939 – However, since the incident and treatment as alleged by the appellant relate to the period 1994 to 1997, therefore, letter dated 24th February, 2003 is of no avail to the respondents – Respondent No.1 was guilty of unfair trade practice and adopted unfair method and deceptive practice by making false statement orally as well as in writing – Both the child and his mother (appellant) suffered physical and mental injury due to the misleading advertisement, unfair trade practice and negligence of the respondents – Appellant and the child thus entitled for enhanced compensation for the injury suffered by them – Since no reason given by the National Commission for deducting 50% of the compensation amount and to deposit the same with the Consumer Legal Aid Account of the Commission that part of the order passed by

the National Commission is set aside – Amount of compensation enhanced from Rs.5 lakhs (as directed by the National Commission) to Rs.15 lakhs with direction to the respondents to pay the amount to the appellant.

The appellant's son suffered from convulsions/fits. Respondent no.1, an Ayurvedic practitioner, had claimed through advertisement that he had total cure for such convulsions/fits. The appellant approached respondent No.1 for treatment of her son. Respondent no.1 prescribed medicines and for considerable time period, the appellant got her son treated from respondent no.1. The condition of the child, however, only deteriorated despite respondent no.1's re-assurance that the line of treatment was correct. Later, when a Consultant Neurologist was consulted, he opined that there was no hope of the child growing up as a normal person.

The appellant lodged complaint before the consumer commission alleging that respondent No.1 was passing off Allopathic medicines as Ayurvedic medicines and that he was prescribing Allopathic medicines, for which he was not competent to prescribe. It was further alleged that respondent no.1 was a quack and guilty of medical negligence, criminal negligence and breach of duty as he was playing with the lives of innocent people without understanding the disease. It was, inter alia, prayed that direction be issued to respondents to pay a sum of Rs.20 lakhs as compensation; to refund the charges paid by the appellant to the respondents and to reimburse expenses incurred by the appellant in course of the treatment.

So far as entitlement of respondent No.1 to prescribe allopathic medicine is concerned, the respondents relied on a letter dated 24th February, 2003 issued by the Secretary, Medical Education Department, Government of U.P. to suggest that the Aurvedic/Unani Practitioners

practicing Ayurvedic System are also authorised to use allopathic medicines under U.P. Indian Medical Council Act, 1939.

The National Commission held that respondent No.1 having made the false representation was guilty of unfair trade practice but held that in the light of letter dated 24th February, 2003 respondent No.1 was entitled to prescribe Allopathic medicines. However, with a view to curb false representation and to restore faith of the people in Ayurvedic System the National Commission passed a direction under Section 14(1) (f) of the Consumer Protection Act, 1986 directing the respondents to pay compensation of Rs.5 lakhs but it ordered to pay only a sum of Rs.2.50 lakhs to the appellant and to deposit the rest of the amount of Rs.2.50 lakhs in favour of Consumer Legal Aid Account of the National Commission.

In the instant appeal, the appellant-complainant challenged the quantum of compensation ordered to be paid in favour of appellant and the part of compensation ordered to be deposited with Legal Aid. She also raised doubt on the authority of respondent No.1 to prescribe Allopathic medicines contending that the letter dated 24th February, 2003 was of no help to respondent No.1 and could not be given retrospective effect.

Allowing the appeal, the Court

HELD: 1. The incident and treatment as alleged by the appellant relate to the period 1994 to 1997. Therefore, letter dated 24th February, 2003 is of no avail to the respondents as the same was not in existence during the period of treatment. From the aforesaid letter it is clear that in connection with some case the High Court of Allahabad issued direction to take action against the quacks who were practicing in Allopathic Medicine but not registered with Medical Council. [Para 13] [160-D; 161-E]

2. The respondent No.1 has nowhere pleaded that he was registered with the Medical Council or enrolled in the State Medical Register. He has not cited even the registration number and no specific plea has been taken that he has already been registered with the U.P. State Medical Council. Even the registration number has not been mentioned. Merely on the basis of a vague plea; the National Commission held that respondent No.1 was entitled to practice and prescribe modern Allopathic medicine. [Para 14] [161-F-G]

3. The National Commission has already held that respondent No.1 was guilty of unfair trade practice and adopted unfair method and deceptive practice by making false statement orally as well as in writing. In view of the aforesaid finding, it is held that both the child and the appellant suffered physical and mental injury due to the misleading advertisement, unfair trade practice and negligence of the respondents. The appellant and the child thus are entitled for an enhanced compensation for the injury suffered by them. Further, no reason has been given by the National Commission for deducting 50% of the compensation amount and to deposit the same with the Consumer Legal Aid Account of the Commission. [Para 15] [161-H; 162-A-C]

4. Accordingly, that part of the order passed by the National Commission is set aside and the amount of compensation is enhanced to Rs.15 lakhs for payment in favour of the appellant with a direction to the respondents to pay the amount to the appellant within three months. [Para 16] [162-C-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8660 of 2009.

From the Judgment & Order dated 29.01.2009 of the

National Consumer Disputes Redressal Commission, New Delhi in Original Petition No. 234 of 1997.

Rajeev Sharma for the Appellant.

Gaurave Bhargava, Niraj Gupta for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. This appeal has been preferred by the complainant-appellant against the order and judgment dated 29th January, 2009 passed by the National Consumer Disputes Redressal Commission, New Delhi (hereinafter referred to as the 'National Commission') in Original Petition No. 234 of 1997 whereby the National Commission quantified the compensation payable by the respondents as Rs. 5,00,000/- and directed respondent No.1 to pay a consolidated sum of Rs.2,50,000/- to the appellant and to deposit the remaining amount of Rs.2,50,000/- in the account of the Consumer Legal Aid of the National Commission.

2. The appellant is aggrieved by the said order and judgment with respect to the total amount of compensation granted. She has also challenged that part of the order whereby Rs.2,50,000/- out of the total compensation amount has been ordered to be deposited in the account of Consumer Legal Aid of the National Commission.

3. The facts that lead the complainant to move before the National Commission are as follows:

Prashant, son of the appellant born in May 1989 suffered from febrile convulsions during fever at the age of six months. He was taken to nearby Doctor who after examining him informed that the children can get such kind of fits during fever. He was treated by giving paracetamol tablet. Even after that Prashant had high fever he suffered convulsions for which he was treated by one Dr. Ashok Panagariya, Consultant

Neurologist and Associate Professor of Neurology SMS Medical College Hospital, Jaipur and at All India Medical Sciences, New Delhi.

4. According to the appellant, she came across an advertisement published in a newspaper 'Jan Satta' dated 8.8.1993 offering treatment of the patients having fits with Ayurvedi medicine by Dr. R.K. Gupta-respondent No.1. The advertisement impressed the appellant as the respondent No.1 claimed total cure of fits. The appellant wrote a detailed letter to respondent No.1 about her son's fits during high fever. In response, respondent No.1 sent a letter dated 23rd November, 1993 assuring that he had specialised treatment for the problem of Prashant by Ayurvedic medicines. He advised the appellant to bring her son Prashant in his Clinic. Accordingly, on 21st February, 1994 the appellant and her husband along with Prashant visited respondent No.2-Neeraj Clinic Pvt. Ltd., run by respondent No.1 at Rishikesh. Prashant was registered vide Registration No.7955 dated 21.2.1994. The appellant was made to pay Rs.2,150/- towards consultancy charges and the cost of medicines for one year vide Cash Memo No.61 dated 21.2.1994 by respondent No.1. She was told by respondent No.1 that medicines given were the combination of hundreds of herbs. Respondent No.1 also handed over a printed circular to the appellant who started thereafter giving medicines to Prashant regularly in the hope that he will be cured. It was alleged that despite medicines being given regularly the condition of Prashant started deteriorating day by day and the fits which were occasional and occurred only during the high fever, started occurring even without fever.

5. On being informed of the condition of Prashant respondent No.1 intimated that the medicine being Ayurvedic had slow effect. He instructed the appellant to regularly administer the medicines. Respondent No.1 sent medicine through VPP. On seeing condition of Prashant getting deteriorated again, the appellant sent a fax dated 18th June,

1995 to respondent No.1 and in response thereto, respondent No.1 sent fax advising to continue the medicines as before. Thereafter another communication was sent to respondent No.1, in response whereof respondent No.1 sent a letter on 30.9.1995 reassuring that the line of treatment was correct and he advised the appellant to bring Prashant for check up and also the left over medicines. The appellant along with Prashant again visited the Clinic at Rishikesh to consult respondent No.1 in October, 1995. After examining Prashant respondent No.1 gave medicines for which he charged Rs.1500/-. The appellant was given black and thick white tables to be administered to Prashant. In the fax dated 20.6.1995 respondent No.1 advised the appellant to continue with the treatment for 3 years. Meanwhile, the fits became more frequent and for longer durations. On 14th November, 1995, the appellant contacted respondent No.1 over telephone and during discussion, respondent No.1 told the appellant not to worry and assured her to send more powerful medicines. Thereafter, respondent No.2 sent white coloured tables with a letter dated 14.11.1995. During the period from February 1994 to October 1996 the appellant did not contact Dr. Ashok Pangariya. However, since the condition of Prashant worsened the appellant again consulted Dr. Ashok Pangariya on 28th October, 1996 who told her that there was no hope of the child becoming normal and he will not grow as a normal child. To ensure the family tree growing, the complainant wanted to have another child, but due to her physical and mental condition and total preoccupation with Prashant she was advised to undergo medical termination of pregnancy. On making enquiry as to the nature of medicines prescribed by respondent no.1 to Prashant it was revealed that the small white tablets were Selgin which is not meant for children. It is alleged that respondent No.1 was passing off Allopathic medicines as Ayurvedic medicines. It is further alleged that he is a quack and guilty of medical negligence, criminal negligence and breach of duty as he was playing with the lives of innocent people without understanding the disease.

He was prescribing Allopathic medicines, for which he was not competent to prescribe.

It was, inter alia, prayed that direction be issued to respondents to pay a sum of Rs.20 lakhs as compensation; to refund the charges paid by the appellant to the respondents and to reimburse the expenses incurred by the appellant on travelling to Rishikesh and a sum of Rs.10 lakhs for undergoing termination of pregnancy.

6. On notice, the respondents appeared before the National Commission and denied the allegation. According to respondent No.1 he obtained Ayurvedacharaya degree on 31st December, 1984 and established respondent No.2-Clinic in the year 1991. It was accepted that the appellant approached the respondent No.1 for treatment of her son's seizures. After examination of the appellant's son he prescribed medicines, namely, 'Phenobarbitone' or 'Phenobarbital' and 'Wafera' which are Allopathic as well as ayurvedic medicines and which are considered to be an appropriate drug for epilepsy patients. The Medicine Code-A1-'Wafera' is an Ayurvedic medicine and is a brain tonic. He denied that medicine 'Selgin' was prescribed. It was alleged that the appellant failed to administer the medicines as prescribed by him. On the other hand, she consulted various other Doctors simultaneously for treatment of her son including Dr. Ashok Panagariya and Doctors at AIIMS. It was asserted that the treatment given to Prashant, son of the appellant was proper treatment for epilepsy and Prashant could have developed mental retardation due to the intake of other medicines. The Ayurvedic medicines take their own time before showing signs of recovery and, therefore, there was slow improvement.

7. So far as entitlement of respondent No.1 to prescribe allopathic medicine is concerned, the respondents relied on a letter dated 24th February, 2003 issued by one Shri Jagjit Singh, Secretary, Medical Education Department, Government of U.P. to suggest that the Aurvedic/Unani Practitioners

practicing Ayurvedic System are also authorised to use allopathic medicines under U.P. Indian Medical Council Act, 1939.

8. The National Commission by its order dated 16th January, 2003 directed that the medicines be sent to an appropriate laboratory. By an order dated 5th March, 2004, the medicines were sent to Shri Ram Institute for Industrial Research, New Delhi. As per the reports of the said Institute the medicines were Allopathic medicines, except one which could not be identified.

9. After hearing the parties and on perusal of the report submitted by Shri Ram Institute for Industrial Research Laboratory, the National Commission by the impugned judgment held that respondent No.1 having made the false representation was guilty of unfair trade practice but held that in the light of letter dated 24th February, 2003 respondent No.1 was entitled to prescribe Allopathic medicines. With a view to curb such a false representation and to restore faith of the people in Ayurvedic System the National Commission passed a direction under Section 14(1) (f) of the Consumer Protection Act, 1986 to pay compensation of Rs.5 lakhs but it ordered to pay only a sum of Rs.2.50 lakhs to the appellant and to deposit the rest of the amount of Rs.2.50 lakhs in favour of Consumer Legal Aid Account of the National Commission.

10. The respondents have not challenged the finding of the National Commission to the effect that respondent No.1 has made false representation and was guilty of unfair trade practice.

11. In the present case, the learned counsel for the appellant has challenged the quantum of compensation ordered to be paid in favour of appellant and the part of compensation ordered to be deposited with Legal Aid. She has also raised doubt on the authority of respondent No.1 to prescribe Allopathic medicines. It was contended that the letter dated 24th

February, 2003 is of no help to respondent No.1 and cannot be given retrospective effect.

12. Considering these challenges by the appellant and on accepting the finding of the National Commission that respondent no.1 is guilty of unfair trade practice the questions that arise for our consideration are:

(i) Whether respondent No.1 was entitled to practice and prescribe modern Allopathic medicines; and

(ii) What is the amount of compensation to which the appellant is entitled ?

13. The incident and treatment as alleged by the appellant relate to the period 1994 to 1997. Therefore, letter dated 24th February, 2003 is of no avail to the respondents as the same was not in existence during the period of treatment. The said letter dated 24th February, 2003 reads as follows:

"No.726/71-2-2003-15

From
Jagjit Singh
Secretary, U.P. Government
Medical Education Department
To
All Medical Officers
Uttar Pradesh
Medical Education Department-2

Lucknow: Dated 24 February 2003

Sub: To stop activities of harassment and suppression of Integrated Medical Practitioners in the State.

Sir,

I have been directed to state that it is known that the job of Registering Ayurvedic/Unani Practitioners is done by U.P. Indian Medical Council. In the State Ayurvedic/

Unani Practitioners practicing Ayurvedic System are authorized to use allopathic medicines under UP Indian Medical Council Act, 1939 Section 39(1) and 41(2) and they hold the same rights as that of allopathic practitioners. Hon'ble High Court has directed to take action against quacks who are registered nowhere. Accordingly it has been decided that if during any such harassment any of the Registered Ayurvedic/Unani Practitioner produces the Registration Certificate then no action should be taken against him.

Therefore the above orders are to be complied strictly.

Yours faithfully,

Sd/-
Jagjit Singh
Secretary"

From the aforesaid letter it is clear that in connection with some case the High Court of Allahabad issued direction to take action against the quacks who are practicing in Allopathic Medicine but not registered with Medical Council.

14. Learned counsel for the respondents has not brought to our notice any Act known as U.P. Indian Medical Council Act, 1939 but we find that there is an Act known as U.P. Indian Medicine Act, 1939. In any case respondent No.1 has nowhere pleaded that he was registered with the Medical Council or enrolled in the State Medical Register. He has not cited even the registration number and no specific plea has been taken that he has already been registered with the U.P. State Medical Council. Even the registration number has not been mentioned. Merely on the basis of a vague plea; the National Commission held that respondent No.1 was entitled to practice and prescribe modern Allopathic medicine.

15. The National Commission has already held that respondent No.1 was guilty of unfair trade practice and adopted

unfair method and deceptive practice by making false statement orally as well as in writing. In view of the aforesaid finding, we hold that both Prashant and the appellant suffered physical and mental injury due to the misleading advertisement, unfair trade practice and negligence of the respondents. The appellant and Prashant thus are entitled for an enhanced compensation for the injury suffered by them. Further, we find no reason given by the National Commission for deducting 50% of the compensation amount and to deposit the same with the Consumer Legal Aid Account of the Commission.

16. We, accordingly, set aside that part of the order passed by the National Commission and enhance the amount of compensation at Rs.15 lakhs for payment in favour of the appellant with a direction to the respondents to pay the amount to the appellant within three months. The appeal is allowed but there shall be no separate order as to costs.

B.B.B. Appeal allowed.

ADDL.DISTT.SUB-REGISTRAR SILIGURI
v.
PAWAN KUMAR VERMA AND OTHERS
(Civil Appeal No. 4167 of 2013)

MAY 1, 2013

[G.S. SINGHVI AND KURIAN JOSEPH, JJ.]

STAMP ACT, 1899:

s.2(16B) read with s.47-A - 'Market value' - Registration on orders of court - Stamp duty - Held: The scheme for valuation for the purpose of registration would show that an instrument has to be valued in terms of market value at the time of execution of document -- Market value for the purpose of Stamp Act is not same as suit valuation for the purpose of jurisdiction and court fees - Where registering authority has any difference of opinion as to assessment on stamp duty of instrument presented for registration on orders of court, it will only be appropriate that Registrar makes a back reference to court concerned and court undertakes a fresh exercise after affording an opportunity of hearing to registering authority with regard to proper value of instrument for registration - Registering authority cannot be compelled to follow invariably the value fixed by court for the purpose of suit valuation - Orders of courts below are set aside - Trial court shall consider the matter afresh after affording an opportunity hearing to appellant and pass appropriate orders with regard to stamp duty for the purpose of registration of partition deed - Suits Valuation Act, 1887 - Registration Act, 1908 - West Bengal Stamp (Prevention of Undervaluation of Instruments) Rules, 2001-- r.3.

In a partition suit, the trial court directed the appellant - Additional District Sub-Registrar, who was not a party before the court, to complete the registration on the basis

of the stamps duty as per the suit valuation. When the decree was presented for registration, the appellant observed that there was no proper valuation for the purpose of registration. The plaintiff approached the trial court which held that once the value was fixed by the court, Registrar could not make an attempt to reassess the same. The appeal filed by the Registrar was dismissed by the High Court.

In the instant appeal, the question for consideration before the Court was while registering an instrument of partition, whether the registering authority under the Registration Act, 1908 is bound by the assessment of stamp duty made by the court as per suit valuation.

Allowing the appeal, the Court

HELD: 1.1 The scheme for valuation for the purpose of registration would show that an instrument has to be valued in terms of the market value at the time of execution of the document. Market value for the purpose of Stamp Act, 1899 is not the same as suit valuation for the purpose of jurisdiction and court fee. The procedures are different for assessment of the stamp duty and for registration of an instrument. The reference to the expression 'on the basis of any court decision after hearing the State Government' appearing in r. 3 of The West Bengal Stamp (Prevention of Undervaluation of Instruments) Rules, 2001, would clearly show that the suit valuation cannot be automatically followed for the purpose of registration. [para 9 and 14] [171-E-F; 173-C-E]

1.2 Once the court has made the exercise to fix the market value of a property, the same can be reopened or altered only in a process known to law. That is not the situation in the instant case where a partition suit was

filed in the year 1999, compromised in the year 2001, stamp value assessed on the basis of suit valuation and the decree presented for registration in the year 2007. The Sheristadar made a mechanical assessment of stamp duty on 1/4th share of the suit property as per the compromise and fixed the stamp duty accordingly. That does not meet the requirement under law. The trial court has, thus, clearly erred in directing the registration to be done on the basis of suit valuation. [para 13-14] [173-B-C, E-F]

Nitya Hari Kundu and Others vs. State of W.B. and Others **AIR 2001 Calcutta 76 - Distinguished.**

1.3 The Suits Valuation Act, 1887 and Stamp Act, 1899 operate in different fields. However, going by the scheme of the Act and Rules as amended by West Bengal, this Court is of the view that where the registering authority has any difference of opinion as to assessment on the stamp duty of the instrument presented for registration on the orders of the court, it will only be appropriate that Registrar makes a back reference to the court concerned and the court undertakes a fresh exercise after affording an opportunity of hearing to the registering authority with regard to the proper value of the instrument for registration. The registering authority cannot be compelled to follow invariably the value fixed by the court for the purpose of suit valuation. [para 15] [173-G-H; 174-A-B]

1.4 Accordingly, the impugned order dated 02.09.2010 of the High Court and the orders dated 30.03.2001 and 27.08.2007 passed by the Civil Judge (Senior Division), are set aside. The trial court shall consider afresh the matter after affording an opportunity hearing to the appellant and pass appropriate orders with regard to the stamp duty for the purpose of registration

of the partition deed. [para 16] [174-B-D]

Case Law Reference:

AIR 2001 Calcutta 76 Distinguished para 4

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4167 of 2013.

From the Judgment & Order dated 02.09.2010 of the High Court of Calcutta in Co. No. 689 of 2008.

Joydep Mazumar, Avijit Bhattacharjee for the Appellant.

V.N. Raghupathy for the Respondents.

The Judgment of the Court was delivered by

KURIAN, J. 1. Leave granted.

2. While registering an instrument of partition, whether the registering authority under the Registration Act, 1908 is bound by the assessment of stamp duty made by the court as per suit valuation, is the question arising for consideration in this case.

3. Petitioner is aggrieved by the order dated 02.09.2010 of the High Court of Calcutta passed on a petition filed by the petitioner challenging the order passed by the Civil Judge (Senior Division) at Siliguri on 22.08.2007. Respondents are parties to a partition suit filed by the 1st Respondent herein before the Civil Judge (Senior Division) at Siliguri in T.S. (Partition) No. 70 of 1999. The Trial Court had directed the petitioner, who was not a party before the court, to complete the registration on the basis of the stamp duty as per the suit valuation. The suit was valued at Rs.50 lakhs for the purpose of suit valuation. During the pendency of the suit, dispute was compromised and, accordingly, Annexure P3 - Order dated 30.03.2001 was passed ordering:

> "that the suit be and the same is decreed in final form on compromise in terms of the joint compromise petition

dated 15.11.2000 which do form part of the decree. The parties do bear their respective costs. Parties are directed to file Stamp Papers as would be assessed by the Sheristadar for engrossing the Final Decree and for registration of the same. Sheristadar is directed to assess the amount of Stamp Paper over the valuation of the suit property at once.... "

(Emphasis supplied)

4. Subsequently, some clerical corrections were carried out in the order, on 12.02.2007. When the decree was presented for registration, the same was objected to by the petitioner observing that there is no proper valuation for the purpose of registration. Aggrieved, the plaintiff took up the matter before the Civil Judge (Senior Division) at Siliguri leading to Annexure P6- Order. The learned Civil Judge (Senior Division) took the view that once the value has been fixed by the court, Registrar cannot make an attempt to reassess the same. Aggrieved, the Additional District Sub-Registrar, Siliguri, approached the High Court. Placing reliance on its earlier decision on *Nitya Hari Kundu and Others vs. State of W.B. and Others*[1], the High Court dismissed the petition and, hence, the Special Leave Petition.

5. In order to analyse disputes in proper perspective, it is necessary to refer to the statutory provisions governing the issue. Indian Stamp Act, 1899, as amended by the West Bengal, has defined 'market value' at Section 2 (16B), which reads as follows:

"(16B)"market value" means, in relation to any property which is the subject-matter of an instrument, the price which such property would have fetched or would fetch if sold in open market on the date of execution of such instrument as determined in such manner and by such authority as

1. AIR 2001 Calcutta 76.

may be prescribed by rules made under this Act or the consideration stated in the instrument, whichever is higher;"

(Emphasis supplied)

6. Section 2(12) of Indian Stamp Act, 1899, as amended by the West Bengal, has also defined 'execution' with reference to an instrument to mean "signed" and "signature".

7. Section 47A of Indian Stamp Act, 1899, as amended by the West Bengal, provided for the procedure for dealing with undervaluation. To the extent relevant, the provision reads as follows: -

"**47A. Instruments of conveyance, etc., under-valued, how to be dealt with.**- (1) Where the registering officer appointed under the Registration Act, 1908 (16 of 1908), has, while registering any instrument of-

(a) agreement or memorandum of any agreement relating to a sale or lease-cum-sale of immovable property,

(b) conveyance,

(c) exchange of property,

(d) gift,

(e) partition,

(f) power-of-attorney-

(i) when given for consideration to sell any immovable property, or

(ii) in such other cases referred to in article 48 of Schedule IA,

where proper stamp duty is payable on the basis of market value,

(g) settlement,

(h) transfer of lease by way of assignment,

reason to believe that the market value of the property which is the subject-matter of any such instrument has not been truly set forth in the instrument presented for registration, he may, after receiving such instrument, ascertain the market value of the property which is the subject-matter of such instrument in the manner prescribed and compute the proper stamp duty chargeable on the market value so ascertained and thereafter he shall, notwithstanding anything to the contrary contained in the Registration Act, 1908, in so far as it relates to registration, keep registration of such instrument in abeyance till the condition referred to in sub-section (2) or sub-section (7), as the case may be, is fulfilled by the concerned person.

(2) Where the market value of the property which is the subject-matter of an instrument has been ascertained and the proper duty chargeable thereon has been computed under sub-section (1), the registering officer shall, in the manner prescribed, send to the concerned person a notice calling upon him to make payment of the deficit amount of stamp duty within such time as may be prescribed, and if such person makes payment of such deficit amount of stamp duty in the prescribed manner, the registering officer shall register the instrument.

(3) Where the concerned person does not make payment of the stamp duty as required under sub-section (2) within the time specified in the notice issued under that sub-section, the registering authority shall refer the matter to such authority and in such manner as may be prescribed for determination of the market value of the property which is the subject-matter of such instrument and the proper stamp duty payable thereon:

(4) to (7) xxx xxx xxx xxx xxx xxx xxx

(8) (a) The authority referred to in sub-section (3) may, on receipt of any information or otherwise, suo motu within five years from the date of registration of any instrument, where such instrument was registered on the basis of the market value which was set forth in the instrument or which was ascertained by the registering officer referred to in sub-section (1), call for and examine any such instrument and any other document relating thereto for the purpose of satisfying himself as to the correctness of the market value of the property which is the subject-matter of such instrument and which was set forth in the instrument or which was ascertained under sub-section (2) and the stamp duty payable thereon.

(b) If, after such examination, the authority referred to in clause (a) has reasons to believe that the market value of the property which is the subject-matter of such instrument has not been truly set forth in the instrument or correctly ascertained under sub-section (2), he may, after giving the parties concerned in the instrument a reasonable opportunity of being heard, determine the market value of the property which is the subject-matter of such instrument and the amount of stamp duty chargeable thereon in the manner referred to in sub-section (5), and the difference in the amount of stamp duty, if any, between the stamp duty so determined by him and the stamp duty already paid by the concerned person shall be required to be paid by him in the prescribed manner :"

(Emphasis supplied)

8. Rule 3 of The West Bengal Stamp (Prevention of Undervaluation of Instruments) Rules, 2001 has provided for the procedure to be adopted when there is undervaluation. To the extent relevant, the procedure reads as follows:

3. Manner of determination of market value and furnishing of particulars relating to any property.- (1) The market value within the meaning of clause [16(B)] of section 2 in relation to any land or any land with building shall, after taking into consideration the particulars referred to in sub-rule (2), be determined on the basis of the highest price for which sale of any land or any land with building, of similar nature and area and in the same locality or in a comparable locality, has been negotiated and settled during the five consecutive years immediately proceeding the date of execution of any instrument setting forth such market value, or on the basis of any court decision after hearing the State Government, or on the basis of information, report or record that may be available from any court or any officer or authority of the Central Government or the State Government or any local authority or local body, or on the basis of consideration stated in such instrument for such land or land with building, whichever is greater."

(Emphasis supplied)

9. The scheme for valuation for the purpose of registration would show that an instrument has to be valued in terms of the market value at the time of execution of the document. In the instant case, it appears that there was no such valuation in the Civil Court. The learned Civil Judge, as per annexure P3-Order dated 30.03.2001, directed the Sheristadar to asses the amount of stamp paper for the valuation of the suit property. The suit was instituted in the year 1999. The same was compromised in the year 2001. The plaintiff filed stamp papers as per valuation of the Sheristadar in the suit on 03.08.2004 and the decree was presented for registration before the Additional Registrar on 23.05.2007. In view of the objection raised with regard to the assessment of market value for the purpose of registration, the plaintiff sought for clarification leading to annexure P6-Order.

10. The High Court has placed reliance on a single bench decision in *Nitya Hari Kundu's* case (supra). It was a case where the court permitted an item of a trust property to be sold after fixing the market value. When the Registrar refused to accept the valuation made by the court, a writ petition was filed in the High Court where it was conceded by the Registrar that:

"14. …it is correct to say that a Court decision permitting a trust estate to sell a trust property for a particular consideration, must necessarily be accepted as a determination of the market value of the property in the stamp rules."

11. However, the High Court also considered the matter on merits and finally held in paragraph 13, which reads as follows: -

"13. Therefore, in interpreting the statutes if I make harmonious construction of S. 47A read with the Rules made thereunder, it will be read that valuation made by the Court cannot be said to be done not truly set forth and there is any reason to disbelieve, otherwise. If any authority does so it will tantamount to exceeding the jurisdiction made under the law. The authority concerned cannot sit on appeal over a Court decision unless appeal is preferred from such order which is absent herein."

12. It appears that the learned Civil Judge and the High Court only referred to the headnote in *Nitya Hari Kundu's* case (supra), which reads as follows:

"Stamp Act (2 of 1899), S.47-A-Valuation of duty under S.47-A- Valuation made by Court and sale deed sent for Registration S.47A is not applicable- After determination of value by Court, it cannot be said that there is reason for Registrar to believe that valuation is not correctly made - Registrar is bound by that valuation and has to act upon it."

13. The court had, in fact, fixed the market value of the property in that case for permitting the Trust estate to put it to sale. However, without reference to the court, it appears that the Collector made an independent assessment and that was what was struck down by the court. Once the court had made the exercise to fix the market value of a property, the same can be reopened or altered only in a process known to law. That is not the situation in the instant case where a partition suit was filed in the year 1999, compromised in the year 2001, stamp value assessed on the basis of suit valuation and the decree presented for registration in the year 2007.

