M/S. GIAN CHAND & BROTHERS AND ANOTHER
v.
RATTAN LAL @ RATTAN SINGH
(Civil Appeal No.130 of 2013)

JANUARY 8, 2013

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

Code of Civil Procedure, 1908 – Order VIII, rr. 3, 4 & 5 – Manner in which allegations of fact in the plaint should be traversed – Legal consequences flowing from its non-compliance – Appellants filed suit for recovery of the money allegedly lent by it to the defendant-respondent – Appellants placed reliance upon the alleged signatures of the defendant-respondent on the cash book maintained by the appellants – Respondent denied having borrowed any sum from the plaintiffs-appellants and further denied the alleged signatures on the cash book – Held: The burden of proving the facts rests on the party who substantially asserts the affirmative issues and not the party who denies it but there may be an exception thereto – On facts, the plaintiff examined witnesses, proven entries in the books of accounts and also proven the acknowledgements duly signed by the defendant – The defendant, on the contrary, except making a bald denial of the averments, did not state anything else – Nothing was put to the witnesses in the cross-examination when the documents were exhibited – The defendant only came with a specious plea in his evidence which was not pleaded – In the circumstances, the High Court fell into error in holding that it was obligatory on the part of the plaintiffs to examine the handwriting expert to prove the signatures – The finding that the plaintiffs had failed to discharge the burden was absolutely misconceived in the facts of the case – In the written statement, there was absolutely evasive denial – The defendants could not have been permitted to lead any

evidence when nothing was stated in the pleadings – The courts below had correctly rested the burden of proof on the defendant but the High Court, in an erroneous impression, overturned the said finding – Evidence – Onus to prove – Evasive denial by defendant – Effect.

Evidence – Variance in the pleadings in the plaint and the evidence adduced by the plaintiffs – Effect – Held: On facts, the variance was absolutely very little – It did not remotely cause prejudice to the defendant – In all circumstances, it cannot be said that because of variance between pleading and proof, the rule of secundum allegata et probata would be strictly applicable.

Evidence – Books of accounts maintained in regular course of business – Held: Should not be rejected without any kind of rebuttal or discarded without any reason.

The appellants filed suit for recovery of the money allegedly lent by it to the defendant-respondent. The appellants placed reliance upon the alleged signatures of the defendant-respondent on the cash book maintained by the appellants. The respondent denied having borrowed any sum from the plaintiffs-appellants and further denied the alleged signatures on the cash book. The suit was decreed by the trial court. The decree was partially modified by the first appellate court.

On further appeal by the defendant, the High Court held that the findings returned by the courts below were perverse on two counts, namely, incorrect placing of onus on the defendant to prove that the signatures had been forged more so when there was denial of the same and second, the variance in the pleadings and the evidence as regards the amounts in question were not appositely taken note of, and accordingly set aside the judgments of the courts below. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. The plaintiffs have categorically asseverated that the defendant used to avail advance money from the plaintiffs with the promise to bring his agriculture produce for sale at their shop and the said amount had been duly entered in the books of accounts which the defendant had acknowledged under his signatures in the corresponding entries. The Accountant of the firm, PW-1, has proved various entries and they have been marked as exhibits. There had been no objection when the signatures were stated to be that of the defendant. Also, nothing has been put to him in the cross-examination about the signatures. The partner of the firm, PW-2, has testified the signatures in the entries. He has clearly stated that he was able to identify the signatures. [Para 15] [612-G-H; 613-A-C]

1.2. In paragraphs 6 and 7 of the plaint, it was averred that the defendant had given the acknowledgement of amount under his signature in the corresponding entry in the books of accounts. While replying to the same, the defendant has said that the arguments in para 6 of the plaint are wrong and denied in view of the preliminary objections. The preliminary objections pertained to bald denial of liability, lack of locus standi to file the suit, non-joinder of parties and lack of cause of action. But, there was no plea whatsoever as regards the denial of signature or any kind of forgery or fraud. The plaintiffs had asserted that there was an acknowledgement under the signatures of the defendant. But there was no denial by the defendant about the signatures; and further, the acknowledgements had been proven without objection. Only in the examination-in-chief, the defendant had disputed the signature and in the cross-examination he has mercurially deposed that he does not remember to have signed at the time of any purchase. [Para 16] [613-E-H; 614-A-B]

1.3. It is well settled principle of law that a person who asserts a particular fact is required to affirmatively establish it. The burden of proving the facts rests on the party who substantially asserts the affirmative issues and not the party who denies it but the said principle may not be universal in its application and there may be an exception thereto. If the plaintiff asserts that the defendant had acknowledged the signature, it is obligatory on his part to substantiate the same. But the present case is not one such case where the plaintiffs have chosen not to adduce any evidence. They have examined witnesses, proven entries in the books of accounts and also proven the acknowledgements duly signed by the defendant. The defendant, on the contrary, except making a bald denial of the averments, had not stated anything else. That apart, nothing was put to the witnesses in the cross-examination when the documents were exhibited. He only came with a specious plea in his evidence which was not pleaded. Thus, the High Court has fallen into error in holding that it was obligatory on the part of the plaintiffs to examine the handwriting expert to prove the signatures. The finding that the plaintiffs had failed to discharge the burden is absolutely misconceived in the facts of the case. [Paras 17, 21] [614-B-C; 615-D-F]

1.4. Furthermore, Rules 3, 4 and 5 of Order VIII, CPC form an integral code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. It is obligatory on the part of the defendant to specifically deal with each allegation in the plaint and when the defendant denies any such fact, he must not do so evasively but answer the point of substance. It shall not be sufficient for a defendant to deny generally the grounds alleged by the plaintiffs but he must be specific with each allegation of fact. Rule 4 of Order VIII, CPC stipulates that a defendant must not evasively answer the

point of substance. If he receives a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received, and that if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances. Rule 5 of Order VIII, CPC deals with specific denial and clearly lays down that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted against him. [Paras 22, 23] [615-G-H; 616-A-D]

1.5. In the instant case, in the written statement, there was absolutely evasive denial. Where there is total evasive denial and an attempt has been made to make out a case in adducing the evidence that he was not aware whether the signatures were taken or not, it is not permissible. The defendants could not have been permitted to lead any evidence when nothing was stated in the pleadings. The courts below had correctly rested the burden of proof on the defendant but the High Court, in an erroneous impression, has overturned the said finding. [Para 24 and 26] [616-E-F, 617-D]

Anil Rishi v. Gurbaksh Singh **(2006) 5 SCC 558: 2006 (1) Suppl. SCR 659;** *Krishna Mohan Kul v. Pratima Maity and others* **(2004) 9 SCC 468:2003 (3) Suppl. SCR 496;** *Shashi Kumar Banerjee and Others v. Subodh Kumar Bannerjee since deceased and after him his legal representatives and Others* **AIR 1964 SC 529;** *Badat and Co., Bombay v. East India Trading Co.* **AIR 1964 SC 538: 1964 SCR 19;** *Sushil Kumar v. Rakesh Kumar* **(2003) 8 SCC 673: 2003 (4) Suppl. SCR 802 – relied on.**

A. Raghavamma and Another v. A. Chenchamma and Another **AIR 1964 SC 136: 1964 SCR 933 – referred to.**

2. Though with regard to the amounts in question there is some variance in the pleadings in the plaint and the evidence adduced by the plaintiffs but, the variance is absolutely very little. In fact, there is one variation, i.e., at one time, it is mentioned as Rs.6,64,670 whereas in the pleading, it has been stated as Rs.6,24,670 and there is some difference with regard to the date. Such a variance does not remotely cause prejudice to the defendant. The true test is whether the other side has been taken by surprise or prejudice has been caused to him. In all circumstances, it cannot be said that because of variance between pleading and proof, the rule of *secundum allegata et probate* would be strictly applicable. In the present case, it cannot be said that the evidence is not in line with the pleading and in total variance with it or there is virtual contradiction. Thus, the finding returned by the High Court on this score is unacceptable. [Para 27] [617-E-G; 618-B-D]

Celina Coelho Pereira (Ms) and Others v. Ulhas Mahabaleshwar Kholkar and Others **(2010) 1 SCC 217: 2009 (15) SCR 558 – relied on.**

3. Furthermore, the plaintiff No. 2, his accountant and other witness have categorically stated that the books of accounts have been maintained in the regular course of business. The same has not been disputed by the defendant. In such circumstances, there is no reason that the books of accounts maintained by the plaintiff firm in the regular course of business should have been rejected without any kind of rebuttal or discarded without any reason. [Para 28 and 29] [618-E-F; 619-A-B]

Commissioner of Income Tax, Delhi v. Woodward Governor India Private Limited **(2009) 13 SCC 1: 2009 (5) SCR 738 – relied on.**

4. The High Court has erroneously recorded that the

findings returned by the courts below are perverse and warranted interference and, accordingly, the judgment of the High Court is set aside and that of the courts below are restored. [Para 30] [619-B-C]

Case Law Reference:

2006 (1) Suppl. SCR 659	**relied on**	**Para 17**
2003 (3) Suppl. SCR 496	**relied on**	**Para 18**
AIR 1964 SC 529	**relied on**	**Para 19**
1964 SCR 933	**referred to**	**Para 20**
1964 SCR 19	**relied on**	**Para 22, 25**
2003 (4) Suppl. SCR 802	**relied on**	**Para 24**
2009 (15) SCR 558	**relied on**	**Para 27**
2009 (5) SCR 738	**relied on**	**Para 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 130 of 2013.

From the Judgment & Order dated 26.02.2009 of the High Court of Punjab & Haryana at Chandigarh in RSA No. 1570 of 2008.

Gautam Narayan, Dayan Krishnan, Nikhil Nayyar for the Appellants.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. In this appeal, the assail is to the legal soundness of the judgment and decree dated 26.2.2009 in R.S.A. No. 1570 of 2008 passed by the learned single Judge of the High Court of Punjab and Haryana at Chandigarh whereby it overturned the decision of the learned Additional District Judge, Kurukshetra in Civil Appeal No. 96 of 2006 dated 12.03.2008 wherein the judgment and decree dated 20.07.2006 passed by the learned Additional Civil Judge (Sr. Division), Pehowa was partially modified.

3. The facts which are necessary to be stated are that the plaintiffs-appellants (hereinafter referred to as "plaintiffs") had initiated a civil action forming the subject matter of CS No. 337 of 2004 in the court of Additional Civil Judge (Sr. Division), Pehowa for recovery of a total sum of Rs.10,45,620/- along with pendente lite and future interest at @18% per annum. It was the case of the plaintiffs that plaintiff No. 1 is a registered partnership firm carrying the business of commission agent for sale and purchase of food grains in Shop No. 69, New Green Market at Anaj Mandi in Pehowa and plaintiff No. 2 is the partner of the said partnership firm. The plaintiff firm advances money to the agriculturists and charges commission on the sale price of the agricultural produce sold as determined by the market committee. For the aforesaid purpose, it has been maintaining the books of accounts in the regular course of business. The respondent-defendant (hereinafter referred to as "the defendant") had been maintaining regular and long standing current account with the plaintiffs. The defendant had taken advance from time to time from the plaintiffs which he had promised to return at the shop of the plaintiffs. All the transactions between the parties were entered in the books of accounts which reflected that as on 30.4.2002, a sum of Rs.5,80,000/- stood in the name of the defendant towards outstanding balance and he had acknowledged the same under his signature in the corresponding account entry in the account books of the plaintiffs. The defendant neither returned the money nor brought any agricultural produce for sale to the shop of the plaintiffs till 27.5.2003. The plaintiffs served a legal notice on 26.2.2004 on the defendant to make good the payment and also made repeated requests requiring him to pay the dues, but all requests and demands went in vain and eventually, on 18.8.2004, he refused to comply with the request. Being put in such a situation, the plaintiffs were compelled to institute the

suit on 19.8.2004 wherein they claimed Rs.9,72,670/- which included the total amount lent to the defendant at various times and Rs.72,950/- towards interest till the date of filing of the suit and further claimed pendente lite and future interest @ 18% per annum. Be it noted, the borrowings for the financial years 2002-2003 and 2003-2004 were reflected in the "rokar bahi".

4. A written statement was filed by the defendant which consisted of two parts, namely, preliminary objections and reply on merits. In the preliminary objections, it was stated that the suit was not maintainable; that the father of the defendant was a customer of the plaintiffs' firm but the defendant had nothing to do with the plaintiffs; that if there was any liability, it was of Kewal Krishan and not of the defendant; that the plaintiffs had no locus standi to file the suit and it was defective for non-joinder of parties; and that no cause of action arose against the defendant. As far as the merits are concerned, reference was made to every paragraph of the plaint and in oppugnation, it was stated that some of the averments were false. As far as the other averments were concerned, the defendant denied them due to lack of knowledge.

5. The learned trial Judge, on the basis of the pleadings, framed five issues. The principal issues that were really addressed on contest were whether the plaintiff was entitled to recover an amount of Rs.10,45,620/- along with interest pendente lite and future interest @ 18% per annum; that whether the suit of the plaintiff was not maintainable in the present form; that whether the plaintiff had no locus standi and cause of action to file and maintain the suit; and that whether the suit of the plaintiff was bad for non-joinder of necessary parties.

6. Be it noted, on behalf of the plaintiffs including the partner of the plaintiffs' firm, three witnesses were examined and 13 documents, namely, copy of ledger, bahi, copy of ledger of S.T./C.S.T., copy of Form-A, Form-C, copy of resolution dated 31.10.1993 and copy of the certificate dated 28.07.2005 were brought in the evidence and marked as exhibits. The defendant

examined himself as DW-1 and did not produce any documentary evidence.

7. The learned trial Judge, considering the evidence on record, came to hold that the plaintiffs had been able to establish that the firm was engaged in the business of a commission agent which lends money to the agriculturists; that the business transaction with the plaintiff's firm had not been denied by the defendant; that the bahi entries had been produced on record by the plaintiffs to show that the amount was advanced to the defendant and the said entries had the stamp and signatures of the defendant; that the plea of the defendant that his signatures on the bahi entries were fraudulently obtained had not been substantiated; that the transactions in dispute were numerous and extended over a number of years and there was no reason not to lend credence to the genuineness of the books of accounts; that the plaintiffs had the locus standi to file the suit and the cause of action had arisen to initiate a civil action and that the plea that the suit was defective for non-joinder of parties had really not been pressed. Being of this view, the learned trial Judge opined that the plaintiffs were entitled to recover the amount of Rs.10,45,620/- along with pendente lite and future interest @ 6% per annum and, accordingly, decreed the suit.

8. Grieved by the aforesaid judgment and decree, the defendant preferred a Civil Appeal wherein it was contended that when the signatures in the books of accounts were denied, it was obligatory on the part of the plaintiffs to get the same examined by a handwriting expert; that the signatures in the books of accounts had been forged by the plaintiffs; that certain entries did not bear the signatures of the defendant; that the plaintiffs had failed to show why such a huge amount had been advanced to the defendant; and that the learned trial Judge had fallen into error by decreeing the suit of the plaintiffs.

9. The first appellate court, considering the contentions raised before it, came to hold that the plaintiffs had placed

reliance on the ledger entries which were maintained in the regular course of business; that from Exhibit P-2, it was vivid that a sum of Rs.5,80,000/- was taken in cash by the defendant and it had his signatures and that the aspect of forgery has not been pleaded and, in any case, had not been proven at all; and that except two entries, namely, Exh. P-4 and P-9, the defendant had signed in all the entries which were maintained in the regular course of business; that the written statement was absolutely evasive and no plea of forgery being taken, the challenge that the signatures were obtained fraudulently or by any other method or undue relationship did not warrant consideration and, in any case, the onus did lie on the defendant which was not discharged.

10. On the aforesaid base, it opined that the plaintiffs were entitled to recover the amount excluding the sums covered under those two entries along with proportionate interest and, accordingly, partly allowed the appeal and modified the judgment and decree of the learned trial Judge.

11. Being dissatisfied, the defendant preferred second appeal and the learned single Judge framed four substantial questions of law, namely, (i) whether a suit for recovery could be decreed when the pleadings and evidence led by the plaintiffs were at substantial variance; (ii) whether the plaintiffs could be said to have established its case, particularly when the defendant had denied the factum of borrowing any sum and the signatures on the cash book and no evidence including document/finger print expert was led by the plaintiffs to establish the signatures of the defendant in the account books; (iii) whether it was obligatory on the part of the plaintiff to prove the alleged signatures of the defendant in the cash book when they had been disputed; and (iv) whether the admission of the defendant could be assumed in the absence of clear and unambiguous admission of the party to the litigation.

12. The High Court referred to paragraphs 6 and 7 of the plaint and Exhibits P-1, P-2, P-3, P-7, P-9 and P-10 and

noticed the variance of the amounts mentioned therein and further opined that when the signatures had been denied, the onus was on the plaintiffs to examine a handwriting expert to establish the veracity of the signatures to bring home the plea set up by the plaintiffs in the plaint. It also ruled that the courts below had fallen into error in holding that the onus to prove the falsity was on the defendant. Analyzing the documents and evidence, the learned single Judge came to hold that the averments as pleaded in the plaint and the evidence in support thereof were at variance with each other and the evidence did not substantiate the claim and the onus to prove the accounts and rokar bahi having not been discharged, the judgments of the fora below were unsustainable. Hence, the present appeal.

13. We have heard Mr. Gautam Narayan, learned counsel for the appellants. Despite service of notice, there has been no appearance on behalf of the respondent.

14. On a careful reading of the judgment, it is noticeable that the High Court has observed that the findings returned by the courts below are perverse and, accordingly, jurisdiction under Section 100 of the Code of Civil Procedure could be exercised. The perversity has been noticed on two counts, namely, incorrect placing of onus on the defendant to prove that the signatures had been forged more so when there was denial of the same and second, the variance in the pleadings and the evidence as regards the amounts in question were not appositely taken note of. Thus, we are required to see whether the approach of the learned single Judge in annulling the judgments of the courts below is correct on the aforesaid grounds which, according to him, reflect perversity of approach.

15. First, we shall deal with the onus to prove in such a case. The plaintiffs, in paragraphs 4 and 5 of the plaint, have categorically asseverated that the defendant used to avail advance money from the plaintiffs with the promise to bring his agriculture produce for sale at their shop and the said amount had been duly entered in the books of accounts which the

defendant had acknowledged under his signatures in the corresponding entries. The Accountant of the firm, PW-1, has proved various entries and they have been marked as exhibits. There had been no objection when the signatures were stated to be that of the defendant. It is admitted by him that Exh. P-9 did not bear the signature of the defendant. It is worthy to note that nothing has been put to him in the cross-examination about the signatures. The partner of the firm, PW-2, has testified the signatures in the entries. He has clearly stated that he was able to identify the signatures. The defendant had examined himself as DW-1 and had only stated that he had no dealings with the plaintiffs but his father was a customer of the firm. He had disputed to have signed any entries. In the cross-examination, he has admitted his signatures on the written statement and stated that he did not remember whether at the time of purchase, his signatures were taken or not.

16. As noticed earlier, the High Court has held that the fora below erroneously placed the onus on the defendant to disprove his signatures. On a careful scrutiny of the evidence, it is manifest that the signatures are proven by the witnesses and they have been marked as exhibits without any objection. It is interesting to note that in paragraphs 6 and 7 of the plaint, it was averred that the defendant had given the acknowledgement of amount under his signature in the corresponding entry in the books of accounts. While replying to the same, the defendant has said that the arguments in para 6 of the plaint are wrong and denied in view of the preliminary objections. It is apt to note that the preliminary objections pertained to bald denial of liability, lack of locus standi to file the suit, non-joinder of parties and lack of cause of action. Thus, there was no plea whatsoever as regards the denial of signature or any kind of forgery or fraud. The High Court, as we find, has observed that the plaintiffs should have examined a handwriting expert. The plaintiffs had asserted that there was an acknowledgement under the signatures of the defendant. There was no denial by the defendant about the signatures; and further, the

acknowledgements had been proven without objection. Only in the examination-in-chief, the defendant had disputed the signature and in the cross-examination he has mercurially deposed that he does not remember to have signed at the time of any purchase.

17. It is well settled principle of law that a person who asserts a particular fact is required to affirmatively establish it. In *Anil Rishi v. Gurbaksh Singh*[1], it has been held that the burden of proving the facts rests on the party who substantially asserts the affirmative issues and not the party who denies it and the said principle may not be universal in its application and there may be an exception thereto. The purpose of referring to the same is that if the plaintiff asserts that the defendant had acknowledged the signature, it is obligatory on his part to substantiate the same. But the question would be what would be the consequence in a situation where the signatures are proven and there is an evasive reply in the written statement and what should be construed as substantiating the assertion made by the plaintiff.

18. In *Krishna Mohan Kul v. Pratima Maity and Others*[2], it has been ruled thus: -

> "When fraud, misrepresentation or undue influence is alleged by a party in a suit, normally, the burden is on him to prove such fraud, undue influence or misrepresentation."

19. In *Shashi Kumar Banerjee and Others v. Subodh Kumar Bannerjee since deceased and after him his legal representatives and Others,*[3] a Constitution Bench of this Court, while dealing with a mode of proof of a will under the Indian Succession Act, observed that where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same.

1. (2006) 5 SCC 558.
2. (2004) 9 SCC 468.
3. AIR 1964 SC 529..

20. In *A. Raghavamma and Another v. A. Chenchamma and Another*[4], while making a distinction between burden of proof and onus of proof, a three-Judge Bench opined thus: -

> "There is an essential distinction between burden of proof and onus of proof : burden of proof lies upon the person who has to prove a fact and it never shifts, but the onus of proof shifts. The burden of proof in the present case undoubtedly lies upon the plaintiff to establish the factum of adoption and that of partition. The said circumstances do not alter the incidence of the burden of proof. Such considerations, having regard to the circumstances of a particular case, may shift the onus of proof. Such a shifting of onus is a continuous process in the evaluation of evidence."

21. The present case is not one such case where the plaintiffs have chosen not to adduce any evidence. They have examined witnesses, proven entries in the books of accounts and also proven the acknowledgements duly signed by the defendant. The defendant, on the contrary, except making a bald denial of the averments, had not stated anything else. That apart, nothing was put to the witnesses in the cross-examination when the documents were exhibited. He only came with a spacious plea in his evidence which was not pleaded. Thus, we have no hesitation in holding that the High Court has fallen into error in holding that it was obligatory on the part of the plaintiffs to examine the handwriting expert to prove the signatures. The finding that the plaintiffs had failed to discharge the burden is absolutely misconceived in the facts of the case.

22. The said aspect can be looked from another angle. Rules 3, 4 and 5 of Order VIII form an integral code dealing with the manner in which allegations of fact in the plaint should be traversed and the legal consequences flowing from its non-compliance. It is obligatory on the part of the defendant to

4. AIR 1964 SC 136.

specifically deal with each allegation in the plaint and when the defendant denies any such fact, he must not do so evasively but answer the point of substance. It is clearly postulated therein that it shall not be sufficient for a defendant to deny generally the grounds alleged by the plaintiffs but he must be specific with each allegation of fact (see *Badat and Co., Bombay v. East India Trading Co.*[5]).

23. Rule 4 stipulates that a defendant must not evasively answer the point of substance. It is alleged that if he receives a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received, and that if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances. Rule 5 deals with specific denial and clearly lays down that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted against him.

24. We have referred to the aforesaid Rules of pleading only to highlight that in the written statement, there was absolutely evasive denial. We are not proceeding to state whether there was admission or not, but where there is total evasive denial and an attempt has been made to make out a case in adducing the evidence that he was not aware whether the signatures were taken or not, it is not permissible. In this context, we may profitably refer to a two-Judge Bench decision in *Sushil Kumar v. Rakesh Kumar*[6] wherein, while dealing with the pleadings of election case, this Court has held thus: -

> "**73.** In our opinion, the approach of the High Court was not correct. It failed to apply the legal principles as contained in Order 8 Rule 3 and 5 of the Code of Civil Procedure.

5. AIR 1964 SC 538.

6. (2003) 8 SCC 673.

The High Court had also not analysed the evidence adduced on behalf of the appellant in this behalf in detail but merely rejected the same summarily stating that vague statements had been made by some witnesses. Once it is held that the statements made in paragraph 18 of the election petition have not been specifically denied or disputed in the written statement, the allegations made therein would be deemed to have been admitted, and, thus, no evidence contrary thereto or inconsistent therewith could have been permitted to be laid."

25. We may state with profit that in the said case, reliance was placed on *Badat and Co. v. East India Trading Co.* (supra).

26. Scrutinized thus, the irresistible conclusion would be that the defendants could not have been permitted to lead any evidence when nothing was stated in the pleadings. The courts below had correctly rested the burden of proof on the defendant but the High Court, in an erroneous impression, has overturned the said finding.

27. Another aspect which impressed the High Court was the variance in the pleadings in the plaint and the evidence adduced by the plaintiffs. To appreciate the said conclusion, we have keenly perused paragraphs 6 and 7 of the plaint and the evidence brought on record. It is noticeable that there is some variance but, as we perceive, we find that the variance is absolutely very little. In fact, there is one variation, i.e., at one time, it is mentioned as Rs.6,64,670 whereas in the pleading, it has been stated as Rs.6,24,670 and there is some difference with regard to the date. In our considered view, such a variance does not remotely cause prejudice to the defendant. That apart, it does not take him by any kind of surprise. In *Celina Coelho Pereira (Ms) and Others v. Ulhas Mahabaleshwar Kholkar and Others*[7], the High Court had non-suited the landlord on the

7. (2010) 1 SCC 217.

ground that he had not pleaded that the business of the firm was conducted by its partners, but by two other persons and that the tenant had parted with the premises by sub-letting them to the said two persons under the garb of deed of partnership by constituting a bogus firm. This Court observed that there is substantial pleading to that effect. The true test, the two-Judge Bench observed, was whether the other side has been taken by surprise or prejudice has been caused to him. In all circumstances, it cannot be said that because of variance between pleading and proof, the rule of *secundum allegata et probate* would be strictly applicable. In the present case, we are inclined to hold that it cannot be said that the evidence is not in line with the pleading and in total variance with it or there is virtual contradiction. Thus, the finding returned by the High Court on this score is unacceptable.