14. Market value for the purpose of Indian Stamp Act, 1899 is not the same as suit valuation for the purpose of jurisdiction and court fee. The procedures are different for assessment of the stamp duty and for registration of an instrument. The reference to the expression 'on the basis of any court decision after hearing the State Government' appearing in Rule 3 of The West Bengal Stamp (Prevention of Undervaluation of Instruments) Rules, 2001, would clearly show that the suit valuation cannot be automatically followed for the purpose of registration. The learned Civil Judge has, thus, clearly erred in directing the registration to be done on the basis of suit valuation. The Sheristadar made a mechanical assessment of stamp duty on 1/4th share of the suit property as per the compromise and fixed the stamp duty accordingly for Rs.12,50,000/-. That does not meet the requirement under law.

15. The Suits Valuation Act, 1887 and The Indian Stamp Act, 1899 operate in different fields. However, going by the scheme of the Act and Rules as amended by West Bengal, we are of the view that it will only be appropriate that in such situations where the registering authority has any difference of opinion as to assessment on the stamp duty of the instrument presented for registration on the orders of the court, it will only be appropriate that Registrar makes a back reference to the court concerned and the court undertakes a fresh exercise after

affording an opportunity of hearing to the registering authority with regard to the proper value of the instrument for registration. The registering authority cannot be compelled to follow invariably the value fixed by the court for the purpose of suit valuation.

16. Accordingly, we set aside the impugned order dated 02.09.2010 of the High Court of Calcutta and order dated 30.03.2001 of the learned Civil Judge, Siliguri and order dated 27.08.2007 of Civil Judge (Senior Division), Siliguri. The court of the learned Civil Judge (Senior Division), Siliguri shall consider afresh the matter after affording an opportunity for hearing to the petitioner and pass appropriate orders with regard to the stamp duty for the purpose of registration of the partition deed. This exercise should be completed within a period of three months from the date of receipt of this order. Appeal is allowed.

17. There is no order as to costs.

R.P. Appeal allowed.

MANGA @ MAN SINGH
v.
STATE OF UTTARAKHAND
(Criminal Appeal No. 1156 of 2008)

MAY 3, 2013

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

PENAL CODE, 1860:

ss. 147, 148, 302/149 and 307/149 – Group of 15 accused opened fire on complainant party causing death of two and injuries to others—Conviction by trial court – Upheld by High Court – Held: There is ample evidence to support prosecution case that accused came with fire arms and opened fire on complainant party – It is an undisputed fact that two persons died of fire-arm injuries and all the injuries suffered by others were also fire-arm injuries – In the circumstances, non-detection of pellets or bullets will not be of any consequence – Conviction and sentence imposed by courts below cannot be found fault with – Code of Criminal Procedure, 1973 – Investigation – Non-recovery of bullets/ pellets – Criminal law – Motive.

s.141 read with ss.40, 144 and 149 —"Other offence" occurring in Clause 'Third' of s.141 –- Connotation of –- Held: A conspectus reading of s.40 makes it clear that for all offences punishable under IPC, the main clause of s.40 would straight away apply in which event the expression "other offence" used in s.141 'Third', will have to be construed as any offence for which punishment is prescribed under IPC – The principle of ejusdem generis is not applicable – Interpretation of statutes – Ejusdem generis.

CODE OF CRIMINAL PROCEDURE, 1973:

s.157—Three days' delay in sending express report to Magistrate – Held: There was no delay in reporting the matter to police – FIR was factually recorded without delay and investigation started on the basis of FIR — In the circumstances, delay, in forwarding the report to Magistrate does not in any way vitiate the case of prosecution – Besides, no prejudice is shown to have been caused to accused.

EVIDENCE:

Testimony of related witnesses – Non-examination of independent witnesses – Discussed – Judicial notice.

The appellants were prosecuted for causing death of two persons and injuries to others by gun shots. The prosecution case was that there was bad blood between the accused-appellants in connection with the daughter of A-1, and further with regard to payment of vehicle charges. On the date of incident at about 8.30 A.M. when PW-3, the brother of complainant (PW-2), went to his fields, he was accosted by A-1 to A-4, but he escaped and returned back. By 10.00 A.M., the accused, 15 in number, armed with guns and country-made pistols reached the house of the complainant and opened fire in which one person died on the spot and others received serious gun-shot injuries. One of them died the following day in the hospital. The trial court convicted the accused u/ss 147, 148, 302/149 and 307/149 and sentenced them to imprisonment for life u/s 302/149 and 7 years RI u/s 307/ 149. The High Court confirmed the conviction and the sentences.

In the instant appeals, it was contended for the appellants, *inter alia,* that there was delay in filing the FIR and long delay in forwarding the express report to the Magistrate, which vitiated the prosecution case; that there was a communal tension prevailing in the area and in the milieu, the victims received injuries, therefore, the

appellants could not be held responsible for the same merely because they possessed licenced fire-arms. It was also contended that the principle of common object could not be applied to the nature of offences punishable u/ss 302, 307 read with s.149 as well as ss. 147 and 148 IPC and since the expression "other offence" u/s 141, 'Third' has been used along with the offences of mischief or criminal trespass, it can only relate to similar such offences of the same species and not commission of all other offences, as in the case on hand. On behalf of appellant no. 1 in Crl. A. No. 1165 of 2008, it was contended that he was the resident of a different village and was falsely implicated.

Dismissing the appeals, the Court

HELD: 1.1. With regard to delay in filing the FIR, in fact going by the version of PWs-2 and 3 supported by PWs-1 and 4, the occurrence took place at 10 a.m. in the morning. The matter was reported by PW-2 to the police by 11.45 a.m. and it has come in the evidence that the distance between the place of occurrence and the police station was 12 Kms. There was nothing brought out on the defence to contradict the said statement made by the prosecution witnesses. It was also stated that PW-2 had to reach the police station only through a bullock cart. In such circumstances, the lodging of the FIR by 11.45 a.m., cannot be held to be highly delayed. Besides, where more than ten persons suffered injuries and one person died on the spot, it is quite possible that every member of the injured party would have taken the immediate required time to attend to the injured, by moving them to the hospital. Therefore, it can never be said that there was any delay at all in reporting the matter to the police, or in registering the FIR. [para 26] [197-C-H]

1.2. As regards the express report being forwarded to Magistrate on 24.11.2001, in the first place, it is not

shown as to how such a delay caused any prejudice to the accused. The trial court has noted that the investigating officer was not questioned at all about the reasons for not sending the report prior to 24.11.2001. It has further noted that in the 'Panchnama' of deceased 'M', the crime number was clearly mentioned along with the relevant sequence. The trial court has, therefore, found that without recording the FIR on the date of incident, namely, 21.11.2001, crime number could not have been mentioned in the 'Panchnama'. The FIR was factually recorded without delay on the basis whereof the investigation started; and in the absence of any other infirmity in that respect, the delay in forwarding the report to the Magistrate does not in any way vitiate the case of the prosecution. [para 16, 17 and 20] [190-C-F-H; 191-A; 194-B]

Jang Singh and Others v. State of Rajasthan, **2000 (3) SCR 970 = 2001 (9) SCC 704; held inapplicable.**

Sandeep v. State of Uttar Pradesh, **2012 (5) SCR 952 = 2012 (6) SCC 107*;*** *Bhajan Singh @ Harbhajansingh and Ors. v. State of Haryana,* **2011 (7) SCR 1 = (2011) 7 SCC 421*;*** *Shivlal & Another v. State of Chhattisgarh,* **2011 (11) SCR 429 =AIR 2012 SC 280; relied on.**

1.3. With regard to plea of communal tension, except making the bald suggestion, which was rightly denied, there was nothing brought out either in the evidence of the prosecution witnesses or placed by way of defence evidence before the court, as to what was the nature of communal tension, who were all communally and inimically disposed of and when did such communal friction occur. In fact, all what was stated in s. 313 statement, was 'false implication' due to enmity and political reasons. It was not even suggested to any of the witnesses that there was communal hatred as between those witnesses examined in support of the prosecution

or that it was due to such communal tension they suffered such injuries, as well as casualties in their family. [para 23] [195-B-D, F-G]

1.4. Though PWs-1 to 4 were closely related to the deceased, they also suffered fire-arm injuries at the hands of the appellants and the injuries sustained by them were duly supported by medical evidence — both documentary as well as oral — through PWs-5, 6, 7 and 8. There was nothing pointed out in the evidence of PWs-1 to 4 to discredit their version. The High Court has rightly held that having regard to the nature of evidence tendered by them, there were no good grounds to discard their version. [para 24 and 27] [196-B-D; 198-B]

1.5. As regards non-examination of independent witness, the High Court has found that though the injured witnesses were related to each other, their evidence was natural and there was nothing to find fault with their version. It has further held rightly that it is the quality of the witness and not the quantity that matters. It has also taken judicial notice of the fact that the public are reluctant to appear and depose before the court, especially in criminal cases because of many obvious reasons. [para 27] [198-A-C]

State of Maharashtra v. Chandraprakash Kewalchand Jain **1990 (1) SCR 115 = 1990 (1) SCC 550;** *State of U.P. v. Pappu* **2004 (6) Suppl. SCR 585 = 2005 (3) SCC 594;** *State of Punjab v. Gurmit Singh* **1996 (1) SCR 532 =1996 (2) SCC 384;** *State of Orissa v. Thakara Besra* **2002 (3) SCR 173 = 2002 (9) SCC 86;** *State of H.P. v. Raghubir Singh* **1993 (2) SCR 17 = 1993 (2) SCC 622;** *Wahid Khan v. State of M.P.* **2009 (15) SCR 1207 = 2010 (2) SCC 9;** *Rameshwar v. State of Rajasthan* **1952 SCR 377 = AIR 1952 SC 54 - referred to.**

1.6. As regards failure to recover empty cartridges or bullets from the scene of occurrence, suffice it to state that when there was enough evidence to support the version of the prosecution that some of the appellants were in possession of licenced arms and others were holding unlicenced pistols and the shooting with those arms was sufficiently established by the version of the injured eye-witnesses, non-detection of pellets or bullets will not be of any consequence as a vitiating factor to defeat the case of the prosecution. It is an undisputed fact that two persons died of fire-arm injuries and all the injuries suffered by others were also firm-arm injuries. [para 28] [198-D-G]

1.7. With regard to gathering of a number of accused within a short span of time, it may be noted that a one hour gap in a village was more than sufficient to gather any number of persons, especially when the purpose of such gathering was to cause a physical attack on a weak and unarmed party. It is relevant to note that while thirteen persons were seriously injured, of whom two succumbed to injuries, not even a scratch was reported against any of the appellants. There was not even a suggestion that any of the injured party was in possession of any weapon, like even a stick or a 'lathi'. [para 29] [199-B-D]

1.8. It will be relevant to take note of the motive, which was not seriously disputed on behalf of the appellants. [para 30] [199-E]

1.9. As far as plea of appellant no. 1 in Crl. A. No. 1165 of 2008 that he was a resident of a different village and was falsely implicated, the evidence of PW-1 disclosed that the father-in-law of the said appellant is the resident of the village and since he had no male child, the appellant was living along with him. In the family register of the year 1999 as well as the copy of the electoral list, the name of the appellant was clearly mentioned. [para 32] [200-C, F-G]

2.1. As regards the interpretation to be given to the expression 'other offence' in s. 141, 'Third', a literal interpretation of the same only means that apart from the offences of mischief and criminal trespass, all other offences would fall within the said clause 'Third'. Reading s. 141 'Third' along with s.149, if the commission of any other offence apart from mischief or criminal trespass was by a member of an unlawful assembly, the prescription of common object will automatically get satisfied. [para 33 and 38] [201-B; 206-C-E]

Surjit Singh Kalra v. Union of India and Another **1991 (1) SCR 364 =1991 (2) SCC 87;** *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.* **2008 (4) SCR 822 = 2008 (4) SCC 755 – referred to**

2.2. If, in terms of s.144 IPC mere possession of a deadly weapon by a member of an unlawful assembly, which is likely to cause death would attract s.141'Third', as a corollary, it will have to be held that the expression 'or other offence' mentioned in s.141 should without doing any violence to the said provision, include all other offences apart from the offence of mischief or criminal trespass. Similar will be the interpretation that can be made relating to the offence of rioting prescribed u/s 146 punishable u/s 147 as well as s.148, namely, rioting, armed with deadly weapons. [para 38] [206-F-H; 207-A]

2.3. It cannot be said that because the offences mischief or criminal trespass are used preceding the expression "other offence" in s.141 'Third', it should be taken that such offence would only relate to a minor offence of mischief or trespass and that the expression "other offence" should be restricted only to that extent. The offence of mischief and trespass could also be as grave as that of an offence of murder, for which the punishment of life imprisonment can be imposed as

provided for u/ss 438, 449, 450 etc. Therefore, this Court holds that the principle of 'ejusdem generis' cannot be imported to s.141 'Third'. [para 42] [208-A-C]

2.4. Further, going by the main clause of s.40, the word "offence" since denotes the thing made punishable under the IPC, 'other offence' mentioned in s.141 'Third', can only denote to offences, which are punishable under any of the provisions of IPC. Therefore, by applying the main clause of s.40, it can be straight away held that all offences referred to in any of the provisions of the IPC for which the punishment is provided for, would automatically fall within the expression "other offence", which has been used in s.141 'Third'; and, this Court is of the firm view that only such a construction would be in tune with the purport and intent of the law makers while defining an unlawful assembly for commission of an offence with a common object, as specified u/s 141 of the Code. In the case on hand, since no special law or local law was attracted and the accused were charged only for with offences under the Penal Code, main clause of s.40 gets attracted along with s.141 'third' IPC. Having regard to such a construction of s.141, read along with s.40 IPC, the offences found proved by the courts below against the appellants, falling u/s 302/149, and 307/149 along with ss.147 and 148 IPC and the conviction and sentences imposed, cannot be found fault with. [para 43 and 46] [208-D-G; 210-A-C]

Case Law Reference:

2000 (3) SCR 970	**held inapplicable**	**para 11**
2012 (5) SCR 952	**relied on**	**para 19**
2011 (7) SCR 1	**relied on**	**para 19**
2011 (11) SCR 429	**relied on**	**para 19**

1990 (1) SCR 115	**referred to**	**para 25**
2004 (6) Suppl. SCR 585	**referred to**	**para 25**
1993 (2) SCR 17	**referred to**	**para 25**
2002 (3) SCR 173	**referred to**	**para 25**
1996 (1) SCR 532	**referred to**	**para 25**
2009 (15) SCR 1207	**referred to**	**para 25**
1952 SCR 377	**referred to**	**para 25**
1991 (1) SCR 364	**referred to**	**Para 34**
2008 (4) SCR 822	**referred to**	**Para 35**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1156 of 2008.

From the Judgment & Order dated 14.06.2007 of the High Court of Uttarakhand at Nainitial in Criminal Appeal No. 21 of 2005.

WITH

Crl. A.Nos. 1157, 1158, 1159, 1160, 1161, 1162, 1163, 1164, 1165 & 1166 of 2008.

S.R. Singh, Ashok Kumar Sharma, Sushant K. Yadav, Ujjawal Pandey, Sudeep Kumar, Asha Gopalan Nair, Atul Kumar, S.K. Verma, Rohit Minocha (A.C.), D.K. Pradhan, Abhay Kumar, Mrinal Bharti, U.P. Singh, Abhishek Atrey, Tanmay Aggarwal, Babita Tyagi, Yunus Malik Harendra Singh, Samir Malik for the appearing parties.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. In these appeals the challenge is to the common judgment of the Division Bench of the High Court of Uttarakhand at Nainital

dated 14.6.2007 in Criminal Appeal Nos.17, 18, 19, 21, 22, 23, 24, 25 and 95 of 2005. The High Court by the impugned judgment confirmed the conviction and sentences awarded by the trial Court in its judgment and order dated 01.2.2005, in Sessions Case No.156/2002 State v. Soma and Others. The appellants were all convicted for offences under Section 302, 307 read with Section 149 and Sections 147 & 148 of Indian Penal Code (IPC). Each of the accused was awarded the punishment of life imprisonment and fine of Rs.5000/- under Sections 302/149 IPC and seven years rigorous imprisonment and fine of Rs.3000/- under Section 307/149 IPC and one year's rigorous imprisonment and Rs.1000/- fine under Section 148 IPC and six months' rigorous imprisonment and Rs.500/- fine under Section 147 IPC. All the sentences were directed to run concurrently.

2. Criminal Misc. Petition No.22687 of 2011 in Criminal Appeal No.1160 of 2008 filed by the *de facto* complainant is allowed. Applicant is impleaded as party-respondent.

3. The genesis of the case was that the complainant Sajjad @ Kala PW-2 was the resident of village Dadoobas, within the jurisdiction of Bhagwanpur police station, district Haridwar. On 21.11.2001 his brother Ayyub (PW-3) went to his field situated near the river. He was accosted by A1 to A-4 Soma, Chander, Pyara and Radha and fearing assault at their hands Ayyub (PW-3) escaped and rushed back to the residence and reported the matter to PW-2. PW-3 stated to have gone to his field by around 8.30 to 8.45 a.m. and retuned back by 9 to 9.15 a.m. By 10 a.m. the accused, 15 in number, armed with guns and country made pistols approached the house of the complainant, where all other family members were also present. The accused party stated to have abused the complainant and the family members and that while the complainant and his family members were attempting to pacify the accused party, without heeding to any of their advice, accused party opened fire in which Mehroof s/o Nazir, on sustaining gun shot injuries

in his chest, succumbed to the injuries and died on the spot. That Iqurar Ali, another person was seriously injured and 10 others were also injured in the firing assault at the instance of the appellants. They were all shifted to Roorkee hospital for treatment. The body of the deceased Mehroof, was lying at the place of occurrence. PW-2 stated to have lodged written complaint Ka-1 in the police station at about 11.45 a.m. on the same date, whereafter a case was registered against all the accused persons. Iqurar Ali, the other seriously injured person, died on 24.11.2001 at about 4.30 a.m. Thereafter, PW-2 gave a further report Ka-2 to the police station Bhagwanpur. The post-mortem was conducted on the bodies of Mehroof and Iqurar Ali. The investigating officer, in furtherance of the investigation, recovered the guns, prepared the site plan, recorded the statement of witnesses and on conclusion of the investigation, submitted the charge-sheet before the Court. According to PW-2, two years prior to the incident in connection with Soma's (A-1) daughter, there was a gunshot firing by the appellants Bijendra (A-5) and Tirath (A-15) respectively, which was however, compromised outside the Court. He further informed that a '*marpeet'* took place between Pyara (A-3) s/o Soma and one Liyakat s/o Nuruddin four days prior to the date of incident with regard to payment of Metador (vehicle) charges and that two days thereafter, exchange of hot words took place between them.

4. It was in the above stated background that the offence was alleged to have been committed by the appellants. The prosecution examined PWs-1 to 13 of whom, PWs-1 to 4 were injured eye-witnesses, namely, Gayyur, Sajjad @ Kala, Ayyub and Ashraf. PW-5 is Dr. S.S. Lal, who conducted the post-mortem on the body of Mehroof. PW-6 is Dr. D.D. Lumba, who attended on the injured persons numbering ten. PW-7 is Dr. Ajay Aggarwal, who attended on the injured eye-witnesses PWs-1 and 2. PW-8 is Dr. R.K. Pandey, who conducted the post-mortem on the body of Iqurar Ali. PW-9 is Dr. Yogesh Kumar, radiologist, who proved X-ray reports of seven of the injured

witnesses. PW-10, Sub Inspector, R.K. Awasthi is the investigating officer.

5. In the questioning under Section 313 C.r.P.C., all the accused took the plea of 'false implication' and that they have been implicated due to enmity, as well as for political reasons. The injuries on the body of Mehroof as stated in the post-mortem report were as under:

> "(1) Fire arm would of entry 1 cm x 1 cm rounded in front of left side of chest. 4 cm away from left nipple at 10 O' Clock position, margins inverted, blackening & tattooing present."

6. According to PW-5, Dr. S.S. Lal, Medical officer, the death was caused due to shock and hemorrhage resulting from the ante-mortem firearm injuries sustained by the deceased.

7.Thus, the death was one of homicidal and was proved beyond doubt. The injuries on the body of Iqurar Ali, as per PW-6 the doctor, who attended on him immediately after he was shifted to Roorkee Civil Hospital were as under:

> "(1) Lacerated would 1cm x 0.5 cm x through and through left pinna back middle part. No blackening scorching and tattooing seen around the wound.
>
> (2) Lacerated would 1.0 cm x 0.5 cm x muscle deep tragus of left ear. No blackening, scorching and tattooing seen around the wound.
>
> (3) Lacerated would 1.6 cm x 1.0 cm x depth not probed middle of chin lower part. No blackening, scorching and tattooing seen around the wound. Adv. X-ray and fresh in duration."

8. Considering the precarious condition of the injured Iqurar Ali, he was referred to a higher medical centre for treatment on 21.11.2001 at 12:10 p.m. He was taken to PGI

Hospital, Chandigarh from where he was referred to AIIMS, New Delhi. However, considering the health of Iqurar Ali, he was allowed to be taken back to his house. He succumbed to his injuries on 24.11.2001. PW-8 who conducted the post-mortem on the body of Iqurar Ali, noted the following ante-mortem injuries:

> "(1) Fire arm wound of entry 0.5 cm x 0.08 cm below in middle part of chin. Margins are incised. No blackening and tattooing seen around the wound, on explanation. Bullet traversed through brain substance, strike at occipital bone. There is fracture of occipital bone rebound through brain substance back of neck and recovered from space between C5 & C6 from muscle, fracture of C5 cervical vertebra.
>
> (ii) Abrasion 1.5 cm x 1 cm on the left pinna of tragus."

9. According to PW-8, the death of Iqurar Ali was due to hemorrhage and coma resulting from the ante-mortem fire-arm injuries sustained by the deceased. Therefore, it was established that the death of Iqurar Ali was also a homicidal death on account of fire-arm injuries sustained by him. PW-6 also examined other injured persons including PW-1 Gayyur, PW-3 Ayyub and PW-4 Ashraf and seven others. According to the report, injuries were all due to fire-arms.

10. In all these appeals, the main submissions were made by Shri S.R. Singh, learned senior counsel for the appellants, in Criminal Appeal Nos.1157/2008, 1158/2008, 1161/2008 and 1164/2008 and by Mr. Ashok Kumar Sharma counsel for the appellant in 1156/2008. The other learned counsel appearing for the appellants in Criminal Appeal Nos.1166, 1159 and 1155 of 2008 adopted the submissions of the above counsel. On behalf of the State, Dr. Abhishek Attrey addressed arguments. Mr. Yunus Malik appeared and made submissions on behalf of the *de facto* complainant, who was impleaded pursuant to

the orders passed in Crl.M.P. 22687/2011 in Crl.A.1160 of 2008.

11. Having heard learned counsel for the appellants, the sum and substance of the submission of learned counsel was that there was delay in lodging of the FIR, that there were serious lacunae in the case of the prosecution framed against the appellants in that the evidence did not establish the offence alleged against the appellants, that there was long delay in sending express report to the Magistrate and thereby, violation of Section 157 Cr.P.C. was committed and consequently, the conviction could not have been ordered. According to learned counsel, when PW-3 Ayyub was alleged to have been accosted around 8.30 to 8.45 a.m. by four persons in the field, it was hard to believe that within a matter of about an hour, there could have been formation of an unlawful assembly by as many as 15 persons with fire-arm weapons, both licenced and country-made, to cause such gruesome and murderous attacks on the deceased and other injured persons, in order to invoke Sections 302 and 307 read with Section 149 IPC, along with Sections 147 & 148 IPC. It was contended that if at all the offence of common object can be attributed to the appellants, it could have been only under Section 141 'third', which cannot be applied to the nature of offences alleged against the persons, namely, Sections 302, 307 read with 149, as well as 147 & 148 IPC. As far as the first appellant in Cri. Appeal No.1165/2008 was concerned, it was contended that he was totally alien to the village where the occurrence took place as he belonged to a different village and that he had been falsely roped in. It was also contended that there was a communal tension in the village as admitted by PW-13 and that under political pressure the police implicated all the persons in the village who were holding licenced arms. Reliance was placed on *Jang Singh and Others v. State of Rajasthan* - 2001 (9) SCC 704 in support of the submission of Section 157 Cr.P.C.

12. As against the above submissions, learned counsel for

the State argued that non-recovery of bullets or pellets or not sending the guns for ballistic expert report by itself may not vitiate the case of the prosecution, when there was direct evidence relating to the occurrence and injuries inflicted by the appellants on the deceased and other injured persons.

13. Learned counsel contended that when after PW-3 was accosted between 8.30 and 8.45 a.m. and who escaped from the onslaught of the appellants in the field, the appellants had more than an hour, inasmuch as they reached the place of occurrence only by 10 a.m. and, therefore, they had enough time to gather other assailants and indulge in the gruesome act. As far as the scope of Section 149 was concerned, learned counsel contended that the said submission was satisfactorily met in the judgments of the Court below and the same does not merit any consideration. Learned counsel for PW-2 also adopted the submissions of the learned counsel for the State.

14. Having heard learned counsel for the respective parties and having perused the material papers placed before us including the judgment of the High Court as well as that of the trial Court, we find that the following relevant questions require to be addressed, namely:

(1) What is the interpretation to be placed on Section 141 'third' vis-à-vis Section 149 IPC,

2) Whether the so-called delay in forwarding express report to the Magistrate after three days from the date of occurrence, namely, on 24.11.2001 would vitiate the case of the prosecution.

(3) Whether the prevalence of communal riots at the time of occurrence merits acceptance in order to extricate the appellants from the conviction imposed.

(4) Whether there was any lacunae in the case of the prosecution based on various points raised on behalf of the appellants.

15. We wish to deal with the first question in the last.

16. As far as the second question is concerned, it is based on the factum of the time taken in forwarding the express report to the Magistrate. Since in Exhibit Ka-47 namely, the First Information Report, the concerned Court put the date 24.11.2001 after the expression 'seen' and there being no other endorsement prior or subsequent to 21.11.2001 mentioning any other date, there is no doubt that the express report was forwarded to the Magistrate only on 24.11.2001. The question, therefore, for consideration is whether that by itself would vitiate the whole case of the prosecution. The submission is that since there was such a wide time gap as between the alleged date of occurrence, namely, 21.11.2001 and the forwarding of the report to the Magistrate on 24.11.2001, there was every chance of antedating the FIR. In support of the said submission based on Section 157 of Cr.P.C., reliance was placed upon the decision reported in *Jang Singh* (supra). In the first blush, though the said submission appears to be very sound, on a detailed analysis, we find that it is without any substance for more than one reason.

17. In the first place, it is not shown as to how such a delay caused any prejudice to the accused. Except merely stating that the three days delay in forwarding the express report belies the case of the prosecution as alleged, nothing else was shown in support of the said submission. In fact the trial Court dealt with this very submission. The trial Court has noted that the investigating officer was not questioned at all about the reasons for not sending the report prior to 24.11.2001. It has further noted that in the '*Panchnama*' of the deceased Mehroof, the crime was clearly mentioned along with the relevant sequence of crime. The trial Court has therefore, found that without recording the First Information Report on that very day, namely,

21.11.2001, the crime number could not have been mentioned in the '*Panchnama'*.

18. In this context, when we refer to the decision relied upon by the learned counsel for the appellants, namely, *Jang Singh* (supra), we find that this Court has noted the vitiating factors in the entire case of the prosecution, including the delay in sending the First Information Report to the Magistrate for which there was no explanation. By merely referring to the said factor along with the other serious defects noted by this Court, it was concluded that the case of the prosecution was not made out. We, therefore, do not find any scope to apply the said decision as a proposition of law in order to apply the same to the case on hand.

19. *Per Contra*, it will be appropriate to refer to a reasoned decision of this Court reported in *Sandeep v. State of Uttar Pradesh* - 2012 (6) SCC 107, wherein this very Bench dealt with the implication of Section 157 Cr.P.C. and held as under in paragraphs 62 and 63:

> "**62.** It was also feebly contended on behalf of the appellants that the express report was not forwarded to the Magistrate as stipulated under Section 157 Cr.P.C. instantaneously. According to the learned counsel FIR which was initially registered on 17-11-2004 was given a number on 19-11-2004 as FIR No. 116 of 2004 and it was altered on 20-11-2004 and was forwarded only on 25-11-2004 to the Magistrate. As far as the said contention is concerned, we only wish to refer to the reported decision of this Court in *Pala Singh v. State of Punjab* wherein this Court has clearly held that (SCC p. 645, para 8) where the FIR was actually recorded without delay and the investigation started on the basis of that FIR and there is no other infirmity brought to the notice of the court then, however improper or objectionable the delay in receipt of the report by the Magistrate concerned be, in the absence of any prejudice to the accused it cannot by itself justify the

> conclusion that the investigation was tainted and the prosecution insupportable.
>
> **63.** Applying the above ratio in *Pala Singh* to the case on hand, while pointing out the delay in the forwarding of the FIR to the Magistrate, no prejudice was said to have been caused to the appellants by virtue of the said delay. As far as the commencement of the investigation is concerned, our earlier detailed discussion discloses that there was no dearth in that aspect. In such circumstances we do not find any infirmity in the case of the prosecution on that score. In fact the above decision was subsequently followed in *Ishwar Singh v. State of U.P.* and *Subash Chander v. Krishan Lal*."

We can also refer to a recent decision of this Court in *Bhajan Singh @ Harbhajansingh and Ors. v. State of Haryana* – (2011) 7 SCC 421. Relevant paras 29 and 31 are as under:

> "**29.** It is not that as if every delay in sending the report to the Magistrate would necessarily lead to the inference that the FIR has not been lodged at the time stated or has been ante-timed or ante-dated or investigation is not fair and forthright. Every such delay is not fatal unless prejudice to the accused is shown. The expression "forthwith" mentioned therein does not mean that the prosecution is required to explain delay of every hour in sending the FIR to the Magistrate. In a given case, if number of dead and injured persons is very high, delay in dispatching the report is natural. Of course, the same is to be sent within reasonable time in the prevalent circumstances.
>
> **31.** In view of the above, we are in agreement with the High Court that there was no delay either in lodging the FIR or in sending the copy of the FIR to the Magistrate. It may be pertinent to point out that the defence did not put any question on these issues while cross-examining the investigating officer, providing him an opportunity to

explain the delay, if any. Thus, we do not find any force in the submissions made by the learned counsel for the appellants in this regard."

Again in *Shivlal & Another v. State of Chhattisgarh*- AIR 2012 SC 280, the significance and relevance relating to sending a copy of FIR to the Illaqa Magistrate has been explained as under in paragraph 9:

"9.........the Magistrate must be immediately informed of every serious offence so that he may be in a position to act under Section 159, Cr.P.C., if so required. The object of the statutory provision is to keep the Magistrate informed of the investigation so as to enable him to control investigation and, if necessary, to give appropriate direction. However, it is not that as if every delay in sending the report to the Magistrate would necessarily lead to the inference that the FIR has not been lodged at the time stated or has been ante-timed or ante-dated or investigation is not fair and forthright. In a given case there may be an explanation for delay. An unexplained inordinate delay in sending the copy of the FIR to Illaka Magistrate may affect the prosecution case adversely. However, such an adverse inference may be drawn on the basis of attending circumstances involved in a case."

In the case on hand nothing was put to PW-13 (Investigating Officer) as regards the alleged delay in sending the FIR to the Magistrate and or to any prejudice was caused to the appellants on that account. It would have enabled the Investigating Officer to explain the reason for the delay. In any event nothing has been shown as to any prejudice caused to the appellants on the ground of alleged delay in sending a copy of FIR to the Magistrate.

20. When we apply the above principle laid down in the said decision for the reasons to be adduced for the other questions to be dealt with in this judgment, we hold that there

was no dearth in the process of investigation based on the factum of the alleged occurrence on 21.11.2001, as reported by the complainant PW-2 and the mere delay in forwarding of the express report to the Magistrate has not caused any dent in the case of the prosecution. In other words, we have no difficulty in stating that the FIR was factually recorded without delay and the investigation started on the basis of the FIR and in the absence of any other infirmity in that respect, the delay in forwarding the report to the Magistrate does not in any way vitiate the case of the prosecution.

21. With this we come to the next question. The submission on behalf of the appellants was that there was communal tension prevailing and, therefore, if in that milieu, someone was injured, those who were possessing licenced arms in the village cannot be held responsible, even if it resulted in the death of two individuals and injuries to several other persons. In support of the said contention, reference was made to the deposition of PW-13, the Investigating Officer. To a stray question put to him, PW-13 answered that;

"there had been gross tension present in the said village which had been communal in nature and scope thereof. I had neither recorded the time of commencement of any proceeding, in the said village nor, had I recorded culmination thereof, in the contents of leaflet No.1 of my Case Diary nor further, had I copied down the contents of the Inquest-Report [Panchaytnama], in the contents thereof."

22. Reference was also made to a suggestion made to the said witness, which was denied and the statement was to the following effect:

"It is also wrong and incorrect, to accordingly allege and consequently suggest, to the effect that, on account of the then prevailing communal tension, in the said village, subsequently in consultation of all licensed weapon-holders

of the community of accused of the said village, the present accused, as a matter of fact, had since been implicated, in a belied manner, on account of undue pressure, in the present matter. However, this fact remains true and correct, to the effect that, except the licensed arm-holders belonging, to the community of accused, there was no other licensed arm-holder or, any other member, from their community present, at the said spot of occurrence."

23. Except making the said bald suggestion, which was rightly denied, there was nothing brought out or placed either in the evidence of the prosecution witness or by way of defence evidence before the court, as to what was the nature of communal tension, who were all communally and inimically disposed of and when such communal friction occurred. In fact, what all was stated in the Section 313 statement, was 'false implication' due to enmity and political reasons. Political difference and communal difference are two different factors and, therefore, it is not known why such a specific stand of communal tension was not taken in the Section 313 questioning. If really there was any communal tension in the village, there would have been any number of witnesses who would have come forward and stated the same before the Court, as none would have been prejudiced nor affected by making such a true statement before the Court. When we consider the oral evidence of PW-13, namely, that there had been gross tension present in the village, as there was nothing recorded in the police station, it will be a dangerous proposition if simply based on the said isolated statement, one were to conclude that the present occurrence and its aftermath were solely due to communal tension. It was not even suggested to any of the witnesses that there was communal hatred as between those witnesses examined in support of the prosecution or that it was due to such communal tension they suffered such injuries, as well as casualties in their family. In fact, we are of the view that there are too many incongruities in the said submission, inasmuch as the said submission is

made in desperation and does not deserve any consideration. Therefore, the said submission is also liable to be rejected as meritless.

24. With this, we come to the last of the questions as to whether there were any lacunae in the case of the prosecution based on the submissions of the learned counsel. Before dealing with the submissions, we wish to note that though PWs-1 to 4 were closely related to the deceased, they also suffered fire-arm injuries at the hands of the appellants and the injuries sustained by them were duly supported by medical evidence, both documentary as well as oral, namely, through PWs-6, 7, 8 and 9. There was nothing pointed out in the evidence of the above witnesses, namely, PWs-1 to 4, except stating that since because they were closely related, their version about the occurrence was not true in order to discredit their version. Even before the Courts below the only argument made was that the said witnesses were related to the deceased and that they falsely implicated the appellants. In our considered opinion, merely based on such a flimsy submission as regards the credibility of those witnesses, the evidence of those injured eye witnesses cannot be discarded.

25. In fact with regard to the reliance to be placed upon the injured witnesses, this Court has held in very many decisions as to the due credence to be given. The following decisions can be referred to for that purpose:-

(1) *State of Maharashtra v. Chandraprakash Kewalchand Jain* -1990 (1) SCC 550

(2) *State of U.P. v. Pappu* – 2005 (3) SCC 594

(3) *State of Punjab v. Gurmit Singh* – 1996 (2) SCC 384

(4) *State of Orissa v. Thakara Besra* – 2002 (9) SCC 86

(5) *State of H.P. v. Raghubir Singh* – 1993 (2) SCC 622

(6) *Wahid Khan v. State of M.P.* – 2010 (2) SCC 9

(7) *Rameshwar v. State of Rajasthan* – AIR 1952 SC 54

Applying the principles laid down in those decisions, we hold that on this ground there is no scope to interfere with the orders impugned in these appeals.

26. It was thus contended that there was delay in filing the FIR. In fact going by the version of PWs-2 and 3 supported by PWs-1 and 4, the occurrence took place at 10 a.m. in the morning. The matter was reported by PW-2 to the police by 11.45 a.m. and it has come in the evidence that the distance between the place of occurrence and the police station was 12 Kms. There was nothing brought out on the defence to contradict the said statement made by the prosecution witnesses. It was also stated that PW-2 had to reach the police station only through a bullock cart. In such circumstances, the lodging of the FIR by 11.45 a.m., cannot be held to be highly delayed. When it is stated that the occurrence took place at 10 a.m., where more than ten persons suffered injuries and one person died on the spot and while another person died after three days, it is quite possible that every member of the injured party would have taken the immediate required time to attend to the injured, by moving them to the hospital and arranging the required transport for them, while also taking stock of the situation in order to proceed further for lodging the complaint with the police. That by itself would have taken not less than an hour for them and only thereafter, a decision might have been taken by PW-2 to go to the police station for lodging the FIR. Therefore, it can never be held that there was any delay at all in reporting the matter to the police, nor in registering the FIR.

27. It was contended that according to the prosecution when the accused party attacked the injured party apart from the family members of the injured party, local villagers were also present but yet, none was examined by way of independent witness. The said submission has been rightly rejected by the High Court by giving reasons. The High Court has rightly held that though the injured witnesses were related to each other, having regard to the nature of evidence tendered by them, there were no good grounds to discard their version. It has found that their evidence was natural and there was nothing to find fault with their version. It has further held rightly that it is the quality of the witness and not the quantity that matters. It has also taken judicial notice of the fact that the public are reluctant to appear and depose before the Court, especially in criminal cases because of many obvious reasons. We fully endorse the said conclusion of the High Court, while dealing with the said submission made on behalf of the appellants.

28. It was then contended that the investigating officer though visited the spot did not detect any empty cartridges or bullets. PW-13 in his evidence has stated that he had neither detected any empty cartridges nor any pellets on the spot of occurrence. If he had not detected it, then the reason is as simple as that. It is not the case of the appellants that pellets were strewn all around the place of occurrence visibly, but yet the investigating officer failed to collect and place even some of them before the Court. When there was enough evidence to support the version of the prosecution that the appellants, some of whom were in possession of licenced arms and others were holding unlicenced pistols and the shooting with those arms was sufficiently established by the version of the injured eye-witnesses, we fail to understand as to how non-detection of pellets or bullets will be of any consequence as a vitiating factor to defeat the case of the prosecution. It is an undisputed fact that both the deceased died of fire-arm injuries and all the injuries suffered by others were also firm-arm injuries. The said contention also therefore, deserves to be rejected.

29. The contention about not noting the route of arrival and route of escape, in our considered opinion, are very flimsy submissions and do not deserve any consideration at all. It was then contended that PW-3 was initially accosted by A1 to A-4 at around 8.30 to 8.45 a.m. and that he reported back at 9.00 to 9.15 a.m. at his house, by escaping from their clutches and that the alleged occurrence took place at 10 a.m. and, therefore, within such a short time, there could have been no scope for the appellants to gather fifteen persons to cause the attack on the injured party. We have concluded in the earlier part of our judgment that a one hour gap in a village was more than sufficient to gather any number of persons, especially when the purpose of such gathering was to cause a physical attack on a weak and unarmed party. It is relevant to note that while thirteen persons were seriously injured, of whom two succumbed to injuries, not even a scratch was reported against any of the appellants. There was not even a suggestion that any of the injured party was in possession of any weapon, like even a stick or a '*lathi*'. Therefore, all the above factors only go to show that the plea of lack of sufficient time to gather more number of persons can hardly be a ground of defence, as against the overwhelming direct evidence present before the Courts below.

30. It will be relevant to take note of the alleged motive, which was not seriously disputed on behalf of the appellants. It was unfortunate that in spite of the fact that members of the injured party earnestly attempted to dissuade the situation by pacifying the appellants, no good sense appeared to have prevailed upon the appellants, who seem to have taken an upper hand and caused the onslaught on the unarmed members of the injured party, of whom one was a female. The submissions of the appellants, therefore, do not merit consideration on this ground as well.

31. A feeble submission was made that the FIR does not even reveal that PW-2 was injured. On the other hand, a

reading of the FIR discloses that PW-2 specifically mentioned that he along with others was injured due to the onslaught of the appellants. Yet another feeble submission was that PW-3 stated that they were all standing outside the house at the time when the accused party approached the place of occurrence, while the case of the prosecution was that only after the arrival of the accused the members of the injured party came out of their house. We see absolutely no substance in the said submission as we do not find that such a silly discrepancy can cause any dent in the case of the prosecution, which is otherwise supported by overwhelming evidence, both oral as well as documentary.

32. On behalf of the first appellant in Criminal Appeal No. 1165 of 2008, it was contended that he belonged to a different village and that he was falsely implicated. In fact, the said contention was dealt with by the trial Court extensively, which has noted that the said accused claimed that he was the resident of the village Manduwala of District Saharanpur and that he was actually present at Saharanpur on that date. In the Section 313 statement, the said accused had admitted that he was 50 years old and at the time of the incident he would have been 46-47 years old, while the family register which was produced at his instance disclosed that his age was 38 years. The trial Court, therefore, held that by relying upon such an age old register, the abode of the said accused at the time of occurrence could not have been arrived at. On the other hand, the evidence of PW-1 disclosed that the father-in-law of the said accused is the resident of the village concerned, that since he had no male child, the said accused was living along with his father-in-law and that in the family register of the year 1999 produced by the prosecution, as well as the copy of the electoral list, the name of the said accused was clearly mentioned. The contention on behalf of the said accused that due to enmity with his father-in-law he was implicated, was rejected by saying that if that was the case, there was no reason for the prosecution to leave out the father-in-law and implicate the son-in-law alone.

The said point raised on behalf of the said accused also, therefore, does not merit any consideration. We, therefore, hold that none of the points raised alleging lacunae in the case of the prosecution merit any consideration and the same are, therefore, rejected. The said question is also answered against the appellants.

33. With that we come to the main question as to the interpretation to be given to Section 141 'third', read along with Section 149, IPC. In the forefront, we wish to highlight the extent of power of this Court in the matter of interpretation of words in the provision of a statute. In this context, at the outset, we wish to quote the words of Justice G.P. Singh in the celebrated book on *'Principles of Statutory Interpretation',* where the learned author in Chapter II under the caption 'Guiding Rules' in sub-para 1(d) stated as under, under the caption 'Departure from rule':-

"**(d) Departure from the rule**

In discharging its interpretative function, the Court can correct obvious drafting errors and so in suitable cases "the court will add words, or omit words or substitute words". But "before interpreting a statute in this way the Court must be abundantly sure of three matters : (1) the intended purpose of the statute or provision in question, (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed." Sometimes even when these conditions are satisfied, the court may find itself inhibited from interpreting the statutory provision in accordance with underlying intention of Parliament, e.g. when the alteration in language is too far reaching or too big or when the subject matter calls for strict interpretation such as a penal

provision." *(See Inco Europe Ltd. v. First Choice Distribution (a firm) (2000) 2 ALL ER 109, p.115 (HL)"*

(Emphasis added)

34. In the decision of this Court reported in *Surjit Singh Kalra v. Union of India and Another* - 1991 (2) SCC 87, while laying down the principle of purposive construction to be adopted by Courts, it has been held as under in paragraph 19:-

"19. True it is not permissible to read words in a statute which are not there, but "where the alternative lies between either supplying by implication words which appear to have been accidentally omitted, or adopting a construction which deprives certain existing words of all meaning, it is permissible to supply the words" (Craies *Statute Law,* 7th edn., p. 109). Similar are the observations in *Hameedia Hardware Stores v. B. Mohan Lal Sowcar* where it was observed that the court construing a provision should not easily read into it words which have not been expressly enacted but having regard to the context in which a provision appears and the object of the statute in which the said provision is enacted the court should construe it in a harmonious way to make it meaningful. An attempt must always be made so to reconcile the relevant provisions as to advance the remedy intended by the statute. (See: *Sirajul Haq Khan v. Sunni Central Board of Waqf.*)"

(Emphasis added)

35. The principle statute in Maxwell's *Interpretation of Statutes* under the Chapter "Exceptional Construction" is also relevant, which was applied in one of the judgments of this Court reported in *Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd.* - 2008 (4) SCC 755. The said principle has been extracted in para 53 of the said judgment, which reads as under:-

"**53.** In the chapter on "Exceptional Construction" in his book on *Interpretation of Statutes*, Maxwell writes:

"WHERE the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, by rejecting them altogether, or by interpolating other words, under the influence, no doubt, of an irresistible conviction that the legislature could not possibly have intended what its words signify, and that the modifications thus made are mere corrections of careless language and really give the true meaning."

36. Keeping the above basic principles in mind, we considered the submission of Shri S.R. Singh, learned senior counsel who appeared for the appellants in Criminal Appeal Nos.1157/2008, 1158/2008, 1161/2008 and 1164/2008. According to the learned counsel, under Section 141 'third', the expression 'other offence' used therein for the purpose of ascertaining the common object of a person in an unlawful assembly, would only be relatable to offences similar to those such as, mischief or criminal trespass, referred to in the said clause. The learned senior counsel submitted that such an interpretation should be laid by applying the principle of *ejusdem generis*. The learned counsel, therefore, contended that if that be the legal position, reading Section 141'third' and Sections 147, 148 and 149 together, none of the offences referred to in Sections 147 and 148 or any of the other grave offences falling under other provisions of the Indian Penal Code will get attracted. The learned counsel, therefore, contended that conviction for offences under Section 302 read with Sections

149 and 307 read with Section 149 IPC, as well as Sections 147 and 148 of IPC with the aid of Section 141, could not have been made. Though the said submission looks quite attractive in the first blush, on a deeper scrutiny of the other provisions contained in the Code, we are afraid that such a narrow interpretation, which is sought to be applied by the learned senior counsel cannot be made.

37. In this context, Section 40 IPC, which defines 'offence' is also required to be noted. In order to appreciate the submission and to arrive at a correct conclusion, we feel that Section 40 IPC, Sections 141, 147, 148 and 149 are required to be extracted which are as under:-

"**40. "Offence"**- Except in the Chapters and sections mentioned in clauses 2 and 3 of this section, the word "offence" denotes a thing made punishable by this Code.

In Chapter IV, [Chapter VA] and in the following section, namely, sections [64,65,67,71], 109,110,112,114,115, 116,117, [118,119,120] 187, 194, 195, 203, 211, 213, 214, 221, 222, 223, 224, 225, 327, 328, 329, 330, 331, 347, 348, 388, 389 and 445, the word "offence" denotes a thing punishable under this code, or under any special or local law as hereinafter defined.

And in sections 141, 176, 177, 201, 202, 212, 216 and 441, the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine.

141. Unlawful assembly – An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is-

First- To overawe by criminal force, or show of criminal

force, the Central or any State Government or Parliament or the Legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or

Second- To resist the execution of any law, or of any legal process; or

Third – To commit any mischief or criminal trespass, or other offence; or

Fourth - By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth - by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation – An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

147. Punishment for rioting- Whoever is guilty of rioting, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

148. Rioting, armed with deadly weapon- Whoever is guilty of rioting, being armed with a deadly weapon or with anything which, used as a weapon of offence, is likely to cause death, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

149. Every member of unlawful assembly guilty of offence

committed in prosecution of common object- 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”

38. Section 141 ‘third’, clearly mentions that an assembly of five or more persons is designated as an unlawful assembly if the common object of the persons composing that assembly as among other offences namely, mischief or criminal trespass or commission of other offence. A literal interpretation, therefore, only means that apart from the offence of mischief and criminal trespass, all other offences would fall within the said clause ‘third’ mentioned in Section 141. Other related sections falling under the said Chapter VIII are up to Section 160. Reading Section 141 ‘third’ along with Section 149, if the commission of any other offence apart from mischief or criminal trespass and such commission of offence was by a member of an unlawful assembly, the prescription of common object will automatically get satisfied. When we refer to Section 144 in this context, we find that joining an unlawful assembly armed with a deadly weapon, which is likely to cause death, can be inflicted with a punishment prescribed therein. If the interpretation placed by learned senior counsel is accepted, we wonder whether the prescription placed in Section 144 could be held to be in consonance with section 141 ‘third’. The definite answer can only be in the negative. If mere possession of a deadly weapon by a member of an unlawful assembly, which is likely to cause death would attract Section 141‘third’ as a corollary, it will have to be held that the expression ‘or other offence’ mentioned in Section 141 should without doing any violence to the said provision, include all other offences apart from the offence of mischief or criminal trespass. Similar will be the interpretation that can be made relating to the offence, namely, rioting prescribed under Section 146 punishable under

Sections 147 as well as 148, namely, rioting, armed with deadly weapons.

39. The principle '*ejusdem generis*' means 'where a law lists specific classes of persons or things and then refers to them in general, the general statements only apply to the same kind of persons or things specifically listed'. The learned senior counsel for the appellants, therefore, contended that since the expression "other offence" under Section 141 'third' has been used along with the offence, mischief or criminal trespass, it can only relate to similar such offences of the same species and not commission of all other offences as in the case on hand, namely, murder or attempt to commit murder.

40. When we test the said submission by making reference to the Chapter, in which the offence of mischief and trespass are specified in the Code, we are able to expose the glaring fallacy in the submission of the learned senior counsel. Mischief and criminal trespass fall under Chapter XVII. The caption of the said Chapter is "of offences against property". The offences dealt with in the said Chapter are governed by Sections 378 to 462. The offences dealt with apart from mischief and trespass are theft, extortion, robbery, dacoity, dacoity with murder, misappropriation of property, criminal breach of trust, dealing with stolen property and cheating.

41. While referring to the offence of mischief, Sections 435 to 438 deals with mischief by fire or any explosive substance with the intent to destroy a house or other properties or to destroy or make unsafe a decked vessel etc., for which imprisonment for life or a term which may extend to ten years apart from fine can be imposed. While dealing with the offence of trespass under Sections 449 and 450, whoever commits house-trespass for committing an offence punishable with death can be punished for imprisonment for life or rigorous imprisonment for a term not exceeding ten years, apart from fine. Similar such provisions for other types of criminal trespass have also been provided for in the said Chapter.

42. We fail to appreciate as to how simply because the offences mischief or criminal trespass are used preceding the expression "other offence" in Section 141 'third', it should be taken that such offence would only relate to a minor offence of mischief or trespass and that the expression "other offence" should be restricted only to that extent. As pointed out by us above, the offence of mischief and trespass could also be as grave as that of an offence of murder, for which the punishment of life imprisonment can be imposed as provided for under Sections 438, 449, 450 etc. Therefore, we straight away hold that the argument of learned senior counsel for the appellants to import the principle of '*ejusdem generis*' to Section 141 'third', cannot be accepted.

43. The submission of the learned senior counsel cannot also be countenanced by applying Section 40 of the Code, which specifically mentions as to how the term 'offence' will have to be construed. In the main clause of the said section it has been clearly set out that the word "offence" denotes a thing made punishable by this Code except the Chapters and Sections mentioned in clauses 2 and 3 of the said section. Therefore, going by the main clause of Section 40, the word "offence" since denotes the thing made punishable under the Code, 'other offence' mentioned in Section 141 'third', can only denote to offences, which are punishable under any of the provisions of the Code. Therefore, by applying the main clause of Section 40, it can be straight away held that all offences referred to in any of the provisions of the Code for which the punishment is provided for would automatically fall within the expression "other offence", which has been used in Section 141 'third'.

44. What has been excepted in the main clause of Section 40 are what has been specifically mentioned in sub-clauses 2 and 3 of the said section. As far as sub-clause 2 is concerned, while making reference to Chapter IV and Chapter VA, as well as other sections mentioned therein, it states that the word "offence" would denote a thing punishable under the Code,

namely, Indian Penal Code or under any special or local law, which have been defined to mean a law applicable to a particular subject or a law applicable only to a particular part of India. When we read sub-clause 3 of Section 40, Section 141 has been specifically mentioned in the said sub-clause. To understand the purport of the said clause, it will be worthwhile to extract that part of the provision which reads;

> "And in sections 141, 176, 177, 201, 202, 212, 216 and 441, the word "offence" has the same meaning when the thing punishable under the special or local law is punishable under such law with imprisonment for a term of six months or upwards, whether with or without fine".

45. It is quite apparent that the said sub-clause in regard to the offences under any special or local law, wherein punishment of imprisonment for a term of six months or upwards with or without fine is prescribed, the meaning assigned in those special or local laws are to be imported while invoking Section 141 or other sections mentioned in the said sub-clause 3 of Section 40.

46. Therefore, a conspectus reading of Section 40 makes the position abundantly clear that for all offences punishable under the Indian Penal Code, the main clause of Section 40 would straight away apply in which event the expression "other offence" used in Section 141 'third', will have to be construed as any offence for which punishment is prescribed under the Code. To put it differently, whomsoever is proceeded against for any offence punishable under the provisions of the Indian Penal Code, Section 40 sub-clause 1 would straight away apply for the purpose of construing what the offence is and when it comes to the question of offence under any other special or local law, the aid of sub-clauses 2 and 3 will have to be applied for the purpose of construing the offence for which the accused is proceeded against. Therefore, having regard to sub-clause 1 of Section 40 of the Code read along with Section 141 'third', the argument of learned senior counsel for the appellants will

have to be rejected. We are, therefore, of the firm view that only such a construction would be in tune with the purport and intent of the law makers while defining an unlawful assembly for commission of an offence with a common object, as specified under Section 141 of the Code. In the case on hand, since mo special law or local law was attracted and the accuses were charged only for the offence under the Indian Penal Code, Section 40(1) gets attracted along with Section 141 'third' IPC. Having regard to such a construction of ours on Section 141, read along with Section 40 IPC, the offence found proved against the appellants, namely, falling under Sections 302 read with 149, 307 read with 149 along with 147 and 148 of the Code for which the conviction and sentence imposed by the Court below cannot be found fault with.

47. In the light of our above conclusions on the various submissions made by the counsel for the appellants, we do not find any merit in these appeals. The appeals, therefore, fail and the same are dismissed. Appellant Soma in Criminal Appeal No.1158/2008 who is on bail is directed to surrender before Magistrate forthwith for serving out the remaining period of sentence, if any, failing which the Chief Judicial Magistrate Haridwar is directed to take him into custody and send him to jail to serve out the sentence, if any. A copy of the judgment be sent to the said CJM by the Registry forthwith.

R.P. Appeals dismissed.

REGISTRAR GENERAL, CALCUTTA HIGH COURT
v.
SHRINIVAS PRASAD SHAH AND OTHERS
(Civil Appeal No. 4282 of 2013)

MAY 3, 2013

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

WEST BENGAL SCHEDULED CASTES AND SCHEDULED TRIBES (IDENTIFICATION) ACT, 1994:

s.5 – Issuance of certificate — Competent authority — West Bengal Judicial Service Examination, 2007— Respondent claiming to be a member of Scheduled Tribe on the basis of certificate issued by Director, Backward Class Welfare, West Bengal – Treated as a general category candidate – Held: The notification specifically stipulates that a candidate belonging to SC/ST/BC must have a certificate in support of his/her claim from a competent authority as specified under the Act — There is no error in the decision taken by the Commission in not entertaining respondent's application as a ST candidate since no certificate was produced from competent authority – However, respondent would be appointed as a Judicial Officer consequent to the examination conducted in 2010 wherein he appeared by producing the certificate issued by competent authority.

The respondent in terms of Notification dated 17.1.2007, submitted his application for West Bengal Judicial Service Examination 2007 by paying an amount of Rs.200/- as required by General category candidates. However in the application he mentioned that he belonged to "Gonda Community", a Scheduled Tribe and also attached a certificate from the Director, Backward Class Welfare, West Bengal. The Commission considered him as a general candidate as he had not produced the

certificate from the competent authority. The writ petition filed by him was allowed by the Single Judge of the High Court. The Division Bench declined to interfere.

Allowing the appeal, the Court

HELD: 1.1. This Court is of the considered opinion that in view of the specific legislation passed by the West Bengal State Legislature Assembly i.e. West Bengal Scheduled Caste and Scheduled Tribes (Identification) Act, 1994, and the specific stipulation in the notification issued to the candidates, the guideline 10 of para 13 of *Kumari Madhuri Patil's* **case is inapplicable, particularly to the facts of the instant case. The Act does not recognize the Director, Backward Class Welfare, West Bengal as a competent authority to issue the certificate. Therefore, the Commission was justified in not placing reliance on the certificate issued by the Director, Backward Class Welfare, West Bengal. [para 13] [220-G-H; 221-A]**

Kumari Madhuri Patil and Another vs. Additional Commissioner, Tribal Development and Others, **1994 (3) Suppl. SCR 50 = (1994) 6 SCC 241 - held inapplicable.**

1.2. In the instant case, the Court is not concerned with dispute that is pending before the Scrutiny Committee. This is a case of total non-compliance of the conditions stipulated in the notification dated 17.1.2007(information to the candidates) wherein it has been specifically stated that a candidate claiming to be SC/ST/BC must have a certificate in support of his/her claim from a competent authority specified in the West Bengal Scheduled Caste and Scheduled Tribes (Identification) Act, 1994. There is no error in the decision taken by the Commission in not entertaining the respondent's application as a ST candidate since no certificate was produced from the competent authority, as provided under the Act. Consequently, in the absence

of the requisite certificate, the Commission was justified in treating him as a general category candidate. [para 12 and 15] [220-B-D; 222-B-C]

1.3. The guidelines in in *Kumari Madhuri Patil's* **case or the brochure issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, New Delhi would not override the specific conditions stipulated in the notification (information to the candidates) of compliance of the provisions of the West BengalAct of 1994. [para 16] [222-D-E]**

1.4. Further, clause 13.2 of Chapter 13 of the brochure issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, New Delhi is also inapplicable in view of the statutory provision incorporated in the West Bengal Act of 1994. [para 13] [221-B]

1.5. The Judgment of the High Court is set aside. However, the respondent would be appointed as a judicial officer in the West Bengal Judicial Service consequent to the examination conducted in the year 2010 since he produced the Certificate issued by the competent authority under West Bengal Act of 1994 on 22.9.2009. [para 17] [222-F-H]

GM, Indian Bank vs. R. Rani and Anr. **(2007) 12 SCC 796 – cited.**

Case Law Reference:

1994 (3) Suppl. SCR 50	**held inapplicable**	**para 4**
(2007) 12 SCC 796	**cited**	**para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4282 of 2013.

From the Judgment & Order dated 16.09.2011 of the High Court at Calcutta in FMA No. 1217 of 2010.

Jaideep Gupta, Raju Chatterjee, Sankar Divate, G.S. Chatterjee, Soumya Chakraborty, A. Deb Kumar, Atulesh Kumar, Y. Lokesh, Avijit Bhattacharjee, Bikas Kargupta for the appearing parties.