28. The next aspect which requires to be addressed is whether the books of accounts could have been rejected by the High Court on the ground that the entries had not been proven due to dispute of signatures solely on the foundation that the plaintiff had not examined the handwriting expert when there was a denial of the signature. We have already dealt with the factum of signature, the pleading and the substance in the evidence. The plaintiff No. 2, his accountant and other witness have categorically stated that the books of accounts have been maintained in the regular course of business. The same has not been disputed by the defendant. In such a circumstance, we may profitably reproduce a few lines from *Commissioner of Income Tax, Delhi v. Woodward Governor India Private Limited:*[8] -

"One more principle needs to be kept in mind. Accounts regularly maintained in the course of business are to be taken as correct unless there are strong and sufficient reasons to indicate that they are unreliable."

8. (2009) 13 SCC 1.

29. Applying the said principle to the pleadings and the evidence on record, we find no reason that the books of accounts maintained by the plaintiff firm in the regular course of business should have been rejected without any kind of rebuttal or discarded without any reason.

30. In view of the aforesaid analysis, we conclude and hold that the High Court has erroneously recorded that the findings returned by the courts below are perverse and warranted interference and, therefore, the judgment rendered by it is legally unsustainable and, accordingly, we allow the appeal, set aside the judgment of the High Court and restore that of the courts below. In the facts and circumstances of the case, there shall be no order as to costs.

B.B.B. Appeal allowed.

KAVI RAJ & OTHERS
v.
STATE OF J&K & ORS.
(Civil Appeal No. 162 of 2013)

JANUARY 9, 2013

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

Service Law – Posting (or transfer) beyond the cadre (or parent department) – Appellants selected and appointed as Assistant Surgeons – But posted against vacant posts of Senior/Junior House Officers, at the Government Medical College pursuant to a Government order issued by the Department of Health and Medical Education pertaining to posting of Assistant Surgeons – Subsequent order by Principal of the Medical College reverting the appellants to their parent Department, the Directorate of Health Service – Assailed by appellants – Single Judge of High Court set aside the order on ground that the appointment of appellants at the College was not by way of deputation and accordingly there was no question of their reversion to their parent department – Decision overturned by Division Bench of High Court – On appeal, held: Though the posts of Assistant Surgeons were created by the Health and Medical Education Department of the State Government, the said department comprised of two independent Directorates, namely, the Directorate of Health Services and the Directorate of Medical Education – Evidently, on facts, the appellants were substantively appointed to the Directorate of Health Services, and not in the Directorate of Medical Education –Their posting at the Government Medical College was most certainly beyond their parent cadre, and therefore, by way of deputation – Mere fact that consent of the appellants was not sought before their posting at the Government Medical College did not have any determinative effect – Reversion/repatriation of the appellants

to their parent department, i.e., the Directorate of Health Services, accordingly affirmed.

Service Law – Posting (or transfer) beyond the cadre (or parent department) –Consent of employee – Relevance and determination of – Held: Broadly, an employee can only be posted (or transferred) to a post against which he is selected – An employee's posting (or transfer), to a department other than the one to which he is appointed, against his will, would be impermissible – But willingness of posting beyond the cadre (and/or parent department) need not be expressly sought and can be implied – In the instant case, the appellants were issued posting orders by the Principal, Government Medical College – They accepted the same, and assumed charge as Senior/Junior House Officers at the Government Medical College, despite their selection and appointment as Assistant Surgeons – No doubt about their willingness/readiness to serve with the borrowing Directorate – Consent of the appellants was tacit and unquestionable.

Constitution of India, 1950 – Article 141 – Determination made by Supreme Court on merits – Proposition upheld as legal extended to other similarly situated parties since they were also heard by the Supreme Court.

The appellants were selected and appointed as Assistant Surgeons. A Government Order pertaining to the posting of Assistant Surgeons was issued by the Department of Health and Medical Education on 17.7.1997. In consonance with the Government Order dated 17.7.1997, the Principal, Government Medical College, Jammu, by an Office Order dated 30.12.1997, posted all the appellants against the vacant posts of Senior/Junior House Officers, at the Government Medical College, Jammu (and at hospitals associated with the said college). However, by order dated 7.1.1998, the Principal, Government Medical College, Jammu, reverted the appellants to their parent Department, namely, the

Directorate of Health Service, Jammu. The order dated 7.1.1978 was assailed by the appellants before the High Court primarily on the ground that the Secretary, Department of Health and Medical Education being the appointing authority of the appellants; the Principal Medical College, Jammu, had no jurisdiction to issue the order dated 7.1.1998.

A Single Judge of the High Court set aside the order dated 7.1.1998 holding that the consent of the concerned employees, prior to their appointment on deputation was mandatory; and that absence of consent in the case at hand established that the appointment of the appellants at the Government Medical College, Jammu, (and/or at hospitals associated therewith), was not by way of deputation, and accordingly, there was no question of their reversion to their parent department. The Single Judge also relied upon the Government Order dated 17.7.1997 in order to conclude, that the posting of the appellants at the Government Medical College, Jammu (and/or at hospitals associated therewith) was not beyond their cadre. Referring to paragraph 5(f) thereof, the Single Judge held, that the posting of the appellants was within the scope of the conditions of their employment. The decision was however set aside by the Division Bench and therefore the present appeals.

Disposing of the appeals, the Court

HELD: 1. It cannot be said that the appointment of the appellants was substantively made to a cadre under the Director of Medical Education. The appointment of the appellants in the Directorate of Medical Education, was clearly by way of deputation. Their posting at the Government Medical College Jammu (and/or at the hospitals associated therewith) was most certainly beyond their parent cadre, and therefore, by way of deputation. [Para 18] [640-G-H; 641-A]

2. Even though it is clear, that the posts of Assistant Surgeons were created by the Health and Medical Education Department of the State Government, it is also clear that the aforesaid department is comprised of two independent Directorates, namely, the Directorate of Health Services and the Directorate of Medical Education. The employees of each of the two Directorates are governed by a separate set of rules. The rules governing the conditions of service of gazetted employees of the Directorate of Medical Education, do not have the posts of Assistant Surgeons. The cadre of Assistant Surgeons is only found in the rules of recruitment applicable to gazettled employees of the Directorate of Health Service. Secondly, the assertion made by the respondents, that there were no posts of Assistant Surgeon when the appellants were selected and posted at the Government Medical College, Jammu (and/or at the hospitals associated therewith), in the Directorate of Medical Education, has not been disputed by the appellants. In the absence of any posts of Assistant Surgeon in the Directorate of Medical Education, it is impossible to infer that the appellants (who were selected against the posts of Assistant Surgeons) could have belonged to the Directorate of Medical Education. Furthermore, consequent upon the selection of the appellants by the Public Service Commission they were issued appointment orders dated 12.8.1997. A perusal of the same reveals, that such of the candidates who had been selected as Assistant Surgeons, and belonged to Jammu region, were to report to the Director, Health Services, Jammu. Whereas, those belonging to the Kashmir region, were to report to the Director, Health Services, Kashmir. The Directors of Health Services, Jammu as well as Kashmir, are admittedly incharge of the administrative chain of command, in the respective Directorates of Health Services. This by itself demonstrates, that the

appointment of the appellants was to the Directorate of Health Services, and not in the Directorate of Medical Education. Fourthly, the order issued by the Principal, Government Medical College, Jammu dated 30.12.1997 reveals, that the appellants were being posted as Senior/ Junior House Officers. The posts of Senior/Junior House Officer are distinct and separate from the posts of Assistant Surgeons. The posts of Senior/Junior House Officers, are included in the cadre of posts in the Directorate of Medical Education. The appellants posting as Senior/Junior House Officers also exhibits, that their appointment was not within the Directorate of Health Services, but was against posts outside the Directorate of Health Services. Furthermore, even the impugned order dated 7.1.1998 noted, that the appellants were being temporarily deployed "...from the Directorate of Health Services, Jammu..." to meet the exigency of shortage of doctors at the Government Medical College, Jammu. Sixthly, the endorsement at serial no.2 of the order dated 7.1.1998 (extracted in paragraph 5 above) reveals, that a request was made by the by the Director, Health Services, Jammu, that the appellants be reverted to the Directorate of Health Services, to meet the needs of the said service. Seventhly, the order of the Department of Health and Medical Education dated 20.4.1998 reveals, that the posting of the appellants at the Government Medical College, Jammu (and/or at hospitals associated therewith), was made by the two Directors of Health Services in violation of Government Orders, thereby, defeating the very purpose for which the appellants were selected and appointed. Lastly, is the unrefuted assertion by the respondents, that the salary of the appellants continued to be drawn from the Directorate of Health Services, for the entire duration during which the appellants remained posted at the Government Medical College, Jammu (and/or at the hospitals associated therewith). Had the appellants been

legitimately working within their own cadre, their salary would undoubtedly have been drawn from the funds of the Directorate of Medical Education. Based on the disbursement of salary to the appellants from the funds of Directorate of Health Services, the appellants must be deemed to be substantive employees of the cadre of Assistant Surgeons of the Directorate of Health Services. There is therefore no room for any doubt, that the appellants were substantively appointed to the Directorate of Health Services, and not in the Directorate of Medical Education. [Para 19] [641-B-H; 642-A-H; 643-A-C]

3. The mere fact, that the appellants consent was not sought before their posting at the Government Medical College, Jammu (and/or at the hospitals associated therewith) would not have any determinative effect on the present controversy. Broadly, an employee can only be posted (or transferred) to a post against which he is selected. This would ensure his stationing, within the cadre of posts, under his principal employer. His posting may, however, be regulated differently, by statutory rules, governing his conditions of service. In the absence of any such rules, an employee cannot be posted (or transferred) beyond the cadre to which he is selected, without his willingness/readiness. Therefore, an employee's posting (or transfer), to a department other than the one to which he is appointed, against his will, would be impermissible. But willingness of posting beyond the cadre (and/or parent department) need not be expressly sought. It can be implied. It need not be in the nature of a written consent. Consent of posting (or transfer) beyond the cadre (or parent department) is inferable from the conduct of the employee, who does not protest or contest such posting/transfer. In the present controversy, the appellants were issued posting orders by the Principal, Government Medical College, Jammu,

dated 30.12.1997. They accepted the same, and assumed charge as Senior/Junior House Officers at the Government Medical College, Jammu, despite their selection and appointment as Assistant Surgeons. Even now, they wish to continue to serve against posts, in the Directorate of Medical Education. There cannot be any doubt, about their willingness/readiness to serve with the borrowing Directorate. The consent of the appellants is tacit and unquestionable. [Para 20] [643-E-H; 644-A-C]

4. In the instant case, consequent upon the decision by the Single Judge, whereby, the impugned order of reversion/ repatriation of the appellants to the Directorate of Health Services dated 7.1.1998 was set aside, two Letters Patent Appeals, were filed by the respondents herein. In the first of the Letters Patent Appeals, 18 Assistant Surgeons were impleaded as respondents, whereas, in the second Letters Patent Appeal, 24 Assistant Surgeons were impleaded as respondents. The first Letters Patent Appeal was dismissed in default and was never restored. As such, a technical plea was advanced by the appellants, that the order passed by the Single Judge relating to 18 Assistant Surgeons had attained finality and that the binding effect in connection with the 18 Assistant Surgeons, should be extended to the remaining 24 Assistant Surgeons. However, insofar as the matter pertaining to 24 Assistant Surgeons is concerned, the decision rendered by the Division Bench of the High Court on 24-2-2006 has been affirmed by this Court on merits. The decision pertaining to the 24 Assistant Surgeons (whose claim was decided by the impugned order dated 24.2.2006) constitutes a declaration of law, and is binding under Articles 141 of the Constitution of India. Such being the stature of the determination rendered in respect of 24 Assistant Surgeons (whose claim was adjudicated by the Letters Patent Bench of High Court), the same should, if

permissible, also be extended to the other 18 Assistant Surgeons. Ordinarily, in a situation when a judgment attains finality between rival parties, it is not legitimate to reopen the issue, even for correcting an error, which emerges from a subsequent adjudication. The factual position in the present controversy is, however, slightly different. The Assistant Surgeons against whom the Letters Patent Appeal was dismissed in default, are also before this Court and they have also been afforded an opportunity of hearing. Since all of them are before this Court, and have been represented through counsel, undoubtedly, the determination on merits in the instant controversy should be extended to them, as well. Since such a choice can be made in the present case, the proposition which has been upheld as legal, should be extended to the others similarly situated. It would be unthinkable to implement an order, which has been set aside after due notice and hearing. [Paras 22, 24, 25] [644-F-H; 645-A-C; 646-B-D, E-F, G-H; 647-A-B]

5. The reversion/repatriation of the appellants to their parent department, i.e., the Directorate of Health Services, Jammu, is affirmed. [Para 26] [647-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 162 of 2013.

From the Judgment & Order dated 24.02.2006 of the High Court of Jammu & Kashmir at Jammu in L.P.A. (SW) No. 88 of 2000.

WITH

C.A. No. 163 of 2013

C.A. Sundaram, Nar Hari Singh, Vikas Mehta, Madhavi Choudhary, Zafar Inayat, Rohini Musa for the Appellant.

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

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Leave granted.

2. Consequent upon the creation of posts of Assistant Surgeons, the Health and Medical Education Department of the State of Jammu & Kashmir, addressed a requisition to the Jammu & Kashmir Public Service Commission (hereinafter referred to as "the Public Service Commission") to recruit 1255 posts of Assistant Surgeons. Based on the aforesaid requisition, the Public Service Commission issued a notification dated 31.12.1996 for inviting applications for 1255 posts of Assistant Surgeons in the pay-scale of Rs.2200-4000. Based on the aforesaid notification, an advertisement dated 2.1.1997 appeared in newspapers inviting applications for 1255 posts of Assistant Surgeons, belonging to the Health and Medical Education Department.

3. In June, 1997 the Public Service Commission after completing the process of selection, prepared a select list of successful candidates. The names of the appellants herein, appeared in the list of successful candidates. Consequent upon the selection of the appellants as Assistant Surgeons by the Public Service Commission, the Department of Health and Medical Education, issued an order dated 12.8.1997 appointing the appellants against the advertised posts of Assistant Surgeons. An extract of the aforesaid order, relevant to the present controversy, is being reproduced hereunder:

> "The candidates belonging to Jammu region shall report to Director Health Services, Jammu and those belonging to Kashmir region to Director Health Services Kashmir for further postings. As regards migrant candidates they shall report to Director, Health Services Jammu for further orders."

(emphasis is ours)

It is not a matter of dispute, that in furtherance of the order of appointment dated 12.8.1997, all the appellants reported to the Director, Health Services, Jammu as they all belonged to the Jammu region. The next step, as is evident from the extracted portion of the appointment order, was the appellants' actual posting.

4. A Government Order pertaining to the posting of Assistant Surgeons, was issued by the Department of Health and Medical Education on 17.7.1997. Paragraph 5 of the aforesaid Government Order is relevant, and is accordingly being extracted hereunder:

> "5. The Doctors appointed against General category shall be posted in various Hospitals in the following orders:
>
> (a) Allopathic Dispensaries
>
> (b) Primary Health Centres and Police Hospitals;
>
> (c) Community Health Centres;
>
> (d) Sub-District Hospitals;
>
> (e) District Hospitals;
>
> (f) Hospitals of Jammu and Srinagar including Evening/Urban Clinic and after that in Medical Education and other organizations;
>
> (g) Surgeons shall be posted only in such Hospitals where Operation Theatres are available and the Hospitals are housed in Govt. Buildings."

Sub-paragraph (f) of paragraph 5 extracted hereinabove leaves no room for any doubt, that Assistant Surgeons could be posted in Hospitals of Jammu and Srinagar including evening/ urban clinics, "….and after that…", in medical education and other organizations. In consonance with the Government Order dated 17.7.1997, the Principal, Government Medical College,

Jammu, by an Office Order dated 30.12.1997, posted all the appellants against the vacant posts of Senior/Junior House Officers, at the Government Medical College, Jammu (and at hospitals associated with the said college).

5. Despite posting of the appellants at the Government Medical College, Jammu (and/or at hospitals associated therewith), on 30.12.1997; within a week thereof, by an order dated 7.1.1998, the Principal, Government Medical College, Jammu, reverted the appellants to their parent Department, namely, the Directorate of Health Service, Jammu. The instant order dated 7.1.1978 was first assailed by the appellants before the High Court of Jammu and Kashmir (hereinafter referred to as "the High Court"). It is now the subject matter of challenge by them, before this Court. Since the present controversy relates to the order dated 7.1.1998, whereby, the appellants were ordered to be reverted/repatriated to their parent department, the same is being extracted hereunder:

> "Consequent to the appointment of house surgeons in the various specialities in this institution, the Assistant Surgeons, who were temporarily deployed from the Directorate of Health Services, Jammu to meet the exigency of shortage of doctors in Govt. Medical College, Jammu, are hereby reverted to their parent department. The doctors listed in Annexure-I attached hereto stand relieved today the 7th January, 1998 forenoon with the direction to report for duty to the Director Health Services, Jammu."
>
> (emphasis is ours)

A perusal of the order extracted hereinabove discloses the basis of the alleged repatriation of the appellants to the Directorate of Health Services, Jammu. Firstly, the appellants' parent department is described as, the Directorate of Health Services. Secondly, the appellants posting as Senior/Junior House Officers, was disclosed. Namely, to meet the exigency

of shortage of doctors at the Government Medical College, Jammu. And thirdly, that the aforesaid posting was depicted as a temporary deployment from the Directorate of Health Services, Jammu. Besides the main order dated 7.1.1998 extracted above, it is also relevant to reproduce the endorsement made at serial no.2 of the aforesaid order, to the Director, Health Services, Jammu. The same is therefore being extracted below:

> "2. Director Health Services, Jammu. This is in reference to his verbal request for reversion of the Assistant Surgeons to the directorate to meet immediate needs in the health services."
>
> (emphasis is ours)

A perusal of the aforesaid endorsement discloses the fourth reason for the alleged repatriation of the appellants to the Directorate of Health Services, Jammu, namely, to meet the immediate needs of the Department of Health Services.

6. So as to assail the order dated 7.1.1998 whereby the appellants were repatriated to the Directorate of Health Services, Jammu, three writ petitions came to be filed before the High Court. The details of the writ petitions are being narrated hereinbelow:

(i) Dr.Shazia Hamid vs. State of Jammu & Kashmir (SWP no.35/98)

(ii) Dr.Rajni Malhotra vs. State of Jammu & Kashmir (SWP no.36/98)

(iii) Dr.Sarita vs. State of Jammu & Kashmir (SWP no.37/98)

Having entertained the aforesaid writ petitions, the High Court issued the following interim directions, on 8.1.1998:

> "The grievance of the petitioners is that they have been deployed to the Government Medical College Jammu by the Director Health Services, Jammu and the Principal Medical College, Jammu has further posted them in Medical College, Jammu. They are being relieved by the person of the Principal Government Medical College Jammu who is having no authority to transfer them and direct them to report back to Director Health Services, Jammu.
>
> Issue notice to the respondents, issue notice in the CMP also.
>
> In the meanwhile, respondents are directed not to disturb the status of the petitioners till objections are filed and considered by this Court."

We are informed, that in compliance with the said interim directions, all the appellants continued to discharge their duties at the Government Medical College, Jammu (and/or at hospitals associated therewith). And that eversince, upto the present juncture, despite the impugned order (passed by the Letters Patent Bench, of the High Court) having been passed against them, the appellants posting has remained unaltered. Even now, they are discharging their duties at the Government Medical College, Jammu, (and/or the hospitals associated therewith).

7. It is also relevant to mention herein, that the main ground on which the appellants had assailed the impugned order dated 7.1.1998 before the High Court was, that the same was not issued by the competent authority. In this behalf, it was the case of the appellants, that the Secretary, Department of Health and Medical Education being the appointing authority of the appellants; the Principal Medical College, Jammu, had no jurisdiction to issue the order dated 7.1.1998. It seems to us, that in order to get over the main ground of attack raised at the behest of the appellants, the Health, Family Welfare and Medical Education Department, issued another order on

20.4.1998, with the same effect and consequences. The aforesaid order is also being extracted hereunder:

> "Whereas for public health care 1230 posts of Assistant Surgeons were created vide Government Order No.129-HD of 1996 dated 4.12.96 under special recruitment drive programme and referred to Public Service Commission for selection of suitable candidates.
>
> Whereas public service commission vide their letter No.PSC/1/Dr/AS/5-96 dated 10.6.97 recommended a panel of 1097 candidates for appointment of Assistant Surgeons.
>
> Whereas the Health, FW and Medical Education Deptt issued appointment orders in favour of 1097 Assistant Surgeons and directed the two directors of Health Services to post these doctors in rural areas and other places in pursuance of guidelines as embodied in Government Order no.635 HME of 1997 dated 17.7.97.
>
> Whereas the two directors of Health Services in violation of standing Government Orders deputed/attached/adjusted/detailed to work a good number of new appointments in various health institutions and offices thus defeating the very object of special recruitment drive.
>
> Now therefore in the public interest and health care the said Assistant Surgeons are hereby detached with immediate effect from the places where they have been deputed/attached/adjusted or detailed to work as the case may be and shall report to respective directors of Health Services who shall post them strictly in accordance with the guidelines as detailed in Government Order no.635 HME of 1997 dated 17.7.97 and report compliance to the Administrative Department within fortnight positively."
>
> (emphasis is ours)

The order extracted hereinabove narrates, the exact sequence of events leading to the eventual posting of the appellants, consequent upon their selection as Assistant Surgeons. It also needs to be emphasized, that the order dated 20.4.1998 highlights the fact, that the original posting of the appellants at the Government Medical College, Jammu (and/or at hospitals associated therewith), had been made by the Director of Health Services, in violation of Government Orders, and further that, their repatriation to the Directorate of Health Services, Jammu was in public interest.

8. A learned Single Judge of the High Court on 28.5.1998, allowed all the three writ petitions (wherein the order dated 7.1.1998 had been assailed). According to the understanding of the learned Single Judge, the concerned employees consent, prior to their appointment on deputation was mandatory. Absence of consent, according to the learned Single Judge, established that their appointment at the Government Medical College, Jammu, (and/or at hospitals associated therewith), was not by way of deputation. Since in the present case, the consent of the appellants had admittedly not been obtained prior to their posting vide order dated 30.12.1997, the learned Single Judge concluded, inter alia, that the authorities had wrongly assumed, that the posting of the appellants at the Government Medical College, Jammu (and/or at hospitals associated therewith), was by way of deputation. Accordingly, the learned Single Judge held, that there was no question of the reversion of the appellants to their parent department. For, according to the learned Single Judge, the Government Medical College Jammu (and/or at hospitals associated therewith) comprised of the appellants parent department. Based thereon, the learned Single Judge felt, that the reversion/repatriation of the appellants to the Directorate of Health Services, Jammu, lacked legal sanction.

9. The learned Single Judge also relied upon the Government Order dated 17.7.1997 in order to conclude, that

the posting of the appellants at the Government Medical College, Jammu (and/or at hospitals associated therewith) was not beyond their cadre. Referring to paragraph 5(f) thereof, the learned Single Judge felt, that the posting of the appellants was within the scope of the conditions of their employment.

10. Besides the aforesaid, the learned Single Judge also arrived at the conclusion, that the Principal, Medical College, Jammu had no jurisdiction whatsoever to issue the impugned order dated 7.1.1998 reverting/repatriating the appellants to the Directorate of Health Services, Jammu. In this behalf, the learned Single Judge felt, that the Principal, Government Medical College, Jammu had passed the order dated 7.1.1998, in his capacity as Head of the Department, which was not in consonance with the factual/legal position.

11. The learned Single Judge summarized his conclusions as under:

"In view of the above, it is held that:

(i) The petitioners came to be appointed as Assistant Surgeons.

(ii) The Commissioner/Secretary in the Health and Education Department passed clear orders on 17th July, 1997 that the petitioners be appointed in Jammu Hospitals.

(iii) That the Director Health Services merely performed ministerial act of issuing letter of appointments. He acted in compliance of the Government Orders.

(iv) That the petitioner came to be appointed against available vacancies.

(v) The concept of the petitioner being on deputation would not be attracted to the facts of this case. This is because this was the first appointments of the

petitioners. The concept of parent department and department to which an employee is to be temporarily sent on deputation is missing in this case.

(vi) The fine distinction pointed out on the basis of Rules of Business may be legally correct, but no factual foundation has been laid down for sustaining the argument as projected by the State counsel.

(vii) That the order passed during the period when Model Code of Conduct was in operation and when election process was on, was also not in accordance with law."

Accordingly, the learned Single Judge set aside the impugned order dated 7.1.1998 passed by the Principal, Medical College, Jammu..

12. Dissatisfied with the judgment rendered by the learned Single Judge of the High Court on 28.5.1998, the State Government preferred Letters Patent Appeals. Suffice it to state, that while disposing of the Letters Patent Appeals, the common decision rendered by the learned Single Judge of the High Court, was set aside by the Division Bench on 24.2.2006. The appellants before us, have raised a challenge to the order passed by the Division Bench on 24.2.2006.

13. The first Civil Appeal being disposed of by the instant common order, has been filed by Dr.Kavi Raj and others, whereas the second one has been filed by Dr.Reva Gaind and others. Leaned counsel for the appellants, at the very inception informed us, that the first Civil Appeal survives in respect of only five appellants, namely, Dr.Kanchan Anand, Dr.Arpana Sharma, Dr.Mehbooba Begum, Dr.Nidhi Sharma and Dr.Shama Parveen Bhat. As against the second Civil Appeal, it was stated to be surviving only in respect of Dr.Reva Gaind, Dr.Rachna Wattal, Dr.Mala Mandla, Dr.Karuna Wazir, Dr.Ila

Gupta, Dr.Simi Kandhari, Dr.Indu Raina, Dr.Shivani Malhotra and Dr.Surekha Bhat. It is therefore apparent, that the instant two Civil Appeals are presently surviving only in respect of 14 of the appellants, fully described above.