The Judgment of the Court was delivered by

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

2. The question raised in this case is whether the Public Service Commission of West Bengal (for short 'the Commission') was justified in considering the application of respondent No.1 as a general candidate for recruitment to the West Bengal Judicial Service Examination, 2007 rather than a member of the Scheduled Tribe Community.

3. The Commission circulated a notification on 17th January, 2007 for the information to the candidates on 17th February, 2007 of its conducting West Bengal Judicial Service Examination 2007. In response to the said information the respondent submitted his application by paying an amount of Rs.200/-, as required by the candidates in the general category in order to appear for the examination of 2007. In the application form he had mentioned that he belonged to 'Gonda Community' - Scheduled Tribe Community and also attached a certificate from the Director, Backward Class Welfare, West Bengal. The Commission considered the application of the respondent as a general candidate since he had not produced the certificate required to be produced from the competent authority. The respondent then attended preliminary examination and final examination as a general candidate. The result of the West Bengal Judicial Service Examination 2007 was published in the newspapers on 29.9.2007 and the respondent was shown as a general category candidate. Later the respondent appeared for the personality test as a general

category candidate on 4.12.2007. The Commission published the list of 152 selected candidates on 20.3.2008 and the respondent's name was rank No.86 among the general category candidates, he could not get appointment.

4. The respondent then preferred a representation on 24.4.2008 to the Chairman of the Commission and to the various authorities to consider him as a member of the Scheduled Tribe Community and be selected in that category for the examination held in 2007. Since there was no response, he filed Writ Petition No.9756 (W) of 2008 before the High Court of Calcutta contending that since his status as a Scheduled Tribe was not in question, he should not have been considered as a general category candidate especially in view of the certificate produced by him from the Director, West Bengal Backward Class Welfare. Learned Single Judge of the Calcutta High Court noticed that he had produced a certificate issued by the Director, Backward Class Welfare, West Bengal on 08.01.2003 along with the application and hence he should have been considered as a member of the Scheduled Tribe Community, going by the principle laid down by this court in *Kumari Madhuri Patil and Another v. Additional Commissioner, Tribal Development and Others* (1994) 6 SCC 241. Learned Single Judge therefore directed the Commission and the High Court to appoint the respondent in West Bengal Judicial Service pursuant to the examination conducted in the year 2007 treating him as a member of the Scheduled Tribe Community.

5. The Registrar General, aggrieved by the judgment of the learned Single Judge filed FMA No.1217 of 2010 before the Division Bench of the Calcutta High Court. The Division Bench also concurred with the view of the learned Single Judge and dismissed the appeal. Against which the present appeal has been filed by the Registrar General, Calcutta High Court.

6. Shri Jaideep Gupta, learned senior counsel appearing for the appellant submitted that the High Court has committed

an error in over-looking the specific conditions prescribed in the information to the candidates for the West Bengal Judicial Service Examination 2007. Learned senior counsel submitted that the information specifically stipulated that the caste certificate should be produced from a competent authority as specified in the West Bengal Judicial Service and STs (Identification) Act, 1994 and SCs/STs Welfare Department Order No.261-TW/EC/MR-103/94 dated 6th April, 1995. Further it is also pointed out that no claim from a member of SC/ST/BC or physically handicap would be entertained after submission of the application. Learned senior counsel also submitted that the Judgment of this Court in *Kumari Madhuri Patil's* case (supra) has been misinterpreted and mis-applied and nothing could be spelt out from that Judgment or subsequent judgments diluting the conditions stipulated by the Commission for the examination held in the year 2007. Learned senior counsel also submitted, though in the application form the respondent had indicated that he belonged to ST Community but he did not produce the required certificate as provided in the above-mentioned Act and that he had deposited Rs.200/-which was meant only for the general category candidates. The respondent sat for the said examination as a general category candidate and could not get appointment and having failed to get selected he is estopped from contending that he should have been treated as a member of the Scheduled Tribe for the 2007 examination. Learned senior counsel, however, submitted that later he has produced the required certificate in the 2010 Examination and he is being considered for appointment as a judicial officer in the West Bengal Judicial Service treating him as a member of the Scheduled Tribe.

7. Mr.Soumya Chakraborty, learned counsel appearing for the respondent submitted that the High Court has correctly applied the guidelines laid down by this Court in *Kumari Madhuri Patil's* case (supra) and also submitted that the principles laid down in that are binding judicial precedents.

Reference was made to the Judgment of this Court in *GM, Indian Bank v. R. Rani and Another* (2007) 12 SCC 796. Learned counsel also referred to the brochure published by the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, New Delhi wherein it has been stated that where a candidate belonging to SC/ST is unable to produce a certificate from any of the prescribed authority he might be appointed provisionally, on the basis of a prime facie proof, subject to his furnishing the prescribed certificate within a reasonable time. Learned counsel submitted applying the principle laid down by this Court in *Kumari Madhuri Patil's* case (supra) and the brochure mentioned above, learned Single Judge, as well as the Division Bench of the High Court, was right in holding that the respondent be treated as a member of Scheduled Tribe for the 2007 Examination and be appointed accordingly.

8. We may first refer to the notification issued by the Commission (information to the candidates) for the West Bengal Judicial Service Examination 2007. Earlier part of the notification reads as follows:

"The relevant rules and necessary particulars are stated in the following paragraphs. A candidate should verify from the notified rules that he/she is eligible for admission to the examination. The condition prescribed cannot be relaxed"

9. The notification also refers to the particulars and certificates required, which reads as under:

"**PARTICULARS AND CERTIFICATES REQUIRED:**

(i) A candidate claiming to be SC/ST/BC must have a certificate in support of his/her claim from a competent authority of West Bengal as specified below [vide the West Bengal SCs and STs (Identification) Act, 1994 and SCs, STs Welfare

Department Order No.261-1W/EC/MR-103/94 dated 06.04.1995]

(ii) In the District, the Sub-Divisional Officer of the Sub-Divisional concerned;

(iii) In Kolkata, the District Magistrate South 24-Parganas or such Additional District Magistrates, South 24-Parganas as may be authorized by the District Magistrate, South 24-Parganas in this behalf."

Further, the notification also states as follows:

"No claim for being a member of the SC/ST and BC or a Physically Handicapped person will be entertained after submission of the application."

10.We are in this case concerned with the question whether the Judgment in *Kumari Madhuri Patil's* case (supra), especially sub-paragraph 10 of Paragraph 13 or clause 13.2 of the Chapter 13 of the brochure would override the specific provision stipulated in the notification (information to the candidates). The notification specifically stipulates that a candidate belonging to SC/ST/BC must have a certificate in support of his/her claim from a competent authority as specified under the West Bengal Scheduled Caste and Scheduled Tribes (Identification) Act, 1994. That Act was enacted by West Bengal Legislature to provide for identification of SCs and STs in West Bengal and for matters connected therewith or incidental thereto. Section 4 of the Act deals with the identification of members of Schedule Tribe which reads as under:

"4. Any person belonging to any of the tribes or tribal communities or parts of or groups within tribes or tribal communities, specified in Part XII of the Schedule to the Constitution (Scheduled Tribes) Order, and resident in the locality specified in relation to him in that Part of such

Schedule, may be identified, by a certificate, to be a member of the Schedule Tribe."

Section 5 of the Act deals with the issuance of a certificate which reads as under:

"5. A cerfificate under section 3 or section 4 may be issued-

(a) In the district, by the Sub-divisional Officer of the sub-division concerned, and

(b) In Calcutta, by the District Magistrate, South 24-Parganas, or by such Additional District Magistrate, South 24-Parganas, as may be authorized by the District Magistrate, South 24-Parganas, in this behalf."

Explanation I. "Calcutta" shall mean the town of Calcutta as defined in section 3 of the Calcutta Police Act, 1866.

Explanation II – For the removal of doubt, it is hereby declared that for the purposes of this Act, the District Magistrate, South 24-Parganas, or the Additional District Magistrate, South 24-Parganas, authorized by the District Magistrate, South 24-Parganas, under clause (b) of this section, shall have jurisdiction over Calcutta.

Section 6 of the Act deals with the procedure of issuance of certificate under the Act, on application by the person requiring a certificate under that Act in such form and manner and upon production of such evidence, as may be prescribed.

11. Power has been conferred on the prescribed authority under Section 7 to reject the application if it is not satisfied with the evidence produced by any person under Section 6 and the Rules made thereunder for the issuance of a certificate under

Section 5, giving a person an opportunity of being heard. Section 8 provides for an appeal against any refusal to issue a certificate.

12. We find no error in the decision taken by the Commission in not entertaining the respondent's application as a ST candidate since no certificate was produced from the competent authority, as provided under the West Bengal Scheduled Caste and Scheduled Tribes (Identification) Act, 1994. The information to the candidates specifically stated that the candidates claiming to be SC/ST/BC must have a certificate from a competent authority specified in the West Bengal Scheduled Caste and Scheduled Tribes (Identification) Act, 1994. No such certificate was produced from that competent authority by the respondent. Consequently, in the absence of the requisite certificate, the Commission was justified in treating him as a general category candidate. The first time the respondent produced the certificate from the competent authority was only when he appeared in the examination held on 30.7.2010, by that time he had obtained a certificate from the competent authority on 22.9.2009. Admittedly, at the time when 2007 examination was held no such certificate was produced from the competent authority along with the application. Consequently, the respondent was treated as a general category candidate and hence he could not get appointment as judicial officer in the examination held in the year 2007.

13. We are of the considered opinion that in view of the specific legislation passed by the West Bengal State Legislature Assembly i.e. West Bengal Scheduled Caste and Scheduled Tribes (Identification) Act, 1994, and the specific stipulation in the notification issued to the candidates, the guideline 10 of para 13 of *Kumari Madhuri Patil's* case (supra) is inapplicable, particularly to the facts of this case. Act does not recognize the Director, Backward Class Welfare, West Bengal as a competent authority to issue the certificate.

Therefore, the Commission was justified in not placing reliance on the certificate issued by the Director, Backward Class Welfare, West Bengal. Further clause 13.2 of Chapter 13 of the brochure issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, New Delhi is also in applicable in view of the statutory provision incorporated in the West Bengal Scheduled Caste and Scheduled Tribes (Identification) Act, 1994. In this connection we may refer sub-para 10 of para 13 of *Kumari Madhuri Patil's* case (supra) which reads as under:

> ""In case of any delay in finalizing the proceedings, and in the meanwhile the last date for admission into an educational institution or appointment to an officer post, is getting expired, the candidate be admitted by the Principal or such other authority competent in that behalf or appointed on the basis of the social status certificate already issued or an affidavit duly sworn by the parent/guardian/candidate before the competent officer or non-official and such admission or appointment should be only provisional, subject to the result of the inquiry by the Scrutiny Committee."

14. *Kumari Madhuri Patil's* case (supra) speaks of the constitution of a Scrutiny Committee to resolve the dispute on caste status. When there is a dispute with regard to the certificate produced, there is bound to be delay in finalization of the proceedings, it is in that context sub-para 10 of para 13 of *Kumari Madhuri Patil's* case (supra) stated that in case of any delay in finalizing the proceedings by the Scrutiny Committee and in the meanwhile last date for admission into an educational institutions or appointment to an officer post is getting expired, the candidate be admitted by the principal or such other authority competent in that behalf or appointed on the basis of social status certificate already issued or an affidavit duly sworn by the parent/guardian/candidate before the competent officer or non-official and such admission or appointment should be only provisional, subject to the result of

the enquiry by the Scrutiny Committee. In *GM, Indian Bank* (supra) this Court held that the directions issued by the Judgment in *Kumari Madhuri Patil's* case (supra) would have a binding force of law.

15. We are in this case not concerned with any dispute that is pending before the Scrutiny Committee, this is a case of total non-compliance of the conditions stipulated in the notification (information to the candidates) wherein it has been specifically stated that a candidate claiming to be SC/ST/BC must have a certificate in support of his/her claim from a competent authority specified in the West Bengal Scheduled Caste and Scheduled Tribes (Identification) Act, 1994.

16. In our view, the guidelines in in *Kumari Madhuri Patil's* case (supra) or the brochure issued by the Government of India, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, New Delhi would not override the specific conditions stipulated in the notification (information to the candidates) of compliance of the provisions of the West Bengal Scheduled Caste and Scheduled Tribes (Identification) Act, 1994. In such circumstances we find no error in the decision taken by the Commission in not entertaining the application of the respondent as a member of the ST Community due to non-production of the certificate from the competent authority specified in the above-mentioned Act.

17. The appeal is accordingly allowed and the Judgment of the High Court is set aside. However, we are inclined to record the submission of the learned senior counsel, appearing for the appellant that the respondent would be appointed as a judicial officer in the West Bengal Judicial Service consequent to the examination conducted in the year 2010 since he has produced the Certificate issued by the competent authority under The West Bengal Scheduled Castes and Scheduled Tribes (Identification) Act, 1994. Appeal is, therefore, allowed as above, however there will be no order as to costs.

R.P. Appeal allowed.

VIMAL KANWAR & ORS.
v.
KISHORE DAN & ORS.
(Civil Appeal No. 5513 of 2012)

MAY 03, 2013.

[G.S. SINGHVI AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Motor Vehicle Act, 1988:

s.166 – Fatal accident – Compensation – Computation of – Deductions – Held: Provident Fund, Pension, Insurance, receivable by heirs on account of victim's death will not come within the periphery of the Act to be termed as 'pecuniary advantage' liable for deduction.

s.166 – Fatal accident – Compensation – Compassionate appointment –Deductions towards 'pecuniary advantage' – Held: Compassionate appointment cannot be termed as 'pecuniary advantage' and any amount received on such appointment is not liable for deduction for determining the compensation.

s.166 – Fatal accident – Compensation – Deduction towards income-tax – If annual income comes within taxable range, income tax is required to be deducted for determining actual salary of deceased and presumption would be that employer has deducted the tax at source from employee's salary – In case of income of a non-salaried victim, claimant is required to prove that deceased had paid income tax and no further tax is required to be deducted from the income.

s.166 – Fatal accident – Compensation – Multiplier – Increase towards future income – Held: Deceased being a Government servant and 28 ½ years at the time of death, his

pay would have doubled if he would have continued in service till the date of retirement – Therefore, 100% increase in future income of deceased should have been allowed by Tribunal and High Court – Keeping in view the age of the victim at the time of his death, multiplier of 17 would be applied.

s.166 – Fatal accident – Amounts towards loss of consortium, loss of estate, loss of love and affection for daughter, loss of love and affection for widow and mother and funeral expenses awarded.

In a claim petition filed by the wife, daughter and mother of the victim of a fatal motor accident, who was an Assistant Engineer in a State Government department and was 28 ½ years of age at the time of the death, the Tribunal held that the reckless and negligent driving of the drier of the offending vehicle caused the accident resulting in death of the victim. Though the salary of the victim was Rs.8920/-, the Tribunal reduced it to Rs.8000/-. It further deducted a sum of Rs.1000/- per month towards PF, pension and insurance, assessed the actual salary at Rs.7000/- and added Rs.4500/- towards future income. It applied multiplier of 15 holding that the wife of deceased would get job on compassionate ground and determined the compensation at Rs.14,93,700/-. The High Court though held that multiplier of 15 was not correct, but declined to interfere with the amount of compensation.

Allowing the appeal, the Court

HELD: 1.1. Provident Fund, Pension and Insurance receivable by the claimants on the death of a motor accident victim, will not come within the periphery of the Motor Vehicles Act to be termed as "pecuniary advantage" liable for deduction. [para 19] [234-H; 235-A]

Helen C. Rebello (Mrs) and Others vs. *Maharashtra State*

Road Transport Corporation & Anr. **1998 (1) Suppl. SCR 684 = (1999) 1 SCC 90 – relied on**

1.2. "Compassionate appointment" has no correlation with the amount receivable under a statute occasioned on account of accidental death and cannot be termed as "pecuniary advantage" that comes under the periphery of Motor Vehicles Act and any amount received on such appointment is not liable to be deducted for determination of compensation under the Act. [para 20] [237-B-D]

1.3. It is clear that if the annual income comes within the taxable range, income tax is required to be deducted for determination of the actual salary. In case the income of deceased was only from "salary", the presumption would be that the employer u/s 192 (1) of the Income-tax Act, 1961, had deducted the tax at source from the employee's salary. In case an objection is raised by any party, the objector is required to prove by producing evidence such as LPC to suggest that the employer failed to deduct the TDS from the salary of the employee. However, when income of deceased was from sources other than salary, and the annual income fell within taxable range, and any objection as to deduction of tax is raised by a party then the claimant is required to prove that the victim had already paid income tax and no further tax was to be deducted from the income. [para 21] [237-F-G; 238-C-E]

1.4. In the instant case, none of the respondents brought to the notice of the court that the income-tax payable by the deceased was not deducted at source by the employer- State Government. In absence of such evidence, it is presumed that the salary paid to the deceased as per Last Pay Certificate was paid in accordance with law i.e. by deducting the income-tax on the estimated income of the deceased. [para 22-23] [238-F-H; 239-A]

1.5. Admittedly, the deceased was only 28 years 7 ½ months old at the time of death. In normal course, he would have served the State Government minimum for about 30 years. Even if the Court does not take into consideration the future prospect of promotion which the deceased was otherwise entitled and the actual pay revisions taken effect from 1.1.1996 and 1.1. 2006, it cannot be denied that the pay of the deceased would have doubled if he would have continued in service of the State till the date of retirement. Therefore, this was a fit case in which 100% increase in the future income of the deceased should have been allowed by the Tribunal and the High Court, which they failed to do. [para 29] [242-F-H; 243-A]

General Manager, Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas **(1994) 2 SCC 176;** *New India Assurance Co.Ltd. v. Gopali & ors.* **2012 (6) SCR 834 = AIR 2012 SC 3381;** *K.R. Madhusudhan v. Administrative Officer* **2011 (2) SCR 1061 = 2011 (4) SCC 689;** *Santosh Devi v. National Insurance Company Ltd.* **2012 (3) SCR 1178 = (2012) 6 SCC 421 – relied on.**

1.6. Having regard to the facts and evidence on record, the monthly income of the deceased i.e. Rs.8920/- is rounded off at Rs.9,000 x 2 = Rs.18,000/- per month. From this his personal living expenses, which should be 1/3rd, there being three dependents, has to be deducted. As the deceased was 28 ½ years old at the time of death, the multiplier of 17 is applied. Thus, the normal compensation would be Rs.24,48,000/- to which the Court adds the usual award for loss of consortium and loss of the estate by providing a conventional sum of Rs. 1,00,000/-; loss of love and affection for the daughter Rs.2,00,000/-, loss of love and affection for the widow and the mother at Rs.1,00,000/- each i.e. Rs.2,00,000/- and funeral expenses of Rs.25,000/-. Thus, in all a sum of Rs.29,73,000/- would be a fair, just and reasonable award

in the circumstances of the case. The rate of interest of 12% is allowed from the date of the petition filed before the Tribunal till payment is made. The award passed by the Tribunal and the judgment of the High Court stand modified accordingly. The amount shall be disbursed as directed in the judgment. [para 30-32 and 34] [243-B-E; 244-B]

Sarla Verma & Ors. v. Delhi Transport Corporation & Anr. **2009 (5) SCR 1098 = (2009) 6 SCC 121 – relied on.**

Case Law Reference:

2009 (5) SCR 1098	**relied on**	**para 9**
1998 (1) Suppl. SCR 684	**relied on**	**para 19**
(1994) 2 SCC 176	**relied on**	**para 24**
2012 (6) SCR 834	**relied on**	**para 25**
2011 (2) SCR 1061	**relied on**	**para 24**
2011 (4) SCC 689	**relied on**	**para 26**
2012 (3) SCR 1178	**relied on**	**para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5513 of 2012.

From the Judgment & Order dated 29.07.2011 of the High Court of Rajasthan, Jaipur Bench in S.B. Civil Misc. Appeal No. 1831 of 2003.

S.L. Gupta, R.N. Poddar. S.K. Ray for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. The present appeal is filed against the judgment of the Rajasthan High Court, Jaipur Bench in S.B. Civil Misc. Appeal No. 1831 and 2071 of 2003. By the impugned judgment dated 29th

July, 2011, the Rajasthan High Court upheld the compensation awarded by the Motor Accident Claims Tribunal, Jaipur (hereinafter referred to as the 'Tribunal') and observed as follows:

> *"**13.** In the situation, in the light of the above detail and analysis it appears that the learned tribunal's basis of calculating amount of compensation might be erroneous but in totality determined, assessed and awarded total amount of compensation Rs.14,93,700/- is proper and justified, and there is no adequate basis for increasing or reducing it. Therefore, judgment dated 21.06.2003 by Motor Accident Claims Tribunal, Jaipur is affirmed and appeals by the appellants and Insurance Company are dismissed."*

2. The factual matrix of the case is that on 14th September, 1996 one Mr. Sajjan Singh Shekhawat was sitting on his scooter which was parked on the side of the road and was waiting for one Junior Engineer, N. Hari Babu and another whom he had called for discussion. At that time, the non-applicant No.1, driver of the Jeep No.RJ-10C-0833 came driving from the Railway Station side with high speed, recklessly and negligently and hit the scooter. Sajjan Singh along with his scooter came under the Jeep and was dragged with the vehicle. Due to this accident fatal injuries was caused to him and on reaching the Hospital he expired. The scooter was also damaged completely.

3. Appellant no. 1, the wife of the deceased was aged about 24 years; appellant no. 2, the daughter was aged about 2 years and appellant no. 3, the mother was aged about 55 years at the time of death of the deceased. They jointly filed an application to the Tribunal alleging that negligent and rash driving by non-applicant no. 1 caused the death of Sajjan Singh and claimed compensation of Rs.80,40,160/-. It was brought to the notice of the Tribunal that non-applicant no. 1, the jeep driver was in the employment of the non-applicant no. 2 and

the non-applicant no. 3, the United India Insurance Co. Ltd. was the insurer of the vehicle.

4. The non-applicant No.3, Insurance Company on appearance filed written statement and alleged that the vehicle owner has violated the conditions of the Insurance Policy by not informing them about the accident. Further, according to the Insurance Company the vehicle owner should prove the fact that at the time of accident, the Jeep driver, non-applicant No.1 was holding a valid and effective driving licence.

5. Altogether five issues were framed by the Tribunal:

"1. *Whether due to the vehicle in question Jeep No. RJ 10C 0833 being driven by driver, non-applicant No.1 on 14.09.1996, in front of Assistant Engineer Office, PWD, within the jurisdiction of Police Station Churu, negligently and recklessness and caused accident and injuries due to which Sajjan Singh Shekhawat S/o Bhanwar Singh expired.*

2. *Whether above said vehicle driver at the time accident was in employment of non-applicant No.2 and was working for his benefit and profit.*

3. *Whether the non-applicant No.3, Insurance Company in view of the preliminary objections and preliminary statement in their reply, are relieved of their liability and if not what is the effect thereon.*

4. *Whether the applicant are entitled to get the claim amount or any other justified amount, and if yes which applicant is entitled to how much compensation and from which non-applicant.*

5. *Relief.".*

6. The first issue was answered by the Tribunal in an affirmative manner. It was held that the reckless and negligent driving of the driver of Jeep No.RJ 10C 0833 caused the accident which resulted in the death of Sajjan Singh Shekhawat. Issue Nos. 2 and 3 were also decided in favour of the applicants.

7. Issue Nos. 4 and 5 were related to the entitlement of appellants towards the claims and the relief to be granted. The Tribunal determined the compensation to be granted in favour of the appellants at Rs.14,93,700/- jointly.

8. The actual salary of the deceased was reduced by the Tribunal by deducting certain amounts towards Provident Fund, Pension and Insurance. Without any reason, the Tribunal also reduced the salary at Rs. 8,000/- per month though actual salary of the deceased as per Last Pay Certificate (for short 'LPC') was Rs. 8,920/-. Out of such reduced salary of Rs. 8,000/-, the Tribunal further deducted a sum of Rs.1,000/- per month towards Provident Fund, Pension and Insurance and thereby considered the actual salary of deceased to be Rs.7,000/- per month. An amount of Rs. 4500/- was added to it towards future income and, thereby the net income of deceased was assessed at 11,500/- per month (Rs.7,000/- + Rs.4,500/-).

9. Admittedly, Sajjan Singh died at the age of 28 years and 7 ½ months . He was in the services of the State Government posted as an Assistant Engineer. In the normal course, he would have continued in the services of the State Government upto February, 2026, until attaining 58 years or upto February, 2028, until attaining 60 years. As per the decision of this Court in the case of *Sarla Verma & Ors. v. Delhi Transport Corporation & Anr.* (2009) 6 SCC 121, Sajjan Singh having died at the age of 28 years 7 ½ months, the multiplier of 17 is applicable in calculating the compensation. But the Tribunal applied the lower multiplier of 15 on the ground that the wife would be getting family pension and would get job on the

compassionate ground and the daughter, aged about 2 years would get married in future.

10. Though the High Court noticed the aforesaid mistake it upheld the compensation. A notional deduction of income tax was made by the High Court from the salary of the deceased apart from the deduction of annual pension and came to the conclusion that the award passed by the Tribunal was just and proper as apparent from paragraph 11 of the judgment which reads as under:

> *"**11.** If calculate according to the rate of tax in the year 1996, we find that in the assessment year 1996-97 on Rs.40,000/- no tax was payable. On further income of Rs.20,000/-, 20% was payable, on further income of Rs.60,000/-, 30% of income was taxed. 1/3rd of the salary or Rs.15,000/- which ever was less was standard deduction. Accordingly deducting Rs.15,000/- as standard deduction taking into account the savings and on applying rebate of Rs.12,000/- under Section 80C of the Income Tax Act, the amount which remains, on that Rs.5812/- is payable as tax. Thus, deducting taxable amount out of income is Rs.1,01,228/-. The appellant Vimal Kanwar has herself stated that after death of her husband she receives Rs.1460/- per month as pension. The pension received on death of husband should also be deducted. Thus, on deducting annual pension of Rs.17,520/- the income is Rs.1,83,708/- per annum. According to Sarla Verma judgment increasing 50% for future prospects the amount becomes Rs.1,25,562/- per annum, out of this deducting 1/3rd for personal expenses of the deceased and applying multiplier of 17 according to age of the deceased this amount is Rs.14,23,036/-. The tribunal on account of being deprived of income the deceased has granted Rs.14,78,700/- to the deceased."*

11. The High Court noticed that the Tribunal wrongly applied the multiplier of 15 but refused to interfere with the

award on the following grounds:

> "**12.** *IT is correct, that despite the revise LPC being on record and showing salary to be Rs.8920/- the tribunal has accepted salary to be Rs.8000/- only out of this on account of GPF and State Insurance Rs.1000/- has been deducted and monthly income is assessed as Rs.7,000/-. Thereafter, taking into account increasing income in future etc. Rs.4500/- has been added and monthly income is assessed to be Rs.11500/- this assessment according to evidence on record and established law, does not appear to be proper. It is also worth mentioning that the tribunal for granting compensation to the appellants has taken unit method has basis but while doing so the amount that the deceased would have spent on his personal expenses which is deductable as per judgment of the Hon'ble Supreme Court in the Sarla Verma case and other cases has not been deducted, because of which the dependency is not properly assessed. Thereafter, the multiplier of 15 applied by the tribunal also does not seen to be in accordance to law. It is also worth mentioning that assessing amount in the said manner the tribunal had not deducted the payable income tax and the amount of pension received by Smt. Vimal Kanwar due to death of deceased. Similarly, while assessing dependency deduction for GPF and State Insurance, addition of Rs.4,500/- in monthly income and multiplier of 15 etc. is not in accordance with law. But it is worth mentioning that taking income of the deceased at the time of the accident is Rs.8,920/-, deducting payable income tax and amount of pension received by the wife of the deceased, the amount on account of loss of income to be given to the appellant comes to Rs.14,23,036/-. It appears that the tribunal on account of loss of income has granted Rs.14,78,700/- and for all the remaining heads a total of Rs.15,000/- only, which is definitely too less. All the three appellants should be*

granted proper compensation under heads of cooperation from the deceased, loss of love and affection and service, protection, last rites, lost of estate and on doing this the situation that emerges is that, the total amount of Rs.14,93,700/- awarded by tribunal as compensation is justified and therefore, any interference in the amount of awarded compensation is not proper desirable or necessary."

12. Two appeals, one preferred by the appellants-claimants and another by the Insurance Company, were dismissed by the High Court by common impugned judgment dated 29th July, 2011.

13. From the facts and circumstances of the case, the grievance of the appellants can be summarized as follows:-

(i) No amount can be deducted towards Provident Fund, Pension and Insurance amount from the actual salary of the victim for calculating compensation.

(ii) In the absence of any evidence, the Court suo motu cannot deduct any amount towards income tax from the actual salary of the victim.

(iii) On the facts of the present case, the Tribunal and the High Court should have doubled the salary by allowing 100% increase towards the future prospects and

(iv) The Tribunal and the High Court failed to ensure payment of just and fair compensation.

Reliance was also placed on decisions of this Court which will be discussed later in this judgment.

14. The respondents have appeared but no counter affidavit has been filed by them. Learned counsel for the respondents merely justified the award passed by the Tribunal and affirmed by the High Court.

15. The issues involved in this case are:

(i) Whether Provident Fund, Pension and Insurance receivable by the claimants come within the periphery of the Motor Vehicles Act to be termed as "Pecuniary Advantage" liable for deduction.

(ii) Whether the salary receivable by claimant on compassionate appointment comes within the periphery of the Motor Vehicles Act to be termed as "Pecuniary Advantage" liable for deduction.

(iii) Whether the income tax is liable to be deducted for determination of compensation under the Motor Vehicles Act and

(iv) Whether the compensation awarded to the appellants is just and proper.