14. In order to canvass the claim of the appellants, learned counsel invited our attention to the order of the Principal, Medical College, Jammu dated 30.12.1997, whereby, the appellants were assigned their first posting as Senior/Junior House Officers in different departments of the Government Medical College, Jammu (and/or at hospitals associated therewith). Based thereon, it was the vehement contention of the learned counsel, that the Division Bench of the High Court seriously erred in holding that the appellants were appointed by way of deputation to the Government Medical College, Jammu. To further the contention, that the appellants were not appointed to the Government Medical College, Jammu by way of deputation, it was pointed out, that the posts of Assistant Surgeons against which the appellants were appointed were created by the Health and Medical Education Department. The requisition to fill up 1255 posts of Assistant Surgeons, was also addressed by the Health and Medical Education Department, to the Public Service Commission. It was sought to be canvassed, that the Government Medical College, Jammu, was a part and parcel of the Department of Health and Medical Education, and as such, it was submitted, that the posting of the appellants at the Government Medical College, Jammu (and/or at hospitals associated therewith) cannot be deemed to be a posting by way of deputation. It was accordingly submitted, that the appellants posting could not be deemed to be in a cadre, other than the cadre to which they were substantively appointed. Based on the aforesaid submission, learned counsel for the appellants endeavoured to suggest, that the conclusions recorded by the learned Single Judge were fully justified, and in consonance with law. Learned counsel accordingly prayed that the impugned order dated 24.2.2006 be set aside.

15. In addition to the submission advanced at the hands of the learned counsel for the appellants, as has been noticed in the foregoing paragraph, it was also his vehement contention, that the posting of the appellants was in consonance with the express instructions of the State Government. In this behalf, learned counsel placed reliance on the Government Order dated 17.7.1997, whereby norms for issuing posting orders of candidates freshly selected against the post of Assistant Surgeons, were laid down. Placing reliance on paragraph 5(f) of the aforesaid Government Order dated 17.7.1997 (extracted in paragraph 4 hereinabove) it was submitted, that the posting of the appellants against the vacancies in the Directorate of Medical Education, was clearly within the purview of their selection to posts in the Health and Medical Education Department. Since the posting of the appellants was made in consonance with the Government Order dated 17.7.1997, it was contended, that it was natural to infer that the same was within the cadre to which they were selected and appointed. It was therefore submitted, that the impugned order dated 7.1.1998 passed by the Principal, Government Medical College, Jammu, must be deemed to have been issued on a misunderstanding, that the posting of the appellants at the Government Medical College, Jammu (and/or hospital associated therewith) was beyond the scope of their legitimate posting. For the aforesaid reason also, it was contended that the impugned order dated 7.1.1998 needed to be set aside.

16. We may also place on record the submission of the learned counsel for the appellants, on the same lines as the determination rendered by the learned Single Judge of the High Court. To avoid repetition, reference may be made to paragraph 8 above. Learned counsel, endorsed the aforesaid factual/legal position.

17. In response to the submissions advanced at the hands of the learned counsel for the appellants, the contentions advanced at the hands of the learned counsel for the

respondents, though exhaustive during hearing, are being summarised hereunder, for an overview:

(i) The Department of Health and Medical Education comprises of two independent Directorates, namely, the Directorate of Health Services and the Directorate of Medical Education. The posts of Assistant Surgeons, against which the appellants were selected and appointed belonged to the cadre of posts, under the Directorate of Health Services.

(ii) Whereas, at the time of selection and appointment of the appellants, the Directorate of Health Services had a cadre of Assistant Surgeons, the Directorate of Medical Education, which included the Government Medical College, Jammu (and/or hospitals associated therewith), did not have any post of Assistant Surgeons. Therefore, the posting of the appellants, at the Government Medical College Jammu (and/or at hospitals associated therewith) could only have been by way of deputation.

(iii) Cadres under the Directorate of Health Services, as well as, the cadres under the Directorate of Medical Education are regulated by separate rules. While the Jammu & Kashmir Medical Education (Gazetted) Service Recruitment Rules, 1979, govern the conditions of service of gazetted employees of the Directorate of Medical Education; the Jammu & Kashmir Medical (Gazetted) Service Recruitment Rules, 1970 regulate the recruitment of gazetted employees, in the Directorate of Health Services. Under the 1979 Rules referred to above, there was no post of Assistant Surgeons. Therefore the posts of Assistant Surgeon, were clearly not included in the cadre of posts under the Directorate of Medical Education. It was also pointed out, that

the post of Assistant Surgeon figure in the 1970 Rules referred to above, and as such, the posts of Assistant Surgeon, find a definite place in the cadre of posts, under the Directorate of Health Services. It was sought to be inferred from the above factual/ legal position, that the appointment of the appellants was in the Directorate of Health Services, and their posting at the Government Medical College, Jammu (and/or at the hospitals associated therewith) was by way of deputation.

(iv) Referring to the impugned order passed by the Division Bench dated 24.2.2006, it was pointed out, that the appellants before this Court had not disputed a vital factual position recorded therein, namely, that the salary of the appellants continued to be drawn from the Directorate of Health Services, for the entire duration during which the appellants had been rendering service at the Government Medical College, Jammu (and/or at the hospitals associated therein). It was submitted, that this factual position is sufficient to establish, that the appointment of the appellants was to the Directorate of Health Services, and not in the Directorate of Medical Education.

18. Having given our thoughtful consideration, to the submissions advanced at the hands of the learned counsel for the rival parties, we are of the view, that the submissions advanced on behalf of the respondents, as have been summarized above are unexceptionable. It is therefore, not possible for us to accept that the appointment of the appellants was substantively made to a cadre under the Director of Medical Education. We are also of the view, that the appointment of the appellants in the Directorate of Medical Education, was clearly by way of deputation. Their posting at the Government Medical College Jammu (and/or at the

hospitals associated therewith) was most certainly beyond their parent cadre, and therefore, by way of deputation. The reasons for our aforesaid conclusions, are being recorded in the following paragraphs.

19. Even though it is clear, that the posts of Assistant Surgeons were created by the Health and Medical Education Department of the State Government, it is also clear that the aforesaid department is comprised of two independent Directorates, namely, the Directorate of Health Services and the Directorate of Medical Education. The employees of each of the two Directorates are governed by a separate set of rules. The rules governing the conditions of service of gazetted employees of the Directorate of Medical Education, do not have the posts of Assistant Surgeons. The cadre of Assistant Surgeons is only found in the rules of recruitment applicable to gazettled employees of the Directorate of Health Service. Secondly, the assertion made at the hands of the learned counsel for the respondents, that there were no posts of Assistant Surgeon when the appellants were selected and posted at the Government Medical College, Jammu (and/or at the hospitals associated therewith), in the Directorate of Medical Education, has not been disputed by the learned counsel for the appellants. In the absence of any posts of Assistant Surgeon in the Directorate of Medical Education, it is impossible to infer that the appellants (who were selected against the posts of Assistant Surgeons) could have belonged to the Directorate of Medical Education. Furthermore, consequent upon the selection of the appellants by the Public Service Commission they were issued appointment orders dated 12.8.1997. A relevant extract of the aforesaid appointment order, has been reproduced above. A perusal of the same reveals, that such of the candidates who had been selected as Assistant Surgeons, and belonged to Jammu region, were to report to the Director, Health Services, Jammu. Whereas, those belonging to the Kashmir region, were to report to the Director, Health Services, Kashmir. The Directors of Health Services, Jammu as well as

Kashmir, are admittedly incharge of the administrative chain of command, in the respective Directorates of Health Services. This by itself demonstrates, that the appointment of the appellants was to the Directorate of Health Services, and not in the Directorate of Medical Education. Fourthly, the order issued by the Principal, Government Medical College, Jammu dated 30.12.1997 reveals, that the appellants were being posted as Senior/Junior House Officers. The posts of Senior/Junior House Officer are distinct and separate from the posts of Assistant Surgeons. The posts of Senior/Junior House Officers, are included in the cadre of posts in the Directorate of Medical Education. The appellants posting as Senior/Junior House Officers also exhibits, that their appointment was not within the Directorate of Health Services, but was against posts outside the Directorate of Health Services. Furthermore, even the impugned order dated 7.1.1998 noted, that the appellants were being temporarily deployed "…from the Directorate of Health Services, Jammu…" to meet the exigency of shortage of doctors at the Government Medical College, Jammu. Sixthly, the endorsement at serial no.2 of the order dated 7.1.1998 (extracted in paragraph 5 above) reveals, that a request was made by the by the Director, Health Services, Jammu, that the appellants be reverted to the Directorate of Health Services, to meet the needs of the said service. Seventhly, the order of the Department of Health and Medical Education dated 20.4.1998 reveals, that the posting of the appellants at the Government Medical College, Jammu (and/or at hospitals associated therewith), was made by the two Directors of Health Services in violation of Government Orders, thereby, defeating the very purpose for which the appellants were selected and appointed. Lastly, is the unrefuted assertion at the hands of the learned counsel for the respondents, that the salary of the appellants continued to be drawn from the Directorate of Health Services, for the entire duration during which the appellants remained posted at the Government Medical College, Jammu (and/or at the hospitals associated therewith). Had the appellants been legitimately working within their own cadre, their

salary would undoubtedly have been drawn from the funds of the Directorate of Medical Education. This factual position puts a final seal on the matter, as it does not leave any room for any further imagination. Based on the disbursement of salary to the appellants from the funds of Directorate of Health Services, the appellants must be deemed to be substantive employees of the cadre of Assistant Surgeons of the Directorate of Health Services. There is therefore no room for any doubt, that the appellants were substantively appointed to the Directorate of Health Services, and not in the Directorate of Medical Education.

20. Before concluding, it is essential to deal with certain inferences drawn by the learned Single Judge of the High Court. According to the learned Single Judge, prior consent of an employee is imperative, binding, peremptory and mandatory, before he is posted on deputation outside his parent department. No statutory rule has been brought to our notice, requiring prior consent of an employee, before his deployment against a post beyond his parent cadre. The mere fact, that the appellants consent was not sought before their posting at the Government Medical College, Jammu (and/or at the hospitals associated therewith) would not, in our view have any determinative effect on the present controversy. Broadly, an employee can only be posted (or transferred) to a post against which he is selected. This would ensure his stationing, within the cadre of posts, under his principal employer. His posting may, however, be regulated differently, by statutory rules, governing his conditions of service. In the absence of any such rules, an employee cannot be posted (or transferred) beyond the cadre to which he is selected, without his willingness/readiness. Therefore, an employee's posting (or transfer), to a department other than the one to which he is appointed, against his will, would be impermissible. But willingness of posting beyond the cadre (and/or parent department) need not be expressly sought. It can be implied. It need not be in the nature of a written consent. Consent of

posting (or transfer) beyond the cadre (or parent department) is inferable from the conduct of the employee, who does not protest or contest such posting/transfer. In the present controversy, the appellants were issued posting orders by the Principal, Government Medical College, Jammu, dated 30.12.1997. They accepted the same, and assumed charge as Senior/Junior House Officers at the Government Medical College, Jammu, despite their selection and appointment as Assistant Surgeons. Even now, they wish to continue to serve against posts, in the Directorate of Medical Education. There cannot be any doubt, about their willingness/readiness to serve with the borrowing Directorate. The consent of the appellants is tacit and unquestionable. We are therefore of the view, that the learned Single Judge of the High Court, clearly erred on the instant aspect of the matter.

21. For the reasons expressed hereinabove, we are satisfied, that the impugned order passed by the Letters Patent Bench of the High Court on 24.2.2006, does not suffer from any factual or legal infirmity. The same is therefore, affirmed.

22. Despite having recorded our conclusions on the merits of the controversy, it is also essential for us to take into consideration a technical plea advanced at the hands of the learned counsel for the appellants. It was submitted on behalf of the appellants, that consequent upon the decision by the learned Single Judge (dated 28.5.1998), whereby, the impugned order of reversion/repatriation of the appellants to the Directorate of Health Services dated 7.1.1998 was set aside, two Letters Patent Appeals, i.e., LPA (SW) no.88 of 2000, and LPA (SW) no.89 of 2000 were filed by the respondents herein (to impugn the common order dated 28.5.1998, passed by the learned Single Judge). In the first of the aforesaid Letters Patent Appeals, 18 Assistant Surgeons were impleaded as respondents, whereas, in the second Letters Patent Appeal 24 Assistant Surgeons were impleaded as respondents. It was pointed out, that the Letters Patent Appeal (SW) no.88 of 2000

was dismissed in default.. The said Letters Patent Appeal was never restored. As such, it was submitted, that the order passed by the learned Single Judge on 28.5.1998, relating to 18 Assistant Surgeons, (impleaded as respondents therein), attained finality. Based on the aforesaid uncontroverted position, it was submitted, that it is imperative for the State Government, now to give effect to the order of the learned Single Judge dated 28.5.1998, pertaining to the aforesaid 18 Assistant Surgeons, (impleaded as respondents in LPA(SW) no.88 of 2000). In the aforesaid view of the matter, it was further submitted, that the binding effect in connection with the 18 Assistant Surgeons, should be extended to the remaining 24 Assistant Surgeons (who had been arrayed as respondents in LPA (SW) no.89 of 2000. This, according to the learned counsel for the appellants, would also meet the ends of justice, inasmuch as, all similarly situated individuals, must be placed similarly. According to learned counsel, if this position is not accepted, the appellants would be deprived of their right to equality before the law and to equal protection of the laws, guaranteed under Article 14 of the Constitution of India.

23. We have given our thoughtful consideration to the aforesaid technical plea advanced at the hands of the learned counsel for the appellants. It is not a matter of dispute, that LPA (SW) no.89 of 2000 was adjudicated upon by the Division Bench on merits. In terms of the instant order passed by us, we have affirmed the correctness of the order passed by the Letters Patent Bench of the High Court on 24.2.2006. Thus viewed, it is clear that the controversy was justly adjudicated upon by the Division Bench, in respect of 24 Assistant Surgeons. The only question to be decided, while dealing with the technical plea advanced at the hands of the learned counsel for the appellants is, whether the judgment rendered in LPA (SW) no.88 of 2000 should be extended to LPA(SW) no.89 of 2000. Or vice-a-versa, whether the order of the learned Single Judge, which has attained finality in respect of 18 Assistant

Surgeons, should be extended to the other 24 Assistant Surgeons.

24. In so far as the matter pertaining to 24 Assistant Surgeons is concerned, the decision rendered by the High Court on 24.2.2006 has been affirmed by us on merits. It is therefore legitimate to infer, that the matter has been wrongfully determined by the learned Single Judge. We are of the view, that the decision of the controversy by this Court, pertaining to the 24 Assistant Surgeons (whose claim was decided by the impugned order dated 24.2.2006) constitutes a declaration of law, and is binding under Articles 141 of the Constitution of India. Such being the stature of the determination rendered in respect of 24 Assistant Surgeons (whose claim was adjudicated by the Letters Patent Bench of High Court), we are of the view that the same should, if permissible, also be extended to the other 18 Assistant Surgeons. Ordinarily, in a situation when a judgment attains finality between rival parties, it is not legitimate to reopen the issue, even for correcting an error, which emerges from a subsequent adjudication.

25. The factual position in the present controversy is slightly different. Before this Court two Special Leave Petitions were filed. The Assistant Surgeons against whom the Letters Patent Appeal was dismissed in default, are also before this Court. They have also been afforded an opportunity of hearing. This Court has expressed the opinion that the order passed by the Letters Patent Bench of the High Court on 24.2.2006 deserves to be upheld. If the Assistant Surgeons whose Letters Patent Appeal was dismissed in default, had not been before this Court, it may not have been possible for us to re-adjudicate upon their claim. Since all of them are before us, and have been represented through counsel, we have no doubt in our mind, that the determination on merits in the instant controversy should be extended to them, as well. Since such a choice can be made in the present case, we are of the view, that the proposition which has been upheld as legal, should be extended

to the others similarly situated. The converse proposition, does not commend itself for acceptance. It would be unthinkable to implement an order, which has been set aside after due notice and hearing. We therefore, find no merit in the technical plea advanced at the hands of the learned counsel for the appellants.

26. The reversion/repatriation of the appellants to their parent department, i.e., the Directorate of Health Services, Jammu, is affirmed. The appellants who have continued to discharge their duties eversince their induction into service at the Government Medical College, Jammu (and/or at hospitals associated therewith), will be repatriated/reverted to the Directorate of Health Services, Jammu. Now, that the matter has attained finality, they must be relieved from their postings in the Directorate of Medical Education. So as to enable them to accept the reality of the situation, and to acclimatize them with the position emerging from our order, we consider it just and appropriate to direct, that the appellants be allowed to be continued at their present place of posting till 31.3.2013. They shall be relieved from their posting in the Directorate of Medical Education under all circumstances on the afternoon of 31.3.2013, for onward posting against a cadre post in the Directorate of Health Services.

Disposed of in the aforesaid terms.

B.B.B. Appeals disposed of.

MULTANI HANIFBHAI KALUBHAI
v.
STATE OF GUJARAT & ANR.
(Criminal Appeal No. 219 of 2013)

FEBRUARY 01, 2013

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

Gujarat Animal Preservation (Amendment) Act, 2011 – ss.6B(3) and 6A(3) – Gujarat Animal Preservation Act, 1954 – s.5(1A) – Truck of appellant seized by the police for transporting 28 buffalo calves – Application filed by appellant u/s.451 CrPC for release of the truck – Dismissed on the ground that as per s.6B(3) of the Gujarat Animal Preservation (Amendment) Act, 2011, the truck could not be released before the expiry of six months from the date of its seizure – Propriety – Held: Sub-section (3) of s.6A of the Gujarat Animal Preservation (Amendment) Act, 2011 stipulates that whenever any person transports in contravention of provisions of Sub-section (1), any animal as specified in s.5(1A) of the Gujarat Animal Preservation Act, 1954, such vehicle or any conveyance used in transporting such animal, shall be liable to be seized by the authority/officer concerned – Sub-section 1A of s.5 of the Gujarat Animal Preservation Act, 1954 stipulates a list of prohibited animals, viz. (a) a cow; (b) the calf of a cow, whether male or female and if male, whether castrated or not; (c) a bull and (d) a bullock – In the case at hand, the vehicle impounded by the respondents was transporting 'buffalo calves' which does not fall under the list of prohibited animals mentioned in sub-section 1A of s.5 – Thus, s.6B(3) of the Gujarat Animal Preservation (Amendment) Act, 2011 could not be invoked in order to deny the claim of release of the vehicle – In view of the same, it is not advisable to keep the seized vehicle in the police station in open condition which is prone to natural decay on account

of weather conditions – Further, it is of no use to keep the seized vehicle in the police station for a long period – Respondents accordingly directed to release the truck – Penal Code, 1860 – s.451.

The truck of the appellant was seized by the police for transporting 28 buffalo calves. The appellant filed application under Section 451 CrPC for release of the truck. The application was rejected by the Judicial Magistrate on the ground that as per Section 6B(3) of the Gujarat Animal Preservation (Amendment) Act, 2011, the seized truck could not be released before the expiry of six months from the date of its seizure. The order was upheld by the revisional court as also by the High Court, and therefore the instant appeal.

Allowing the appeal, the Court

HELD: 1. Sub section (3) of Section 6A of the Gujarat Animal Preservation (Amendment) Act, 2011 stipulates that whenever any person transports in contravention of provisions of Sub-section (1), any animal as specified in Section 5(1A) of the Gujarat Animal Preservation Act, 1954, such vehicle or any conveyance used in transporting such animal, shall be liable to be seized by the authority/ officer concerned. In the case at hand, the vehicle which has been impounded by the respondents was not carrying the category of animals which has been laid down under Section 5(1A). The vehicle in question was transporting the 'buffalo calves'. [Paras 8, 9] [656-F, G-H; 657-A]

2. The courts below including the High Court grossly erred by overlooking the correct position of law as stated in Section 6A(3) of the Gujarat Animal Preservation (Amendment) Act, 2011. Sub-section 1A of Section 5 of the Gujarat Animal Preservation Act, 1954 stipulates the schedule of animals which are as under: (a) a cow; (b) the calf of a cow, whether male or female and if male,

whether castrated or not; (c) a bull; (d) a bullock. It is clear from the above description of animals that the buffalo calf does not fall under the list of prohibited animals. Thus, Section 6B(3) of the Gujarat Animal Preservation (Amendment) Act, 2011 cannot be invoked in order to deny the claim of release of the vehicle before the expiry of six months from the date of its seizure. [Para 11] [657-E-H; 658-A]

3. Section 5(1) of the Gujarat Animal Preservation Act, 1954 prohibits slaughtering of any animal without a certificate in writing from the Competent Authority that the animal is fit for slaughter. In other words, without a certificate from competent authority, no animal could be slaughtered. Sub-section (1A) to Section 5 mandates that no certificate under sub-section (1) shall be granted in respect of the abovementioned animals. In the said section, admittedly, 'buffalo calf' has not been mentioned as prohibited animal. In such circumstance, the prohibition relating to release of vehicle before a period of six months as mentioned in Section 6B(3) of the Amendment Act is not applicable since the appellant was transporting 28 buffalo calves only. In view of the same, it is not advisable to keep the seized vehicle in the police station in open condition which is prone to natural decay on account of weather conditions. In addition to the above interpretation, whatever be the situation, it is of no use to keep the seized vehicle in the police station for a long period. The respondents are accordingly directed to release the vehicle - Eicher Truck forthwith. [Paras 12, 13] [658-B-E, G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 219 of 2013.

From the Judgment & Order dated 25.09.2012 of the High Court of Gujarat at Ahmedabad in Special Criminal Application No. 2755 of 2012.

O.P. Bhadani, Rakesh Kumar Singh, Ashok Anand for the Appellant.

Shomik Sanjanwala, Hemantika Wahi, Nandini Gupta for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM,J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 25.09.2012 passed by the High Court of Gujarat at Ahmedabad in Special Criminal Application No. 2755 of 2012 whereby the High Court dismissed the application filed by the appellant herein.

3. **Brief facts:**

(a) The vehicle of the appellant, Eicher Truck, was seized by the police, which was found to be transporting 28 buffalo calves. The First Information Report (in short "FIR") was registered against the appellant on 02.08.2012 for the offences punishable under Sections 279 and 114 of the Indian Penal Code, 1860 (in short "IPC"), Sections 184, 177 and 192 of the Motor Vehicles Act, 1988 (in short "M.V. Act"), Sections 5, 6, 8 and 10 of the Gujarat Animal Preservation Act, 1954 (hereinafter referred to as "the Principal Act") and Section 11 of the Prevention of Cruelty to Animals Act, 1960.

(b) The appellant filed an application being Criminal Misc. Application No. 9 of 2012 under Section 451 of the Code of Criminal Procedure, 1973 (in short "the Code") for the release of his Eicher truck before the Judicial Magistrate, First Class, Gandhinagar, Gujarat. Vide order dated 24.08.2012, the Judicial Magistrate rejected the said application on the ground that as per the provisions of Section 6B(3) of the Gujarat Animal Preservation (Amendment) Act, 2011 (hereinafter referred to as "the Amendment Act"), the vehicle shall not be released before the expiry of six months from the date of its seizure.

(c) Aggrieved by the said order, the appellant filed an application being Criminal Revision Application No. 73 of 2012 before the District & Sessions Judge, Gandhinagar, which was also rejected on 01.09.2012

(d) Dissatisfied with the order of the District & Sessions Judge, Gandhinagar, the appellant preferred Special Criminal Application No. 2755 of 2012 before the High Court. By impugned order dated 25.09.2012, the High Court dismissed the said application.

(e) Challenging the said order, the appellant has filed this appeal by way of special leave.

4. Heard Mr. O.P. Bhadani, learned counsel for the appellant and Mr. Shomik Sanjanwala, learned counsel for the respondents.

5. The only point for consideration in this appeal is whether the Courts below are justified in rejecting the prayer of the appellant as per the provisions of the amended Act?

6. The Bombay Animal Preservation Act, 1954 (in short "the Bombay Act"), which was enacted for the preservation of animals suitable for milch, breeding or for agricultural purposes was made applicable to the State of Gujarat. The following provisions of the said Act are relevant for the case in hand:

> **"Section 5 - Prohibition against slaughter without certificate from Competent Authority.** (1) Notwithstanding any law for the time being in force or any usage to the contrary, no person shall slaughter or cause to be slaughtered any animal unless, he has obtained in respect of such animal a certificate in writing from the Competent Authority appointed for the area that the animal is fit for slaughter.
>
> (1A) No certificate under sub-section (1) shall be granted in respect of—

(a) a cow;

(b) the calf of a cow, whether male or female and if male, whether castrated or not;

(c) a bull;

(d) a bullock;

(2) In respect of an animal to which sub-section (IA) does not apply, no certificate shall be granted under sub-section (1) if in the opinion of the Competent Authority-

(a) the animal, whether male or female, is useful or likely to become useful for the purpose of draught or any kind of agricultural operations;

(b) the animal if male, is useful or likely to become useful for the purpose of breeding;

(c) the animal, if female, is useful or likely to become useful for the purpose of giving milk or bearing offspring.

(3) Nothing in this section shall apply to—

(a) the slaughter of any of the following animals for such bona fide religious purposes, as may be prescribed, namely :—

(i) any animal above the age of fifteen years other than a cow, bull or bullock.

(ii) a bull above the age of fifteen years

(iii) a bullock above the age of fifteen years.

(b) the slaughter of any animal not being a cow or a calf of a cow, bull or bullock, on such religious days as may be prescribed :

Provided that a certificate in writing for the slaughter referred to in clause (a) or (b) has been obtained from the competent authority.

(4) The State Government may, at any time for the purpose of satisfying itself as to the legality or propriety of any order passed by a Competent Authority granting or refusing to grant any certificate under this section, call for and examine the records of the case and may pass such order in reference thereto as it thinks fit.

(5) A certificate under this section shall be granted in such form and on payment of such fee as may be prescribed.

(6) Subject to the provisions of sub-section (4) any order passed by the Competent Authority granting or refusing to grant a certificate, and any order passed by the State Government under sub-section (4) shall be final and shall not be called in question in any Court."

In the Gujarat Animal Preservation Act, 1954, after Section 6, the following new sections were inserted:-

"6A. (1) No person shall transport or offer for transport or cause to be transported any animal specified in sub-section (1A) of section 5 from any place within the State to any another place within the State for the purpose of its slaughter in contravention of the provisions of this Act or with the knowledge that it will be or is likely to be so slaughtered:

Provided that a person shall be deemed to be transporting such animal for the purpose of slaughter unless contrary is proved thereto to the satisfaction of the concerned authority or officer by such person or he has obtained a permit under sub-section (2) for transporting animal for bona fide agricultural or animal husbandry purpose from such authority or officer as the State Government may appoint in this behalf.

(2) (a) A person may make an application in the prescribed form to the authority or officer referred to in sub-section (1) for grant of permit in writing for transportation of any animal specified in sub-section (1A) of section 5 from any place within the State to any another place within the State.

(b) If, on receipt of any such application for grant of permit, such authority is of the opinion that grant of permit shall not be detrimental to the object of the Act, it may grant permit in such form and on payment of such fee as may be prescribed and subject to such conditions as it may think fit to impose in accordance with such rules as may be prescribed.

(3) Whenever any person transports or causes to be transported in contravention of provisions of sub-section (1) any animal as specified in sub-section (1A) of section 5, such vehicle or any conveyance used in transporting such animal along with such animal shall be liable to be seized by such authority or officer as the State Government may appoint in this behalf.

(4) The vehicle or conveyance so seized under sub-section (3) shall not be released by the order of the court on bond or surety before expiry of six months from the date of such seizure or till the final judgment or the court, whichever is earlier.

6B. (1) No person shall directly or indirectly sell, keep, store, transport, offer or expose for sell or bury beef or beef products in any form.

(2) Whenever any person transports or causes to be transported the beef or beef products, such vehicle or any conveyance used in transporting such beef

or beef products along with such beef or beef products shall be liable to be seized by such authority or officer as the State Government may appoint in this behalf.

(3) The vehicle or conveyance so seized under sub-section (2) shall not be released by the order of the court on bond or surety before the expiry of six months from the date of such seizure or till the final judgment of the court, whichever is earlier.

Explanation – For the purpose of this section "beef" means flesh of any animal specified in sub-section (1A) of section 5, in any form."

7. Learned counsel for the appellant submitted that the provisions of the Amended Act clearly mention the applicability of Section 6A(3) to the class of animals as given in Section 5 (1A) of the Principal Act, viz., cow, the calf of a cow, bull and bullock, however, this section nowhere mentions 'buffalo calves' which have been found in the seized vehicle. According to him, in the absence of prohibited categories of animals as aforesaid, invoking of Section 6B(3) for not releasing the vehicle of the appellant before the expiry of six months from the date of seizure is not sustainable in law.

8. In context of the above, it is relevant to note that on 12.10.2011, an amendment was brought in the Principal Act which was called the Gujarat Animal Preservation (Amendment) Act, 2011. By virtue of this Amendment Act, a new Section 6A was brought in the Principal Act. We have already extracted Section 6A of the Amended Act.

9. Sub-section (3) of Section 6A of the Amended Act stipulates that whenever any person transports in contravention of provisions of Sub-section (1), any animal as specified in Section 5(1A), such vehicle or any conveyance used in transporting such animal, shall be liable to be seized by the

authority/officer concerned. It is brought to our notice that the vehicle which has been impounded by the respondents was not carrying the category of animals which has been laid down under Section 5(1A). The vehicle in question was transporting the 'buffalo calves'.

10. A perusal of the FIR shows that one Sajidkhan Pirmohemmed Multani, driver of the vehicle and Rajubhai Kalubhai Multani had been passing from Sector 30 of Gandhinagar, Gujarat. The police tried to stop the said vehicle but when they did not stop, they followed and intercepted the same. On search being made inside the vehicle, they found 28 buffalo calves. Respondent No.2 herein arrested both the persons and seized Eicher Truck bearing Registration No. GJ-9-Z-3801, which is the vehicle in question.

11. The courts below rejected the application filed by the appellant for release of the vehicle under Section 451 of the Code on the ground that as per the provisions of Section 6B(3) of the Amendment Act, the vehicle of the appellant shall not be released before the expiry of six months from the date of its seizure. On going through the relevant provisions, we are of the view that the Courts below including the High Court grossly erred by overlooking the correct position of law as stated in Section 6A(3). Sub-section 1A of Section 5 stipulates the schedule of animals which are as under:

(a) a cow;

(b) the calf of a cow, whether male or female and if male, whether castrated or not;

(c) a bull;

(d) a bullock.

It is clear from the above description of animals that the buffalo calf does not fall under the list of prohibited animals. We have already noted and it is not in dispute that the vehicle in question

was carrying 28 buffalo calves. Thus, Section 6B(3) of the Amendment Act cannot be invoked in order to deny the claim of release of the vehicle before the expiry of six months from the date of its seizure.

12. It is true that Section 5(1) prohibits slaughtering of any animal without a certificate in writing from the Competent Authority that the animal is fit for slaughter. In other words, without a certificate from competent authority, no animal could be slaughtered. Sub-section (1A) to Section 5 mandates that no certificate under sub-section (1) shall be granted in respect of the abovementioned animals. In the said section, admittedly, 'buffalo calf' has not been mentioned as prohibited animal. In such circumstance, the prohibition relating to release of vehicle before a period of six months as mentioned in Section 6B(3) of the Amendment Act is not applicable since the appellant was transporting 28 buffalo calves only. In view of the same, it is not advisable to keep the seized vehicle in the police station in open condition which is prone to natural decay on account of weather conditions. In addition to the above interpretation, whatever be the situation, it is of no use to keep the seized vehicle in the police station for a long period.

13. In the light of the above conclusion, order dated 24.08.2012, passed by the Judicial Magistrate, Gandhinagar in Criminal Misc. Application No. 9 of 2012, order dated 01.09.2012, passed by the District and Sessions Judge, Gandhinagar in Criminal Revision Application No. 73 of 2012 and order dated 25.09.2012, passed by the High Court in Special Criminal Application No. 2755 of 2012 are set aside and the respondents are directed to release the vehicle - Eicher Truck bearing Regn. No. GJ-9-Z-3801 forthwith.

14. The appeal is allowed.

B.B.B. Appeal allowed.

RANGI INTERNATIONAL LTD.
v.
NOVA SCOTIA BANK & ORS.
(Civil Appeal Nos. 253-253A of 2012)

MAY 06, 2013

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

Competition Law – Competition Commission and Competition Appellate Tribunal – Required to pass reasoned orders – Held: The Competition Commission as well as the Appellate Tribunal are exercising very important quasi judicial functions and the orders passed by them can have far reaching consequences – The minimum required of the Commission as well as the Appellate Tribunal is that the orders passed by them are supported by reasons, even briefly – However, on facts, the impugned orders passed by the Competition Commission and the Competition Appellate Tribunal are bereft of any reasons in support of their conclusions and, therefore cannot be sustained – Merits of the issues involved, thus, not gone into by the Supreme Court –Matters remanded back to the Competition Appellate Tribunal for reconsideration of the entire issue on merits including the preliminary objections raised by the appellants – Monopolies and Restrictive Trade Practices Act, 1969.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 253-253-A of 2012.

From the Judgment & Order dated 03.05.2011 of the Competition Appellate Tribunal, New Delhi in RA 41 of 2010 in UTPE 192 of 2008.

Praveen Agrawal for the Appellant.

Ajay Abhay Monga, Dev Mani Bansal, Arun Kumar Beriwal for the Respondents.

The following order of the Court was delivered

O R D E R

1. We have heard learned counsel for the parties.

2. We have perused the impugned order as well as the entire record. In our opinion, the appellants have raised substantial questions of law in the proceeding before the Monopolies and Restrictive Trade Practices Commission. However, the order passed by the Member on 2nd September, 2009 merely states that it is not a case of unfair trade practice within the provisions of the MRTP Act and appears to be a contractual matter between the parties.

3. Aggrieved by the aforesaid order, the appellants filed a review application No. 41 of 2010 under the Monopolies and Restrictive Trade Practices Act, 1969. However, upon the enforcement of the Competition Act, the review was required to be heard by the Competition Appellate Tribunal. The aforesaid review petition was duly heard and dismissed by the Competition Appellate Tribunal on 3.5.2011. It appears that even in the aforesaid order, the Appellate Tribunal merely restated what has been stated by the Member of the Commission in the earlier order.

4. The Competition Commission as well as the Competition Appellate Tribunal are exercising very important quasi judicial functions. The orders passed by the Commission and the Appellate Tribunal can have far reaching consequences. Therefore, the minimum that is required of the Commission as well as the Appellate Tribunal is that the orders are supported by reasons, even briefly. However, the impugned orders are bereft of any reasons in support of the conclusions. We are, therefore, constrained to hold that the impugned orders challenged herein cannot be sustained.

5. At this stage, we may, however take note of the submissions made by the learned counsel for the respondent as it would have some bearing on the proceedings that would now be reopened before the Competition Appellate Tribunal. Learned counsel has submitted that the appellants had willingly entered into a contractual relationship with the respondent-Bank and therefore, the Competition Commission as well as the Appellate Tribunal have rightly non suited the appellants.

6. Learned counsel has also submitted that the petition in fact, is not maintainable under Section 4(2) of the M.R.T.P. Act. He further submitted that the claims made by the appellants are even otherwise barred by limitation.

7. We are not inclined to examine the issues raised by the parties on merits, in view of the order proposed. Without going into the merits of the issues involved, we deem it appropriate to set aside the orders impugned only on the ground that they do not disclose the reasons for the conclusions reached.

8. In view of the above, the appeals are allowed, the matters are remanded back to the Competition Appellate Tribunal for reconsideration of the entire issue on merits including the preliminary objections raised by the appellants.

B.B.B. Appeals allowed.

NIRMA INDUSTRIES LTD. & ANR.
v.
SECURITIES & EXCHANGE BOARD OF INDIA
(Civil Appeal No. 6082 of 2008)

MAY 9, 2013

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

SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997:

Regulation 27 read with Regulation 10 – Order of SEBI rejecting request of appellant for withdrawal of offer to acquire equity shares – Challenged for denial of oral hearing – Held: Not being given an opportunity of oral hearing cannot always be equated to a situation, where no opportunity is given to a party to submit an explanation at all – The entire material on which the appellants were relying was placed before SEBI and on its consideration the offer of the appellants was rejected – Therefore, it cannot be said that the appellants have been in any manner prejudiced by the non-grant of the opportunity of personal hearing – Further, neither the appellants nor their Merchant Bankers requested for a personal hearing – Administrative law – Natural justice – Personal hearing.

Regulation 27(1)(b)(c) and (d) – Rejection of request for withdrawal of offer to acquire equity shares – Held: Rejection of request made by appellants for withdrawal from the public offer or exemption under Regulation 27(1)(d) cannot be said to be an order causing adverse civil consequences – Appellants had made an informed business decision – Normally, the public offer once made can only be withdrawn in exceptional circumstances as indicated in Regulation 27(1)(b), (c) and (d) – These sub-clauses are exceptions to the general rule and, therefore, have to be construed very strictly –Clauses (b) and (c) are within the same genus of

impossibility – Clause (d) also being an exception to the general rule would have to be construed in terms of clauses (b) and (c) – Clause (d) would not permit SEBI to accept the offer of withdrawal when it has become uneconomical for the acquirer to perform the public offer – The meaning of terms "such circumstances" from the realm of impossibility cannot be stretched to the realm of economic undesirability – Therefore, it cannot be said that the principle of ejusdem generis is not applicable for interpreting Regulation 27(1) (d) – SEBI as well as the SAT have correctly concluded that withdrawal of the open offer in the given set of circumstances is neither in the interest of investors nor development of the securities market — Interpretation of statues – Ejusdem generis – Maxim 'noscitur a sociis'.

Regulation 27(1) – Order of SEBI rejecting request for withdrawal – Plea of delay in passing the order – Held: The plea was not raised before SAT — It has been raised for the first time in the submissions made before Supreme Court – Since, it is a statutory appeal u/s 15Z of the SEBI Act, the plea cannot be permitted to be raised – Even on merits, there was no delay on the part of SEBI in approving the draft letter of offer – Securities and Exchange Board of India Act, 1992 – s.15Z – Delay/Laches.

The appellants filed the instant appeal challenging order of the Security Appellate Tribunal (SAT) whereby the appeal against the order dated 30.4.2007 passed by SEBI rejecting the request for withdrawal of the offer of the appellants to acquire the equity shares of SRMTL under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997, was rejected.

It was contended for the appellants that the order passed by SEBI was passed without granting any opportunity of hearing to them. It was submitted that even if the regulations do not specifically provide for the grant of an opportunity of hearing, it ought to be read into the

Regulations in view of the drastic civil consequences, which the appellants would suffer under the impugned order passed by the SEBI and upheld by SAT. It was further contended that Regulation 27(1)(d) provides an exception for withdrawal of open offer not limited to the narrow confines of Clauses (b) and (c) of Regulation 27(1). It was submitted that the exception under Regulation 27(1)(d) deals with a separate and distinct class of cases i.e. conferring a discretion on SEBI to allow withdrawal of open offers in "such circumstances", which "in the opinion of the Board merit withdrawal" and, as such, Regulation 27(1)(d) could not be read "*ejusdem generis*" with the preceding clauses to restrict its scope.

Dismissing the appeal, the Court

HELD: 1.1. Not being given the opportunity of oral hearing cannot always be equated to a situation, where no opportunity is given to a party to submit an explanation at all, before an order is passed causing civil consequences to it. Regulation 27 of the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 1997 (Takeover Code) does not contemplate a provision that the party seeking to withdraw from the public offer is required to be given an oral hearing before an order is passed on the request for withdrawal. [para 22] [684-D-F]

1.2. The purpose of granting an opportunity of hearing is to ensure fair treatment of the person or entity against whom an order is likely to be passed. In the instant case, all material had been placed by the appellants before the SEBI in their letter dated 4.5.2006 and the same material was also placed before the appellants' merchant bankers, which made an application on 22.9.2006 to SEBI to exempt the appellants from the open offer or withdraw the open offer under Regulation

27 or re-fix the price of the open offer. The Merchant Bankers had discussions with the officers of the SEBI before giving the opinion in its letter dated 27.6.2006. Thus, it is apparent that all the necessary information was available before SEBI for taking a decision as to whether the claim of the appellants seeking exemption from the Takeover Code, or withdrawal of the Letter of Offer would fall within the purview of Regulation 27(1) (d). Necessary clarifications, as required by the Merchant Bankers had also been given in the subsequent correspondences. Therefore, it cannot be said that substantial justice has not been done in the case of the appellants. [para 19 and 22-23] [683-E-G; 682-C-D; 685-C-E]

Canara Bank & Ors. Vs. Debasis Das & Ors. **2003 (2) SCR 968 = 2003(4) SCC 557; and** *Managing Director, ECIL, Hyderabad & Ors. Vs. B. Karunakar & Ors.* **1993 (2) Suppl. SCR 576 = 1993 (4) SCC 727 – referred to.**

1.3. The appellants cannot justifiably claim that any order had been passed by SEBI that would cause adverse civil consequences, as envisaged by this Court in *B. Karunakar & Ors*. **The appellants after making a market assessment decided to invoke the pledge on July 22, 2005. Having acquired more than 15% shares of the target company which triggered the Regulation 10 of the Takeover Code, the appellants published the proposed open offer to acquire upto 20% of the shares of the existing shareholders. It is undisputable that normally the public offer once made can only be withdrawn in exceptional circumstances as indicated in Regulation 27(1) (b), (c) and (d). The rejection of the request made by the appellants for withdrawal from the public offer or exemption under Regulation 27(1)(d) cannot be said to be an order causing** *adverse civil consequences*. **The appellants had made an informed business decision which they felt subsequently, was likely to cause losses.**

In such circumstances, they wanted to pull out and throw the burden on to the other shareholders. Therefore, no prejudice has been caused to the appellants by the order passed by the SEBI rejecting their request. [para 22 and 24] [684-A-C; 686-A-C]

1.4. The provisions of Regulations 32(1) and 32(2) are of no assistance to the appellants. Firstly, neither the appellants nor their Merchant Bankers requested for an opportunity for a personal hearing. Secondly, SEBI has not issued any instructions or directions u/s 11, which requires that the rules of natural justice be complied with. Thirdly, it cannot be said that the appellants had been condemned unheard as the entire material on which the appellants were relying was placed before SEBI. It is upon consideration of the entire matter that the offer of the appellants was rejected by the detailed order passed by SEBI on 30.4. 2007. [para 32] [691-C-F]

Union of India & Anr. Vs. Jesus Sales Corporation **1996 (3) SCR 894 = 1996 (4) SCC 69 - relied on.**

Automotive Tyre Manufacturers Association Vs. Designated Authority & Ors. **2011 (1) SCR 198 = 2011 (2) SCC 258;** *Darshan Lal Nagpal (Dead) by LRs. Vs. Government of NCT of Delhi & Ors.* **2012 (2) SCR 595 = 2012 (2) SCC 327- held inapplicable.**

2.1. The SAT has correctly come to the conclusion that under the SEBI Act, the Board has been entrusted with the fundamental duties of ensuring orderly development of the securities market as a whole and to protect the integrity of the securities market. A conspectus of the Regulations would show that the scheme of the Takeover Code is – (a) to ensure that the target company is aware of the substantial acquisition; (b) to ensure that in the process of the substantial acquisition or takeover, the security market is not

distorted or manipulated and (c) to ensure that the small investors are given an option to exit, that is, they are offered a choice to either offload their shares at a price as determined in accordance with the Takeover Code or to continue as shareholders under the new dispensation. The Takeover Code is meant to ensure fair and equal treatment of all shareholders in relation to substantial acquisition of shares and takeovers and that the process does not take place in a clandestine manner without protecting the interest of the shareholders. [para 39-40] [696-E; 699-F-H; 700-A]

2.2. Regulation 27(1) states the general rule in negative terms. It provides that no public offer, once made, shall be withdrawn. The three sub-clauses, namely, clauses (b), (c) and (d) are exceptions to the general rule and, therefore, have to be construed very strictly. The exceptions cannot be construed in such a manner that would destroy the general rule that no public offer shall be permitted to be withdrawn after the public announcement has been made. Clearly clauses (b) and (c) are within the same genus of *impossibility*. Clause (d) also being an exception to the general rule would have to be construed in terms of clauses (b) and (c). Therefore, the term "such circumstances" in clause (d) would also be restricted to situation which would make it impossible for the acquirer to perform the public offer. The discretion has been left to the Board by the legislature realizing that it is impossible to anticipate all the circumstances that may arise making it impossible to complete a public offer. Clause (d) would not permit SEBI to accept the offer of withdrawal even in circumstances when it has become uneconomical for the acquirer to perform the public offer. Applying the maxim 'noscitur a sociis', the meaning of the term "such circumstances" cannot be stretched from the realm of *impossibility* to the realm of *economic undesirability*. Therefore, it cannot be said that the

principle of *ejusdem generis* is not applicable for interpreting Regulation 27(1) (d) of the Takeover Code. Regulation 3(1) (f) (iv) (which exempts the acquisition of shares by banks and public financial institutions as pledgees, from the provisions of the Takeover Regulations) is not applicable in the instant case. [para 42, 47, 48, 49, 51 and 53] [701-B-D; 703-D; 703-G-H; 704-G-H; 707-A; 707-F-G]

Maharashtra University of Health Sciences and Ors. Vs. Satchikitsa Prasarak Mandal & Ors. **2010 (3) SCR 91 = 2010 (3) SCC 786;** *Kavalappara Kottarathil Kochuni vs. State of Madras* **AIR 1960 SC 1080;** *Amar Chandra Chakraborty Vs. Collector of Excise* **(1972 (2) SCC 444; and** *Commissioner of Income Tax, Udaipur, Rajasthan Vs. McDowell and Co. Ltd.* **2009 (8) SCR 983 = 2009 (10) SCC 755 - referred to.**

Attorney General vs. Prince Ernest Augustus of Hanover, **(1957) AC 436 referred to.**

Municipal Corporation of Greater Bombay vs. Bharat Petroleum Corporation Ltd. **2002 (2) SCR 860 = 2002 (4) SCC 219;** *Maharashtra University of Health Sciences & Ors. vs. Satchikitsa Prasarak Mandal & Ors.* **2010 (3) SCR 91= 2010 (3) SCC 786; and** *Union of India & Ors. Vs. Alok Kumar* **2010 (5) SCR 35 = 2010 (5) SCC 349 – cited.**

Black's Law Dictionary, **referred to.**

2.3. SEBI as well as the SAT have correctly concluded that withdrawal of the open offer in the given set of circumstances is neither in the interest of investors nor development of the securities market. Permitting the withdrawal would lead to encouragement of unscrupulous elements to speculate in the stock market. Encouraging such a practice of an offer being withdrawn which has become uneconomical would have a destabilizing effect in the securities market. This would

be destructive of the purpose for which the Takeover Code was enacted. [para 50 and 56] [705-F-G; 709-B-C]

Sahara India Real Estate Corporation Limited & Ors v. Securities and Exchange Board of India & Anr. **(2012) 8 SCALE 101 – held inapplicable.**

2.4. In the instant case, no fraud has been played on the appellants as such. The shares were acquired by the appellants on the basis of an informed business decision. The conclusion reached by SAT that the appellants are only trying to wriggle out of a bad bargain, which is not permissible under Regulation 27(1) (d) of the Takeover Code, does not call for any interference.[para 60, 67 and 68] [710-F; 715-D-F]

Ram Chandra v. Savitri Devi **2003 (4) Suppl. SCR 543 = 2003 (8) SCC 319***; S.P.Chengalvaraya Naidu (dead) by LRs. vs. Jagannath (Dead) by LRs. and Ors.* **1993 (3) Suppl. SCR 422 =1994 (1) SCC 1 – referred to.**

Marfani and Co. Ltd. vs. Midland Bank Ltd. **1968 (2) All E.R. 573; and** *Indian Overseas Bank vs. Industrial Chain Concern* **1989 (2) Suppl. SCR 27 = 1990 (1) SCC 484 – held inapplicable.**

3. The plea of 8 months delay on the part of SEBI to process the Letter of Offer of the appellants was not made before SAT and it has been raised for the first time, in the submissions made before this Court. In fact, the ground is not even pleaded in the grounds of appeal. The submission is mentioned only in the list of dates. Since, it is a statutory appeal u/s 15Z of the SEBI Act, the plea cannot be permitted to be raised in this Court for the first time, unless the submission goes to the very root of the matter. This apart, even on merit, there was no delay on the part of SEBI in approving the draft letter of offer. [para 71-72] [716-F-H; 717-A; 718-F]

4. As regards the plea that the Court ought to appoint

an independent valuer and direct a fresh valuation to be made on the basis of principles contained in Regulation 20(5) of the Takeover Code, suffice it to say that the formula given in Regulation 20 would have no applicability in the facts and circumstances of the case. The determination of the lowest price under Regulation 20 would be at a stage prior to the making of the public announcement and not thereafter. [para 73] [718-G-H; 719-A-B]

Case Law Reference:

2003 (2) SCR 968	referred to	para 22
1993 (2) Suppl. SCR 576	referred to	para 22
2011 (1) SCR 198	held inapplicable	para 26
2012 (2) SCR 595	held inapplicable	para 27
1996 (3) SCR 894	relied on	para 30
2002 (2) SCR 860	cited	para 37
2010 (3) SCR 91	cited	para 37
2010 (5) SCR 35	cited	para 37
AIR 1960 SC 1080	referred to	para 45
(1972 (2) SCC 444	referred to	para 46
2009 (8) SCR 983	referred to	para 48
(1957) AC 436	referred to	para 49
(2012) 8 SCALE 101	held inapplicable	para 55
2003 (4) Suppl. SCR 543	referred to	para 57
1993 (3) Suppl. SCR 422	referred to	para 58
1968 (2) All E.R. 573	held inapplicable	para 64
1989 (2) Suppl. SCR 27	held inapplicable	para 64

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6082 of 2008.

From the Judgment & Order dated 06.06.2008 of the Securities Appellate Tribunal Mumbai in Appeal No. 74 of 2007.

Shyam Divan, Divyam Agarwal, Zerick Dastur, Sarthak Mehrotra, Nirman Sharma, Bina Gupta for the Appellants.

Pratap Venugopal, Gaurav Nair (for K.J. John & Co.) for the Respondent.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. This statutory appeal is filed under Section 15Z of the Securities and Exchange Board of India Act, 1992 (hereinafter referred to as the 'SEBI Act') against the order dated 5th June, 2008 (impugned order) passed by the Security Appellate Tribunal (SAT) whereby SAT has dismissed the appeal filed by the appellants impugning the direction contained in the communication dated 30th April, 2007 of SEBI (SEBI order). By the aforesaid order, the request of the appellants for withdrawal of an offer to acquire the equity shares of Shree Ram Multi Tech Limited (SRMTL) under the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (Takeover Code/Takeover Regulation) has been rejected.