16. For determination of the aforesaid issues, it is necessary to notice the relevant facts as mentioned hereunder.

17. Smt. Vimal Kanwar, PW-3 (appellant no.1 herein), who is the wife of the deceased has stated in her examination in chief that her husband obtained BE Degree from Jodhpur University in First Class and he was directly appointed to the post of Assistant Engineer in the year 1994. At the time of accident he was 28 years old and was getting salary of Rs.9,000/- per month. If he had been alive he would have got promoted upto the rank of Chief Engineer.

18. Ram Avtar Parikh, PW-2 is an employee of Public Works Department, where the deceased was working. He stated that Sajjan Singh was working on the post of Assistant Engineer and at that time his monthly salary was Rs.8,920/-. In support of his statement he produced the Last Pay Certificate and the Service Book (Exh. 1.) of the deceased.

19. The first issue is "whether Provident Fund, Pension and

Insurance receivable by claimants come within the periphery of the Motor Vehicles Act to be termed as "Pecuniary Advantage" liable for deduction."

The aforesaid issue fell for consideration before this Court in *Helen C. Rebello (Mrs) and Others vs. Maharashtra State Road Transport Corporation & Anr.* reported in (1999) 1 SCC 90. In the said case, this Court held that Provident Fund, Pension, Insurance and similarly any cash, bank balance, shares, fixed deposits, etc. are all a "pecuniary advantage" receivable by the heirs on account of one's death but all these have no correlation with the amount receivable under a statute occasioned only on account of accidental death. Such an amount will not come within the periphery of the Motor Vehicles Act to be termed as "pecuniary advantage" liable for deduction. The following was the observation and finding of this Court:

> "**35.** Broadly, we may examine the receipt of the provident fund which is a deferred payment out of the contribution made by an employee during the tenure of his service. Such employee or his heirs are entitled to receive this amount irrespective of the accidental death. This amount is secured, is certain to be received, while the amount under the Motor Vehicles Act is uncertain and is receivable only on the happening of the event, viz., accident, which may not take place at all. Similarly, family pension is also earned by an employee for the benefit of his family in the form of his contribution in the service in terms of the service conditions receivable by the heirs after his death. The heirs receive family pension even otherwise than the accidental death. No correlation between the two. Similarly, life insurance policy is received either by the insured or the heirs of the insured on account of the contract with the insurer, for which the insured contributes in the form of premium. It is receivable even by the insured if he lives till maturity after paying all the premiums. In the case of death, the insurer indemnifies to pay the sum to

> the heirs, again in terms of the contract for the premium paid. Again, this amount is receivable by the claimant not on account of any accidental death but otherwise on the insured's death. Death is only a step or contingency in terms of the contract, to receive the amount. Similarly any cash, bank balance, shares, fixed deposits, etc. though are all a pecuniary advantage receivable by the heirs on account of one's death but all these have no correlation with the amount receivable under a statute occasioned only on account of accidental death. How could such an amount come within the periphery of the Motor Vehicles Act to be termed as "pecuniary advantage" liable for deduction. When we seek the principle of loss and gain, it has to be on a similar and same plane having nexus, inter se, between them and not to which there is no semblance of any correlation. The insured (deceased) contributes his own money for which he receives the amount which has no correlation to the compensation computed as against the tortfeasor for his negligence on account of the accident. As aforesaid, the amount receivable as compensation under the Act is on account of the injury or death without making any contribution towards it, then how can the fruits of an amount received through contributions of the insured be deducted out of the amount receivable under the Motor Vehicles Act. The amount under this Act he receives without any contribution. As we have said, the compensation payable under the Motor Vehicles Act is statutory while the amount receivable under the life insurance policy is contractual."

20. The second issue is "whether the salary receivable by the claimant on compassionate appointment comes within the periphery of the Motor Vehicles Act to be termed as "Pecuniary Advantage" liable for deduction."

"Compassionate appointment" can be one of the conditions of service of an employee, if a scheme to that effect is framed by the employer. In case, the employee dies in

harness i.e. while in service leaving behind the dependents, one of the dependents may request for compassionate appointment to maintain the family of the deceased employee dies in harness. This cannot be stated to be an advantage receivable by the heirs on account of one's death and have no correlation with the amount receivable under a statute occasioned on account of accidental death. Compassionate appointment may have nexus with the death of an employee while in service but it is not necessary that it should have a correlation with the accidental death. An employee dies in harness even in normal course, due to illness and to maintain the family of the deceased one of the dependents may be entitled for compassionate appointment but that cannot be termed as "Pecuniary Advantage" that comes under the periphery of Motor Vehicles Act and any amount received on such appointment is not liable for deduction for determination of compensation under the Motor Vehicles Act.

21. The third issue is "whether the income tax is liable to be deducted for determination of compensation under the Motor Vehicles Act"

In the case of *Sarla Verma & Anr.* (Supra), this Court held "generally the actual income of the deceased less income tax should be the starting point for calculating the compensation."

This Court further observed that "where the annual income is in taxable range, the word "actual salary" should be read as "actual salary less tax". Therefore, it is clear that if the annual income comes within the taxable range income tax is required to be deducted for determination of the actual salary. But while deducting income-tax from salary, it is necessary to notice the nature of the income of the victim. If the victim is receiving income chargeable under the head "salaries" one should keep in mind that under Section 192 (1) of the Income-tax Act, 1961 any person responsible for paying any income chargeable under the head "salaries" shall at the time of payment, deduct

income-tax on estimated income of the employee from "salaries" for that financial year. Such deduction is commonly known as tax deducted at source ('TDS' for short). When the employer fails in default to deduct the TDS from employee salary, as it is his duty to deduct the TDS, then the penalty for non-deduction of TDS is prescribed under Section 201(1A) of the Income-tax Act, 1961.

Therefore, in case the income of the victim is only from "salary", the presumption would be that the employer under Section 192 (1) of the Income-tax Act, 1961 has deducted the tax at source from the employee's salary. In case if an objection is raised by any party, the objector is required to prove by producing evidence such as LPC to suggest that the employer failed to deduct the TDS from the salary of the employee.

However, there can be cases where the victim is not a salaried person i.e. his income is from sources other than salary, and the annual income falls within taxable range, in such cases, if any objection as to deduction of tax is made by a party then the claimant is required to prove that the victim has already paid income tax and no further tax has to be deducted from the income.

22. In the present case, none of the respondents brought to the notice of the Court that the income-tax payable by the deceased Sajjan Singh was not deducted at source by the employer- State Government. No such statement was made by Ram Avtar Parikh, PW-2 an employee of Public Works Department of the State Government who placed on record the Last Pay Certificate and the Service Book of the deceased. The Tribunal or the High Court on perusal of the Last Pay Certificate, have not noticed that the income-tax on the estimated income of the employee was not deducted from the salary of the employee during the said month or Financial Year. In absence of such evidence, it is presumed that the salary paid to the deceased Sajjan Singh as per Last Pay Certificate was paid in accordance with law i.e. by deducting the income-tax

on the estimated income of the deceased Sajjan Singh for that month or the Financial Year. The appellants have specifically stated that Assessment Year applicable in the instant case is 1997-98 and not 1996-97 as held by the High Court. They have also taken specific plea that for the Assessment Year 1997-98 the rate of tax on income more than 40,000/- and upto Rs.60,000/- was 15% and not 20% as held by the High Court. The aforesaid fact has not been disputed by the respondents.

23. In view of the finding as recorded above and the provisions of the Income-tax Act, 1961, as discussed, we hold that the High Court was wrong in deducting 20% from the salary of the deceased towards income-tax, for calculating the compensation. As per law, the presumption will be that employer-State Government at the time of payment of salary deducted income-tax on the estimated income of the deceased employee from the salary and in absence of any evidence, we hold that the salary as shown in the Last Pay Certificate at Rs.8,920/- should be accepted which if rounded off comes to Rs.9,000/- for calculating the compensation payable to the dependent(s).

24. The fourth issue is "whether the compensation awarded to the appellants is just and proper."

For determination of this issue, it is required to determine the percentage of increase in income to be made towards prospects of advancement in future career and revision of pay. In *General Manager, Kerala State Road Transport Corporation, Trivandrum v. Susamma Thomas* (1994) 2 SCC 176 this Court noticed the age and income of the deceased for determination of future prospects of advancement in life and career. The Court held as follows:

"**19.** In the present case the deceased was 39 years of age. His income was Rs 1032 per month. Of course, the future prospects of advancement in life and career should also be sounded in terms of money to augment the multiplicand. While the chance of the multiplier is determined by two factors, namely, the rate of interest appropriate to a stable economy and the age of the deceased or of the claimant whichever is higher, the ascertainment of the multiplicand is a more difficult exercise. Indeed, many factors have to be put into the scales to evaluate the contingencies of the future. All contingencies of the future need not necessarily be baneful. The deceased person in this case had a more or less stable job. It will not be inappropriate to take a reasonably liberal view of the prospects of the future and in estimating the gross income it will be unreasonable to estimate the loss of dependency on the present actual income of Rs 1032 per month. We think, having regard to the prospects of advancement in the future career, respecting which there is evidence on record, we will not be in error in making a higher estimate of monthly income at Rs 2000 as the gross income."

25. In *New India Assurance Co. Ltd. v. Gopali & Ors.* reported in AIR 2012 SC 3381 this Court noticed that the High Court determined the compensation by granting 100% increase in the income of the deceased. Taking into consideration the fact that in the normal course, the deceased would have served for 22 years and during that period his salary would have certainly doubled, this Court, upheld the judgment of the High Court.

26. In *K.R. Madhusudhan v. Administrative Officer* (2011) 4 SCC this Court observed that there can be departure from the rule of thumb and held as under:-

"**10.** The present case stands on different factual basis where there is clear and incontrovertible evidence on record that the deceased was entitled and in fact bound to get a raise in income in the future, a fact which was corroborated by evidence on record. Thus, we are of the view that the present case comes within the "exceptional

circumstances" and not within the purview of the rule of thumb laid down by Sarla Verma1 judgment. Hence, even though the deceased was above 50 years of age, he shall be entitled to increase in income due to future prospects."

27. Recently in *Santosh Devi v. National Insurance Company Ltd.* reported in (2012) 6 SCC 421 this Court found it difficult to find any rationale for the observation made in paragraph 24 of the judgment in Sarla Verma's case and observed as follows:

"**14.** We find it extremely difficult to fathom any rationale for the observation made in para 24 of the judgment in Sarla Verma case2 that where the deceased was self-employed or was on a fixed salary without provision for annual increment, etc., the courts will usually take only the actual income at the time of death and a departure from this rule should be made only in rare and exceptional cases involving special circumstances. In our view, it will be naïve to say that the wages or total emoluments/income of a person who is self-employed or who is employed on a fixed salary without provision for annual increment, etc., would remain the same throughout his life.

15. The rise in the cost of living affects everyone across the board. It does not make any distinction between rich and poor. As a matter of fact, the effect of rise in prices which directly impacts the cost of living is minimal on the rich and maximum on those who are self-employed or who get fixed income/emoluments. They are the worst affected people. Therefore, they put in extra efforts to generate additional income necessary for sustaining their families.

18. Therefore, we do not think that while making the observations in the last three lines of para 24 of Sarla Verma's judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is self-employed or who is paid fixed

wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30% increase in his total income over a period of time and if he/she becomes the victim of an accident then the same formula deserves to be applied for calculating the amount of compensation."

28. In the case of *New India Assurance Co. Ltd.* (Supra), this Court noticed that the High Court determined the compensation by granting 100% increase in the income of the deceased. Taking into consideration the fact that in the normal course, the deceased would have served for 22 years and during that period his salary would have certainly doubled, upheld the judgment of the High Court with following observation:

"**20.**We are also of the view that the High Court was justified in determining the amount of compensation by granting 100% increase in the income of the deceased. In the normal course, the deceased would have served for 22 years and during that period his salary would have certainly doubled because the employer was paying 20% of his salary as bonus per year."

29. Admittedly, the date of birth of deceased Sajjan Singh being 1st February, 1968; the submission that he would have continued in service upto 1st February, 2026, if 58 years is the age of retirement or 1st February, 2028, if 60 years is the age of retirement is accepted. He was only 28 years 7 ½ month old at the time of death. In normal course, he would have served the State Government minimum for about 30 years. Even if we do not take into consideration the future prospect of promotion which the deceased was otherwise entitled and the actual pay revisions taken effect from 1st January, 1996 and 1st January, 2006, it cannot be denied that the pay of the deceased would have doubled if he would continued in services of the State till the date of retirement. Hence, this was a fit case in which 100% increase in the future income of the deceased should have

been allowed by the Tribunal and the High Court, which they failed to do.

30. Having regard to the facts and evidence on record, we estimate the monthly income of the deceased Sajjan Singh at Rs.9,000 x 2 = Rs.18,000/- per month. From this his personal living expenses, which should be 1/3rd, there being three dependents has to be deducted. Thereby, the 'actual salary' will come to Rs.18,000 – Rs.6,000/- = Rs.12,000/- per month or Rs.12,000 x 12 =1,44,000/- per annum. As the deceased was 28 ½ years old at the time of death the multiplier of 17 is applied, which is appropriate to the age of the deceased. The normal compensation would then work out to be Rs.1,44,000/- x 17 =Rs.24,48,000/- to which we add the usual award for loss of consortium and loss of the estate by providing a conventional sum of Rs. 1,00,000/-; loss of love and affection for the daughter Rs.2,00,000/-, loss of love and affection for the widow and the mother at Rs.1,00,000/- each i.e. Rs.2,00,000/- and funeral expenses of Rs.25,000/-.

31. Thus, according to us, in all a sum of **Rs.29,73,000/-** would be a fair, just and reasonable award in the circumstances of this case.

32. The rate of interest of 12% is allowed from the date of the petition filed before the Tribunal till payment is made.

33. Respondent No.3 is directed to pay the total award with interest minus the amount (if already paid) within three months. The appellant No.2-daughter who was aged about 2 years at the time of accident of the deceased has already attained majority; money may be required for her education and marriage. In the circumstances, we direct respondent No.3 to deposit 25% of the due amount in the account of appellant no.1-the wife. Out of the rest 75% of the due amount, 35% of the amount be invested in a Nationalized Bank by fixed deposit for a period of one year in the name of the daughter-appellant No.2. Out of the rest 40% of the due amount, 20% each be

invested in a Nationalized Bank by fixed deposit for a period of one year in the name of the appellant Nos. 1 and 3, the wife and the mother respectively.

34. The award passed by the Tribunal dated 21st June, 2003 and the judgment dated 29th July, 2011 of the Rajasthan High Court stand modified to the extent above. The appeal is allowed with the aforesaid observation and direction. No separate order as to costs.

R.P. Appeal allowed.

JAYAMMA & ORS.
v
THE DEPUTY COMMISSIONER, HASSAN DIST., HASSAN AND ORS.
(Civil Appeal Nos. 4345-4429 of 2013)

MAY 6, 2013.

[G.S. SINGHVI AND KURIAN JOSEPH, JJ.]

Constitution of India, 1950:

Arts. 226 and 142 – Writ petition seeking direction to Land Acquisition Collector to complete acquisition proceedings – Held: Whether to acquire a particular property or not is for the Government to decide — Court cannot compel Land Acquisition Collector to pass awards in respect of land acquisition proceedings which had already lapsed – In the instant case, since owners have suffered damages, they are entitled to compensation – In order to do complete justice, it is ordered that each of the petitioners shall be paid a lump sum amount of Re.1 lakh towards damages for the hardships they have undergone on account of seepage resulting in dampness and cracks to their residential buildings – Land Acquisition Act, 1894 – ss. 4(1), 6, 48 and 36.

Art. 226 – Writ petition seeking direction to Land Acquisition Collector to act in terms of letter issued by Secretary to Government – Held: Is wholly misconceived — If a subordinate authority in Government does not act in terms of direction or instruction issued by superior authority, it is not for court to order compliance, if it is not otherwise governed by a statutory procedure.

Agricultural land of the appellants had been acquired for an irrigation canal. Their houses came within the seepage affected area of the canal. Proceedings to acquire the property were initiated, but were not completed. The High Court in writ petitions directed the Land Acquisition Collector to pass awards. In writ appeals the stand of the State authorities was that the hardship of the writ petitioners was being resolved and for that purpose acquisition was not necessary. The Division Bench of the High Court disposed of the appeals accordingly.

Dismissing the appeals, the Court

HELD: 1.1. Whether to acquire a particular property or not is for the Government to decide. It is not within the jurisdiction of the court to compel the Government to acquire any property, otherwise than as per the Land Acquisition Act. Court cannot compel the Land Acquisition Collector to pass awards in respect of the land acquisition proceedings which had already lapsed. In the instant case, the declaration u/s 6 had already lapsed by the time the writ petitioners approached the High Court. This crucial factual position has not been taken note of by the High Court. [para 8-9] [250-F-H; 251-F-G]

1.2. Besides, under the scheme of the Land Acquisition Act, the Government is at liberty to withdraw from the acquisition of any land of which possession has not been taken, at any stage prior to the passing of the award. In case the owner, in consequence of such withdrawal, has suffered any damages, he is entitled to compensation in that regard u/s 48 of the Act. In the case on hand, there is no question of any such Notification on withdrawal since the proceedings had already lapsed. Admittedly, no possession had been taken. Therefore, s. 36 does not apply. [para 8-9] [250-G-H; 251-A-F]

1.3. Even otherwise, the writ petition was wholly misconceived. The prayer is for direction to the Land Acquisition Collector to act in terms of letter issued to

him by the Secretary to the Government. If a subordinate authority in the Government does not act in terms of the direction or instruction issued by the superior authority, it is not for the Court to compel that subordinate authority to comply with such instruction or direction, if it is not otherwise governed by a statutory procedure. [para 10] [252-C-E]

1.4. However, the fact remains that the residential houses of the appellants are in the seepage affected area coming under the Canal. It has to be noted that the agricultural land of the petitioners had already been acquired and what remained was only the residential part. Petitioners had the grievance that on account of the seepage, there was dampness resulting also in cracks on the building. In view of the miseries suffered by these poor persons, it will not be just and fair to relegate them to workout their remedies before civil court for damages, at this distance of time. Therefore, in the interests of justice and in order to do complete justice, it is ordered that each of the appellants shall be paid a lump sum amount of Re.1 lakh. However, it is made clear that the respondents are at liberty, if so required or warranted in public interest, to acquire the said properties. [para 11] [252-F-H; 253-A-C]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4345-4429 of 2013.

From the Judgment and Order dated 09.12.2011 of the Division Bench of High Court of Karnataka at Bangalore in Writ Appeal No. 16390 of 2011 & Writ Appeal Nos. 16601-684 of 2011.

Shantha Kumar Mahale for the Appellants.

V.N. Raghupathy, Naveen R. Nath, Lalit Mohini Bhat, Darpan K.M., for the Respondents.

The Judgment of the Court was delivered by

KURIAN, J.1. Leave granted.

2. Whether the High Court, under Article 226 of the Constitution of India, can compel the State to complete the acquisition proceedings initiated under Section 4(1) of the Land Acquisition Act (for short 'the Act'), is one of the short questions arising for consideration in these cases. Another short question is – Whether writ can be issued compelling the Land Acquisition Collector/Officer to implement the instruction issued to him by the Government otherwise than under the procedure under the Act?

SHORT FACTS

3. The writ petitioners/appellants herein having their property in Mukundur village, Hassan Taluk in Karnataka State approached the High Court for following directions:

> "Issue Writ of Mandamus directing Deputy Commissioner and Land Acquisition Officer to pass the award as per the directions of the Principal Secretary, Revenue Department, Government of Karnataka and the decision of State Government dated 19.11.2009."

4. The letter dated 19.11.2009 from the Principal Secretary to Government, Revenue Department, addressed to the Deputy Commissioner, Hasan District, reads as under:

> "Sir,
>
> Sub:- Framing award in respect of Mukundooru, Gaddebindenahalli and Chikkagondanahalli villages which are acquired as seepage affected villages at Hassan District - Reg.
>
> Ref:- Your Letter No. BhuSwaSa-150:2008-09 dated 11.09.2009.
>
> With regard to the above subject, your attention is

attracted towards your letter. As it is already decided in the order No. RD 120 REH 1992 dated 15.04.1999 to shift these villages with regard to seepage, due to Hemavathi Irrigation canal project, it was already informed in the earlier letter dated 16.03.1999 that, there is no necessity to submit the same afresh before high level committee presided by the Regional Commissioner and further to frame award in respect of these villages.

In furtherance, it is clearly ordered by the Hon'ble Chief Minister to frame award with regard to Mukundooru village and disburse compensation amount, it is already informed in the letter dated 30.07.2009 bearing No. RD 113 BhuSwaHa 2009 to initiate action as per the said order. Wherefore, I am directed to inform you to initiate action as already directed by the Governor (*sic* Government)."

5. The petitioners' case was that on account of the seepage from the distributory canal of the reservoir, they had suffered serious damage to their houses and, on their representations, the Government had already taken a decision to acquire the property. The land acquisition officer, according to the petitioners, had on 15.04.1999, initiated proceedings under Section 4 of the Land Acquisition Act and, thereafter, Section 6 Declaration was issued. However, the proceedings got lapsed since no award was passed within the period prescribed under Section 11A of the Act.

6. It is seen as per Annexure-P2 – Notification dated 27.10.2007, that the Land Acquisition Collector had initiated proceedings under Section 4(1) of the Act for acquiring the lands of the petitioners and it was followed by Section 6 declaration dated 15.10.2008 published on 23.10.2008. Since, no serious steps were taken to complete the acquisition by passing the awards, it appears, the petitioners approached the High Court under Article 226 of the Constitution of India in 2011 for a direction to compel the land acquisition collector to act

as per the instruction issued by the Government and to complete the acquisition proceedings. The learned Single Judge, by order dated 07.03.2011 disposed of the writ petitions directing the land acquisition collector and the State to pass awards in the case of the petitioners and a few others within four weeks from the receipt of the Order. There was also a further direction that the petitioners should vacate the property if they were still in possession and that they should handover possession prior to the receipt of the compensation.

7. Aggrieved, land acquisition collector, State and others filed Writ Appeals leading to the impugned Judgment dated 09.12.2011. It was contended that the hardships on account of seepage could be resolved by constructing 'a drainage canal' and acquisition for that reason was not necessary and not in contemplation also. The Judgment of the Single Judge was set aside and the Appeals were disposed of with the direction to complete the canal project within three months. It was also clarified that the petitioners were free to initiate appropriate legal action in case there was still seepage. Thus, aggrieved, the writ petitioners filed the Special Leave Petitions.

8. Under Section 11A of the Land Acquisition Act, the Collector is to pass the award under Section 11 within a period of two years from the date of the publication of the declaration and, in case no award is made within that period, the entire proceedings for acquisition of the land would lapse. In the instant case, the declaration under Section 6 dated 15.10.2008 published on 23.10.2008 had already lapsed by the time the writ petitioners had approached the High Court. This crucial factual position, unfortunately, has not been taken note of by the High Court. The Court cannot compel the land acquisition collector to pass awards in respect of the land acquisition proceedings which had already lapsed. That apart, under the scheme of the Land Acquisition Act, the Government is at liberty to withdraw from the acquisition of any land of which possession has not been taken at any stage prior to the

passing of the award. In case the owner, in consequence of such withdrawal, has suffered any damages, he is entitled to compensation in that regard, under Section 48 of the Act, which reads as follows:

> "**48. Completion of acquisition not compulsory, but compensation to be awarded when not completed**.- (1) Except in the case provided for in section 36, the Government shall be at liberty to withdraw from the acquisition of any land of which possession has not been taken.
>
> (2) Whenever the Government withdraws from any such acquisition, the Collector shall determine the amount of compensation due for the damage suffered by the owner in consequence of the notice or of any proceedings thereunder, and shall pay such amount to the person interested, together with all costs reasonably incurred by him in the prosecution of the proceedings under this Act relating to the said land.
>
> (3) The provisions of Part III of this Act shall apply, so far as may be, to the determination of the compensation payable under this section."

9. In the case on hand, there is no question of any such Notification on withdrawal since the proceedings had already lapsed. Admittedly, no possession had been taken. Therefore, Section 36 does not apply. Whether to acquire a particular property or not is for the Government to decide. It is not within the jurisdiction of the Court to compel the Government to acquire any property, otherwise than as per the Land Acquisition Act. No doubt, the High Court exercises judicial review of administrative action or inaction. But having regard to the various facts and circumstances or factors, it is for the Government to consider at the permissible stage as to whether a particular property is to be acquired or whether an Award is to be passed pursuant to proceedings already initiated under

Section 4(1) of the Act. The Act is a complete code as far as such decisions are concerned and Government is well within their jurisdiction to act as per the scheme provided under the Act. Merely because proceedings under Section 4 of the Land Acquisition Act has been initiated, it is not required under law to acquire the land. It is not within the jurisdiction of the Court to compel the Government to pass an Award pursuant to Notification issued under Section 4(1) of the Act even when it is followed by the declaration.

10. Even otherwise, the writ petition was wholly misconceived. The prayer is for direction to the land acquisition collector to act in terms of letter issued to the land acquisition collector by the secretary to the Government. If a subordinate authority in the Government does not act in terms of the direction or instruction issued by the superior authority, it is not for the Court to compel that subordinate authority to comply with the instruction or direction issued by the superior authority, if it is not otherwise governed by a statutory procedure. Court is not the executing forum of the instruction issued by the Government to its subordinates. That jurisdiction lies elsewhere under the scheme of the Constitution. Therefore, on that count also, the writ petition was liable to be dismissed.

11. Yet with all these, the fact remains that the residential houses of the petitioners are in the seepage affected area in Mukundur village coming under 6th District Minor Hemavathi Left Bank Canal. Despite decades long efforts made by the petitioners, it appears even the cement concrete lining to the canal has been done only recently and that too in order to avoid the acquisition for which twice notifications had already been issued. It has to be noted that the agricultural land of the petitioners had already been acquired and what remained was only the residential part. Petitioners had the grievance that on account of the seepage, there was dampness resulting also in cracks on the building. In view of the miseries suffered by these poor persons, we are of the view that it will not be just and fair

to relegate them to workout their remedies before the civil court for damages, at this instance of time. Therefore, in the interests of justice and in order to do complete justice, we order that each of the petitioners shall be paid a lump sum amount of Re.1 lakh each towards damages for the hardships they have already undergone on account of seepage resulting in dampness and cracks to their residential buildings. The respondents 7/8 shall see that the amount as above is deposited in the bank account of the respective petitioner within three months. We, however, make it clear that this Judgment shall not stand in the way of the respondents, if so required or warranted in public interest, acquiring the disputed lands.

12. Subject to the above, the appeals are dismissed. No costs.

R.P. Appeals dismissed.

KRISHNAN & ORS.

v.

STATE OF HARYANA & ORS.

(Criminal Appeal No. 973 of 2008)

MAY 7, 2013

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

Narcotic Drugs and Psychotropic Substances Act, 1985:

s.32-A – Sentence awarded under the Act, not to be suspended, nor any remission/commutation to be ordered – Questions (i) Whether s.32-A is violative of Arts. 72 and 161 of Constitution of India; and (ii) whether s.32-A NDPS Act is violative of Arts 14 and 21 of the Constitution of India, inasmuch as the same abrogates the rights of a convict under the Act to be granted remission/commutation, etc. – Referred to larger Bench – Constitution of India, 1950 – Arts. 14, 21, 72 and 161.

The instant appeal arose out of the decision of the High Court upholding the validity of the letter dated 28.6.2006 issued by the Deputy Inspector General of Prisons, Haryana giving effect to provisions of s.32-A of the Narcotic Drugs and Psychotropic Substances Act, 1985. The High Court held that the appellants were not entitled to relief sought for by them.