Facts :

2. On 22nd March, 2002, the Promoters (including friends, relatives and associates) of SRMTL – a listed company – borrowed a sum of Rs.48.94 crores from the appellants and pledged equity shares of SRMTL worth Rs.1,42,88,700/- (24.25% of equity capital) as security. The debt was in form of issue of Secured Optionally Fully Convertible Premium Notes by three closely held unlisted companies (Issuer Companies) for an issue price of Rs.1,00,000/- each having nominal value of Rs.1,35,000/- each. The issue was made by the Issuer

Companies by way of subscription agreements and the individual premium notes issued by each are as under :

(i) Shree Rama Polysynth Pvt. Ltd.	-	1664
(ii) East-West Polyart Ltd.	-	1500
(iii) Ideal Petroproducts Ltd.	-	1730
Total	-	4894

3. The Issuer Companies pledged equity shares in the capital of SRMTL and other closely held companies as security in favour of the appellants till the redemption of the Premium Notes by way of pledge agreements (Pledged Shares). The equity shares of SRMTL pledged by each of the Issuer Companies are as under :

(i) Shree Rama Polysynth Pvt. Ltd.	-	52,49,786
(ii) East-West Polyart Ltd.	-	28,74,800
(iii) Ideal Petroproducts Ltd.	-	62,64,114
Total	-	1,42,88,700

4. In May-June, 2002, the pledge over the shares, which were in dematerialized form, was carried out in the form prescribed by National Securities Depository Limited and was recorded in the records of the respective depositories of the appellants and the Issuer Companies. On June 10, 2005, the appellants, in terms of the enforcement provisions contained in the subscription agreements and the pledge agreements issued notices to the Issuer Companies calling upon them to redeem the outstanding Premium Notes within a period of 30 days, failing which the appellants would be constrained to invoke the pledge. Premium notes were not redeemed (i.e. debt was not repaid). Upon default, under the provisions of the Notes, the appellants called upon each of the Issuer Companies to

redeem the outstanding Notes within 30 days. Since the Notes were not redeemed within the notice period, the pledge was invoked on July 22, 2005.

5. The invocation of the pledge triggered Regulation 10 of the Takeover Code.

6. On 26th July, 2005, in accordance with the Regulation 10 of the Takeover Code, the appellants made a Public Announcement (PA) for proposed open offer to acquire upto 20% of the shares of the existing shareholders. The Public Announcement was published in the Financial Express, Mumbai Edition. According to the appellants, the price offered in the PA, being Rs.18.60/- per share, was arrived at as per Regulation 20(4) of the Takeover Code (applicable to frequently traded shares). The PA stated that SRMTL has suffered business losses and its net worth has been eroded. The PA also clearly stated that the offer may be withdrawn as per Regulation 27 of the Takeover Code.

7. The appellants further claimed that as per Regulation 18 of the Takeover Code, draft letter of offer was submitted to SEBI on August 8, 2005. According to the appellants in the aforesaid letter, it was specifically stated that details were given of the composition of Board of Directors and audited balance sheets of last three years, share holding pattern PRE-OFFER and POST-OFFER and justification of offer price. The letter further stated that "Acquirers reserve the right to withdraw the offer pursuant to Regulation 27 of the Regulation". In the meanwhile, the concurrent auditor appointed by the Lenders of SRMTL, M/s Ernst & Young and the internal auditor of SRMTL, M/s. R. C. Sharma & Co. in their respective audit reports for the quarter July-September, 2005, had noted certain irregularities in the operations and systems of SRMTL. The Audit Committee, therefore, recommended a special investigative audit to look into the irregularities. In view of the above, a change in management was effected on the insistence of the Lender Banks. All Promoter Directors tendered their

resignations in their place independent Directors were appointed. The Board of Directors of SRMTL, after considering the respective audit report of the aforesaid two accountants, accepted the recommendations of the Audit Committee and on January 28, 2006 directed a special investigative audit into the financial affairs of the company. The Board appointed M/s. R. C. Sharma & Co., to conduct the special investigative audit and submit its report. After investigation, M/s. R. C. Sharma & Co. submitted its report in three parts, comprising of two interim reports and one final report on January 30, 2006. In March-April, 2006, the aforesaid report of M/s. R.C. Sharma came in the public domain, resulting in sharp decline in prices of shares of SRMTL. It is claimed by the appellants that M/s. R.C. Sharma's report enclosed two earlier inspection reports of 2002 by Kalyaniwala & Mistry (Kalyaniwala Report) and by Sharp and Tannan Associates (Sharp Report), respectively. These reports were not made available to public. Their existence was disclosed for the first time when they were filed in the Gujarat High Court as part of proceeding in Company Petition No.111 of 2005. The appellants further claimed that under Regulation 18 of the Takeover Code, SEBI was expected to revert with its comments and observations in about 21 days, i.e. by 29th August, 2005. However, letter of offer submitted to SEBI was issued after more than 249 days on 26th April, 2006.

8. The appellants further claim that pursuant to the fraud perpetrated by the Promoter Directors of SRMTL and fraudulent embezzlement of funds in SRMTL in excess of Rs.350 crores being unearthed, an application was made on 4th May, 2006 to either exempt them from making the open offer or to permit them to withdraw the open offer under Regulation 27 of the Takeover Code or to re-fix the price of the Open Offer. The appellants further claimed that the aforesaid request was justified on the basis of special circumstances cited by the appellants in the aforesaid letter of May 4, 2006. It had been pointed out that an investigation into the affairs of SRMTL by M/s Ramesh C. Sharma and Co. Chartered Accountants

revealed that a cumulative amount of Rs.326.48 Crores had been siphoned out of/embezzled from the coffers of SRMTL by its erstwhile Promoter Directors. This conclusion was based on the reports submitted by M/s. R.C. Sharma & Co. It was pointed out that the financial accounts of SRMTL revealed that it had lost its net worth. Asset Reconstruction Company (India) Limited (ARCIL) had acquired the debts and underlying rights and obligations from the secured creditors of SRMTL. ARCIL had also issued a notice dated January 25, 2006 under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) threatening action under Section 13(4) thereof. In the meantime, the High Court of Gujarat had disposed of the winding up petition filed against SRMTL by the UTI Bank and Karnataka Bank Ltd. on February 27, 2006. It had also come to the knowledge of the appellants that though the balance sheets of SRMTL disclosed a contingent liability of only Rs.15.28 Crores as on March 31, 2005, the actual value was about Rs.263.65 Crores (out of which Rs.30.65 Crores had already crystallized). The final reason given was share price of SRMTL shares had fallen substantially from the date of making the Public Announcement.

9. Since the appellants did not receive any response from the respondent, a request was made on July 1, 2006 to the Merchant Bankers requesting them to forward an application for withdrawal of the open offer to the respondent. It appears that the Merchant Bankers vide letter dated 27th June, 2006 *inter alia* informed the appellants that the grounds mentioned in the letter dated 4th May, 2006 are not valid grounds, in terms of the provisions of Regulation 27 of the Takeover Code. On July 1, 2006, the appellants requested the Merchant Bankers to convey its request in a renewed form to SEBI for its consideration. The renewed request was contained in a letter dated July 01, 2006 which was sent to the Merchant Bankers as an annexure to the letter which was also sent on July 01, 2006, in reply to the letter of the Merchant Bankers dated 27th

June, 2006. In the aforesaid reply, the appellants had also informed the Merchant Bankers that it did not agree with the views expressed by the Merchant Bankers even prior to the consideration of the facts presented by the appellants to SEBI. Regulation 27(1) (c) does not provide for specific approval of SEBI for withdrawal of the open offer, which is what they were seeking. On July 8, 2006, the Merchant Bankers informed the appellants that the relevant regulation is 27(1)(d) and not 27(1)(c). The letter also refers to a telephonic conversation with one Mr. Deepak Shah on 8th July, 2006 informing him about certain particulars required by the Merchant Bankers. A complete list of details, required by the Merchant Bankers, was listed in the aforesaid letter. The appellants were requested to send the same at the earliest. The appellant sent a reply to the aforesaid request on 8th July, 2006. Thereafter, on 1st September, 2006, the appellant was informed by the Merchant Bankers that based on the information supplied on July 1, 2006 and August 28, 2006, an application had been drafted by them for being filed with SEBI, seeking withdrawal of the open offer. The aforesaid draft application was sent to the appellant for verification of the factual position stated therein. From a perusal of the letter dated 21st September, 2006, the appellants informed the Merchant Bankers that the clarifications sought on September 1, 2006 had been sent to them on 7th September, 2006. Therefore, a request was made to include the clarifications in the original draft letter and include the same in the paragraph in contingent liability under special circumstances for withdrawal of the open offer.

10. In response to the aforesaid request of the appellants, the Merchant Bank applied to SEBI on September 22, 2006 requesting that the appellants be permitted to withdraw the offer. The letter also mentioned the special reasons for the withdrawal as given by the appellants in the letter dated 4th May, 2006. *It is important to notice here that no request for personal hearing was made in any of the aforesaid communications.*

11. The appellants further claimed that on 30th April, 2007, the application of the Merchant Bankers/appellants was rejected on the ground that the appellants ought to have conducted due diligence. The appellants pointed out that the aforesaid decision was taken by SEBI without affording any personal hearing to the appellants and without application of mind. The appellants claim that the respondent did not appreciate that the fraudulent transactions, systematic embezzlement and siphoning of funds was unearthed by special investigative audit and could not have been found by an outside third party like appellants before invoking the pledge. Even any due diligence that could be conducted could only have been done on published financial information in the public domain, which has now been found to be fraudulent in character. The appellants have in the Public Announcement and Letter of Offer relied on books of accounts for last three financial years i.e. 2002-03, 2003-04 and 2004-05 of SRMTL. Even SEBI with all its compliance requirements and investigative powers was unable to unearth these instances of fraud perpetrated by promoters of SRMTL.

12. Being aggrieved by the SEBI order, the appellants filed Appeal No.74 of 2007 before the SAT. By the impugned order dated 5th June, 2008, the SAT rejected the appeal filed by the appellants. It has been held by SAT that :

> "a) Regulation 27(1)(d) of the Takeover Code is to be given a strict interpretation and the words *"such circumstances as in the opinion of the Board merit withdrawal"* is to be read ejusdem generis to be limited to only circumstances where it is impossible to make a public offer.
>
> b) Appellants ought to have conducted due diligence.
>
> C) Appellants knew about (i) poor financial condition of SRMTL; (ii) filing of winding up petitions by UTI Bank against SRMTL; (iii) net worth of SRMTL being negative; (iv) several cases of recovery being filed against SRMTL."

13. The aforesaid order of SAT is challenged before us by Nirma Industries Ltd. in this statutory appeal under Section 15Z of the SEBI Act.

14. We have heard very elaborate submissions made by Mr. Shyam Divan, learned senior counsel on behalf of the appellants and Mr. Pratap Venugopal for SEBI. Mr. Divan submits that the main issue involved in this appeal is whether under Regulation 27(1)(d), SEBI has power to grant exemption to the appellants from the requirement of making a public offer under Regulation 10. The alternative issue framed by Mr. Divan is as to whether dehors Regulation 27(1) (d), SEBI would still have the residual power to grant exemption. Apart from the aforesaid two legal issues, Mr. Divan's primary submission is based on breach of rules of natural justice. He submits that the order passed by SEBI has been passed without granting any opportunity of hearing to the appellants. Even if the regulations do not specifically provide for the grant of an opportunity of hearing, it ought to be read into the regulations in view of the drastic civil consequences, which the appellants would suffer under the impugned order passed by the SEBI upheld by SAT. Mr. Divan has straightaway pointed out to the order passed by SEBI on 30th April, 2007 rejecting the request made in letter dated 22nd September, 2006 for withdrawal of the public offer. He has pointed out the observations made in Paragraph 4 of the aforesaid order, which are as under:-

> "We are of the view that the acquirer should have done due diligence before invocation of pledge, and refrained themselves from invoking their pledge if circumstances so warranted. Such circumstances, arising out of omission on the part of the acquirers to have taken due precaution or business misfortunes, in our opinion, are not reasons sufficient enough to merit withdrawal of the open offer."

15. The aforesaid conclusions, according to Mr. Divan, are not supported by any reasons let alone sufficient reasons. The

order passed by SEBI, according to him, is non-speaking and, therefore, ought to have been quashed on that ground alone.

16. The same submission was also made before the SAT. It has been rejected by the SAT by giving detailed reasons. Taking into consideration the facts and circumstances of this case, it cannot be said that Rules of Natural Justice have been violated. The special circumstances which had been elaborately set out in the two letters written by the appellants on May 4, 2006 and July 1, 2006 and the application made by the Merchant Bankers on September 22, 2006 have been summarized by Mr. Shyam Divan in the written submission which are as follows :

"a. An investigation into the affairs of SRMTL by Ramesh C. Sharma & Co., Chartered Accountants, revealed that a cumulative amount of Rs. 326.48 Crores had been siphoned out of/embezzled from the coffers of SRMTL by its erstwhile Promoter Directors. Ramesh C. Sharma & Co. submitted two interim reports [in February and March 2006] and a final report (in March 2006) to arrive at its aforesaid conclusions.

b. Further the financial accounts of SRMTL revealed that it had lost its net worth.

c. Asset Reconstruction Company (India) Limited ("ARCIL") had acquired the debts and underlying rights and obligations from the secured creditors of SRMTL. ARCIL issued a notice dated January 25, 2006 under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI") threatening action under Section 13(4) thereof.

d. The High Court of Gujarat had disposed of the winding up petition filed against SRMTL by the UTI Bank and Karnataka Bank Ltd. vide order dated February 27, 2006.

e. It had come to the Appellant's knowledge that though the Balance Sheets of SRMTL disclosed a contingent liability of only Rs. 15.28 Crores as on March 31, 2005, the actual value was about Rs. 263.65 Crores (out of which Rs.30.65 Crores had already crystallized).

f. The share price of SRMTL shares had fallen substantially from the date of making the Public Announcement."

17. In the letter dated May 4, 2006, it was pointed out that subsequent to the Public Announcement dated 26th July, 2005 and filing of the draft letter of offer, the circumstances leading to the requirement of making of Public Announcement by the appellants (pledgee acquirers) or requirements of the regulation has substantially changed to the prejudice of the appellants and, therefore, it was constrained to seek exemption from requirement of the Regulations and/or permission to withdraw the draft letter of offer. The letter sets out the sequence of events leading to the acquisition, which triggered the provisions of Regulation 10. It sets out the reasons for fixing the offer price at Rs. 18.60 per share. The price had been determined at deriving the average of weekly high and low closing prices of shares of SRMTL (the target company) at Bombay Stock Exchange (BSE) during 26 weeks preceding the date of Public Announcement. In Paragraph 4 of the letter, it is mentioned as under:-

"Subsequent to the Public Announcement and filing of the draft Letter of Offer, the price of the shares of SRMTL has fallen substantially due to circumstances beyond the control of the Acquirers. It has come to the knowledge of the Acquirers that subsequent to the Public Announcement

and filing of the draft Letter of Offer, the financial condition of SRMTL has substantially deteriorated on account of gross mismanagement and embezzlement by the promoter directors of SRMTL. It is apparent that SRMTL has lost its substratum and that chances of its revival are negligible."

18. In Paragraph 5 of the letter, a prayer is made for permission either to exempt the Regulation 3(1) (1) read with Regulation 4(2) of the Takeover Regulations or withdrawal of offer under Regulation 27, on the basis of the justification given for seeking withdrawal. The complete justification is given thereafter in Paragraph 6, which consists of sub-paragraphs 6.1 to 6.8. The ultimate reason for seeking withdrawal is given in Paragraphs 7 and 8, which are as under:-

"7. Under the aforesaid circumstances, it is apparent that SRMTL has lost its substratum and that chances of its revival are negligible. The Pledgee Acquirers while enforcing the security created by pledging the shares of SRMTL, are being saddled with an additional burden of Rs.21,91,54,314 to the undue advantage of the other shareholders of SRMTL. The purpose sought to be achieved by operation of the Regulations is lost in view of the subsequent developments and the Regulations are operating harshly against the Pledgee Acquirers. In view of the changed scenario, it would be inequitable and unfair to compel the Pledgee Acquirers to offer to purchase the shares of SRMTL from the other shareholders of SRMTL in accordance with the draft Letter of Offer.

8. In light of the change in circumstances as stated hereinabove, considering the present state of affairs, it would be just, fair and equitable (i) to exempt the Pledgee Acquirers from operation of Regulation 10 of the Regulations in exercise of powers conferred by Regulation 3(1)(1) read with Regulation 4(2) of the Regulations or (ii) to permit withdrawal of the Public Announcement and the draft Letter of Offer in terms of Regulation 27 of the Regulations or (iii) permit the Pledgee Acquirers to re-fix the offer price on the basis of the current market price of the shares of SRMTL."

19. It is an admitted fact that the aforesaid letter was sent by the appellants to its Merchant Bankers. In its letter dated 27th June, 2006, the Merchant Bankers informed the appellants that the grounds mentioned in the letter dated 4th May, 2006 are not valid grounds in terms of provisions of Regulation 27 of the Takeover Code. Therefore, clearly the Merchant Banker was also of the opinion that the specific circumstances relied upon by the appellants were of no relevance in seeking withdrawal under Regulation 27. However, on the insistence of the appellants, the Merchant Bankers by its letter dated 22nd September, 2006 requested SEBI to exempt the appellants from the open offer or withdraw the open offer under Regulation 27 or re-fix the price of the open offer. It appears that the Merchant Bankers had discussions with the officers of the SEBI before giving the aforesaid opinion in its letter dated 27th June, 2006. it was only thereafter the appellants were informed as under:-

"We have perused the various grounds you have mentioned in your above letter to SEBI and are unable to find any of these as valid grounds in terms of the provisions of Regulation 27 of the SEBI (Substantial Acquisition of Shares & Takeovers) Regulations, 1997. The fact that the market price of the target company is far below the offer price cannot be a reason for seeking withdrawal of the offer. Regulation 27(1) of the Takeover code is the only regulation permitting withdrawal of public offers and the same is reproduced below:

……."

20. Still not satisfied, the appellants wrote to its Merchant Bankers on 1st July, 2006 requesting it to forward the letter dated 4th May, 2006 to SEBI for its consideration. In the letter, it was mentioned as follows:-

> "Meanwhile, we do not agree with your views even prior to SEBI's consideration of the facts presented by us. Please do note that Regulation 27(1)(c) does provide for specific approval of SEBI for withdrawal of the open offer, which is what we are seeking. Unless SEBI considers our letter and informs us of a decision not to approve the application for withdrawal, it would be premature to foreclose the options available to us by a fair application of the law. Consequently, you are requested to forward our enclosed application formally to SEBI so that SEBI can consider the same and take a decision in the matter. Once the decision of SEBI is communicated, we can take further steps in the matter."

21. As noticed earlier, the Merchant Bankers were still not satisfied with the information provided by the appellants in support of its request for withdrawal of the open offer. Therefore, the appellants had given further clarifications to the Merchant Bankers. It was only on receipt of the clarifications that the Merchant Bankers forwarded the request to SEBI for consideration.

22. From the above, it is apparent that all the necessary information was available before SEBI for taking a decision as to whether the claim of the appellants seeking exemption from the Takeover Code, or withdrawal of the Letter of Offer would fall within the purview of Regulation 27(1) (d). The purpose of granting an opportunity of hearing is to ensure fair treatment of the person or entity against whom an order is likely to be passed. In the present case, we are unable to accept the submission of Mr. Shyam Divan that the impugned order passed by SEBI on 30th April, 2007, rejecting the application

of the appellants for exemption/withdrawal by SEBI caused any "*adverse civil consequences*". Having acquired the shares of the target company to the extent which triggered the Regulation 10 of the Takeover Code, the appellants published in the Financial Express, Mumbai Edition the proposed open offer to acquire upto 20% of the shares of the existing shareholders. The price offered in the Public Announcement, being Rs. 18.60 per share was arrived at as per Regulation 20(4) of the Takeover code, which is applicable to frequently traded shares. It is undisputable that normally the public offer once made can only be withdrawn in exceptional circumstances as indicated in Regulation 27(1) (b), (c) and (d). In their letter dated 4th May, 2006, the appellants had given detailed reasons giving justification for seeking exemption/withdrawal/price fixation. Not being given the opportunity of oral hearing cannot always be equated to a situation, where no opportunity is given to a party to submit an explanation at all, before an order is passed causing civil consequences to it. Mr. Shyam Divan has been at pains to point out that rules of natural justice require that an opportunity of hearing should have been given to the appellants. We see no reason to read into Regulation 27 - the provision that the party seeking to withdraw from the public offer is required to be given an oral hearing before an order is passed on the request for withdrawal. We also see no merit in the submission that an oral hearing was particularly necessary in the light of the fraud, which has been perpetrated by the promoters of the target company on the innocent shareholders, which will also include the appellants. Such a submission can not be accepted either on facts or in law. The appellants had made a business decision in deliberately purchasing the shares of the target company to such an extent that it had to, under the law; make the Public Announcement for purchase of other shares at the price of Rs.18.60 per share.

23. In support of his submissions on breach of Rules of Natural Justice, in his written submission, Mr. Shyam Divan has

relied on *Canara Bank & Ors. Vs. Debasis Das & Ors.*[1] In this case, this Court reiterated the well known Rules of Natural Justice. Otherwise the particular case relied upon has no relevance to the present proceedings. In the *Canara Bank's* case (supra), this Court was considering the case of an employee subjected to the disciplinary proceedings. Again this Court reiterated the well known principle that natural justice is the administration of justice in a commonsense liberal way. Further that the rules have been enforced by the Courts to ensure that substantial justice is done to the party proceeded against. In the present case, it is a matter of record that all material had been placed by the appellants before the SEBI in its letter dated 4th May, 2006 and the same material was also placed before the Merchant Bankers. Necessary clarifications, as required by the Merchant Bankers, had also been given in the subsequent correspondences, as noticed by us in the earlier part of the judgment. Therefore, it cannot be said that substantial justice has not been done in the case of the appellants. This Court in *Canara Bank's* case (supra) reiterated the principle laid down in *Managing Director, ECIL, Hyderabad & Ors. Vs. B. Karunakar & Ors.*[2] Here again, this Court has reiterated that even an administrative order, which involved civil consequences, must be consistent with the rules of natural justice. The expression "civil consequences" encompasses infraction of not merely property or personal rights but of civil liberties, material deprivations and non-pecuniary damages. In other words, anything which affects the rights of the citizen in ordinary civil life.

24. In our opinion, the appellants cannot justifiably claim that any order had been passed by SEBI that would cause adverse civil consequences, as envisaged by this Court in *B. Karunakar & Ors.* (Supra). The appellants after making a market assessment decided to invoke the pledge on July 22,

1. (2003) 4 SCC 557.
2. (1993) 4 SCC 727.

2005. Since the shares which came to the appellants were more than 15%, statutorily Regulation 10 was triggered. The rejection of the request made by the appellants for withdrawal from the public offer or exemption under Regulation 27(1)(d) cannot be said to be an order causing *adverse civil consequences*. The appellants had made and informed business decision which unfortunately for them, instead of generating profits was likely to cause loses. In such circumstances, they wanted to pull out and throw the burden on to the other shareholders. We, therefore, fail to see what prejudice has been caused to the appellants by the order passed by the SEBI rejecting the request of the appellants.

25. In *B. Karunakar & Ors.* (supra), having defined the meaning of "civil consequences", this Court reiterated the principle that the Court/Tribunal should not mechanically set aside the order of punishment on the ground that the report was not furnished to the employee. It is only if the Court or Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment. In other words, the Court reiterated that the person challenging the order on the basis that it is causing civil consequences would have to prove the prejudice that has been caused by the non-grant of opportunity of hearing. In the present case, we must hasten to add that, in the letter dated 4th May, 2006, the appellants have not made a request for being granted an opportunity of personal hearing. Therefore, the ground with regard to the breach of rules of natural justice clearly seems to be an after thought.

26. Mr. Shyam Divan had also relied on *Automotive Tyre Manufacturers Association Vs. Designated Authority & Ors.*[3] The aforesaid judgment is again of no relevance in the present case. The scope and ambit of the Anti-Dumping Regulations, the Customs Tariff (Identification, Assessment & Collection of Anti-Dumping Duty on Dumped Articles & for Determination of

3. (2011) 2 SCC 258.

Injury) Rules, 1995 was under consideration of this Court. Upon consideration of the entire matter, the Court reiterated the principle of law, which is stated as follows:-

> **"80.** It is thus, well settled that unless a statutory provision, either specifically or by necessary implication excludes the application of principles of natural justice, because in that event the court would not ignore the legislative mandate, the requirement of giving reasonable opportunity of being heard before an order is made, is generally read into the provisions of a statute, particularly when the order has adverse civil consequences which obviously cover infraction of property, personal rights and material deprivations for the party affected. The principle holds good irrespective of whether the power conferred on a statutory body or Tribunal is administrative or quasi-judicial. It is equally trite that the concept of natural justice can neither be put in a straitjacket nor is it a general rule of universal application."

27. Considering the 1995 Rules, it was held as follows:-

> **"83.** The procedure prescribed in the 1995 Rules imposes a duty on the DA to afford to all the parties, who have filed objections and adduced evidence, a personal hearing before taking a final decision in the matter. Even written arguments are no substitute for an oral hearing. A personal hearing enables the authority concerned to watch the demeanour of the witnesses, etc. and also clear up his doubts during the course of the arguments. Moreover, it was also observed in *Gullapalli*, if one person hears and other decides, then personal hearing becomes an empty formality."

28. It was noticed by the Court that in the matter under consideration, the entire material had been collected by the predecessor of the DA. He had allowed the interested parties and/or their representatives to present the relevant information

before him in terms of Rule 6(6) but the final findings in the form of an order were recorded by the successor DA, who had no occasion to hear the appellants. Therefore, it was held that the final order passed by the new DA offends the basic principle of natural justice. In the present case, the appellants did not make a formal request before SEBI for being given an opportunity of personal hearing. Thus, the reliance on the aforesaid case is misplaced.