Referring the matter to larger Bench, the Court

HELD: 1.1. The validity of s.32-A, so far as the competence of the court is concerned, was partly struck down. As to the question of imposing complete embargo on remission and commutation in the context of Arts 72 and 161 of the Constitution of India, the issue was not conclusively decided by the court. More so, in paragraph

15, the reference has been made that such exclusion cannot be held as unconstitutional on account of it not being absolute, in view of the constitutional powers conferred upon the executive. Articles 72 and 161 of the Constitution empower the President of India and the Governor of a State to grant pardons, reprieves, respites or remissions of punishments or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the Union and State exists. [para 5] [262-E-G]

Dadu @ Tulsidas v. State of Maharashtra, **(2000) 8 SCC 437 – referred to.**

1.2. In fact, Art. 72 and 161 of the Constitution provide for residuary sovereign power, thus, there could be nothing to debar the authorities concerned to exercise such power even after rejection of one clemency petition and even in the changed circumstances. [para 7] [263-E]

Krishta Goud and J. Bhoomaiah v. State of Andhra Pradesh & Ors., **(1976) 1 SCC 157;** *State of Haryana & Ors. v. Jagdish* **2010 (3) SCR 716 = AIR 2010 SC 1690;** *State of Uttar Pradesh v. Sanjay Kumar* **2012 (7) SCR 359 = (2012) 8 SCC 537– referred to**

1.3. This Court has always clarified that the punishment of a fixed term of imprisonment so awarded would he subject to any order passed in exercise of the clemency powers of the President of India or the Governor of the State, as the case may be. Pardons, reprieves and remissions under Art. 72 or Art. 161 are granted in exercise of prerogative power. There is no scope of Judicial review of such orders except on very limited grounds. The power to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly and reasonably. Administration of justice

cannot be perverted by executive or political pressure. Of course, adoption of uniform standards may not be possible while exercising the power of pardon. Thus, directions of the court specifying a minimum term of incarceration do not interfere with the sovereign power of the State. Such directions have been passed by courts considering the gravity of the offences directing that the accused would not be entitled to be considered for premature release under the guidelines issued for that purpose i.c. under Jail Manual, etc. or even u/s 433-A Cr.P.C. [para 9] [262-C-F]

Epuru Sudhakar & Anr. v. Government of A.P. & Ors., **2006 (7) Suppl. SCR 81 = (2006) 8 SCC 161;** *Union of India & Ors. v. Ind-Swift Laboratories Limited,* **2011 (2) SCR 1087 = (2011) 4 SCC 635;** *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay* **1962 Suppl. SCR 496 = AIR 1962 SC 853– referred to**

1.4. Keeping in view the decisions of this Court and the submissions made in the instant appeal, the appeal raises the following substantial questions of law:

(i) "Whether s.32A NDPS Act is violative of Arts. 72 and 161 of the Constitution of India"; and

(ii) "Whether s.32A NDPS Act is violative of Arts. 14 and 21 of the Constitution of India, inasmuch, as the same abrogates the rights of an accused/convict under the Act to be granted remission/ commutation, etc." [para 13] [267-D-F]

1.5. This Court is of the opinion that the matter requires to be considered by a larger bench, either by a three Judges Bench first or by a five Judges Bench directly. [para 16] [268-E]

Coir Board Ernakulam & Anr. v. Indira Devai P.S. & Ors., **(2000) 1 SCC 224,** *Bangalore Water Supply & Sewerage*

Board v. A Rajappa, **1978 (3) SCR 207 = AIR 1978 SC 548;** *Pradip Chandra Parija & Ors. v. Pramod Chandra Patnaik & Ors.,* **AIR 2002 SC 296;** *Union of India & Anr. v. Hansoli Devi*, **(2002) 7 SCC 273– referred to**

Case Law Reference:

(2000) 8 SCC 437	**referred to**	**para 4**
(1976) 1 SCC 157	**referred to**	**para 7**
2010 (3) SCR 716	**referred to**	**para 8**
2012 (7) SCR 359	**referred to**	**Para 9**
2006 (7) Suppl. SCR 81	**referred to**	**Para 10**
2011 (2) SCR 1087	**referred to**	**Para 11**
1962 Suppl. SCR 496	**referred to**	**para 12**
(2000) 1 SCC 224	**referred to**	**Para 13**
1978 (3) SCR 207	**referred to**	**Para 14**
(2002) 7 SCC 273	**referred to**	**para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 973 of 2008.

From the Judgment & Order dated 22.02.2007 of the High Court of Punjab and Haryana at Chandigarh in Criminal Misc. No. 63845-M of 2006.

Rekha Pandey for the Appellants.

Paras Kuhad (A.C.), ASG, Huzefa Ahmadi (A.C.), Pradhuman Gohil, Vikash Singh, Mrinmayee S., Rajiv Gaur 'Naseem', Kamal Mohan Gupta, Zahid Hussain for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order dated 22.2.2007 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Misc. No. 63845-M of 2006, wherein the High Court has upheld the validity of the letter dated 28.6.2006 issued by the Deputy Inspector General of Prisons, Haryana, giving effect to the provisions of Section 32-A of Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act').

2. The High Court referring to various provisions of the Punjab Jail Manual held that the appellants are not entitled to any remission in view of the provisions of Section 32-A of NDPS Act. Section 32-A of the NDPS is reproduced herein as under:

> **"32A. No suspension, remission or commutation in any sentence awarded under this Act.-**Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law for the time being in force but subject to the provisions of Section 33, no sentence awarded under this Act (other than Section 27) shall be suspended or remitted or commuted."

3. The High Court has held that legal provisions concerning remission are governed by the statutory provisions as laid down in Punjab Jail Manual rather than under Article 161 of the Constitution of India. The provisions of Section 32-A of NDPS Act would have overriding effect, notwithstanding anything contained in the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.'), or any other law for the time being in force. Thus, the appellants were not entitled for the relief sought by them.

4. This Court while examining the issue, has considered the three Judge Bench judgment of this Court in *Dadu @Tulsidas v. State of Maharashtra,* (2000) 8 SCC 437, wherein the validity of the said provisions was challenged. Relevant part of the judgment reads as under:

"1.......The section is alleged to be arbitrary, discriminatory and violative of Articles 14 and 21 of the Constitution of India which creates unreasonable distinction between the prisoners convicted under the Act and the prisoners convicted for the offences punishable under various other statutes. It is submitted that the legislature is not competent to take away, by statutory prohibition, the judicial function of the court in the matter of deciding as to whether after the conviction under the Act the sentence can be suspended or not. The section is further assailed on the ground that it has negated the statutory provisions of Sections 389, 432 and 433 of the Code of Criminal Procedure........ It is further contended that the legislature ***cannot make relevant considerations irrelevant or deprive the courts of their legitimate jurisdiction to exercise the discretion. It is argued that taking away the judicial power*** *of the appellate court to suspend the sentence despite the appeal meriting admission, renders the substantive right of appeal illusory and ineffective.*

xxx xxx xxx xxx xxx

15. *The restriction imposed under the offending section, upon the executive are claimed to be for a reasonable purpose and object sought to be achieved by the Act. Such exclusion cannot be held unconstitutional, on account of its not being absolute in view of the constitutional powers conferred upon the executive. Articles 72 and 161 of the Constitution empowers the President and the Governor of a State to grant pardons, reprieves, respites or remissions of punishments or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the Union and State exists.....The distinction of the convicts under the*

Act and under other statutes, insofar as it relates to the exercise of executive powers under Sections 432 and 433 of the Code is concerned, cannot be termed to be either arbitrary or discriminatory being violative of Article 14 of the Constitution. Such deprivation of the executive can also not be stretched to hold that the right to life of a person has been taken away except, according to the procedure established by law. It is not contended on behalf of the petitioners that the procedure prescribed under the Act for holding the trial is not reasonable, fair and just. ***The offending section, insofar as it relates to the executive in the matter of suspension, remission and commutation of sentence, after conviction, does not, in any way, encroach upon the personal liberty of the convict tried fairly and sentenced under the Act.*** *The procedure prescribed for holding the trial under the Act cannot be termed to be arbitrary, whimsical or fanciful. There is, therefore, no vice of unconstitutionality in the section insofar as it takes away the powers of the executive conferred upon it under Sections 432 and 433 of the Code, to suspend, remit or commute the sentence of a convict under the Act.*

*16****. Learned counsel appearing for the parties were more concerned with the adverse effect of the section on the powers of the judiciary. Impliedly conceding that the section was valid so far as it pertained to the appropriate Government, it was argued that the legislature is not competent to take away the judicial powers of the court by statutory prohibition as is shown to have been done vide the impugned section.*** *Awarding sentence, upon conviction, is concededly a judicial function to be discharged by the courts of law established in the country. It is always a matter of judicial discretion, however, subject to any mandatory minimum sentence prescribed by the law. The award of sentence by a criminal court wherever made subject to the right of*

appeal cannot be interfered or intermeddled with in a way which amounts to not only interference but actually taking away the power of judicial review. Awarding the sentence and consideration of its legality or adequacy in appeal is essentially a judicial function embracing within its ambit the power to suspend the sentence under the peculiar circumstances of each case, pending the disposal of the appeal.

xxx xxx xxx xxx xxx

25. *Judged from any angle, the section insofar as it completely debars the appellate courts from the power to suspend the sentence awarded* ***to a convict under the Act cannot stand the test of constitutionality. Thus Section 32-A insofar as it ousts the jurisdiction of the court to suspend the sentence awarded to a convict under the Act is unconstitutional……..***

26. Despite holding that Section 32-A is unconstitutional to the extent it affects the functioning of the criminal courts in the country, we are not declaring the whole of the section as unconstitutional in view of our finding that the section, insofar as it takes away the right of the executive to suspend, remit and commute the sentence, is valid and intra vires of the Constitution. The declaration of Section 32-A to be unconstitutional, insofar as it affects the functioning of the courts in the country, would not render the whole of the section invalid, the restriction imposed by the offending section being distinct and severable.

27. Holding Section 32-A as void insofar as it takes away the right of the courts to suspend the sentence awarded to a convict under the Act, would neither entitle such convicts to ask for suspension of the sentence as a matter of right in all cases nor would it absolve the courts of their legal obligations

to exercise the power of suspension of sentence within the parameters prescribed under Section 37 of the Act.

xxx xxx xxx xxx

29. Under the circumstances the writ petitions are disposed of by holding that:

(1) Section 32-A does not in any way affect the powers of the authorities to grant parole.

(2) It is unconstitutional to the extent it takes away the right of the court to suspend the sentence of a convict under the Act.

(3) Nevertheless, a sentence awarded under the Act can be suspended by the appellate court only and strictly subject to the conditions spelt out in Section 37 of the Act, as dealt with in this judgment. (Emphasis added)

5. Thus, it is evident from the aforesaid judgment that the validity of the aforementioned provisions, so far as the competence of the court is concerned, was partly struck down. As to the question of imposing complete embargo on remission and commutation in the context of Articles 72 and 161 of the Constitution of India, the issue was not conclusively decided by the court. More so, in paragraph 15, the reference has been made that such exclusion cannot be held as unconstitutional on account of it not being absolute, in view of the constitutional powers conferred upon the executives. Articles 72 and 161 of the Constitution empower the President of India and the Governor of a State to grant pardons, reprieves, respites or remissions of punishments or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the Union and State exists.

6. A two Judge Bench of this Court heard the matter on

8.1.1993 and *prima facie* had been of the view that on a plain reading of Section 32-A of NDPS Act, it appeared to be quite draconian and to understand the matter further, the Court requested Shri Huzefa Ahmadi, learned senior counsel and Shri Paras Kuhad, learned Additional Solicitor General, to assist the Court as Amicus Curiae, as to whether Section 32-A of NDPS Act, would apply to the clemency powers of the President of India and the Governor of the State and what could be its applicability with respect to the statutory rules which have been framed by the State, in exercise of its executive powers under the Constitution. In view thereof, both Shri Huzefa Ahmadi, learned senior counsel and Shri Paras Kuhad, learned ASG made their submissions pointing out that the powers of clemency under Articles 72 and 161 of the Constitution, cannot be controlled by any statute and, therefore, it requires a clarification that the provisions of Section 32-A of NDPS Act cannot be a fetter to the said powers of clemency by any means whatsoever.

7. In fact, Articles 72 and 161 of the Constitution provide for residuary sovereign power, thus, there could be nothing to debar the concerned authorities to exercise such power even after rejection of one clemency petition and even in the changed circumstances. (Vide: *Krishta Goud and J. Bhoomaiah v. State of Andhra Pradesh & Ors.,* (1976) 1 SCC 157).

8. In *State of Haryana & Ors. v. Jagdish,* AIR 2010 SC 1690, this Court has considered as under:

"33. Articles 72 and 161 of the Constitution provide for a residuary sovereign power, thus, there can be nothing to debar the concerned authority to exercise such power, even after rejection of one clemency petition, if the changed circumstances so warrant.

xx xx xx xx

35. In view of the above, it is evident that the clemency

power of the Executive is absolute and remains unfettered for the reason that the provisions contained under Article 72 or 161 of the Constitution cannot be restricted by the provisions of Sections 432, 433 and 433-A Cr.PC. though the Authority has to meet the requirements referred to hereinabove while exercising the clemency power.

To say that clemency power under Articles 72/161 of the Constitution cannot be exercised by the President or the Governor, as the case may be, before a convict completes the incarceration period provided in the short-sentencing policy, even in an exceptional case, would be mutually inconsistent with the theory that clemency power is unfettered.

The Constitution Bench of this Court in Maru Ram, (AIR 1980 SC 2147) (supra) clarified that not only the provisions of Section 433-A Cr. P.C., would apply prospectively but any scheme for short sentencing framed by the State would also apply prospectively. Such a view is in conformity with the provisions of Articles 20(1) and 21 of the Constitution. The expectancy of period of incarceration is determined soon after the conviction on the basis of the applicable laws and the established practices of the State. When a short sentencing scheme is referable to Article 161 of the Constitution, it cannot be held that the said scheme cannot be pressed in service. Even if, a life convict does not satisfy the requirement of remission rules/short sentencing schemes, there can be no prohibition for the President or the Governor of the State, as the case may be, to exercise the power of clemency under the provisions of Articles 72 and 161 of the Constitution. Right of the convict is limited to the extent that his case be considered in accordance with the relevant rules etc., he cannot claim premature release as a matter of right."

9. In *State of Uttar Pradesh v. Sanjay Kumar*, (2012) 8 SCC 537, this Court held that commutation of death sentence to a specified term of imprisonment without entitlement to premature release is the via media found by courts, where considering the facts and circumstances of a particular case, the court has come to the conclusion that it was not "the rarest of rare cases", warranting death penalty, but a sentence of 14 years or 20 years, as referred to in the guideline laid down by the States, would be totally inadequate. Life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years, rather it always means the whole natural life. This Court has always clarified that the punishment of a fixed term of imprisonment so awarded would he subject to any order passed in exercise of the clemency powers of the President of India or the Governor of the State, as the case may be. Pardons, reprieves and remissions under Article 72 or Article 161 of the Constitution are granted in exercise of prerogative power. There is no scope of Judicial review of such orders except on very limited grounds. The power to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly and reasonably. Administration of justice cannot he perverted by executive or political pressure. Of course, adoption of uniform standards may not be possible while exercising the power of pardon. Thus, directions of the court specifying a minimum term of incarceration do not interfere with the sovereign power of the State. Such directions have been passed by courts considering the gravity of the offences directing that the accused would not be entitled to be considered for premature release under the guidelines issued for that purpose i.c. under Jail Manual, etc. or even under Section 433-A Cr.P.C.

10. In *Epuru Sudhakar & Anr. v. Government of A.P. & Ors.,* (2006) 8 SCC 161, this Court held as under:

> *"34. The position, therefore, is undeniable that judicial review of the order of the President or the*

> *Governor under Article 72 or Article 161, as the case may be, is available and their orders can be impugned on the following grounds:*
>
> *(a) that the order has been passed without application of mind;*
>
> *(b) that the order is mala fide;*
>
> *(c) that the order has been passed on extraneous or wholly irrelevant considerations;*
>
> *(d) that relevant materials have been kept out of consideration;*
>
> *(e) that the order suffers from arbitrariness."*

11. It has further been submitted by the said learned senior counsel that reading down of provisions of Section 32-A of NDPS Act will not serve the purpose and he has placed a very heavy reliance on the judgment of this Court in *Union of India & Ors. v. Ind-Swift Laboratories Limited,* (2011) 4 SCC 635, wherein the Court observed:

> ***"19.** This Court has repeatedly laid down that in the garb of reading down a provision it is not open to read words and expressions not found in the provision/statute and thus venture into a kind of judicial legislation. It is also held by this Court that the rule of reading down is to be used for the limited purpose of making a particular provision workable and to bring it in harmony with other provisions of the statute."*

12. In *Sardar Syedna Taher Saifuddin Saheb v. State of Bombay,* AIR 1962 SC 853, this Court while dealing with the people of Bohra community, while interpreting the provisions of Article 25 and 26 of the Constitution, and dealing with the particular Act held as under:

> *"It is not possible in the definition of excommunication*

which the Act carries, to read down the Act so as to confine excommunication as a punishment of offences which are unrelated to the practice of the religion which do not touch and concern the very existence of the faith of the denomination as such. Such an exclusion cannot be achieved except by rewriting the section."

Thus, it is submitted that as far as the plain language of Section 32-A of NDPS Act is concerned, it is absolute in its terms and gives no leeway for remission or commutation of any sentence or any ground whatsoever, thus contrary to the mandate of Articles 72 and 161. There is no scope for reading down the section, as the language is absolute in its terms and the same cannot be read down without doing violence to the language.

13. From the above, it is evident that the petition raises the following substantial questions of law:

I. Whether Section 32A NDPS Act is violative of Articles 72 and 161 of the Constitution of India.

II. Whether Section 32A NDPS Act is violative of Articles 14 and 21 of the Constitution of India, inasmuch, as the same abrogates the rights of an accused/convict under the Act to be granted remission/commutation, etc.

14. In *Coir Board Ernakulam & Anr. v. Indira Devai P.S. & Ors.,* (2000) 1 SCC 224, this Court while dealing with a similar reference by a Bench of two Judges doubting the correctness of seven Judges' Bench judgment in *Bangalore Water Supply & Sewerage Board v. A Rajappa,* AIR 1978 SC 548, held as under:-

"*The judgment delivered by the seven learned Judges of the Court in Bangalore Water Supply case, does not, in our opinion, require any reconsideration on a reference being made by a two Judge Bench of the Court, which is bound by the judgment of the larger Bench. The appeals shall, therefore, be listed before the appropriate Bench for further proceedings.*"

15. The Constitution Bench of this Court in *Pradip Chandra Parija & Ors. v. Pramod Chandra Patnaik & Ors.,* AIR 2002 SC 296, while dealing with a similar situation held that judgment of a co-ordinate Bench or larger Bench is binding. However, if a Bench of two Judges concludes that an earlier judgment of three Judges is so very incorrect that in no circumstances it can be followed, the proper course for it to adopt is to refer the matter to a Bench of three Judges setting out, the reasons why it could not agree with the earlier judgment. If, then, the Bench of three Judges also comes to the conclusion that the earlier judgment of a Bench of three Judges is incorrect, reference to a Bench of five Judges is justified. (See also: *Union of India & Anr. v. Hansoli Devi,* (2002) 7 SCC 273)

16. In view of the above, we are of the opinion that the matter requires to be considered by a larger bench, either by a three Judges Bench first or by a five Judges Bench directly. The papers may be placed before Hon'ble the Chief Justice of India for appropriate orders.

R.P. Matter referred to Larger Bench.

BANK OF MAHARASHTRA
v.
PANDURANG KESHAV GORWARDKAR & ORS.
(Civil Appeal No. 7045 of 2005)

MAY 7, 2013

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

RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993:

ss. 17 and 19 (19) of 1993 Act r/w ss.529(1)(c), proviso and 529-A of Companies Act – Recovery of debts of company by bank/financial institution – Claim of workmen – Held: Where a company is in liquidation, a statutory charge is created in favour of workmen in respect of their dues over security of every secured creditor and this charge is pari passu with that of secured creditor – Such statutory charge is to the extent of workmen's portion in relation to security held by secured creditor of debtor company – This position is equally applicable where assets of company have been sold in execution of recovery certificate obtained by bank or financial institution against debtor company when it was not in liquidation but before the proceeds realised from such sale could be fully and finally disbursed, the company had gone into liquidation – Relevant date is the date of winding up order and not the date of sale – Where the sale of security has been effected in execution of recovery certificate issued by DRT, distribution of undisbursed proceeds has to be made by DRT alone in accordance with s. 529A of Companies Act and by no other forum or authority — Where debtor company is not in liquidation, s.19(19) does not come into operation at all – Companies Act, 1956 – ss. 529(1)(c) proviso, and 529-A – Interpretation of Statutes – Legislation by reference – Legislation by incorporation.

s. 19(19) of 1993 Act read with ss. 529-A and 529(1)(c), proviso of Companies Act – Company in liquidation – Debt of bank/financial institution and claim of workmen – Held: Once the company is in winding up, the only competent authority to determine workmen's dues and quantify workmen's portion is the liquidator, who has to act under supervision of company court– s.19(19) of the 1993 Act does not clothe DRT with jurisdiction to determine workmen's claims against debtor company — Certain incidental and ancillary powers given to DRT do not encompass power to adjudicate upon or decide dues of workmen of debtor company.

In the case filed by the appellant-Bank for recovery of its dues against a company, the Debts Recovery Tribunal gave its judgment on 19.7.2001 and issued the recovery certificate on 21.8.2001. Consequently, the Recovery Officer, DRT, on 22.1.2004, auctioned the movable properties of the Company. By order dated 8.10.2004, the Company was ordered to be wound up and Official Liquidator was appointed. The workmen of the Company filed a writ petition before the High Court seeking a direction to the Recovery Officer to recover the amount of Rs.3 crores from the appellant Bank realized by it from sale of movables of the Company and for a direction to the Recovery Officer to adjudicate the claims/dues of the workmen/employees and release the amount due to them in priority over all the claims. The High Court held that the jurisdiction to determine the payment and its priorities was totally vested with the DRT under the Act and the workmen should approach the DRT for determination of their claim and consequential payment. The High Court also issued guidelines to DRT for determination of priorities.

The Bank filed C.A.No.7045 of 2005. C.A. No.7046 of 2005 was filed by Indian Banks Association. The Division Bench before which the appeals were listed, felt that the

question: "whether the claims of the workmen who claimed to be entitled to payment *pari passu* have to be considered by the official liquidator or whether their claims have to be adjudicated upon by the Debts Recovery Tribunal" was likely to arise in a large number of cases and, therefore, referred the matter for consideration by a larger Bench.

Allowing the appeals, the Court

HELD: 1.1. The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 has not only conferred exclusive jurisdiction upon DRT for determination of the matters specified in s.17 but has also ousted jurisdiction of all other courts and other authorities in entertaining and deciding such matters. The powers of the Supreme Court and the High Court under Arts. 226 and 227, however, remain unaffected [s.18]. The applications for recovery of debts due to banks or financial institutions can be decided by DRT alone after coming into force of the 1993 Act and no other forum. The jurisdiction of DRT in regard to matters specified in s.17 is exclusive. [para 45] [296-B-D]

1.2. Section 19 provides a comprehensive procedure before the DRT for making an application where a bank or a financial institution has to recover any debt from any person. Section 34 gives the 1993 Act overriding effect. However, the effect of the winding up order is provided in s.447 of the Companies Act, 1956. Accordingly, an order for winding up a company operates in favour of all the creditors and all the contributories of the company as if it has been made on the joint petition, of a creditor and or a contributory. [para 32, 35 and 39] [290-C-D; 292-A; 293-B]

1.3. A cumulative reading of ss. 529A and 529(1)(c), proviso of the Companies Act leads to an irresistible conclusion that where a company is in liquidation, a statutory charge is created in favour of workmen in respect of their dues over the security of every secured creditor and this charge is *pari passu* with that of the secured creditor. Such statutory charge is to the extent of workmen's portion in relation to the security held by the secured creditor of the company. This position is equally applicable where the assets of the company have been sold in execution of the recovery certificate obtained by the bank or financial institution against the debtor company when it was not in liquidation but before the proceeds realised from such sale could be fully and finally disbursed, the company had gone into liquidation. Thus, pending final disbursement of the proceeds realised from the sale of security in execution of the recovery certificate issued by the DRT, if debtor company becomes company in winding up, ss. 529A and 529(1)(c) proviso come into operation immediately and statutory charge is created in favour of workmen in respect of their dues over such proceeds.[para 63and 72(ii) and (iii)] [309-E-H; 314-E-H; 315-A-C]

Rajasthan State Financial Corporation and Another v. Official Liquidator and Another **2005 (3) Suppl. SCR 1073 = 2005 (8) SCC 190;** *Jitendra Nath Singh v. Official Liquidator & Ors.* **2013 (1) SCC 462;** *Andhra Bank v. Official Liquidator and Another* **2005 (2) SCR 776 = 2005 (5) SCC 75;** *International Coach Builders Ltd. v. Karnataka State Financial Corporation* **2003 (2) SCR 631 = 2003 (10) SCC 482; and** *A.P. State Financial Corporation v. Official Liquidator* **2000 (2) Suppl. SCR 288 = 2000 (7) SCC 291 – relied on.**

Maharashtra State Financial Corporation v. Ballarpur Industries Ltd. **AIR 1993 Bom 392;** *ICICI Bank Ltd. v. SIDCO Leathers Ltd and Ors.* **2006 (1) Suppl. SCR 528 = 2006 (10) SCC 452;** *Central Bank of India v. State of Kerala and Ors* **2009 (3) SCR 735 = 2009 (4) SCC 94 – referred to.**

1.4. Having regard to the scheme of law, the relevant date for arriving at the ratio at which the sale proceeds are to be distributed amongst workmen and secured creditors of the company is the date of the winding up order and not the date of sale. [para 64 and 72(iv)] [310-A-B; 315-C-D]

1.5. Where the sale of security has been effected in execution of recovery certificate issued by DRT under the 1993 Act, the distribution of undisbursed proceeds has to be made by the DRT alone in accordance with s. 529A of the Companies Act and by no other forum or authority. It is so because s.19(19) of the 1993 Act provides that DRT may order distribution of the sale proceeds amongst the secured creditors in accordance with s.529A where a recovery certificate is issued against the company registered under the Companies Act. The workmen of the company in winding up acquire the standing of secured creditors on and from the date of the winding up order (or where provisional liquidator has been appointed, from the date of such appointment) and they become entitled to distribution of sale proceeds in the ratio as explained in the illustration appended to s.529(3)(c) of the Companies Act.[para 65 and 72(ix) and (x)] [310-C-F; 316-H; 317-A-C]

2.1. Section 19(19) of the 1993 Act does not clothe DRT with jurisdiction to determine the workmen's claims against the debtor company. In the first place, 1993 Act has provided for special machinery for speedy recovery of dues of banks and financial institutions in specific matters. The 1993 Act also provides for the modes of recovery of the amount so adjudicated by the DRTs. The 1993 Act has not brought within its sweep, the adjudication of claims of persons other than banks and financial institutions. DRT has not been given powers to adjudicate the dues of workmen of the debtor company. The adjudication of workmen's claims against the debtor

company has to be made by the liquidator. It is a substantive matter and DRT has neither competence nor machinery for that. Once the company is in winding up, the only competent authority to determine the workmen's dues and quantify workmen's portion is the liquidator who obviously has to act under the supervision of the company court. The liquidator has the responsibility and competence to determine the workmen's dues where the debtor company is in liquidation. Certain incidental and ancillary powers given to DRT do not encompass power to adjudicate upon or decide dues of the workmen of the debtor company. [paras 65, 66, 67 and 72(xi)] [310-F-H; 311-A, B-C, G; 317-D-E]

Allahabad Bank v. Canara Bank & Anr. **2000 (2) SCR 1102 = 2000 (4) SCC 406 – explained.**

2.2. Secondly, s.19(19) of the 1993 Act is a provision of distribution mechanism and not an independent adjudicatory provision. This provision follows adjudication of claim made by a bank or financial institution. It comes into play where a certificate of recovery is issued against a company which is in winding up. Where the debtor company is not in liquidation, s.19(19) does not come into operation at all. Following Tiwari Committee Report and Narasimham Committee Report, the present s.19(19) was incorporated in 1993 Act for protection of *pari passu* charge of secured creditors, including workmen's dues at the time of distribution of the sale proceeds of such company. The participation of workmen along with secured creditors u/s. 19(19) is, to a limited extent, in the distribution of the sale proceeds by the DRT and not for determination of their claims against the debtor company by the DRT. [para 67] [311-D-G]

2.3. Thirdly, the expression, 'the Tribunal may order the sale proceeds of such company to be distributed among its secured creditors in accordance with the

provisions of s.529A of the Companies Act' occurring in s. 19(19) does not empower DRT to itself examine, determine and decide upon workmen's claim u/s 529A. The expression means that where the debtor company is in winding up, the sale proceeds of such company realized under the 1993 Act are to be distributed among its secured creditors by following s. 529A of the Companies Act. Mention of s. 529A in s.19(19) is neither a legislation by reference nor a legislation by incorporation. What it requires is that DRT must follow the mandate of s. 529A by making distribution in equal proportion to the secured creditors and workmen of the debtor company in winding up. [para 68] [311-H; 312-A-C]

2.4. Section 19(19) covers a situation only where a debtor company is in winding up or where a provisional liquidator has been appointed in respect of the debtor company and in no other situation. If the debtor company is not in liquidation nor any provisional liquidator has been appointed and merely winding up proceedings are pending, there is no question of distribution of sale proceeds among secured creditors in the manner prescribed in s. 19(19) of the 1993 Act. [para 69 and 72(i) and (xii)] [312-D-E; 314-D-E; 317-F]

2.5. Where the winding up petition against the debtor company is pending but no order of winding up has been passed nor any provisional liquidator has been appointed in respect of such company at the time of order of sale by DRT and the properties of the debtor company have been sold in execution of the recovery certificate and proceeds of sale realized and full disbursement of the sale proceeds has been made to the bank concerned or financial institution, the subsequent event of the debtor company going into liquidation is no ground for reopening disbursement by the DRT. [para 71 and 72(vi)] [313-C-E; 315-E-G]

2.6. However, before full and final disbursement of sale proceeds, if the debtor company has gone into liquidation and a liquidator is appointed, disbursement of undisbursed proceeds by DRT can only be done after notice to the liquidator and after hearing him. In that situation if there is claim of workmen's dues, the DRT has two options available with it. One, the bank or financial institution which made an application before DRT for recovery of debt from the debtor company may be paid the undisbursed amount against due debt as per the recovery certificate after securing an indemnity bond of restitution of the amount to the extent of workmen's dues as may be finally determined by the liquidator of the debtor company and payable to workmen in the proportion set out in the illustration appended to s. 529(3)(c) of the Companies Act. The other, DRT may set apart tentatively portion of the undisbursed amount towards workmen's dues in the ratio as per the illustration following s.529(3)(c) and disburse the balance amount to the applicant bank or financial institution subject to an undertaking by such bank or financial institution to restitute the amount to the extent workmen's dues as may be finally determined by the liquidator, falls short of the amount which may be distributable to the workmen as per the illustration. The amount so set apart may be disbursed to the liquidator towards workmen's dues on ad hoc basis subject to adjustment on final determination of the workmen's dues by the liquidator. The first option must be exercised by DRT only in a situation where no application for distribution towards workmen's dues against the debtor company has been made by the liquidator or the workmen before the DRT. [para 71 and 72(vii and viii)] [313-E-H; 314-A-C; 315-H; 316-A-G]

3.1. In the instant case, on 08.10.2004, the Company Judge ordered the Company to be wound up and the

official liquidator was appointed as liquidator of the Company with the usual powers under the Companies Act. There is thus no doubt that on and from 08.10.2004, the Company is in liquidation and the official liquidator stands appointed. [para 28] [289-E]

3.2. The claims of the workmen who claim to be entitled to payment *pari passu* have to be considered and adjudicated by the liquidator of the debtor company and not by the DRT. [para 73] [317-H; 318-A]

3.3. The impugned judgment is set aside. The Debt Recovery Tribunal and the official liquidator of the Company shall proceed further concerning workmen's dues as indicated in the judgment. [para 74] [318-B]

Radheshyam Ajitsaria and Another v. Bengal Chatkal Mazdoor Union & Ors. **2006 (2) Suppl. SCR 918 = 2006 (11) SCC 771; and** *Nahar Industrial Enterprises Ltd. v. Hong Kong And Shanghai Banking Corporation* **2009 (12) SCR 54 = 2009 (8) SCC 646 – cited.**

Case Law Reference:

2000 (2) SCR 1102	**relied on**	**para 17**
2013 (1) SCC 462	**explained**	**para 17**
2005 (2) SCR 776	**relied on**	**para 19**
2006 (2) Suppl. SCR 918	**cited**	**para 19**
2005 (3) Suppl. SCR 1073	**relied on**	**para 19**
2003 (2) SCR 631	**relied on**	**para 21**
2009 (12) SCR 54	**cited**	**para 22**
2000 (2) Suppl. SCR 288	**relied on**	**para 52**
AIR 1993 Bom 392	**referred to**	**para 53**
2006 (1) Suppl. SCR 528	**referred to**	**para 57**
2009 (3) SCR 735	**referred to**	**para 58**

CIVL APPEALLATE JURISDICTION : Civil Appeal No. 7045 of 2005.