29. Mr. Shyam Divan then relied on *Darshan Lal Nagpal (Dead) by LRs. Vs. Government of NCT of Delhi & Ors.*[4] The Court in this case was considering whether the Government of NCT of Delhi could invoke Section 17(1) and (4) of the Land Acquisition Act and dispense with the rule of hearing embodied in Section 5A (2) for the purpose of acquiring certain land. In this context, the Court observed that the reasons given by NCT for invoking the emergency provision were not justified. It was observed that the documents produced by the parties including the notings recorded in the concerned file and the approval accorded by the Lieutenant Governor do not contain anything from which it can be inferred that a conscious decision was taken to dispense with the application of Section 5A which represents two facets of the rule of hearing that is the right of the land owner to file objection against the proposed acquisition of land and of being heard in the inquiry required to be conducted by the Collector. There is no such duty caused on SEBI under the Regulations, which would make it incumbent upon it to grant an opportunity of hearing before rejecting the application made by the appellants or its Merchant Bankers. This apart, we again reiterate that the appellants in its letter of 4th May, 2006 did not make any request for a personal hearing. In such circumstances, in our opinion, SAT has correctly concluded that:

> "Having acquired the shares of the target company which breached the threshold limit prescribed by the takeover

4. (2012) 2 SCC 327.

code, the appellants were required to make a public officer to acquire further shares of that company for which a public announcement was made. The normal rule being that the public offer once made could not be withdrawn, it was only in the exceptional circumstances referred to in the earlier part of our order that such an offer could be withdrawn. The appellants were invoking those exceptional circumstances and the Board having considered the matter took a decision. It is not that they had no opportunity to place their point of view before the Board. In these circumstances, it was not necessary for them to be given a personal hearing."

30. Mr. Venugopal has further pointed out that apart from the appellants, even the Merchant Bankers did not make a request for a personal hearing. He submitted that grant of an opportunity for a personal hearing can not be insisted upon in all circumstances. In support of this submission, he relied on judgment of this Court in the case of *Union of India & Anr. Vs. Jesus Sales Corporation*[5]*.* The submission can not be brushed aside in view of the observations made by this Court in the aforesaid judgment, which are as under:-

"5. The High Court has primarily considered the question as to whether denying an opportunity to the appellant to be heard before his prayer to dispense with the deposit of the penalty is rejected, violates and contravenes the principles of natural justice. In that connection, several judgments of this Court have been referred to. It need not be pointed out that under different situations and conditions the requirement of compliance of the principle of natural justice vary. The courts cannot insist that under all circumstances and under different statutory provisions personal hearings have to be afforded to the persons concerned. If this principle of affording personal hearing is extended whenever statutory authorities are vested with the power

5. (1996) 4 SCC 69.

to exercise discretion in connection with statutory appeals, it shall lead to chaotic conditions. Many statutory appeals and applications are disposed of by the competent authorities who have been vested with powers to dispose of the same. Such authorities which shall be deemed to be quasi-judicial authorities are expected to apply their judicial mind over the grievances made by the appellants or applicants concerned, but it cannot be held that before dismissing such appeals or applications in all events the quasi-judicial authorities must hear the appellants or the applicants, as the case may be. When principles of natural justice require an opportunity to be heard before an adverse order is passed on any appeal or application, it does not in all circumstances mean a personal hearing. The requirement is complied with by affording an opportunity to the person concerned to present his case before such quasi-judicial authority who is expected to apply his judicial mind to the issues involved. Of course, if in his own discretion if he requires the appellant or the applicant to be heard because of special facts and circumstances of the case, then certainly it is always open to such authority to decide the appeal or the application only after affording a personal hearing. But any order passed after taking into consideration the points raised in the appeal or the application shall not be held to be invalid merely on the ground that no personal hearing had been afforded.

……."

31. Taking into consideration the facts and circumstances of this case, we are unable to accept the submission of Mr. Shyam Divan with regard to the breach of rules of natural justice, in this case, merely because the appellants were not given a personal hearing.

32. Mr. Shyam Divan had also submitted that grant of opportunity of hearing ought to be read into Regulation 27(1)

(d), which enables SEBI to grant exemption or permit withdrawal in "such circumstances as in the opinion of the Board merit withdrawal". He submits that an informed opinion could only be taken by the Board under the aforesaid Regulation by permitting the concerned applicant an opportunity of personal hearing. The learned senior counsel also sought support for the aforesaid submission that Regulation 32(1) which permits the Board to issue directions as it deem fit in the interests of investors in the securities and securities market under Section 11 or 11(b) or 11(d). Regulation 32(2) specifically provides that in any proceedings initiated by the Board, it shall comply with the principle of natural justice, before issuing directions to any person. In our opinion, the aforesaid provisions are of no assistance to the appellants. Firstly, neither the appellants nor their Merchant Bankers requested for an opportunity for a personal hearing. Secondly, in the present case, SEBI has not issued any instructions or directions under Section 11, which requires that the rules of natural justice be complied with. Thirdly, it cannot be said that the appellants had been condemned unheard as the entire material on which the appellants were relying was placed before SEBI. It is upon consideration of the entire matter that the offer of the appellants was rejected. This is evident from the detailed order passed by SEBI on 30th April, 2007. The letter indicates precisely the exceptional circumstances mentioned by the appellants seeking to withdraw the public announcement. Each and every circumstance mentioned was considered by SEBI. Therefore, it can not be said that the appellants have been in any manner prejudiced by the non-grant of the opportunity of personal hearing. Therefore, the submission made by Mr. Shyam Divan with regard to the breach of rules of natural justice is rejected.

33. Mr. Shyam Divan then submitted that the interpretation placed on Regulation 27(1) (d) by SEBI as well as the SAT results in restriction on the wide powers given to SEBI to regulate the securities market to further the object of the SEBI Act. He submits that the appellants are equally "an investor" in

the market; therefore, the regulator also has to keep the interest of the appellants in mind. He makes a reference to Regulation 3(1) (f) which provides that nothing contained in Regulations 10, 11 and 12 shall apply to acquisition of shares in the ordinary course of business by banks and financial institutions as pledgees. This, according to Mr. Shyam Divan, is an indicator that, for a certain class of institutional investor there is a carve out. He submits that similar carve out is also provided for the small investors. In the present case, the appellants have lost out only because there was an inordinate delay in taking action by SEBI. Specifying the changes that would be required in the letter of offer, the necessary decision was to be taken by SEBI within 21 days under Regulation 18. But it was not taken by SEBI for a period of 8 months or 239 days, to be precise. Thus, there was a delay of 221 days. During this period, the entire scenario had changed. In such circumstances, the appellants would be entitled to exit option like any other ordinary investor. He submits that by giving a very narrow and restrictive interpretation to Regulation 27, SAT has actually curtailed the wide powers vested in SEBI to regulate the securities market to further the object of the Regulations.

34. He submits that Regulation 27(1) (d) should be construed to confer wide powers on SEBI to allow withdrawal of an open offer in cases where although it is not impossible to complete open offer, but such an offer, in its opinion, merits withdrawal. It is submitted that the words "such circumstances as in the opinion of the Board merit withdrawal", appearing in Regulation 27(1)(d) of the Takeover Regulations must mean –

"a. The formation of an opinion by Respondent – which though subjective in nature – must be based on the existence of objective facts;

b. The opinion must be one that is formed by Respondent based upon, circumstances which merit withdrawal of the public offer;

c. Circumstances which go into the formation of the

opinion, must be circumstances that are relevant to the question of withdrawal of the public offer;

d. The circumstances must be such that no reasonable person, who comes into possession or knowledge thereof, can be compelled to (ignore such circumstances and) proceed with the public offer."

35. Therefore, the discretion conferred on respondent under Regulation 27(1) (d), entailed the duty of respondent to form its opinion based on relevant facts and the circumstances prevailing at the time when the application for withdrawal of open offer was made. Admittedly, the respondent failed to do so.

36. Learned senior counsel further submitted that the SAT in interpreting Regulation 27 has wrongly relied upon the principle of *Ejusdem Generis*. He submits that the rule of *ejusdem generis* applies only if the statutory provision – (i) contains an enumeration of specific words; (ii) the subjects of enumeration constitute a class or category; (iii) that class of category is not exhausted by the enumeration; (iv) the general terms follow the enumeration; and (v) there is no indication of a different legislative intent.

37. Learned senior counsel submits that in the present case none of the said requirements are met. The rule of *ejusdem generis* is restricted to cases where the specific words precede the general words in the language of the statute, and in totality from a singular genus along with the general words. The sub-clauses of Regulation 27 do not form a common genus of cases where it is impossible to do an open offer. Learned senior counsel submitted that the provisions contained in the Takeover Code are regulatory in nature and, therefore, have to be construed widely. The Takeover Code provisions do not apply to pledgees. The text of the Takeover Code indicates a different legislative intent so far as the

pledgees are concerned. He submits that the court is entitled to look at the legislative history for interpretation of any provision in the Act, Rule or Regulation. He submits that the legislative history of Regulation 27(1) would clearly show that *ejusdem generis* was not the appropriate rule of interpretation to be implied while construing the aforesaid provisions. He pointed out that sub-regulation (a) of Regulation 27(1), as originally enacted, dealt with a case of a competing acquirer which would entitle the first acquirer to be exempted from making the open offer. However, to ensure that shareholders of Target Company should have an option to decide from both offers, sub-regulation (a) was omitted on September 9, 2002. Sub-Regulation (b) deals with a situation where requisite statutory approvals are not granted to make the open offer; and Sub-Regulation (c) deals with a situation where the sole acquirer dies and although it is possible that the legal heirs could make the open offer, nonetheless grants an exemption to the deceased acquirer and his heirs. Regulation 27(1) (d), is not confined to a particular situation, but grants a general power to SEBI to permit withdrawal of open offer where the facts and circumstances in its opinion may merit withdrawal, taking into account the facts and circumstances of that particular case. Therefore, according to the learned senior counsel, the SAT erred in law in construing Regulation 27(1) (d) on the principle of *ejusdem generis*. According to Mr. Shyam Divan, Regulation 27(1) (d) provides an exception for withdrawal of open offer not limited to the narrow confines of Clauses (b) and (c) of Regulation 27(1). According to him, the exception under Regulation 27(1) (d) deals with a separate and distinct class of cases i.e. where respondent has been conferred discretion to allow withdrawal of open offers in "such circumstances," which "in the opinion of the Board merit withdrawal". Therefore, for this reason also Regulation 27(1)(d) cannot be read *ejusdem generis* with the preceding clauses to restrict the scope. According to him, the word "such" used in Regulation 27(1)(d) is used in the context of circumstances that in the opinion of the Board merit withdrawal. According to learned counsel, the same does not

take colour from Regulations 27(1) (b) or 27(1)(c). This apart, he submits that the interpretation given to Regulation 27 by the SAT is so narrow that it leads to absurd consequences. The narrow construction of Regulation 27(1) (d) would permit withdrawal only on the same footing as the circumstances enumerated under Regulation 27(1)(b) and (c). This would leave no discretion with SEBI to approve withdrawal, "in such circumstances", which in the opinion of the Board "*merit withdrawal*." Finally, it is submitted that it is an accepted principle that where two interpretations are possible then such an interpretation ought to be taken which will not render any provision of a statute otiose. According to him, Regulation 27(1) (d) would be rendered meaningless if it is read *ejusdem generis* with Regulation 27(1) (b) and Regulation 27(1) (c). Learned senior counsel also relied on Regulation 3 of Takeover Regulations which empowers the respondent to grant a complete exemption to an acquirer from Regulations 10, 11 and 12 in certain cases. He submits that residuary power under Regulation 3(1) in addition to the specific scenario mentioned therein is strongly indicative of the intention of the legislature. In the facts of the present case, it is submitted by Mr. Shyam Divan that had the appellants realized that there was a fraud before making public announcement, it could have gone to the Takeover Panel after it exercised the pledge on July 22, 2005 and applied for exemption from Regulations 10, 11 and 12. In those circumstances, the plea of the appellants for exemption would have been considered before the making of the public announcement. It is only because the fraud was detected much after the making of the public announcement that the appellants had made an application for withdrawal of the open offer. In such circumstances, the respondent can certainly exercise its power under Regulation 27(1)(d) after granting a hearing. In short, the submission of Mr. Shyam Divan is that the regulations permit exercise of discretion *before and after public announcement.* Therefore, SEBI as well as SAT had erred in giving a very narrow interpretation to regulation 27(1)(d). Learned senior counsel also referred to Regulation 22(14) of the Takeover

Regulations which provides that an acquirer who has withdrawn an open offer shall not be permitted to make an open offer for a period of six months from the date of withdrawal of the offer. Applying this to Regulation 27, he submits that it is amply clear that impossibility as sought to be interpreted in Regulation 27 cannot vanish in six months. Therefore, according to him, it is clear that withdrawal of an open offer need not be on account of impossibility only. In support of these submissions, he relied on *Municipal Corporation of Greater Bombay Vs. Bharat Petroleum Corporation Ltd.*[6] *Maharashtra University of Health Sciences & Ors. Vs. Satchikitsa Prasarak Mandal & Ors.*[7] and *Union of India & Ors. Vs. Alok Kumar*[8]*.*

38. We are unable to accept the submission of Mr. Shyam Divan that the rule of *ejusdem generis* has been wrongly applied by SAT in interpreting the provisions of Regulations 27(1) (b) (c) and (d).

39. In our opinion, the SAT has correctly come to the conclusion that under the SEBI Act, Board has been entrusted with the fundamental duties of ensuring orderly development of the securities market as a whole and to protect the integrity of the securities market. It is precisely for this purpose that the provision is made in Regulation 7 that any acquirer, who acquires shares or voting rights which would entitle him to more than 5% or 10% or 14% shares or voting rights in a company, shall disclose at every stage the aggregate of share holding or voting rights in that company to the company and to the stock exchanges where shares of the target company are listed. Under Regulation (8), such an acquirer shall within 21 days from the financial year ending March 31, make yearly disclosures to the company, in respect of his holdings as on 31st March. Regulation 8A provides for disclosure of information with regard to pledged shares. The Board has power under

6. (2002) 4 SCC 219.
7. (2010) 3 SCC 786.
8. (2010) 5 SCC 349.

Regulation 9, to call for information with regard to the disclosures made under Regulations 6, 7, and 8 as and when required by the Board. Regulation 10 mandates that no acquirer shall acquire shares or voting rights which entitle such acquirer to exercise 15% or more of the voting rights in a company, unless such acquirer makes a public announcement to acquire shares of such company in accordance with the Regulations. The Takeover Code then prescribed a detailed procedure for making a public announcement and the manner in which the offer price is determined at which the shares are offered to public shareholders. Regulation 11 provides that no acquirer who, together with persons acting in concert with him, has acquired, in accordance with the provisions of law, 15% or more but less than 55% of the shares or voting rights in a company, shall acquire, either by himself or through or with persons acting in concert with him additional shares or voting rights entitling him to exercise more than 5% of the voting rights unless such acquirer makes a public announcement to acquire shares in accordance with the Regulations. Again, Regulation 12 provides that irrespective of whether or not there has been any acquisition of shares or voting rights in a company, no acquirer shall acquire control over the target company, unless such person makes a public announcement to acquire shares and acquires such shares in accordance with the Regulations. Under Regulation 13, before making any public announcement of offer referred to in Regulation 10 or Regulation 11 or Regulation 12, the acquirer is duty bound to appoint a Merchant Banker holding a certificate of registration granted by the Board. Such Merchant Banker is required to be not associates of or group of the acquirer or the target company. In other words, it has to be a totally independent entity. Under Regulation 14, the Merchant Banker is required to make public announcement under Regulation 10 or Regulation 11 within four working days of entering into an agreement for acquisition of shares or voting rights exceeding the respective percentage specified in Regulations 10 and 11. Regulation 15 provided that public announcement to be made under Regulations 10, 11 or 12 shall

be made in all editions of one English national daily with wide circulation, one Hindi national daily with wide circulation and a regional language daily with wide circulation at the place where the registered office of the target company is situated and at the place of the stock exchange where the shares of the target company are most frequently traded. Simultaneously, a copy of the public announcement has to be submitted to the Board through the Merchant Banker; sent to all the stock exchanges on which the shares of the company are listed for being notified on the notice board; and sent to the target company at its registered office for being placed before the Board of Directors of the company. Regulation 16 sets out in detail the particulars which are required to be expressly stated and the public announcement is made under Regulations 10, 11 or 12. Regulation 17 provides that the public announcement or any advertisement, circular, brochure, publicity material or letter of offer issued in relation to the acquisition of shares must not contain any misleading information. Under Regulation 18, within 14 days from the date of public announcement made under Regulations 10, 11 or 12, as the case may be, the acquirer, through its Merchant Banker, is mandated to file with SEBI the draft of the letter of offer, containing disclosures as specified by the Board. This letter of offer is to be dispatched to the shareholders not earlier than 21 days from its submission to the Board. However, the Board has the power to specify changes, if any, in the letter of offer which the merchant banker and the acquirer is required to carry out such changes before the letter of offer is dispatched to the shareholders. Regulation 20 provides that the offer to acquire share under Regulations 10, 11 or 12 shall be made at a price not lower than the price determined as per sub-regulations (4) and (5).Sub-Regulations (4) and (5) provides a complete procedure for determination of the price. Under Regulation 21, it is provided that the public offer made by the acquirer to the shareholders of the target company shall be for a minimum 20% of the voting capital of the company. Regulation 24 imposes certain general obligations of the merchant banker. Before the public

announcement of the offer is made, the merchant banker is required to ensure that - (a) the acquirer is able to implement the offer; (b) the provision relating to Escrow account referred to in Regulation 28 has been made; (c) firm arrangements for funds and money for payment through verifiable means to fulfil the obligations under the offer are in place; (d) the public announcement of offer is made in terms of the Regulations. Under Regulation 24(2), it is provided that the merchant banker shall furnish to the Board a due diligence certificate which shall accompany the draft letter of offer. Under Regulation 24(4), the merchant banker is required to ensure that the contents of the public announcement of offer as well as the letter of offer are true, fair and adequate and based on reliable sources, quoting the source wherever necessary. To ensure the independence of the merchant banker under Regulation 24(5A), the merchant banker is not permitted to deal in the shares of the target company during the period commencing from the date of appointment in terms of regulation 13 till the expiry of 15 days from the date of closure of the offer. It is only upon fulfillment of all obligations by the acquirers under the Regulations, that the merchant banker is permitted to cause the bank with which the escrow amount has been deposited to release the balance amount to the acquirers. (Regulation 24(6)). Under Regulation 24(7), the merchant banker is called to send a final report to the Board within 45 days from the date of closure of the offer.

40. A conspectus of the aforesaid Regulations would show that the scheme of the Takeover Code is – (a) to ensure that the target company is aware of the substantial acquisition ; (b) to ensure that in the process of the substantial acquisition or takeover, the security market is not distorted or manipulated and (c) to ensure that the small investors are given an option to exit, that is, they are offered a choice to either offload their shares at a price as determined in accordance with the takeover code or to continue as shareholders under the new dispensation. In other words, the takeover code is meant to ensure fair and equal treatment of all shareholders in relation

to substantial acquisition of shares and takeovers and that the process does not take place in a clandestine manner without protecting the interest of the shareholders. It is keeping in view the aforesaid aims and objects of the takeover code that we shall have to interpret Regulations 27(1).

Regulation 27 reads as under:

"Withdrawal of offer – (1) No public offer, once made, shall be withdrawn except under the following circumstances:-

(a)……'

(b) the statutory approval(s) required have been refused;

(c) the sole acquirer, being a natural person, has died;

(d) such circumstances as in the opinion o the Board merits withdrawal.

(2) In the event of withdrawal of the offer under any of the circumstances specified under sub-regulation (1), the acquirer or the merchant banker shall:

(a) make a public announcement in the same newspapers in which the public announcement of offer was published, indicating reasons for withdrawal of the offer;

(b) simultaneously with the issue of such public announcement, inform – (i) the Board; (ii) all the stock exchanges on which the shares of the company are listed; and (iii) the target company at its registered office."

41. We may notice here that Regulation 27(1) (a) was omitted by SEBI (Substantial Acquisition of Shares and

Takeovers) (Second Amendment), Regulations, 2002 w.e.f. 9.9.2002. Prior to omission, it read as under :-

"(a) the withdrawal is consequent upon any competitive bid."

42. A bare perusal of the aforesaid Regulations shows that Regulation 27(1) states the general rule in negative terms. It provides that no public offer, once made, shall be withdrawn. Since Clause (a) has been omitted, we are required to interpret only the scope and ambit of clause (b), (c) and (d). The three sub-clauses are exceptions to the general rule and, therefore, have to be construed very strictly. The exceptions cannot be construed in such a manner that would destroy the general rule that no public offer shall be permitted to be withdrawn after the public announcement has been made. Clause (b) would permit a public offer to be withdrawn in case of legal impossibility when the statutory approval required has been refused. Clause (c) again provides for impossibility when the sole acquirer, being a natural person, has died. Clause (b) deals with a legal impossibility whereas clause (c) deals with a natural disaster. Clearly clauses (b) and (c) are within the same genus of *impossibility*. Clause (d) also being an exception to the general rule would have to be naturally construed in terms of clauses (b) and (c). Mr. Divan has placed a great deal of emphasis on the expression "such circumstances" and "in the opinion" to indicate that the Board would have a wide discretion to permit withdrawal of an offer even though it is not impossible to perform. We are unable to accept such an interpretation.

43. The term "*ejusdem generis*" has been defined in Black's Law Dictionary, 9th Edn. as follows :

> "A canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed."

44. The meaning of the expression *ejusdem generis* was considered by this Court on a number of occasions and has been reiterated in *Maharashtra University of Health Sciences and Ors. Vs. Satchikitsa Prasarak Mandal & Ors*[9]. The principle is defined thus :

> "The Latin expression "ejusdem generis" which means "of the same kind or nature" is a principle of construction, meaning thereby when general words in a statutory text are flanked by restricted words, the meaning of the general words are taken to be restricted by implication with the meaning of the restricted words. This is a principle which arises "from the linguistic implication by which words having literally a wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context". It may be regarded as an instance of ellipsis, or reliance on implication. This principle is presumed to apply unless there is some contrary indication [see Glanville Williams, *The Origins and Logical Implications of the Ejusdem Generis Rule*, 7 Conv (NS) 119]."

45. Earlier also a Constitution Bench of this Court in *Kavalappara Kottarathil Kochuni vs. State of Madras*[10] construed the principle of *ejusdem generis* wherein it was observed as follows :

> " …….. The rule is that when general words follow particular and specific words of the same nature, the general words must be confined to the things of the same kind as those specified. But it is clearly laid down by decided cases that the specific words must form a distinct genus or category. It is not an inviolable rule of law, but is only permissible inference *in the absence of an indication to the contrary*."

46. Again this Court in another Constitution Bench decision

9. (2010) 3 SCC 786.

10. AIR 1960 SC 1080.

in the case of *Amar Chandra Chakraborty Vs. Collector of Excise*[11] observed as follows :

> ". … The ejusdem generis rule strives to reconcile the incompatibility between specific and general words. This doctrine applies when (*i*) the statute contains an enumeration of specific words; (*ii*) the subjects of the enumeration constitute a class or category; (*iii*) that class or category is not exhausted by the enumeration; (*iv*) the general term follows the enumeration; and (*v*) *there is no indication of a different legislative intent*."

47. Applying the aforesaid tests, we have no hesitation in accepting the conclusions reached by SAT that clause (b) and (c) referred to circumstances which pertain to a class, category or genus, that the common thread which runs through them is the *impossibility* in carrying out the public offer. Therefore, the term "such circumstances" in clause (d) would also be restricted to situation which would make it impossible for the acquirer to perform the public offer. The discretion has been left to the Board by the legislature realizing that it is impossible to anticipate all the circumstances that may arise making it impossible to complete a public offer. Therefore, certain amount of discretion has been left with the Board to determine as to whether the circumstances fall within the realm of *impossibility* as visualized under sub-clause (b) and (c). In the present case, we are not satisfied that circumstances are such which would make it impossible for the acquirer to perform the public offer. The possibility that the acquirer would end-up making loses instead of generating a huge profit would not bring the situation within the realm of impossibility.

48. We are unable to accept the submission of Mr. Shyam Divan that clause (d) would permit SEBI to accept the offer of withdrawal even in circumstances when it has become uneconomical for the acquirer to perform the public offer. The rule of *ejusdem generis* as defined by this Court in

11. (1972) (2) SCC 444.

Commissioner of Income Tax, Udaipur, Rajasthan Vs. McDowell and Co. Ltd[12]*.* is as follows :

> "The principle of statutory interpretation is well known and well settled that when particular words pertaining to a class, category or genus are followed by general words, the general words are construed as limited to things of the same kind as those specified. This rule is known as the rule of ejusdem generis. It applies when:
>
> (1) the statute contains an enumeration of specific words;
>
> (2) the subjects of enumeration constitute a class or category;
>
> (3) that class or category is not exhausted by the enumeration;
>
> (4) the general terms follow the enumeration; and
>
> (5) here is no indication of a different legislative intent."

49. Mr. Divan has sought to persuade us that clause (d) in fact carves out an exception out of the exceptions provided in clauses (b) and (c). We see no justification in moving away from the Latin maxim "*noscitur a sociis*", which contemplates that a statutory term is recognized by its associated words. The Latin word "*sociis*" means society. It was pointed out by Viscount Simonds in Attorney General vs. Prince Ernest Augustus of Hanover, (1957) AC 436 that when general words are juxtaposed with specific words, general words cannot be read in isolation. Their colour and their contents are to be derived from their context. Applying the aforesaid principle, we are unable to stretch the meaning of terms "such circumstances" from the realm of *impossibility* to the realm of *economic undesirability*. In essence, the submission made by Mr. Divan

12. (2009) 10 SCC 755.

is that unless they are allowed to walk away from the public offer they would have to bear losses which would otherwise have been shared by the erstwhile shareholders of the target company. Accepting such a proposition would be contrary to the aims and objectives of the Takeover Code which is to ensure transparency in acquisition of a large percentage of shares in the target company. It would also encourage undesirable and speculative practices in the stock market. Therefore, we are unable to accept the submission of Mr. Shyam Divan. Regulation 27(1) (d) would empower the SEBI to permit withdrawal of an offer merely because it has become uneconomical to perform the public offer.