From the Judgment & Order dated 11.08.2004 of the High Court of Judicature at Bombay in Writ Petition No. 5293 of 2004.

WITH

C.A. No. 7046 of 2005.

Bhaskar Gupta, L. Nageshwar Rao, Colin Gonsalves, S. Madhusdhan Babu, Dr. Kailash Chand, Lalit Bhasin, Nina Gupta, Swati Sharma, Parvez Khan, Bina Gupta, Amiy Shukla, Jyoti Mendiratta, Puja Sharma, Somnath Padhan, Anagha S. Desai for the Appearing Parties.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. These two appeals from the Bombay High Court came up before a two-Judge Bench (B.P. Singh and R.V. Raveendran, JJ.) on 21.11.2005. While granting leave on that day, the Bench was of the view that the question whether the claims of the workmen who claimed to be entitled to payment *pari passu* have to be considered by the official liquidator or whether their claims have to be adjudicated upon by the Debts Recovery Tribunal (for short, 'DRT') is likely to arise in a large number of cases where recoveries are sought to be made pursuant to the certificates issued by the DRT and, therefore, these appeals required consideration preferably by a Bench of three-Judges. This is how these appeals have come up before us.

2. The appellant in one appeal is Bank of Maharashtra and in the other, Indian Banks Association. As a matter of fact, the main appeal is by Bank of Maharashtra. The Indian Banks Association was not a party to the proceedings before the High

Court or before the DRT but it has preferred appeal, after permission was granted, as in its view the impugned judgment if implemented would have far reaching implications on the banking industry as a whole.

3. As will appear, the High Court was concerned with the writ petition filed by the workmen/employees of Paper and Pulp Conversions Ltd. (for short, 'Company') praying therein that direction be issued to the Recovery Officer, Debt Recovery Tribunal, Mumbai III (for short 'DRT III') to recover the amount of Rs. 3 crores from Bank of Maharashtra ('the Bank') which was allowed to be withdrawn being the money realised from the sale of movables of the Company and for issuance of further direction to the Recovery Officer to adjudicate the claims/dues of the workmen/employees as per the list annexed with the writ petition and after adjudication, in priority over all the claims, release the amount due to them. The workmen/employees also prayed in the writ petition for direction to the Central Government to make rules laying down procedure to be followed by the Recovery Officer under Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for short, '1993 Act').

4. The facts and circumstances on which the workmen relied before the High Court are these: The Company had taken loan from the Bank somewhere in 1980. In 1984-85, the Company faced liquidity problems. One of the creditors of the Company filed a company petition being Company Petition No. 604/1986 before the Bombay High Court in 1986 for winding up of the Company. On 14.01.1987, the company petition was admitted.

5. The Company was closed in 1992. In the same year, a reference was made by the Company to the Board for Industrial and Financial Reconstruction, New Delhi (BIFR) under Section 15(1) of Sick Industrial Companies (Special Provisions) Act, 1985 (for short, 'SICA'). On 1.9.1993, BIFR passed an order for winding up of the Company. The Company challenged the

order of the BIFR before the appellate authority but was unsuccessful.

6. In or about 1995, the Bank filed a suit against the Company and its Directors for recovery of a sum of Rs. 25,39,08,282.79 with future interest thereon at the agreed rate and cost in the Court of Civil Judge, Senior Division, Panvel. The suit was transferred to the DRT III in 1999 and was numbered as original application no. 344/1999.

7. On 19.07.2001, the DRT III allowed the original application made by the Bank by directing the Company and its Directors to pay jointly, severally and personally a sum of Rs. 25,49,91,756.94 with cost and interest at the rate of 6% per annum with quarterly rests from the date of application till its realization. The DRT III further directed in its judgment that in the event of failure of the Company and its Directors to pay the amount to the Bank, as directed, the Bank shall be entitled to sell hypothecated and mortgaged and other immovable and movable properties of the Company and the Directors and the sale proceeds shall be appropriated towards due amount.

8. Consequent upon the Judgment dated 19.7.2001, the DRT III issued recovery certificate on 21.08.2001. In the recovery certificate, it was directed that the Recovery Officer shall realize the amount as per the certificate in the manner and mode prescribed under Sections 25 and 28 of the 1993 Act from the certificate debtors as specified in the certificate. As regards legal heirs of one of the deceased directors, it was directed that they would be liable only to the extent they inherited the property from their predecessor in interest.

9. In the recovery proceedings, the workmen/employees of the Company through their Association made an application on 17.9.2003 and prayed that they be allowed to intervene in the matter and their claims be registered before any auction takes place. The workmen also sent a notice to the Company and its Managing Director requesting them to pay their dues.

The Company, however, disputed their claim.

10. On 22.01.2004, the Recovery Officer auctioned the movable properties of the Company and received an amount of Rs. 4,70,55,000/- by way of sale proceeds. Of that amount, Rs. 3 crores were disbursed to the Bank on 10.03.2004 and remaining amount of Rs. 1,70,55,000/- was kept aside towards the likely claim of the workmen of the Company.

11. The workmen made an application in the company petition No. 604/1986 before the Bombay High Court on 19.03.2004 for appointment of Provisional Liquidator and for staying further proceedings before the DRT III arising out of the above recovery proceedings. The Bank opposed the application of the workmen before the Company Court and submitted that any restraint on the sale of the Company's assets would adversely affect the interest of not only the secured creditors but also the workmen.

12. By an order dated 08.10.2004, the Company has been ordered to be wound up by the Bombay High Court and official liquidator has been appointed as liquidator of the Company with the usual powers under the Companies Act.

13. On 18.06.2004, the workmen filed a writ petition before the Bombay High Court for the reliefs as noted above. The Bombay High Court in the impugned Judgment after hearing the parties held that the jurisdiction to determine the payment and its priorities was totally vested with the DRT under the 1993 Act and, therefore, the workmen should approach the DRT for the purpose of determination of their claim and consequential payment in respect thereof. The relevant directions in the impugned judgment read as follows :

1. The Debt Recovery Tribunal is directed to retain the sum of Rs. 1,17,55,000/- and not to disburse the same either to the 2nd respondent or to any other person till and until the claim of the workers is determined.

2. The Presiding Officer of the Debt Recovery Tribunal, Mumbai shall adjudicate upon the claims of the petitioner workers and more particularly of the employees whose names are set out in Exhibit "A" and determine the salaries payable either as and by way of arrears or otherwise to each of the workers.

3. Once the claim of each of the workmen is determined, the Debut Recovery Tribunal shall make payment of the said dues to the workers out of the amount lying with him of the said Rs. 1,17,55,000/- and if there is a short fall, then the Debt Recovery Tribunal will be permitted to call for the said balance amount from the 2nd respondent out of the sum of Rs. 3 crores which has already been withdrawn by the 2nd respondent from the sale proceeds of the auction sale of the movable properties of respondent no. 1.

4. The Debt Recovery Tribunal shall in the meantime deposit the said amount of Rs.1,17,55,000/- in fixed deposit with a nationalized bank initially for period of three months and then renewable for a further period of three months.

14. The High Court in the impugned judgment, inter alia, has also issued certain guidelines to the DRT III while adjudicating the claim of the workmen and other secured creditors for determination of priorities.

15. The main submission on behalf of the Bank in laying challenge to the impugned judgment is two fold, (one) the workmen have no claim or right over the security held by a bank or financial institution. Their dues can only be adjudicated in an appropriate court (e.g. Industrial Tribunal) when the company is not in liquidation and DRT has no competence in this regard and (two) if the debtor company is in liquidation and the security is sold in proceedings before DRT and Recovery Officer, the sale proceeds will be distributed by taking into account the *pari passu* charge to a limited extent of the "workmen's portion" as

laid down in Section 529(1)(c) proviso read with Section 529A of the Companies Act, 1956 (for short, 'Companies Act').

16. Elaborating the above grounds, Mr. Bhaskar P. Gupta, learned senior counsel for the Bank, submitted that under the 1993 Act, DRT has exclusive jurisdiction to entertain and decide applications only from banks and financial institutions for adjudication and recovery of debts due to such banks and financial institutions. The principal purpose of the DRT is adjudication and recovery of dues of the banks and financial institutions. It also has certain ancillary and incidental powers like giving interim orders by way of receiver, injunction, attachment etc. After determination of dues due to banks and financial institutions, the mode of recovery has been provided in Section 25. However, DRT has not been given any powers to adjudicate the dues of the workmen of the debtor company and none can be read into Section 17 or Section 19 of the 1993 Act. This adjudication is a substantive matter between the workmen and the debtor company (when it is a going concern) and between the workmen and the liquidator when the company is in liquidation. When the debtor company has gone into liquidation, Section 529(1)(c) proviso by a legal fiction creates a *pari passu* charge to a limited extent on the security of the creditor which can be recovered along with the creditor on a priority basis against the sale proceeds of the security under Section 19(19) of the 1993 Act read with Section 529A of the Companies Act. When the debtor company is in liquidation, the dues of workmen can only be determined by the official liquidator including the extent of the deemed charge and the limits. The DRT has neither the competence nor the machinery to adjudicate upon or decide dues of the workmen of the debtor company.

17. Learned senior counsel for the Bank argued that unless an order of winding up was made and the liquidator or the provisional liquidator has been appointed and all the steps as provided in Sections 443 to 450 and 456 are taken, it cannot

be said that Company is in winding up and until the Company is in winding up, the workmen of the Company have no claims on the assets of the Company nor do they have any locus to approach the DRT to participate in a proceeding filed by a bank or financial institution; they are not creditors secured or otherwise. The only remedy that the workmen have is to approach the appropriate court e.g., Industrial Tribunal etc., for determination and realization of their dues. Section 19(19) of the 1993 Act and Section 529A of the Companies Act do not help the workmen as they are not secured creditors. However, where the order of winding up has been made and liquidation proceedings started against a Company, Mr. Bhaskar P. Gupta, learned senior counsel would submit that in such a case the liquidator would be in custody and control of all the assets of company. But in view of exclusive jurisdiction conferred on DRT, no leave of the Company Court needs to be taken by DRT for adjudication under Section 17 and execution of the recovery certificate issued under the 1993 Act. In support of his submissions, learned senior counsel placed reliance upon paragraphs 50, 63, 64 to 70 of the decision of this Court in *Allahabad Bank v. Canara Bank & Anr.*[1] . He also referred to *Jitendra Nath Singh v. Official Liquidator & Ors*[2]. which has followed *Allahabad Bank*[1].

18. Learned senior counsel for the Bank submitted that by virtue of a legal fiction contained in the proviso to Section 529(1)(c) read with Section 529(3)(c), the workmen are entitled to participate along with the concerned creditor to a limited extent in the distribution of the sale proceeds by the DRT under Section 19(19). Otherwise, they can have no claim at all. He would submit that Section 529(1)(c) proviso and Section 529A of the Companies Act form part of a composite scheme and can be brought into play only in the case of a company which is being wound up. In a running company, the dues of workmen are not quantified or determined and, therefore, workmen's

1. (2000) 4 SCC 406.

2. (2013) 1 SCC 462.

portion also cannot be quantified. The workmen have no charge on any asset. By a legal fiction, a *pari passu* charge is created to a limited extent only under Section 529(1)(c) proviso and that too to be determined by the liquidator and none else. Section 19(19) can, thus, have application only if the debtor company is being wound up and not otherwise.

19. Learned senior counsel for the Bank contended that Section 529 of the Companies Act entrusts to the liquidator the competence and responsibility to determine the dues of all creditors who participate in the winding up and determine the priorities amongst them under the supervision of the Company Court. In support of his submissions, Mr. Bhaskar P. Gupta, learned senior counsel for the Bank also relied upon decisions of this Court in *Andhra Bank v. Official Liquidator and Another*[3], *Radheshyam Ajitsaria and Another v. Bengal Chatkal Mazdoor Union & Ors*[4]. *and Rajasthan State Financial Corporation and Another v. Official Liquidator and Another*[5].

20. Mr. L. Nageshwar Rao, learned senior counsel for Indian Banks' Association adopted the submissions of Mr. Bhaskar P. Gupta and further submitted that the High Court proceeded on a fundamental misconception that the workmen had a *pari passu* charge at the relevant time. According to Mr. L. Nageshwar Rao at the relevant time of (a) judgment by the DRT-III allowing the Bank's claim on 19.07.2001, (b) issuance of recovery certificate dated 21.08.2001, (c) sale of movables on 22.01.2004 and (d) payment of partial sale proceeds to the bank (secured creditor) on 10.03.2004, no winding up order had been passed under Section 443(d) of the Companies Act qua the Company and Company's properties had not come to the custody of official liquidator in terms of Section 456. In this view of the matter, the workmen did not enjoy any secured charge on the assets of the Company for the purposes of

3. (2005) 5 SCC 75.

4. (2006) 11 SCC 771.

Section 529A. Accordingly, he would submit that workmen cannot claim under Section 19(19) of the 1993 Act when they even cannot claim under the Companies Act. In this regard, Mr. L. Nageshwar Rao relied upon the decision of this Court in *Radheshyam Ajitsaria*[4].

21. Relying upon the decision of this Court in *International Coach Builders Ltd. v. Karnataka State Financial Corporation*[5] and *Rajasthan State Financial Corporation*[6], Mr. L. Nageshwar Rao argued that the workmen's claim can only be considered under Section 19(19) of the 1993 Act where winding up order has been made and the liquidator is in the custody of company's assets.

22. Mr. L. Nageshwar Rao argued that the view of the High Court was clearly in error as DRT is a limited Tribunal created by a statute for adjudication of specific disputes for the benefit of banks and financial institutions and not all kinds of persons. DRT is not a civil court of unlimited jurisdiction or a Company Court with elaborate statutory powers to address all disputes that may arise in adjudicating workmen's claims in winding up proceedings. In this regard, he relied upon a decision of this Court in *Nahar Industrial Enterprises Ltd. v. Hong Kong And Shanghai Banking Corporation*[7] and submitted that it would be jurisdictionally improper and entirely incongruous for a DRT to itself examine, determine and decide upon workmen's claims under Section 529A.

23. It may be noted here that General Industries Kamgar Union (for short, 'Kamgar Union') has made an application being I.A. No. 3 of 2005 in one of the appeals praying therein that they may be impleaded as party respondent since it is a registered trade union of the workmen employed in the

5. (2005) 8 SCC 190.

6. (2003) 10 SCC 482.

7. (2009) 8 SCC 646.

Company and it represents the entire body of workmen. Having regard to the controversy involved in these appeals, we thought it fit to hear Kamgar Union as it represents the entire body of workmen, including the respondents.

24. Mr. Colin Gonsalves, learned senior counsel for the Kamgar Union, stoutly defended the order of the High Court. He submitted that the argument of the appellants that winding up of a company begins only when the winding up order is made is misconceived as it overlooks Section 441(2) of the Companies Act which says that in cases other than those covered under sub-section (1) of Section 441, the winding up of a company shall be deemed to commence at the time of presentation of the petition for winding up. In the present case, the winding up of the Company has begun with the order dated 01.09.1993 whereby BIFR recommended winding up of the Company under Section 20 of the SICA. According to learned senior counsel for the Kamgar Union, the present case is a case of a company in winding up as Section 20 of SICA makes it mandatory for the Court to make a winding up order on the recommendation of the BIFR. He also referred to para 50 of the *Allahabad Bank*[1] in this regard.

25. As regards Section 19(19) of the 1993 Act, learned senior counsel would submit that this provision is not restricted to a situation where company is in winding up; it also covers situations where the company though not in winding up will be rendered an empty shell if the assets of the company are sold and proceeds handed over to the bank and financial institutions. In the latter circumstances, it is the duty of the DRT to anticipate such a situation and if DRT comes to the conclusion that by selling the assets and paying the proceeds to the bank and/or financial institutions there will be nothing left for the payment of the dues to the workmen, it is bound to disburse the proceeds between the banks and financial institutions, other secured creditors and the workmen as if Section 529A of the Companies Act applies. It was submitted on behalf of the

Kamgar Union that a close look at Section 19(19) of the 1993 Act will indicate that it is legislation by reference and not legislation by incorporation and therefore it is not required that the company must be in liquidation to attract the provisions of Section 19(19).

26. Mr. Colin Gonsalves heavily relied upon a decision of this Court in *Rajasthan State Financial Corporation*[5] and submitted that the issue of jurisdiction of the Company Court and the DRT in respect of companies in liquidation was referred to a three-Judge Bench in view of the apparent conflict between the decisions in *Allahabad Bank*[1] and *International Coach Builders*[6]. He particularly referred to paragraphs 16 and 17 of the Report in *Rajasthan State Financial Corporation*[5] and submitted that the official liquidator represents the entire body of creditors and also holds a right on behalf of the workmen to have a distribution *pari passu* with the secured creditors. The official liquidator has the duty for further distribution of the proceeds on the basis of the preference contained in Section 530 of the Companies Act under the directions of the Company Court and, therefore, to ensure the proper working out of the scheme of distribution, it is necessary to associate the official liquidator with the process of sale so that he can ensure in the light of the directions of the Company Court that a proper price is fetched for the assets of the company in liquidation. It is the contention of Mr. Colin Gonsalves that when the impugned judgment was passed by the Bombay High Court, *Allahabad Bank*1 held the field and based on that the High Court issued guidelines to the DRT. Later, in Rajasthan *State Financial Corporation*[5]*,* the basic proposition of *Allahabad Bank*[1] relating to exclusive jurisdiction cannot be said to hold good. He, thus, submitted that in light of the law laid down in *Rajasthan State Financial Corporation*[5] there is no conflict on the question of the applicability of Section 529A read with Section 529 of the Companies Act in cases where the debtor is a company and is in liquidation.

27. Mr. Colin Gonsalves argued that all sale proceeds in respect of assets sold prior to the date of impugned judgment should be brought to the DRT by the banks and financial institutions; all future sale of assets should be done under the supervision of the High Court; the official liquidator, Bombay High Court should calculate the respective portions of dues of the secured creditors and the workmen in accordance with Section 529A of the Companies Act and the DRT should then distribute the sale proceeds in accordance with the directions of the High Court and in accordance with law.

28. On a careful examination of the record, we find that the submission made by the learned Senior Counsel for the Bank that Company is not in winding up within the meaning of Sections 529 and 529A of the Companies Act is founded on erroneous assumption that no order for winding up the Company has been made. In I.A. 7 of 2013 filed by the respondent no. 1, the copy of the Report dated 01.08.2011 of the official liquidator has been placed on record. It is apparent therefrom that on 08.10.2004, the Company Judge has ordered the Company to be wound up and the official liquidator has been appointed as liquidator of the Company with the usual powers under the Companies Act. There is thus no doubt that on and from 08.10.2004, the Company is in liquidation and the official liquidator stands appointed.

29. In the backdrop of the above factual position, we think that the question framed in the referral order may be examined by us.

30. It is important first to notice some of the provisions of the 1993 Act and the Companies Act. The question can be conveniently answered in light of the statutory provisions.

31. Section 2(d) of the 1993 Act, defines 'bank', which, inter alia, means a banking company. Under Section 2(e) 'banking company' has the meaning assigned to it in clause (c) of Section 5 of the Banking Regulation Act, 1949. 'Financial

institution' is defined in Section 2(h). The 'tribunal' established under Section 3 is known as Debts Recovery Tribunal. Under

Section 17, the tribunal (DRT) has been conferred jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions. Section 18 bars the jurisdiction of all other courts and other authorities except the Supreme Court and High Court exercising jurisdiction under Articles 226 and 227 of the Constitution in relation to the matters specified in Section 17.

32. Section 19 provides a comprehensive procedure before the DRT for making an application where a bank or a financial institution has to recover any debt from any person. It also enables DRT to issue certificate of recovery, its execution and all such orders and directions as may be necessary to give effect to its orders or to prevent abuse of its process or to secure the ends of justice. Omitting the unnecessary clauses, to the extent Section 19 is relevant for the purposes of consideration of these appeals the same is reproduced as under:

> "Section 19. Application to the Tribunal.—(1) Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction—
>
> … … …
>
> (19) Where a certificate of recovery is issued against a company registered under the Companies Act, 1956 (1 of 1956) the Tribunal may order the sale proceeds of such company to be distributed among its secured creditors in accordance with the provisions of section 529A of the Companies Act, 1956 and to pay the surplus, if any, to the company.

… … …

(22) the Presiding Officer shall issue a certificate under his signature on the basis of the order of the Tribunal to the Recovery Officer for recovery of the amount of debt specified in the certificate.

… … …

(25) The Tribunal may make such orders and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice."

33. Section 22, inter alia, empowers the DRT to regulate its own procedure. It is not bound by the procedure laid down by the Code of Civil Procedure, 1908 ('CPC') but is guided by the principles of natural justice and subject to the provisions of the 1993 Act and the rules framed thereunder. It has same powers as are vested in a civil court under the CPC in respect of the matters set out in Section 22(2).

34. Section 25 provides the modes of recovery of debts. The Recovery Officer on receipt of the copy of the recovery certificate is required to proceed to recover the amount of debt specified in the certificate by one or more of the modes set out in that Section which includes attachment and sale of the movable or immovable property/properties of the certificate debtor. Under Section 28, the Recovery Officer may recover the amount of debt under the certificate by one or more of the modes provided thereunder without prejudice to the modes of recovery specified in Section 25. Section 28(4) provides that the Recovery Officer may apply to the court in whose custody there is money belonging to the certificate debtor for payment to him of the entire amount of such money, or if it is more than the amount of debt due an amount sufficient to discharge the amount of debt so due.

35. Section 34 gives the 1993 Act overriding effect. Sub-section (1) thereof provides that the provisions of the 1993 Act shall have the effect notwithstanding anything inconsistent therewith contained in any other law or in any instrument having effect by virtue of any law. Sub-section (2) of Section 34 provides that the provisions of the 1993 Act or the rules made thereunder shall be in addition to and not in derogation of the enactments stated therein.

36. Section 36 empowers the central government to make rules to carry out the provisions of the 1993 Act. In exercise of the powers conferred under Section 36, the central government has framed the Debts Recovery Tribunal (Procedure) Rules, 1993.

37. The Companies Act has undergone substantial amendments by the Companies (Second Amendment) Act 2002 (11 of 2003) but no notification has been issued so far bringing Act 11 of 2003 into effect. Though Section 441 has been substituted by Section 56 of the above Amendment Act but since it has not come into force, we reproduce Section 441 as it stood prior to amendment:

"441. Commencement of winding up by Court—(1) Where, before the presentation of a petition for the winding up of a company by the Court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the Court, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case, the winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up."

38. Section 443 provides for powers of Court on hearing

petition which, inter alia, enables it to make an order for winding up the company and also make an interim order that it thinks fit.

39. The effect of the winding up order is provided in Section 447. Accordingly, an order for winding up a company operates in favour of all the creditors and all the contributories of the company as if it has been made on the joint petition, of a creditor and of a contributory.

40. The appointment of official liquidator so far as it relates to winding up of a company is dealt with in Section 448. Section 451 deals with general provisions as to liquidators. Inter alia, it provides that the liquidator shall conduct the proceedings in winding up the company and perform such duties in reference thereto as the court may impose.

41. Section 456 provides that where a winding up order has been made or where a provisional liquidator has been appointed the liquidator or the provisional liquidator, as the case may be, shall take into his custody or under his control all the properties, effects and actionable claims to which the company is or appears to be entitled.

42. Section 457 empowers the liquidator to do acts stated in paragraphs (a) to (e) of sub-section (1) with the sanction of the court. In a winding up by the court, the liquidator has power to do all acts set out in clauses (i) to (v) of sub-section (2).

43. Section 529, to the extent it is relevant, reads as follows:

"Section 529 - Application of insolvency rules in winding up of insolvent companies. – (1) In the winding up of an insolvent company, the same rules shall prevail and be observed with regard to-

. . . .;

(c) the respective rights of secured and unsecured creditors; as are in force for the time being under the law of insolvency with respect to the estates of persons adjudged insolvent:

Provided that the security of every secured creditor shall be deemed to be subject to a pari passu charge in favour of the workmen to the extent of the workmen's portion therein, and, where a secured creditor, instead of relinquishing his security and proving his debt, opts to realise his security,-

(a) the liquidator shall be entitled to represent the workmen and enforce such charge;

(b) any amount realised by the liquidator by way of enforcement of such charge shall be applied rateably for the discharge of workmen's dues; and

(c) so much of the debt due to such secured creditor as could not be realised by him by virtue of the foregoing provisions of this proviso or the amount of the workmen's portion in his security, whichever is less, shall rank pari passu with the workmen's dues for the purposes of section 529A.]

(2) . . . .

(3) For the purposes of this section, section 529A and section 530,-

(a) "workmen", in relation to a company, means the employees of the company, being workmen within the meaning of the Industrial Disputes Act, 1947 (14 of 1947);

(b) "workmen's dues", in relation to a company, means the aggregate of the following sums due from the company to its workmen, namely:-

(i) to (iv) . . . .

(c) "workmen's portion", in relation to the security of any secured creditor of a company, means the amount which bears to the value of the security the same proportion as the amount of the workmen's dues bears to the aggregate of-

(i) the amount of workmen's dues; and

(ii) the amounts of the debts due to the secured creditors.

Illustration. – The value of the security of a secured creditor of a company is Rs. 1,00,000. The total amount of the workmen's dues is Rs. 1,00,000. The amount of the debts due from the company to its secured creditors is Rs. 3,00,000. The aggregate of the amount of workmen's dues and of the amounts of debts due to secured creditors is Rs. 4,00,000. The workmen's portion of the security is, therefore, one-fourth of the value of the security, that is Rs. 25,000."

44. Section 529A is crucial for consideration of these appeals and it is reproduced as it is:

"Section 529A - Overriding preferential payment.— (1) Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in the winding up of a company-

(a) workmen's dues; and

(b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-section (1) of section 529 pari passu with such dues,

shall be paid in priority to all other debts.

(2) The debts payable under clause (a) and clause

(b) of sub-section (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions."

45. It may be immediately observed that 1993 Act has not only conferred exclusive jurisdiction upon DRT for determination of the matters specified in Section 17 but has also ousted jurisdiction of all other courts and other authorities in entertaining and deciding such matters. The powers of the Supreme Court and the High Court under Articles 226 and 227, however, remain unaffected. The applications for recovery of debts due to banks or financial institutions can be decided by DRT alone after coming into force of the 1993 Act and no other forum. In other words, the jurisdiction of DRT in regard to matters specified in Section 17 is exclusive.

46. DRT has also been vested with power, on adjudication of the application for recovery of debts due to banks or financial institutions, to issue certificate of recovery. On issuance of certificate of recovery, the exclusive jurisdiction has been conferred upon the Recovery Officer in regard to its execution. A complete procedure has been laid down in the 1993 Act for recovery of the debt as per the recovery certificate issued by DRT. Accordingly, adjudication of liability and the recovery of the amount by execution of the certificate are respectively within the exclusive jurisdiction of DRT and the Recovery Officer and no other court or authority can go into the said questions, except as provided in 1993 Act.

47. In *Allahabad Bank*[1], the issues relating to the impact of the 1993 Act on the provisions of the Companies Act fell for consideration before this Court. In that case, the following six points were framed for determination:

(*1*) Whether in respect of proceedings under the RDB Act at the stage of *adjudication* for the money due to the banks or financial institutions and at the stage of *execution* for recovery of monies under the RDB Act, the Tribunal and

the Recovery Officers are conferred exclusive jurisdiction in their respective spheres?

(*2*) Whether for initiation of various proceedings by the banks and financial institutions under the RDB Act, leave of the Company Court is necessary under Section 537 *before* a winding-up order is passed against the company or before provisional liquidator is appointed under Section 446(1) and whether the Company Court can pass orders of stay of proceedings before the Tribunal, in exercise of powers under Section 442?

(*3*) Whether *after* a winding-up order is passed under Section 446(1) of the Companies Act or a provisional liquidator is appointed, whether the Company Court can stay proceedings under the RDB Act, transfer them to itself and also decide questions of *liability, execution and priority* under Section 446(2) and (3) read with Sections 529, 529-A and 530 etc. of the Companies Act or whether these questions are all within the exclusive jurisdiction of the Tribunal?

(*4*) Whether in case it is decided that the distribution of monies is to be done only by the Tribunal, the provisions of Section 73 CPC and sub-sections (1) and (2) of Section 529, Section 530 of the Companies Court also apply — apart from Section 529-A — to the proceedings before the Tribunal under the RDB Act?

(*5*) Whether in view of provisions in Sections 19(2) and 19(19) as introduced by Ordinance 1 of 2000, the Tribunal can permit the appellant Bank alone to appropriate the entire sale proceeds realised by the appellant except to the limited extent restricted by Section 529-A. Can the secured creditors like Canara Bank claim under Section 19(19) any part of the realisations made by the Recovery Officer and is there any difference between cases where the secured creditor opts to stand outside the winding up

and where he goes before the Company Court?

(*6*) What is the relief to be granted on the facts of the case since the Recovery Officer has now sold some properties of the Company and the monies are lying partly in the Tribunal or partly in this Court?

48. As regards first point, this Court held in *Allahabad Bank*[1] that the adjudication of liability and the recovery of the amount by execution of the certificate are respectively within the exclusive jurisdiction of DRT and Recovery Officer and no other court or authority much less the civil court or the company court can go into the said questions relating to the liability and the recovery, except as provided in the 1993 Act. On second and third point, it was held that at the stage of adjudication under Section 17 and execution of the certificate under Section 25, the provisions of 1993 Act confer exclusive jurisdiction on the DRT and the Recovery Officer in respect of debts payable to banks and financial institutions and there can be no interference by the company court under Section 442 read with Section 537 or under Section 446 of the Companies Act. In respect of the moneys realized under the 1993 Act, the question of priorities among the banks and financial institutions and other creditors can be decided only by DRT and in accordance with Section 19(19) read with Section 529A of the Companies Act and in no other manner. To this extent, the Companies Act must yield to the provisions of the 1993 Act. The Court held that this position holds good during the pendency of the winding up petition against the debtor company and also after a winding up order is passed. No leave of the company court was necessary for initiating or continuing the proceedings under the 1993 Act.

49. As regards fourth and fifth point, this Court stated the legal position that it was not correct to say that Section 19(19) of the 1993 Act gives priority to all "secured creditors" to share the sale proceeds before DRT/Recovery Officer. It is only limited class of secured creditors who have priority over all

others in accordance with Section 529A. It was also held that under clause (c) of the proviso to Section 529(1), the priority of the secured creditor who stands outside the winding up is confined to the "workmen's portion" as defined in Section 529(3)(c). This Court agreed with the proposition that the first part of clause(c) of the proviso to Section 529(1) is to be read along with the words "or the amount of workmen's portion in the security, whichever is less". That is, the priority of the secured creditor is only to the extent that any part of the said security is lost in favour of the workmen consequent to demands made by the Liquidator under clauses (a) or (b) or clause (c) to proviso to Section 529(1).

50. On sixth point, it was held in *Allahabad Bank*[1] that the "workmen's dues" have priority over all other creditors, secured and unsecured, because of Section 529A(1)(a) and no secured or unsecured creditor, including banks or financial institutions, can be paid before the workmen's dues are paid.

51. The view in *Allahabad Bank*[1] that the workmen's dues have priority over all other creditors, secured and unsecured, because of Section 529A(1)(a) is no longer a good law and has been held to be so first by a three-Judge Bench in *Andhra Bank*[3] and recently again by a three-Judge Bench in *Jitendra Nath Singh*[2].

52. *A.P. State Financial Corporation v. Official Liquidator*[8], was a case where the Corporation had made applications under Section 446(1) of the Companies Act read with Sections 29 and 46 of the State Financial Corporations Act, 1951 (for short, '1951 Act') before the Company Judge of the High Court for permission to stay outside the liquidation proceedings. The Company Judge granted conditional permission. One of the conditions was that Corporation will undertake to discharge the liability due to the workmen, if any, under Section 529A of the Companies Act. This Court noted

8. (2000) 7 SCC 291.

that 1951 Act was a Special Act for grant of financial assistance to industrial concerns with a view to boost up industrialization and also recovery of such financial assistance if it becomes bad; similarly, the Companies Act deals with companies including winding up of such companies. The proviso to sub-section (1) of Section 529 and Section 529A being a subsequent enactment, the non obstante clause in Section 529A must prevail over Section 29 of the 1951 Act. This Court further said that the statutory right to sell the property by Corporation under Section 29 of the 1951 Act has to be exercised with the rights of *pari passu* charge of the workmen created by the proviso to Section 529 of the Companies Act. Under the proviso to sub-section (1) of Section 529, the liquidator shall be entitled to represent the workmen and enforce the above *pari passu* charge and, therefore, the conditions imposed by the Company Court were justified. If such conditions were not imposed to protect the rights of the workmen, there was every possibility that the secured creditor might frustrate the *pari passu* right of the workmen.

53. In *International Coach Builders*[6], the question under consideration before this Court was whether the rights of the State Financial Corporation under Section 29 of the 1951 Act to sell and realize the security could be exercised without reference to the Company Court when a winding up order is made against the Company. This Court noticed the provisions of the 1951 Act and Sections 529 and 529A of the Companies Act and the divergent views of Bombay High Court, Andhra Pradesh High Court, Punjab and Haryana High Court and Gujarat High Court. This Court approved the decision of the Bombay High Court in *Maharashtra State Financial Corporation v. Ballarpur Industries Ltd*[9]. and held that when the Company was in winding up, the State Financial Corporation to which the assets of the company were charged cannot proceed to realize the security without intervention of the Company Court. It was stated that as a result of amendment

9. AIR 1993 Bom 392.

in Section 529 a *pari passu* charge to the extent of the workmen's portion is created on the security of every secured creditor when he opts to realize security by standing outside the winding up. The Court found no real conflict between Section 29 of the 1951 Act and the Companies Act. Following the decision of this Court in *Andhra Pradesh State Financial Corporation*[8], it was observed that even if it was assumed that there was conflict in the above provisions, Section 29 of the 1951 Act cannot override the provisions of Sections 529(1) and 529A of the Companies Act inasmuch as Financial Corporations cannot exercise the right under Section 29 of the 1951 Act ignoring a *pari passu* charge of the workmen. In para 32 (pg. 498) of the Report this Court concluded its opinion as under:

> *1*. The right unilaterally exercisable under Section 29 of the SFC Act is available against a debtor, if a company, only so long as there is no order of winding up.
>
> 2. SFCs cannot unilaterally act to realise the mortgaged properties without the consent of the official liquidator representing workmen for the *pari passu* charge in their favour under the proviso to Section 529 of the Companies Act, 1956.
>
> *3*. If the official liquidator does not consent, SFCs have to move the Company Court for appropriate directions to the official liquidator who is the *pari passu* charge-holder on behalf of the workmen. In any event, the official liquidator cannot act without seeking directions from the Company Court and under its supervision.

54. In the case of *Andhra Bank*[3], a three-Judge Bench framed three questions for consideration. As regards the question, whether the statement of law contained in para 76 of the Judgment of this Court in *Allahabad Bank*[1] was a good law, this Court answered the question in the negative. Dealing with the question whether the workmen could be directed to be paid

on an adhoc basis having regard to their claim of past dues vis-à-vis the claim of Andhra Bank, this Court observed that when a matter was not pending before the DRT under the 1993 Act, in terms of Section 19(19) thereof, the secured creditors would not get priority per se as language in Section 19(19) is qualified by the words "in accordance with the provisions of Section 529A". The claims of the secured creditors are thus required to be considered giving priority over unsecured creditors but their claim would be *pari passu* with the workmen. While dealing with Section 446 of the Companies Act, this Court held in para 31 (pg. 88) of the Report as follows:

> "31. Section 446 of the Companies Act indisputably confers a wide power upon the Company Judge, but such a power can be exercised only upon consideration of the respective contentions of the parties raised in a suit or a proceeding or any claim made by or against the company. A question of determining the priorities would also fall for consideration if the parties claiming the same are before the court. Section 446 of the Companies Act ipso facto confers no power upon the court to pass interlocutory orders. The question as to whether the courts have inherent power to pass such orders, in our opinion, does not arise for consideration in this proceeding……."

55. *Rajasthan State Financial Corporation*[5], was a matter that was referred to a three-Judge Bench as the two-Judge Bench before whom the matter came up for consideration was of the view that there was a conflict between the decisions of this Court in *Allahabad Bank*[1] and *International Coach Builders*[6]. This Court considered the decisions of some of the High Courts, the decisions in *Allahabad Bank*[1] and *International Coach Builders*[6] and the provisions of Section 29 of the 1951 Act and Sections 529 and 529A of the Companies Act and held that when the assets of the company are sold and the proceeds realized, the debts by way of workmen's dues and debt of the secured creditors have to be paid in full if the

assets are sufficient to meet them and if they are not sufficient, in equal proportions. It was expressly noted that there was no inconsistency between *Allahabad Bank*[1] and *International Coach Builders*[6]. The legal position was summed up in para 18 (pg. 201) of the Report as follows :

> **18.** In the light of the discussion as above, we think it proper to sum up the legal position thus:
>
> (*i*) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.
>
> (*ii*) A District Court entertaining an application under Section 31 of the SFC Act will have the power to order sale of the assets of a borrower company-in-liquidation, but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.
>
> (*iii*) If a financial corporation acting under Section 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-in-liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the Company Court and acting in terms of the directions issued by that court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the creditors in terms of Section 529-A and Section 529 of the Companies Act.
>
> (iv) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the SFC Act are not set in motion, the creditor concerned is to approach the Company Court for appropriate directions regarding the realization of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the company-in-liquidation.

56. What is important to be noticed is that in *Rajasthan State Financial Corporation*[5] the three-Judge Bench stated in no unambiguous terms that once a winding up proceeding has commenced and the Liquidator is put in charge of the assets of the company being wound up, the distribution of the proceeds of the sale of the assets held at the instance of the banks or financial institutions coming under the 1993 Act or of financial corporations coming under the 1951 Act can only be with the association of the Official Liquidator and under the supervision of the Company Court. It has also been stated that whether the assets are realized by a secured creditor even if it be by proceeding under 1993 Act or the 1951 Act, the distribution of assets would only be in terms of Section 529-A of the Companies Act and by recognizing the right of the Liquidator to calculate the workmen's dues and collected for distribution among them *pari passu* with the secured creditors. By noticing that there is no conflict on the question of applicability of Section 529A read with Section 529 of the Companies Act to cases where the debtor is a company and is in liquidation, it was observed that the conflict, if any, is in the view that DRT could sell the properties of the Company in terms of the 1993 Act and to that extent, the 1993 Act shall prevail over the Companies Act being the general law.

57. In *ICICI Bank Ltd. v. SIDCO Leathers Ltd and Ors.*[10], interpretation of Sections 529 and 529A of the Companies Act fell for consideration but in a different fact situation. This Court with regard to Sections 529 and 529A of the Companies Act exposited that Section 529A was brought in the Companies

10. (2006) 10 SCC 452.

Act with a view to bring the workmen's dues *pari passu* with the secured creditors but Section 529A of the Companies Act does not *ex facie* contain a provision on the aspect of priority amongst the secured creditors. Whilst holding so, this Court also said that insofar as the amounts realised under the 1993 Act were concerned, the priorities have to be worked out by DRT alone.

58. In *Central Bank of India v. State of Kerala and Ors*[11], a three-Judge Bench of this Court was concerned with the question whether Section 38-C of the Bombay Sales Tax Act, 1959 (for short, "the Bombay Act") and Section 26-B of the Kerala General Sales Tax Act, 1963 (for short, "the Kerala Act") and similar provision contained in other State legislations by which first charge has been created on the property of the dealer or such other person, who is liable to pay sales tax, etc. are inconsistent with the provisions contained in the 1993 Act for recovery of "debt" and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "the Securitisation Act") for enforcement of security and whether by virtue of non obstante clauses contained in Section 34(1) of the 1993 Act and Section 35 of the Securitisation Act, the two Central legislations will have primacy over the State legislations. The scheme of 1993 Act was highlighted and it was stated that the said Act facilitated creation of specialized fora i.e. Debts Recovery Tribunals and the Debts Recovery Appellate Tribunals for expeditious adjudication of disputes relating to recovery of the debts due to banks and financial institutions. It was noted that there was no provision either in 1993 Act or the Securitisation Act by which the first charge has been created in favour of banks, financial institutions or secured creditors qua the property of the borrower. With reference to Section 13(9) of the Securitisation Act, this Court said that the legislature has ensured that priority given to the claim of the workmen of a company in liquidation under Section 529A of the Companies Act vis-a-vis the

11. (2009) 4 SCC 94.

secured creditors like banks was duly respected; the provisions are only part of the distribution mechanism evolved by the legislature and are intended to protect and preserve the right of the workmen of the Company in liquidation whose assets are subjected to the provisions of the Securitisation Act and are disposed of by the secured creditor in accordance with Section 13 thereof.

59. Then in paragraphs 128, 129, 130 and 131 (pages 141-142) of the Report, this Court in *Central Bank of India*[11] stated the legal position as follows:

> 128. If the provisions of the DRT Act and the Securitisation Act are interpreted keeping in view the background and context in which these legislations were enacted and the purpose sought to be achieved by their enactment, it becomes clear that the two legislations, are intended to create a new dispensation for expeditious recovery of dues of banks, financial institutions and secured creditors and adjudication of the grievance made by any aggrieved person qua the procedure adopted by the banks, financial institutions and other secured creditors, but the provisions contained therein cannot be read as creating first charge in favour of banks, etc.
>
> 129. If Parliament intended to give priority to the dues of banks, financial institutions and other secured creditors over the first charge created under State legislations then provisions similar to those contained in Section 14-A of the Workmen's Compensation Act, 1923, Section 11(2) of the EPF Act, Section 74(1) of the Estate Duty Act, 1953, Section 25(2) of the Mines and Minerals (Regulation and Development) Act, 1957, Section 30 of the Gift Tax Act, and Section 529-A of the Companies Act, 1956 would have been incorporated in the DRT Act and the Securitisation Act.
>
> 130. Undisputedly, the two enactments do not contain

provision similar to the Workmen's Compensation Act, etc. In the absence of any specific provision to that effect, it is not possible to read any conflict or inconsistency or overlapping between the provisions of the DRT Act and the Securitisation Act on the one hand and Section 38-C of the Bombay Act and Section 26-B of the Kerala Act on the other and the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate qua or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case may be.

131. The Court could have given effect to the non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act vis-à-vis Section 38-C of the Bombay Act and Section 26-B of the Kerala Act and similar other State legislations only if there was a specific provision in the two enactments creating first charge in favour of the banks, financial institutions and other secured creditors but as Parliament has not made any such provision in either of the enactments, the first charge created by the State legislations on the property of the dealer or any other person, liable to pay sales tax, etc., cannot be destroyed by implication or inference, notwithstanding the fact that banks, etc. fall in the category of secured creditors.

60. In *Jitendra Nath Singh*[2] again interpretation of Sections 529 and 529A of the Companies Act came up for consideration. There was a divergence of opinion among the Judges hearing the matter. The majority view gave the following interpretation to Sections 529 and 529A of the Companies Act:

16.1. A secured creditor has only a charge over a particular property or asset of the company. The secured

creditor has the option to either realise his security or relinquish his security. If the secured creditor relinquishes his security, like any other unsecured creditor, he is entitled to prove the debt due to him and receive dividends out of the assets of the company in the winding-up proceedings. If the secured creditor opts to realise his security, he is entitled to realise his security in a proceeding other than the winding-up proceeding but has to pay to the liquidator the costs of preservation of the security till he realises the security.

16.2. Over the security of every secured creditor, a statutory charge has been created in the first limb of the proviso to clause (*c*) of sub-section (1) of Section 529 of the Companies Act in favour of the workmen in respect of their dues from the company and this charge is pari passu with that of the secured creditor and is to the extent of the workmen's portion in relation to the security of any secured creditor of the company as stated in clause (*c*) of sub-section (3) of Section 529 of the Companies Act.

16.3. Where a secured creditor opts to realise the security then so much of the debt due to such secured creditor as could not be realised by him by virtue of the statutory charge created in favour of the workmen shall to the extent indicated in clause (*c*) of the proviso to sub-section (1) of Section 529 of the Companies Act rank pari passu with the workmen's dues for the purposes of Section 529-A of the Companies Act.

16.4. The workmen's dues and where the secured creditor opts to realise his security, the debt to the secured creditor to the extent it ranks pari passu with the workmen's dues under clause (*c*) of the proviso to sub-section (1) of Section 529 of the Companies Act shall be paid in priority over all other dues of the company.

61. Whilst there was divergence of opinion on certain

aspects, as regards the exposition of law in paragraph 76 of the judgment in *Allahabad Bank*[1] that workmen's dues have priority over all other creditors, secured and unsecured because of Section 529A(1)(a), the Bench was of unanimous opinion that the said statement in *Allahabad Bank*[1] was not a good law.

62. Section 529A was inserted by Companies (Amendment) Act, 1985. By incorporation of this provision, workmen's dues rank *pari passu* with secured creditors. In other words, the workmen of the company in winding up acquire the status of secured creditors. Pertinently, while inserting Section 529A in the Companies Act by the Companies (Amendment) Act, 1985, the proviso to sub-section (1) of Section 529 was also inserted which provides that the security of every secured creditor shall be deemed to be subject to a *pari passu* charge in favour of the workmen to the extent of the workmen's portion.

63. A cumulative reading of Sections 529A and 529(1)(c) proviso leads to an irresistible conclusion that where a company is in liquidation, a statutory charge is created in favour of workmen in respect of their dues over the security of every secured creditor and this charge is *pari passu* with that of the secured creditor. Such statutory charge is to the extent of workmen's portion in relation to the security held by the secured creditor of the company. This position, in our opinion, is equally applicable where the assets of the company have been sold in execution of the recovery certificate obtained by the bank or financial institution against the debtor company when it was not in liquidation but before the proceeds realised from such sale could be fully and finally disbursed, the company had gone into liquidation. Stated differently, pending final disbursement of the proceeds realised from the sale of security in execution of the recovery certificate issued by the DRT, if debtor company becomes company in winding up, Sections 529A and 529(1)(c) proviso come into operation immediately and statutory charge

is created in favour of workmen in respect of their dues over such proceeds.

64. Having regard to the scheme of law, it appears to us that the relevant date for arriving at the ratio at which the sale proceeds are to be distributed amongst workmen and secured creditors of the company is the date of the winding up order and not the date of sale.

65. Where the sale of security has been effected in execution of recovery certificate issued by DRT under the 1993 Act, the distribution of undisbursed proceeds has to be made by the DRT alone in accordance with Section 529A of the Companies Act. It is so because Section 19(19) of the 1993 Act provides that DRT may order distribution of the sale proceeds amongst the secured creditors in accordance with Section 529A where a recovery certificate is issued against the company registered under the Companies Act. The workmen of the company in winding up acquire the standing of secured creditors on and from the date of the winding up order (or where provisional liquidator has been appointed, from the date of such appointment) and they become entitled to distribution of sale proceeds in the ratio as explained in the illustration appended to Section 529(3)(c) of the Companies Act. The question is whether Section 19(19) of the 1993 Act clothes DRT with jurisdiction to determine the workmen's claims against the debtor company? We do not think so for reasons more than one.

66. In the first place, 1993 Act has provided for special machinery for speedy recovery of dues of banks and financial institutions in specific matters. It is with this objective that it provides for establishment of DRT with the jurisdiction, power and authority for adjudication of claims of the banks and financial institutions. 1993 Act also provides for the modes of recovery of the amount so adjudicated by the DRTs. 1993 Act has not brought within its sweep, the adjudication of claims of

persons other than banks and financial institutions. DRT has not been given powers to adjudicate the dues of workmen of the debtor company. Section 17 or Section 19 of the 1993 Act cannot be read in a manner that allows such exercise to be undertaken by the DRT. DRT does not possess necessary statutory powers to address all disputes that may arise in adjudicating workmen's claims in winding up proceedings. The adjudication of workmen's claims against the debtor company is a substantive matter and DRT has neither competence nor machinery for that. Certain incidental and ancillary powers given to DRT do not encompass power to adjudicate upon or decide dues of the workmen of the debtor company.

67. Secondly, Section 19(19) of the 1993 Act is a provision of distribution mechanism and not an independent adjudicatory provision. This provision follows adjudication of claim made by a bank or financial institution. It comes into play where a certificate of recovery is issued against a company registered under the Companies Act which is in winding up. Where the debtor company is not in liquidation, Section 19(19) does not come into operation at all. Following Tiwari Committee Report and Narasimham Committee Report, the present Section 19(19) was incorporated in 1993 Act for protection of *pari passu* charge of secured creditors, including workmen's dues at the time of distribution of the sale proceeds of such company. The participation of workmen along with secured creditors under Section 19(19) is, to a limited extent, in the distribution of the sale proceeds by the DRT and not for determination of their claims against the debtor company by the DRT. Once the company is in winding up, the only competent authority to determine the workmen's dues and quantify workmen's portion is the liquidator. The liquidator has the responsibility and competence to determine the workmen's dues where the debtor company is in liquidation.

68. Thirdly, the expression, 'the Tribunal may order the sale proceeds of such company to be distributed among its secured

creditors in accordance with the provisions of Section 529A of the Companies Act' occurring in Section 19(19) does not empower DRT to itself examine, determine and decide upon workmen's claim under Section 529A. The above expression means that where the debtor company is in winding up, the sale proceeds of such company realized under the 1993 Act are to be distributed among its secured creditors by following Section 529A of the Companies Act. Mention of Section 529A in Section 19(19) is neither a legislation by reference nor a legislation by incorporation. What it requires is that DRT must follow the mandate of Section 529A by making distribution in equal proportion to the secured creditors and workmen of the debtor company in winding up.

69. We are unable to accept the submission of the learned senior counsel for the Kamgar Union that Section 19(19) is not restricted to a situation where the debtor company is in winding up. In our view, Section 19(19) covers situation where a debtor company is in winding up or where a provisional liquidator has been appointed in respect of the debtor company and in no other situation. If the debtor company is not in liquidation nor any provisional liquidator has been appointed and merely winding up proceedings are pending, there is no question of distribution of sale proceeds among secured creditors in the manner prescribed in Section 19(19) of the 1993 Act.

70. The position stated in *Allahabad Bank*[1] that priorities, so far as the amounts realized under the 1993 Act are concerned, are to be worked out only by DRT admits of no ambiguity and is legally sound but this statement cannot be read as laying down the proposition that in respect of the amounts realized under the 1993 Act, the DRT has power, competence or authority to determine the workmen's dues of the debtor company. The manner of distribution among secured creditors of the monies realized under the 1993 Act does not clothe DRT to adjudicate the claims of secured creditors other than the banks and financial institutions against the company under

Section 19(19). Any statement of law to the contrary in *Allahabad Bank*[1] must be held to be not a good law.

71. In *Rajasthan State Financial Corporation*[5], this Court propounded the proposition that a DRT acting under the 1993 Act would be entitled to order the sale of the properties of the debtor, even if a company is in liquidation, through its Recovery Officer but only after notice to the official liquidator or the liquidator appointed by the Company Court and after hearing him. We are in agreement with the above view. Where the winding up petition against the debtor company is pending but no order of winding up has been passed nor any provisional liquidator has been appointed in respect of such company at the time of order of sale by DRT and the properties of the debtor company have been sold in execution of the recovery certificate and proceeds of sale realized and full disbursement of the sale proceeds has been made to the concerned bank or financial institution, the subsequent event of the debtor company going into liquidation is no ground for reopening disbursement by the DRT. However before full and final disbursement of sale proceeds, if the debtor company has gone into liquidation and a liquidator is appointed, disbursement of undisbursed proceeds by DRT can only be done after notice to the liquidator and after hearing him. In that situation if there is claim of workmen's dues, the DRT has two options available with it. One, the bank or financial institution which made an application before DRT for recovery of debt from the debtor company may be paid the undisbursed amount against due debt as per the recovery certificate after securing an indemnity bond of restitution of the amount to the extent of workmen's dues as may be finally determined by the liquidator of the debtor company and payable to workmen in the proportion set out in the illustration appended to Section 529(3)(c) of the Companies Act. The other, DRT may set apart tentatively portion of the undisbursed amount towards workmen's dues in the ratio as per the illustration following Section 529(3)(c) and disburse the balance amount to the

applicant bank or financial institution subject to an undertaking by such bank or financial institution to restitute the amount to the extent workmen's dues as may be finally determined by the liquidator, falls short of the amount which may be distributable to the workmen as per the above illustration. The amount so set apart may be disbursed to the liquidator towards workmen's dues on ad hoc basis subject to adjustment on final determination of the workmen's dues by the liquidator. The first option must be exercised by DRT only in a situation where no application for distribution towards workmen's dues against the debtor company has been made by the liquidator or the workmen before the DRT.

72. In light of the above discussion, we sum up our conclusions thus:

(i) If the debtor company is not in liquidation nor any provisional liquidator has been appointed and merely winding up proceedings are pending, there is no question of distribution of sale proceeds among secured creditors in the manner prescribed in Section 19(19) of the 1993 Act.

(ii) Where a company is in liquidation, a statutory charge is created in favour of workmen in respect of their dues over the security of every secured creditor and this charge is *pari passu* with that of the secured creditor. Such statutory charge is to the extent of workmen's portion in relation to the security held by the secured creditor of the debtor company.

(iii) The above position is equally applicable where the assets of the debtor company have been sold in execution of the recovery certificate obtained by the bank or financial institution against the debtor company when it was not in liquidation but before the proceeds realized from such sale could be fully

and finally disbursed, the company had gone into liquidation. In other words, pending final disbursement of the proceeds realized from the sale of security in execution of the recovery certificate issued by the debt recovery tribunal, if debtor company becomes company in winding up, Section 529A read with Section 529(1)(c) proviso come into operation and statutory charge is created in favour of workmen in respect of their dues over such proceeds.

(iv) The relevant date for arriving at the ratio at which the sale proceeds are to be distributed amongst workmen and secured creditors of the debtor company is the date of the winding up order and not the date of sale.

(v) The conclusions (ii) to (iv) shall be *mutatis mutandis* applicable where provisional liquidator has been appointed in respect of the debtor company.

(vi) Where the winding up petition against the debtor company is pending but no order of winding up has been passed nor any provisional liquidator has been appointed in respect of such company at the time of order of sale by DRT and the properties of the debtor company have been sold in execution of the recovery certificate and proceeds of sale realized and full disbursement of the sale proceeds has been made to the concerned bank or financial institution, the subsequent event of the debtor company going into liquidation is no ground for reopening disbursement by the DRT.

(vii) However, before full and final disbursement of sale proceeds, if the debtor company has gone into liquidation and a liquidator is appointed, disbursement of undisbursed proceeds by DRT

can only be done after notice to the liquidator and after hearing him. In that situation if there is claim of workmen's dues, the DRT has two options available with it. One, the bank or financial institution which made an application before DRT for recovery of debt from the debtor company may be paid the undisbursed amount against due debt as per the recovery certificate after securing an indemnity bond of restitution of the amount to the extent of workmen's dues as may be finally determined by the liquidator of the debtor company and payable to workmen in the proportion set out in the illustration appended to Section 529(3)(c) of the Companies Act. The other, DRT may set apart tentatively portion of the undisbursed amount towards workmen's dues in the ratio as per the illustration following Section 529(3)(c) and disburse the balance amount to the applicant bank or financial institution subject to an undertaking by such bank or financial institution to restitute the amount to the extent workmen's dues as may be finally determined by the liquidator, falls short of the amount which may be distributable to the workmen as per the above illustration. The amount so set apart may be disbursed to the liquidator towards workmen's dues on ad hoc basis subject to adjustment on final determination of the workmen's dues by the liquidator.

(viii) The first option must be exercised by DRT only in a situation where no application for distribution towards workmen's dues against the debtor company has been made by the liquidator or the workmen before the DRT.

(ix) Where the sale of security has been effected in execution of recovery certificate issued by the DRT

under the 1993 Act, the distribution of sale proceeds has to be made by the DRT alone in accordance with Section 529A of the Companies Act and by no other forum or authority.

(x) The workmen of the company in winding up acquire the standing of the secured creditors on and from the date of winding up order (or where provisional liquidator has been appointed, from the date of such appointment) and they become entitled to the distribution of sale proceeds in the ratio as explained in the illustration appended to Section 529(3)(c) of the Companies Act.

(xi) Section 19(19) of the 1993 Act does not clothe DRT with jurisdiction to determine the workmen's claim against the debtor company. The adjudication of workmen's dues against the debtor company in liquidation has to be made by the liquidator. In other words, once the company is in winding up the only competent authority to determine the workmen's dues is the liquidator who obviously has to act under the supervision of the company court and by no other authority.

(xii) Section 19 (19) is attracted only where a debtor company is in winding up or a provisional liquidator has been appointed in respect of such company. If the debtor company is not in liquidation or if in respect of such company no order of appointment of provisional liquidator has been made and merely winding up proceedings are pending, the question of distribution of sale proceeds among secured creditors in the manner prescribed in Section19(19) of the 1993 Act does not arise.

73. For the above conclusions, we hold, as it must be held, that the claims of the workmen who claim to be entitled to

payment *pari passu* have to be considered and adjudicated by the liquidator of the debtor company and not by the DRT. We answer the question accordingly.

74. The impugned judgment is set aside. The Debt Recovery Tribunal, Mumbai III and the official liquidator of the Company shall proceed further now concerning workmen's dues as indicated in this judgment. The appeals are allowed with no order as to costs. All pending applications stand disposed of.

R.P. Appeals allowed.