50. Mr. Venugopal, in our opinion, has rightly submitted that the Takeover Regulations, which is a special law to regulate "substantial acquisition of shares and takeovers" in a target company lays down a self contained code for open offer; and also that interest of investors in the present case required that they should be given an exit route when the appellants have acquired substantial chunk of shares in the target company. He has correctly emphasised in his submissions that the orderly development of the securities market as a whole requires that public offers once made ought not to be allowed to be withdrawn on the ground of fall in share price of the target company, which is essentially a business misfortune or a financial decision of the acquirer having gone wrong. SEBI as well as the SAT have correctly concluded that withdrawal of the open offer in the given set of circumstances is neither in the interest of investors nor development of the securities market. Mr. Venugopal is correct in voicing the apprehension that if on ground of fall in prices, public offer is allowed to be withdrawn, it could lead to frivolous offers, being made and withdrawn. This would adversely affect the interests of the shareholders of the target company and the integrity of the securities market, which is wholly contrary to the intent and purpose of the takeover regulations. In such circumstances, we are unable to agree with the submission of Mr. Shyam Divan that the order passed by SEBI on 30th April, 2007 can be said to be an order causing civil consequences.

The appellants wanting to withdraw the public offer merely wishes to *cut its losses* at the expense of the innocent shareholders, who are entitled under the Regulations to the exit option. In such circumstances, the appellants would have to buy the shares at the quoted prices of Rs.18.60 per share, placing a financial burden on the appellants. The aim of the appellants was merely to avoid such an added burden. This is patent from the plea made by the Merchant Bankers on 22nd September, 2006 on behalf of the appellants. In the aforesaid application, it is clearly mentioned as under:

> "Under the aforesaid circumstances, it is apparent that SRMTL has lost is substratum, has become a "sick company" and that chances of lis (sic) survival are negligible. The pledgee Acquirers while enforcing the security created earlier (invoking the pledge on the shares of SRMTL) had triggered Regulation 10 of the Regulations requiring the Pledgee Acquirers to make the open offer. However, on account of subsequent knowledge of development at SRMTL, it is apparent that if this offer is not withdrawn, the Pledgee Acquirers *will be saddled with an additional burden of over Rs.25 crores*. In our view, the purpose sought to be achieved by operation of the Regulations is lost in view of the subsequent developments and hence the Regulations will operate harshly again the Pledgee acquirers. In view of the changed scenario, it would be inequitable and unfair to compel the Pledgee Acquires to proceed with the offer to purchase the shares of SRMTL from the shareholders of SRMTL in accordance with the draft Letter of Offer.
>
> In light of the change in circumstances as stated above and considering the present state of affairs, we now appeal to you to kindly permit the acquirers to withdraw the offer by using the powers vested in you in terms of Regulation 27(4) of the Regulations."

51. In view of the foregoing reasons, we are not inclined

to accept the submissions of Mr. Divan that the principle of *ejusdem generis* is not applicable for interpreting Regulation 27(1) (d) of the Takeover Code.

Object of Takeover Code *qua* the Lenders

52. The next submission of Mr. Shyam Divan is based on Regulation 3(1)(f) of the Takeover Code, which exempts the banks and financial institutions from making a public offer where an acquisition of shares is made in the ordinary course of business, in pursuance of the pledge of shares made in its favour. It is submitted that the objective underlying the said provision appears to be to give an exemption to the creditors who acquire shares to secure the loan/credit and then invoke the pledge to recover such credit from the defaulting parties, but not to take over the management of the target companies. On similar reasoning, the said objective, as put forward by the learned senior, would be taken to apply in the case of a private company which gives credit and acquires shares as pledged in course of the business, since the object of such private companies is also not to takeover the management but to secure their loan. It is also submitted that Regulation 27(1) (d) of the Takeover Code ought to be interpreted with such latitude to further the said objective of the Takeover Code.

53. We are unable to accept the aforesaid submission of Mr. Shyam Divan. Rather we find merit in the submission of Mr. Venugopal that Regulation 3(1) (f) (iv) (which exempts the acquisition of shares by banks and public financial institutions as pledgees, from the provisions of the Takeover Regulations), does not advance the case of the appellants any further. Under this regulation, exemption is provided to certain entities that acquire shares in the ordinary course of business. The regulation provides exemption from Regulation 10, 11 and 12 to Scheduled Commercial Banks or Public Financial Institutions acting as pledgees *in the ordinary course of business,* in order to facilitate their business operations. Such acquisition of

shares in normal circumstances is not with the intention of taking over the target company. The shares are acquired to protect the economic interest of the banks and public financial institutions by securing repayment of the loan. Such acquisitions of shares have nothing in common with acquisition of shares by an acquirer company such as the appellants seeking to gain control in the affairs of the target company.

Powers of Respondent under SEBI Act:

54. Mr. Shyam Divan has further submitted that *de hors* the Takeover Regulations/Code, SEBI has wide powers to allow withdrawal of offer under Sections 11 & 11B of the SEBI Act. To safeguard the interest of the investors in securities, and also, to regulate the securities market, SEBI has the power to take whatever steps it considers appropriate. In this context, the learned senior counsel relied upon the case of *Sahara India Real Estate Corporation Limited & Ors v. Securities and Exchange Board of India & Anr*[13]*.*

55. We are not inclined to accept the aforesaid submission. In the aforesaid judgment in *Sahara India Real Estate Corporation Limited* (supra) this Court observed as under:

> "From a collective perusal of Sections 11, 11A, 11B and 11C of the SEBI Act, the conclusions drawn by the SAT, that on the subject of regulating the securities market and protecting interest of investors in securities, the SEBI Act is a stand alone enactment, and the SEBI's powers thereunder are not fettered by any other law including the Companies Act, is fully justified.

56. These observations have been made by this Court to emphasise that SEBI has all the powers to protect the interests of investors in securities and also to ensure orderly, regulated, and transparent functioning of the stock markets. The aforesaid

13. (2012) 8 SCALE 101.

observations would be of no assistance to the appellants herein who is seeking to walk away from public offer merely to avoid economic loses. Rather we agree with the submission of Mr. Venugopal that permitting such a withdrawal would lead to encouragement of unscrupulous elements to speculate in the stock market. Encouraging such a practice of an offer being withdrawn which has become uneconomical would have a destabilizing effect in the securities market. This would be destructive of the purpose for which the Takeover Code was enacted.

Fraud:

57. It is submitted that since fraud vitiates every solemn act, the withdrawal of the public offer by the appellants ought to have been allowed. In this regard, reliance is placed upon *Ram Chandra v. Savitri Devi* (2003) 8 SCC 319 (Paras 15-30).

58. This submission of Mr. Shyam Divan is wholly misconceived in the facts and circumstances of this case. In the case of *Ram Chandra* (supra), this Court has reiterated the principle laid down in the case of *S.P.Chengalvaraya Naidu (dead) by LRs. vs. Jagannath (Dead) by LRs. and Ors.*[14] The principle was explained by Kuldip Singh, J. in the following words:

> "Fraud avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by playing fraud on the court is a nullity and non est in the eyes of law. Such a judgment/decree — by the first court or by the highest court — has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

14. (1994) 1 SCC 1.

59. It was further held in paragraph 5, as follows:-

> "5. The High Court, in our view, fell into patent error. The short question before the High Court was whether in the facts and circumstances of this case, Jagannath obtained the preliminary decree by playing fraud on the court. The High Court, however, went haywire and made observations which are wholly perverse. We do not agree with the High Court that "there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence". The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation."

60. In the present case, no fraud has been played on the appellants as such. The shares were acquired by the appellants on the basis of an informed business decision. The appellants cannot be permitted to take advantage of its own laxity to justify seeking withdrawal of the public offer.

61. Mr. Shyam Divan submitted that SEBI has wrongly concluded that the fact of the large scale embezzlement in the target company were existent prior to the exercise of the pledge by the appellants and, therefore, were "known" or "could have been known" by the appellants, if the appellants had exercised proper "due diligence". He points out that the entire basis and/

or the special circumstances in which the appellants made an application for permission to withdraw the public offer was on the basis of certain facts which came to light subsequently i.e. facts which came in the public domain and/or the knowledge of the appellants, only after the appellants exercised its right of pledge and after the appellants made consequential public announcement. According to the learned senior counsel, the Sharma Report, which came in public domain after the public announcement, for the first time informed the public that through fraudulent transactions, Rs.326 Crores were siphoned off/ embezzled by erstwhile promoters of SRMTL. As soon as the Sharma Report was made public, the market price of the shares of the target company fell from Rs.18.60 to Rs.8.56. He also emphasised that the Sharma Report also brought to public notice the Kalyaniwala Report and Sharp Report. These reports were submitted to the erstwhile Board of Directors of the target company in 2002. However, these reports were not made public and in fact were deliberately withheld from the public *in spite of the same being price sensitive*. Therefore, according to Mr. Shyam Divan, the appellants, or for that matter, any person exercising due diligence and care, could not have and did not know the existence and nature of the fraud and embezzlements by the erstwhile promoters of the target company. If the SEBI, the capital market regulator, with all its infrastructure did not become aware of the damning indictment of a listed company permitting its controlling promoters to *abuse, misuse and embezzle* funds belonging to investors in the securities market, it cannot rationally be accepted that the appellants would have discovered the same by exercise of due diligence. Mr. Shyam Divan further brought to our notice the facts which were known at the time of public announcement and the facts which could not have been known even after due diligence since the same did not reflect in the balance sheet and/or financial statement of the target company. The known facts at the time of public announcement are listed as under:

"SRMTL had negative net worth;

SRMTL Company was recently faced with poor financial performance;

Stated reasons for the aforesaid poor performance and negative net worth was:

(i) Low volume of sales and products;

(ii) Reduced price and lower realization;

(iii) Working capital constraints;

(iv) Higher unabsorbed fixed costs.

Certain Litigations as stated in the Letter of Offer were pending."

62. The facts which could not have been known even after due diligence are stated to be as under:

"Finding of special investigative audit by M/s. R.C.Sharma & Co., Chartered Accountants as contained in the three reports;

Unexplained shortfall of cash – cash being siphoned by those in management.

Issuance of warrants to Pan Emami Cosmed Ltd in concert with Emami's promoters with a view to fraudulently siphon Rs.2.74 Crores.

Promoters fraudulently appropriating money by sale of goods to Emami Ltd by creating charge on trade receivables.

Siphoning of Rs.50 Crores by promoters/directors of SRMTL through related party transactions "by creating a fictitious asset procurement case and subsequently creating false grounds of writing off the same amount in the books of the Company".

Rs. 143 Crores of "huge contingent liability is not disclosed in Balance Sheet as on 31.03.2005.

Systematic embezzlement and siphoning of funds by promoters director of more than 326 Crores by fraudulent transactions."

63. On the basis of the aforesaid, Mr. Shyam Divan submitted that the conclusion recorded by the SEBI which has been upheld and approved by SAT is without any factual basis.

64. Mr. Shyam Divan, relying on Regulation 3A which prohibits dealing in securities of a target company if a person has access to *price sensitive* information, submitted that if the appellants were privy to the contents of the Kalyaniwala and Sharp Reports it would have been precluded from invoking the pledges, as such action would constitute "*dealing in securities*". It is also submitted by Mr. Shyam Divan that the expression "*due diligence*" does not mean that the party has to assume the role of amateur detective, nor is the party obliged to make any enquiries unless it can be established that there existed any circumstances which should have aroused any suspicion. It is also submitted that the law laid down in *Marfani and Co. Ltd. vs. Midland Bank Ltd.*[15] and *Indian Overseas Bank vs. Industrial Chain Concern*[16] which enumerates the benchmark or standards accepted from a party while performing the due diligence should be taken into account.

65. We are not much impressed by any of the submissions made by Mr. Shyam Divan on this issue. Admittedly, the appellants were aware of the litigation against Shree Ram Multi Tech Limited and its Directors. The litigation commenced in the year 2003 i.e. before the public announcement made by the appellants. In fact, the letter of offer itself refers to the pending litigation by and against the target company and its directors.

15. 1968 (2) All E.R. 573.

16. 1990 1 SCC 484.

66. In Paragraph 4.17 of the said letter, the appellants mentioned the cases filed by Banks and Financial Institutions; Cases/Appeals filed by SRMTL against Banks and financial Institutions; Cases filed by the Registrar of Companies in the Court of Additional Chief Metropolitan Magistrate, Ahmedabad in the matter of non payment of dividend under Section 205 of the Companies Act, 1956 and the application filed by the company against Registrar of Companies, Gujarat in Gujarat High Court in this matter under Section 482 of the Criminal Procedure Code. The list also mentions a case filed in the City Civil Court, Ahmedabad by two commercial entities involving a sum of Rs.14275.47 lacs in the matter of recovery of dues and alleged claim for damages. The litany of cases also includes an appeal of SRMTL and its directors before the SAT against an order of SEBI dated 6th September, 2004 restraining the company and few of its directors from accessing the securities market and prohibiting from buying, selling and dealing in securities, directly or indirectly, for a period of five years on the charge of having violated sections 11 and 13 of the SEBI Regulations, 2003. There were six cases pending against the target company in the Labour Court, Kalol, (Gujarat) by ex-employees of the Company in the matter of their dues and compensation. There were cases pending in relation to Central Excise. In one case, CEGAT had passed an order on 25th February, 2004 claiming duty of Rs.101.81 lacs, fine of Rs.2 lacs and penalty of Rs.0.20 lacs. Excise duty authorities have in various cases raised a demand on target company for an aggregate sum of Rs.145.90 lacs towards excise duty and Rs.97.02 lacs towards penalty for various offences. Similarly, excise duty of Rs.1317.65 lacs was demanded as a result of a raid by the Intelligence Officer, Central Excise, Ahmedabad for non-accounted raw materials. Undoubtedly, the appeals were pending in the higher fora in a number of cases. Nonetheless any reasonable investor/group of investors/ consortium would have come to a conclusion that investing in this entity would not be a prudent decision.

67. Taking into account the aforesaid state of affairs, SAT has concluded as follows:-

> "The above facts would seem to be enough to provide the appellants a correct prognosis regarding the financial health and prospects of the target company. Clearly, the appellants decided on invoking the pledge on the shares of the target company with open eyes and sufficient knowledge about the affairs of the target company. It is not as if the appellants were innocent and were caught napping in an unexpected turn of events. We are not, therefore, inclined to accept at its face value the argument of the appellants that they had no prior clue about the adverse financial information relating to the target company and were contained in the later reports of the Chartered Accountants. In this view of the matter, the Board was justified in characterizing the situation that the appellants are faced with as the result of lack of due diligence and/or sheer business misfortune. They are only trying to wriggle out of a bad bargain which is not permissible under Regulation 27(1) (d) of the takeover code."

68. The aforesaid conclusion reached by SAT, in our opinion, does not call for any interference.

69. We are inclined to agree with the submission made by Mr. Venugopal that the appellants cannot be permitted to wriggle out of the obligation of a public offer under the Takeover Regulation. Permitting them to do so would deprive the ordinary shareholders of their valuable right to have an exit option under the aforesaid regulations. The SEBI Regulations are designed to ensure that public announcement is not made by way of *speculation* and to protect the interest of the other shareholders. Very solemn obligations are cast on the *merchant banker* under Regulation 24(1) to ensure that –

(a) the acquirer is able to implement the offer;

(b) the provision relating to Escrow account referred to in Regulation 28 has been made;

(c) firm arrangements for funds and money for payment through verifiable means to fulfil the obligations under the offer are in place;

(d) the public announcement of offer is made in terms of the Regulations;

(e) his shareholding, if any in the target company is disclosed in the public announcement and the letter of offer.

70. Regulation 24(2) mandates that the merchant banker shall furnish to the Board a *due diligence certificate* which shall accompany the draft letter of offer. The aforesaid regulation clearly indicates that any enquiries and any due diligence that has to be made by the acquirer have to be made prior to the public announcement. It is, therefore, not possible to accept the submission of Mr. Shyam Divan that the appellants are to be permitted to withdraw the public announcement based on the discovery of certain facts subsequent to the making of the public announcement. In such circumstances, in our opinion, the judgments cited by Mr. Shyam Divan are of no relevance.

Delay:

71. Mr. Shyam Divan has also indicated that it was because of the unexplained delay of 8 months on the part of SEBI to process the Letter of Offer of the appellants that the prices for the shares of the target company went down from Rs. 18.60 to Rs. 8.56, during this period. This would impose huge financial liability on the appellants. This submission is also wholly misconceived. The submission was not made before SAT and it has been raised for the first time, in the submissions made by Mr. Shyam Divan. In fact, the ground is not even pleaded in the grounds of appeal. The submission is mentioned only in the list of dates. Since, we are considering a statutory

appeal under Section 15Z of the SEBI Act, the same cannot be permitted to be raised in this Court for the first time, unless the submission goes to the very root of the matter. This apart, even on merit, we find that the submission is misconceived. Regulation 18(1) and (2) of the SEBI Takeover Code reads thus:-

> 18. Submission of letter of offer to the Board -
>
> (1) Within fourteen days from the date of public announcement made under regulation 10, 11 or 12 as the case may be, the acquirer shall, through its merchant banker, file with the Board, the draft of the letter of offer containing disclosures as specified by the Board.
>
> (2) The letter of offer shall be dispatched to the shareholders not earlier than 21 days from its submission to the Board under sub-regulation (1):
>
> Provided that if, within 21 days from the date of submission of the letter of offer, the Board specifies changes, if any, in the letter of offer (without being under any obligation to do so), the merchant banker and the acquirer shall carry out such changes before the letter of offer is dispatched to the shareholders :
>
> [Provided further that if the disclosures in the draft letter of offer are inadequate or the Board has received any complaint or has initiated any enquiry or investigation in respect of the public offer, the Board may call for revised letter of offer with or without rescheduling the date of opening or closing of the offer and may offer its comments to the revised letter of offer within seven working days of filing of such revised letter of offer.]"

72. A perusal of the aforesaid regulation clearly shows that the acquirer is required to file the draft letter of offer containing disclosures as specified by the Board within a period of 14

days from the date of public announcement. Thereafter, letter of offer has to be dispatched to the shareholders not earlier than 21 days from its submission to the Board. Within 21 days, the Board is required to specify changes if any, that ought to be made in the letter of offer. The merchant banker and the acquirer have then to carry out such changes before the letter of offer is dispatched to the shareholders. But there is no obligation to do so. Under the second proviso, the Board may call for revised letter of offer in case it finds that the disclosures in the draft letter of offer are inadequate or the Board has received any complaint or has initiated any enquiry or investigation in respect of the public offer. It is important to notice that in the first proviso the Board does not have any obligation to specify any change in the draft letter of offer within a period of 21 days. In the present case, in fact, the Board had not specified any changes within 21 days. We have already noticed earlier that the letter of offer was lacking and deficient in detail. The appellants themselves were taking time to submit details called for, by their merchant bankers through various letters between 08.08.2005 to 20.3.2006. We have already noticed the repeated advice given by the merchant banker to enhance the issue size of the open offer and to comply with other requirements of the Takeover Regulations. The appellants, in fact, were prevaricating and did not agree with the interpretation placed on Regulation 27(1) (d) by the Merchant Banker. We, therefore, reject the submission of Mr. Shyam Divan that there was delay on the part of SEBI in approving the draft letter of offer.

Court may direct fresh valuation:

73. Lastly, Mr. Shyam Divan has submitted that even if the appellants were not to be permitted to withdraw the public offer, the Court ought to appoint an independent valuer and direct a fresh valuation to be made on the basis of principles contained in Regulation 20(5) of the Takeover Regulations. Such a valuation, according to Mr. Shyam Divan, would be justified in

the light of the foregoing submissions. We are not at all impressed by the aforesaid submission. The formula given in Regulation 20 would have no applicability in the facts and circumstances of this case. The determination of the lowest price under Regulation 20 would be at a stage prior to the making of the public announcement and not thereafter.

74. In view of the aforesaid, we find no merit in the appeal and it is accordingly dismissed.

R.P. Appeal dismissed.

CHAIRMAN, RAJASTHAN STATE ROAD TRANSPORT CORPORATION & ORS.

v.

SMT. SANTOSH & ORS.

(SPECIAL LEAVE PETITION (C) No.3265 of 2012)

MAY 10, 2013.

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

CONSTITUTIONAL LAW:

Separation of powers - Issuance of directions by constitutional courts in case of legislative vacuum - HELD: So far as the legislation by court is concerned, as a corollary to doctrine of separation of powers, a judge merely applies the law that it gets from legislature - He is simply not authorised to legislate - However, simply filling up an existing vacuum till legislature chooses to make appropriate laws, does not amount to taking over the functions of legislature - Supreme Court has insightfully identified Art.32 as the constitutional provision that provides for enforcement of fundamental rights in areas of legislative vacuum - Not only has it held that fundamental rights are limitations upon the State power, but the right to constitutional remedies is itself a fundamental right enshrined in Art. 32 and in the case of an infringement of a fundamental right by State, an aggrieved party can approach the Court for a remedy - Issuance of guidelines and directions, in exercise of powers under Arts 32 and 142, has become an integral part of our constitutional jurisprudence - Courts in India have not violated the mandatory constitutional requirement, rather they have only issued certain directions to meet the exigencies - Some of them are admittedly legislative in nature, but the same have been issued only to fill up the existing vacuum, till legislature

enacts a particular law to deal with the situation - In view of the same, it is permissible to issue directions if the law does not provide a solution of a problem, as an interim measure, till proper law is enacted by legislature - The Court, therefore, may also issue necessary directions as an interim measure, if the need has so arisen -- Constitution of India, 1950 -- Arts. 32 and 142.

MOTOR VEHICLES ACT, 1988:

s. 2(44) and 2(28) - Motor vehicle - 'Tractor', 'Dumper' - Held: Tractor is a motor vehicle in terms of definition u/ss 2(28) and 2(44) - Thus, tractor is a motor vehicle as defined under the Act - Tractor which is used basically for agricultural purpose and a dumper used in the factory premises, can suitably be adapted for being used on the road, therefore, they will meet the requirement of definition of motor vehicle u/s 2(28) - The word `only' used in s. 2(28) clearly shows that the exemption is confined only to those kinds of vehicles which are exclusively being used in a factory or in any closed premises - Thus, a vehicle which is not adapted for use upon the road, is only to be excluded.

s.2(28) - Motor vehicle - 'Jugaad' - Held: Within the meaning of s.2(28), any vehicle which is mechanically propelled and adapted for use on roads and does not fall within the exceptions provided therein, is a motor vehicle - As has been held by Allahabad High Court, 'Jugaad' is squarely covered under the definition of motor vehicles as specified u/s 2(28), since it is mechanically propelled and adapted for use on road and, therefore, other relevant provisions of the Act/rules are applicable - Therefore, statutory authorities cannot escape from their duty to enforce the law and restrain the plying of `Jugaad' - They must ensure that `Jugaad' can be plied only after meeting the requirements of the Act - The same has become a menace to public safety as they are causing a very large number of accidents - 'Jugaads' are not

insured and the owners of the `Jugaad' generally do not have the financial capacity to pay compensation to persons who suffer disablement and to dependents of those who lose life - Thus, considering the gravity of the circumstances, statutory authorities must give strict adherence to the circular - However, it is clarified that it is open to the statutory authorities to make exemptions by issuing a notification/circular specifically if such a vehicle is exclusively used for agricultural purposes but for that sufficient specifications have to be provided so that it cannot be used for commercial purposes - Government of India (Ministry of Shipping, Road Transport and Highways) Circular dated 26.7.2007, clarifying that 'Jugaad' is a vehicle u/s 2(28).

M. Nagaraj & Ors. v. Union of India & Ors., **2006 (7) Suppl. SCR 336 = AIR 2007 SC 71;** *State of U.P. & Ors. v. Jeet S. Bisht & Anr.***, 2007 (7) SCR 705 = (2007) 6 SCC 586;** *Dayaram v. Sudhir Batham & Ors.* **2011 (15) SCR 1092 = (2012) 1 SCC 333;** *Vishaka & Ors. v. State of Rajasthan & Ors.,* **1997 (3) Suppl. SCR 404 = AIR 1997 SC 3011;** *Vineet Narain v. Union of India,* **1997 (6) Suppl. SCR 595 = AIR 1998 SC 889,** *L.K. Pandey v. Union of India & Anr.,* **1985 Suppl. SCR 71 = AIR 1986 SC 272;** *D.K. Basu v. State of West Bengal,* **1996 (10) Suppl. SCR 284 = AIR 1997 SC 610;** *Ramamurthy v. State of Karnataka,* **AIR 1997 SC 1739;** *Supreme Court Bar Association v. Union of India,* **1998 (2) SCR 795 = AIR 1998 SC 1895; and** *Kalyan Chandra Sarkar v. Rajesh Ranjan,* **AIR 2005 SC 972;** *M.K. Kunhimohammed v. P.A. Ahmedkutty & Ors.,* **1987 (3) SCR 1149 = AIR 1987 SC 2158;** *Natwar Parikh & Co. Ltd. v. State of Karnataka & Ors.,* **2005 (2) Suppl. SCR 1100 = AIR 2005 SC 3428;** *Kishun Ram v. State of U.P. & Ors.,* **Writ Tax No. 573 of 2011 - referred to**

Case Law Reference:

2006 (7) Suppl. SCR 336	**referred to** **para 14**

2007 (7) SCR 705	**referred to**	**para 14**
2011 (15) SCR 1092	**referred to**	**para 14**
1997 (3) Suppl. SCR 404	**referred to**	**para 14**
1997 (6) Suppl. SCR 595	**referred to**	**para 14**
1985 Suppl. SCR 71	**referred to**	**para 14**
1996 (10) Suppl. SCR 284	**referred to**	**para 14**
AIR 1997 SC 1739	**referred to**	**para 14**
1998 (2) SCR 795	**referred to**	**para 14**
AIR 2005 SC 972	**referred to**	**para 14**
1987 (3) SCR 1149	**referred to**	**para 14**
2005 (2) Suppl. SCR 1100	**referred to**	**para 14**
Writ Tax No. 573 of 2011	**referred to**	**para 14**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (Civil) No. 3265 of 2012.

From the Judgment and order dated 21/09/2011 in SBCMA No.480/2001 of the High Court of Rajasthan at Jaipur.

A. Mariarputham, AG, Siddharth Luthra, ASG, S.C. Maheswari, S.K. Dubey, Manish Singhvi, Manjit Singh, Suryanarayan Singh, AAGs Imtiaz Ahmed, Naghma Imtiaz (for Equity Lex Associates), Satya Siddiqui, Supriya Juneja, S.K. Mishra, Aditya Singla, V.K. Biju, D.S. Mahra, Divena Saighal, Mohan Prasad Gupta, Navjyoti Neelam, Vipul Maheshwari, Ashish Mittal, Irshad Ahmad, Tarjit Singh, Anil Antil, Vartika Sahay Walia, Corporate Law Group, A. Subhashini, Gopal Singh, Ritu Raj Biswas, Chandan Kumar, Mishra Saurav, Yogesh Tiwari, Pragati Neekhra, Hemantika Wahi, K.N. Madhusoodhanan, T.G. Narayanan Nair, Aruna Mathur, Movita, Yusuf Khan, Arputham, Aruna & Co., Sanjay V. Kharde, Asha Gopalan Nair, Vinay Garg, V.G. Pragasam, S.J. Aristotle,

Ranjan Mukherjee, S.C. Ghosh, S. Bhowmick, R.P. Yadav, Jayesh Gaurav, Mohd. Waquar, Tapesh Kumar Singh, Prabu Ramasubramanian, B.S. Banthia, Ramesh Babu M.R. Khwairakpam Nobin Singh, Anil Shrivastav, Ritu Raj, B.V. Balaram Das, Bikas Kargupta, Avijit Bhattacharjee, Sarbani Kar, Abhijit Sengupta, Vikas Sharma, Kamal Mohan Gupta, Bina Madhavan, Jagjit Singh Chhabra, Anitha Shenoy, S. Chandra Shekhar, Vishwa Pal Singh, Shibashish Misra, Suvinay K. Dash, Dharmendra Kumar Sinha, Balaji Srinivasan, Abhishek Atrey, Ashutosh Sharma, Brijesh Panchal, Aishwarya Shandilya, Babita Tyagi, G.N. Reddy, B. Debojit, K. Enatoli Sema, Amit Kumar Singh, Samir Ali Khan, Aviral Saxena, Rohit Kumar Singh, Sunil Fernandes, Isha, Aand., Astha Sharma, Kunal Verma, B. Balaji, T. Mouli Mahendran, R. Rakesh Sharma for the appearing parties.

The following order of the Court was delivered by

O R D E R

1. Originally this petition had been filed challenging the judgment and order of the Rajasthan High Court dated 21.9.2011 passed in S.B. Civil Misc. Appeal No. 480 of 2001, wherein the complete liability of providing compensation in a vehicular accident had been fixed upon the appellant-Rajasthan State Road Transport Corporation (hereinafter referred to as the 'RSRTC'), while unfastening the liability of the driver and the owner of the vehicle, known as 'Jugaad', under the provisions of the Motor Vehicles Act, 1988 (hereinafter referred to as the 'Act').

2. At the time of hearing the petition, this court vide order dated 6.2.2012 did not consider it proper to examine the issue in respect of compensation. However, the question was raised by Shri Imtiaz Ahmed, learned counsel appearing for the RSRTC that this court must examine whether 'Jugaad' is a vehicle under the Act, and in case, it is a motor vehicle under Section 2(28) of the Act, whether such 'Jugaad' is required to

be insured and registered before it is permitted to ply on the road and whether the driver of 'Jugaad' must compulsorily have a driving licence. As such important issues have been raised by Shri Imtiaz Ahmed, we had requested Shri H.P. Raval, learned ASG to assist the court, after taking instructions from the Road Transport Ministry of the Central Government about the status of 'Jugaad' under the Act. Shri Raval responded to the aforesaid queries on 13.4.2012 and submitted that it is a motor vehicle as defined under Section 2(28) of the Act, and the Ministry of Shipping, Road Transport and Highways had issued a circular dated 26.7.2007 issuing instructions to all State transport authorities clarifying that 'Jugaad' is a vehicle under Section 2(28) of the Act and all the States are under a legal obligation to enforce the same. Therefore, no person should be permitted to ply a 'Jugaad' as it violates all the provisions of the Act. It must have a registration and insurance and the driver must have a valid driving license and in case of an accident etc, the liability under the provisions of the Act, may be properly determined. However, Shri Raval has raised a grievance that in spite of issuance of such a circular, most of the States have not enforced the terms of the said circular issued by the Central Government.

3. Considering the aforesaid grievance raised by Shri Raval, this court impleaded the Transport Secretary/ Commissioner of all the States as party respondents and asked them to submit their response. While some of the States have submitted that it is not a vehicle within the meaning of the provisions of Section 2(28) of the Act. The State of Karnataka has submitted the vehicle like 'Jugaad' was not in existence in the State.

4. It has further been pointed out by learned counsel for the parties that enforcement of the provisions of the Act and the rules framed under it, come within the jurisdiction of the State Governments. Therefore, they must be directed to ensure strict compliance of the said provisions of the Act. It has also

been pointed out by Shri Siddharth Luthra, learned ASG that a letter dated 19.7.2012 was sent by the Director (RT) of the Ministry of Road Transport & Highways, Government of India, to all the State Authorities to ensure compliance of the statutory provisions of the Act and the rules.

5. Shri Manish Singhvi, learned senior counsel appearing for the State of Rajasthan has submitted that the government of Rajasthan has examined the matter and decided to prohibit the plying of "Jugaad" on the roads completely. Such a vehicle cannot be used for any commercial purpose, without being registered and duly insured and in compliance with the other statutory requirements. However, the State Government carved out an exception that farmers/poor villagers may be permitted to use the same for their agricultural purposes as an interim measure till the rules are framed in this regard. It has further been submitted that in case 'Jugaads' are found plying on the roads, they shall be impounded and will be dealt with strictly in accordance with law. A similar stand has been taken by the majority of the States.

6. An application has been filed by Rashtriya Kisan Morcha, for impleadment/intervention which is allowed. The Morcha raised a grievance that in case plying of the 'Jugaad' is prohibited completely, it will create a serious problem for the farmers, as seizure/impounding of "Jugaad" would have penal consequences. The 'Jugaad' is nothing, but an improved version of a bullock cart which has been used for centuries in the villages. The farmer communities should not be restrained from using the improved carts/jugaad in the villages to and from houses to the farms and for bringing the agricultural produces from their agricultural lands.

7. Some of the lawyers have raised the issue that issuing any kind of direction by this Court in these regards would amount to legislation which is not permissible in law. Thus, they have suggested that instead of issuing the directions, the Central Government and the State authorities be directed to

frame a policy, amend the rules specifically and enforce the same. However, other lawyers have opposed this view and submitted that the issue involved herein is restricted only with enforcement of law and not with legislation. As the "Jugaad" is a vehicle within the meaning of Section 2(28) of the Act.

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

So far as the legislation by the court is concerned, as a corollary to the doctrine of separation of powers, a judge merely applies the law that it gets from the legislature. Consequently, the Anglo-Saxon legal tradition has insisted that the judge only reflects the law regardless of the anticipated consequences, considerations of fairness or public policy. He is simply not authorised to legislate.

9. In kindred spirit, in *M. Nagaraj & Ors. v. Union of India & Ors.,* AIR 2007 SC 71, Justice Kapadia, writing for the Constitutional Bench, observed:

> "The Constitution is not an ephemeral legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adopted to the various crisis of human affairs. . . . A constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that a constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges."

10. Accordingly, in *State of U.P. & Ors. v. Jeet S. Bisht & Anr.,* (2007) 6 SCC 586, even though the matter was referred to another Bench, owing to a split decision-Justice S.B. Sinha aptly described the modern understanding of the separation of powers thus:

> "Separation of power in one sense is a limit on active jurisdiction of each organ. But it has another deeper and more relevant purpose: to act as check and balance over the activities of other organs. Thereby the active jurisdiction of the organ is not challenged; nevertheless there are methods of prodding to communicate the institution of its excesses and shortfall in duty. . . .Separation of power doctrine has been reinvented in modern times. . . . The modern view, which is today gathering momentum in Constitutional Courts world over, is not only to demarcate the realm of functioning in a negative sense, but also to define the minimum content of the demarcated realm of functioning."

11. In *Dayaram v. Sudhir Batham & Ors.,* (2012) 1 SCC 333, this Court doubted the competence of this Court to issue such directions, which were allegedly to be legislative in nature. Therefore, the matter was referred to a larger bench, and such larger bench held, that in exercise of the powers conferred upon it by Article 32 r/w Article 142 of the Constitution, the directions issued by this Court were valid and laudable, as the same had been made to fill the vacuum that existed in the absence of any legislation, to ensure that only genuine SC/ST and OBC candidates would be able to secure the benefits of certificates issued, and that bogus candidates would be kept out. Simply filling up an existing vacuum till the legislature chooses to make appropriate laws, does not amount to taking over the functions of the legislature.

12. In its activist streak, this Court has also imparted new vigour to the process of constitutional interpretation. For instance, this Court has insightfully identified Article 32 as the constitutional provision that provides for the enforcement of fundamental rights in areas of legislative vacuum. Not only has it held that fundamental rights are limitations upon the State power, but the right to constitutional remedies is itself a fundamental right enshrined in Article 32 of the Constitution, and

in the case of an infringement of a fundamental right by the State, an aggrieved party can approach this Court for a remedy.

13. In *Vishaka & Ors. v. State of Rajasthan & Ors.,* AIR 1997 SC 3011, this Court held:

> "In view of the above, and the absence of enacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly against sexual harassment at work places, we lay down the guidelines and norms specified hereinafter for due observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of the fundamental rights and it is further emphasised that this would be treated as the law declared by this Court under Article 141 of the Constitution."

14. Providing further reinforcement to the Article 32 jurisprudence, in *Vineet Narain v. Union of India,* AIR 1998 SC 889, this Court noted that the issuance of guidelines and directions, in the exercise of the powers under Articles 32 and 142, has become an integral part of our constitutional jurisprudence. It also pointed out that such an exercise of powers was absolutely necessary to fill the void in areas with legislative vacuum. In addition, the Court noted:

> "As pointed out in *Vishaka* (supra), it is the duty of the executive to fill the vacuum by executive orders because its field is co-terminus with that the legislature, and where there is inaction even by the executive for whatever reason, the judiciary must step in, in exercise of its constitutional obligations under the aforesaid provisions to provide absolution till such time as the legislature acts to perform its role by enacting proper legislation to cover the field.
>
> On this basis, we now proceed to give the directions enumerated hereafter for rigid compliance till such time as the legislature steps in to substitute them by proper legislation. These directions made under Article 32 read with Article 142 to implement the rule of law wherein the concept of equality enshrined in Article 14 is embedded, have the force of law under Article 141 and by virtue of Article 144 it is the duty of all authorities, civil and judicial, in the territory of India to act in aid of this Court."

(See also: *L.K. Pandey v. Union of India & Anr.,* AIR 1986 SC 272; *D.K. Basu v. State of West Bengal,* AIR 1997 SC 610; *Ramamurthy v. State of Karnataka,* AIR 1997 SC 1739; *Supreme Court Bar Association v. Union of India,* AIR 1998 SC 1895; and *Kalyan Chandra Sarkar v. Rajesh Ranjan,* AIR 2005 SC 972).

15. Thus, the aforesaid cases clearly reveal that the courts in India have not violated the mandatory constitutional requirement, rather they have only issued certain directions to meet the exigencies. Some of them are admittedly legislative in nature, but the same have been issued only to fill up the existing vacuum, till the legislature enacts a particular law to deal with the situation. In view of the same, it is permissible to issue directions if the law does not provide a solution of a problem, as an interim measure, till the proper law is enacted by the legislature.

We may also issue necessary directions as an interim measure, if the need so arisen.

16. The Act replaced the Motor Vehicles Act, 1939, in view of the changes in transport technology, pattern of passenger and freight movements, taking into consideration the road safety standards, pollution control measures, standards in transportation of hazardous and explosive materials.

17. In *M.K. Kunhimohammed v. P.A. Ahmedkutty & Ors.,* AIR 1987 SC 2158, this Court has made certain suggestions

to raise the limit of compensation payable as a result of vehicular accidents in respect of death and permanent disablement in the event of their being no proof of fault on the part of the person involved in the accident and also in hit and run motor accidents. In this case, the court also suggested the removal of certain disparities in the liability of the insurer to pay compensation. The said recommendations/suggestions were also taken into consideration and incorporated in the Act.

18. The object of bringing and repealing the Act 1939 had been to rationalise certain definitions with additions of certain new definitions of new types of vehicles, strict procedures relating to grant of driving licenses and period of validity thereof; standards of anti-pollution control devices; provisions for issuance of fitness certificates of vehicles and provision for enhancing compensation in case of no fault liability and in hit and run vehicular accidents and also maintenance of State register for driving licenses and vehicles registration.

19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines `tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi-trailer and a side-car, drawn or intended to be drawn by a motor vehicle.

Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of

the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.

20. Section 2(28) of the Act defines "Motor Vehicle" as under:

> "Motor Vehicle" or "vehicle" means **any mechanically propelled vehicle adapted for use upon roads** whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer; **but does not include a vehicle running upon fixed rails or a vehicle of a special type adapted for use only in a factory or in any other enclosed premises** or a vehicle having less than four wheels fitted with engine capacity of not exceeding twenty five cubic centimeters."
> (Emphasis added)

Thus, any vehicle which is mechanically propelled and adapted for use upon roads and does not fall within the exceptions provided therein, is a Motor Vehicle within the meaning of Section 2(28) of the Act.

21. In *Natwar Parikh & Co. Ltd. v. State of Karnataka & Ors.,* AIR 2005 SC 3428, this Court dealt with the issue while dealing with "Tractor" and held as under:

> "Under Section 61 of the 1988 Act, which comes within Chapter IV dealing with registration of motor vehicles, registration of trailers is made compulsory. Under Section 61(2), the registration mark assigned to a trailer is required to be displaced on the side of the drawing vehicle. In the present case, we are not concerned with tractors in the conventional sense. Even the legislature has used the word "drawing vehicle" in place of tractors. Under Section 61(3),

it is provided that no person shall drive a motor vehicle to which a trailer is attached unless the registration mark of the motor vehicle is displayed on the trailer. Similarly, under Section 66 in Chapter V which refers to control of transport vehicles, no owner of a motor vehicle can use the vehicle as a transport vehicle carrying passengers or goods without a permit. Under Section 66(2), the holder of a goods carriage permit may use the vehicle for drawing any trailer. Therefore, under the M.V. Act, 1988, the Parliament has kept in mind the existence of a vehicle classifiable as "tractor-trailer"…

Section 2(28) is a comprehensive definition of the words "motor vehicle". Although, a "trailer" is separately defined under Section 2(46) to mean any vehicle drawn or intended to be drawn by motor vehicle, it is still included into the definition of the words "motor vehicle" under Section 2(28). Similarly, the word "tractor" is defined in Section 2(44) to mean a motor vehicle which is not itself constructed to carry any load. Therefore, the words "motor vehicle" have been defined in the comprehensive sense by the legislature. Therefore, we have to read the words "motor vehicle" in the broadest possible sense keeping in mind that the Act has been enacted in order to keep control over motor vehicles, transport vehicles etc. A combined reading of the definitions under Section 2, …….. shows that the definition of "motor vehicle" includes any mechanically propelled vehicle apt for use upon roads irrespective of the source of power and it includes a trailer. Therefore, even though a trailer is drawn by a motor vehicle, it by itself being a motor vehicle, the tractor- trailer would constitute a "goods carriage" under Section 2(14) and consequently, a "transport vehicle" under Section 2(47). The test to be applied in such a case is whether the vehicle is proposed to be used for transporting goods from one place to another. When a vehicle is so altered or prepared that it becomes apt for use for transporting

goods, it can be stated that it is adapted for the carriage of goods. Applying the above test, ……. the tractor-trailer …… falls under Section 2(14) as a "goods carriage" and consequently, it falls under the definition of "transport vehicle" under Section 2(47) of the M.V. Act, 1988."

22. The Tractor is a machine run by diesel or petrol. It is a self-propelled vehicle for hauling other vehicles. It is used for different purposes. It is also used for agricultural purposes, along with other implements; such as harrows, ploughs, tillers, blade-terracers, seed-drills etc. It is a self-propelled vehicle capable of pulling alone as defined under the definition of Motor Vehicles. It does not fall within any of the exclusions as defined under the Act. Thus, it is a Motor Vehicle in terms of the definition under Section 2(28) of the Act, which definition has been adopted by the Act. So, even without referring to the definition of the Tractor, if the definition of the Motor Vehicle as given under the Act is strictly construed, even then the Tractor is a Motor Vehicle as defined under the Act. The Tractor is not only used for agricultural purposes but is also used for other purposes as stated above. Therefore, it cannot be said that the Tractor in its popular meaning is only used for agricultural purposes and, thus, is not a Motor Vehicle as defined under the Act. The Tractor is a Motor Vehicle is also proved by this definition under Section 2(44) of the Act. Different types of Motor Vehicles have been defined under the provisions of the Act, and the Tractor is one of them. Thus, considering the question from any angle, the Tractor is a Motor Vehicle as defined under the Act.

23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types

mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi-trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'.

24. The Allahabad High Court in Writ Tax No. 573 of 2011- *Kishun Ram v. State of U.P. & Ors.,* held that 'Jugaad' was squarely covered under the definition of motor vehicles as specified under Section 2(28) of the Act, since it was mechanically propelled adapted for use on road and hence other relevant provisions of the Act/rules were applicable. The Court further directed that as the said vehicle did not comply with the provisions of the Act/Rules, the seizure effected by the U.P. authorities could not be interfered with by the court.

25. Further, in Writ Petition No. 6611(M/B) of 2005 - *Avnish Kumar v. State of U.P. & Ors.* decided on 23.2.2011, the Allahabad High Court has issued directions to the statutory authorities to ensure compliance of the provisions of the Act and the rules, and to prevent the illegal plying of such vehicles, the statutory Authorities must take effective measures in conformity with the statutory rules.

26. Learned standing counsel appearing for the State of Haryana has submitted that even the Punjab and Haryana High Court while delivering the judgment as early as 29.3.1995 had directed the State authorities to ensure that no 'Jugaad' shall be permitted to ply in the State of Haryana under any circumstance. The relevant part of the said judgment reads as under:

> "An interim direction is issued that no such Jugars shall be permitted to ply in the State of Haryana under any circumstance. All such Jugars being plied shall be seized by the concerned law enforcing agencies of the State. Since the aforesaid vehicles are being plied **against the provisions of law and these vehicles are not recognised under the Motor Vehicles Act,** the same cannot be released in favour of a person, who is not even admitted to be the registered owner of such vehicle. Despite directions, we have not been intimated as to how such unauthorised vehicles were ordered to be released and by whom. Prima facie, it appears to us that the aforesaid Jugars could not be released either by the law enforcing agencies or by the Magistrates."
>
> (Emphasis added)

27. As such 'Jugaads' were being plied against the provisions of the Act and the rules framed under it, and in case any 'Jugaad' is found on the road and is seized by the police authorities, it could not be released in favour of its owner either by the law enforcing agency or even by the Magistrate. Plying of such vehicles was in utter disregard/violation of the provisions of the Act and the rules framed thereunder.

28. As to whether a particular vehicle can be defined as motor vehicle in terms of Section 2(28) of the Act, is to be determined on the facts of each case taking into consideration the use of the vehicle and its suitability for being used upon the road. Once it is found to be suitable for being used on the road, it is immaterial whether it runs on the public road or private road, for the reason, that actual user for a particular purpose, is no criteria to decide the name. Definition of motor vehicle takes within its ambit, a dumper and tractor. Tractor which is used basically for agricultural purpose and a dumper is used in the factory premises, can suitable be adapted for being used on the road, therefore, they will meet the requirement of definition of motor vehicle under Section 2(28) of the Act. The word `only' used in Section 2(28) of the Act clearly shows that the exemption is confined only to those kinds of vehicles which are exclusively being used in a factory or in any closed premises. Thus, a vehicle which is not adapted for use upon the road, is only to be excluded.

29. However, Shri S.C. Maheshwari, learned senior counsel appearing for the applicant could not satisfactorily reply as under what circumstances, if the tractor which is exclusively used for agricultural purpose, does require registration and insurance and driver also require a driving license, why the same provisions would not apply in case of `Jugaad'.

30. 'Jugaad' does not require the permit, insurance or a driving licence for its driver. There is no specification for its body. It does not require fitness certificate. However, passenger vehicle has a upper limit of number of passengers it can carry. The same remains the position for the goods vehicle as there is a specification for the maximum load it can carry. The 'Jugaad' is not liable to pay any passenger or road tax like other vehicles.

31. In view of the above, as the `Jugaad' is covered in the definition of the motor vehicle under Section 2(28) of the Act, the statutory authorities cannot escape from their duty to enforce the law and restrain the plying of `Jugaad'. The statutory authorities must ensure that `Jugaad' can be plied only after meeting the requirements of the Act. The same has become a menace to public safety as they are causing a very large number of accidents. 'Jugaads' are not insured and the owners of the `Jugaad' generally do not have the financial capacity to pay compensation to persons who suffer disablement and to dependents of those, who lose life. Thus, considering the gravity of the circumstances, the statutory authorities must give strict adherence to the circular referred to hereinabove by the Central Government.

32. However, we clarify that it is open to the statutory authorities to make exemptions by issuing a notification/circular specifically if such a vehicle is exclusively used for agricultural purposes but for that sufficient specifications have to be provided so that it cannot be used for commercial purposes.

The matter is closed now.

R.P. SLP disposed of.

STATE OF M.P. AND OTHERS
v.
SANJAY NAGAYACH AND OTHERS
(Civil Appeal No. 4691 of 2013 etc.)

MAY 16, 2013

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

Madhya Pradesh Co-operative Societies Act, 1960:

s.31(1), second and third provisos and s.31(2) read with s.49(7A)(i), proviso – Supersession of Board of Directors of District Co-operative Bank – Without prior consultation with RBI – Held: When an authority invested with the power purports to act on its own but in substance the power is exercised by external guidance or pressure, it would amount to non-exercise of power, statutorily vested — In the instant case, there is sufficient evidence to conclude that Joint Registrar was acting under extraneous influence and under dictation — Order of supersession is not only in clear violation of second proviso to s.53(1), but also allegations raised in show cause notice are deficiencies mostly relating to systems and procedures and are of general nature and not grave enough to overthrow a democratically elected Board of Directors — Board of Directors was superseded illegally, and, therefore, in view of proviso to s. 49(7A)(i), they need to be put back in office and allowed to continue for the period they were put out of office – Ordered accordingly – Costs imposed on State Government and officer concerned – Legislation – Legislative intent.

s.31(1) second proviso – Expression 'previous consultation with the Reserve Bank' – Connotation of – Held: Previous consultation is a condition precedent before forming an opinion by Joint Registrar to supersede the Board of Directors or not — Mere serving a copy of show cause notice

on RBI with supporting documents is not what is contemplated under second proviso to s. 53(1) – For a meaningful and effective consultation, copy of reply filed by Bank to various charges and allegations levelled against them should also be made available to RBI as well as the action proposed by Joint Registrar, after examining the reply submitted by Bank – Only then, there will be an effective consultation and views expressed by RBI will be a relevant material for deciding whether elected Board be superseded or not – In addition to six propositions laid down in the case of Indian Administrative Services (SCS) Association, U.P., one more proposition that may be added is that when the outcome of proposed action is to oust a democratically elected body, previous consultation with RBI is to be construed as mandatory.

Constitution of India, 1950:

Art. 226 – Writ petition – Alternative remedy – Held: In the instant case, Division Bench of High Court has rightly exercised its jurisdiction under Art. 226 and the alternative remedy of appeal is no bar in exercising that jurisdiction, since the order passed by Joint Registrar was arbitrary and in clear violation of second proviso to s.53(1) of the Act – Madhya Pradesh Co-operative Societies Act, 1960 – s.78.

Co-operative Societies:

Supersession of elected bodies – Held: Co-operative philosophy on society must rest on free universal association, democratically governed and conditioned by equity and personal liberty — Registrar/Joint Registrar, while exercising power of supersession has to form an opinion and that opinion must be based on some objective criteria, which has nexus with final decision and he is bound to follow judicial precedents – The manner in which State Government took so much interest by spending huge public money pursuing the matter upto Supreme Court, that too without following binding

precedents of High Court, deprecated – In view of mushrooming of cases in various courts challenging orders of supersession of elected committees, general directions given – Precedent – Judicial deprecation.

The Board of Directors of a District Co-operative Central Bank were served with a show cause notice dated 2.3.2009 issued by the Joint Registrar, Co-operative Societies, u/s 53(2) of the Madhya Pradesh Co-operative Societies Act, 1960, containing 19 charges. Detailed replies were sent by the Board of Directors on 6.5.2009 and 16.5.2011. However, by order dated 30.9.2011, the Joint Registrar, Co-operative Societies, superseded the Board of Directors of the Co-operative Bank and appointed an Administrator. The Board of Directors of the Bank challenged the order before the High Court on the ground of violation of the second proviso to s.53(1) of the Act for non-consultation with the Reserve Bank of India before taking the decision. The Single Judge disposed of the writ petition directing the parties to avail of the alternative remedy provided u/s 78 of the Act. However, the Division Bench of the High Court set aside the order of supersession on the ground of non-compliance of the second proviso to s.53(1) of the Act.

Dismissing the appeal, the Court

HELD: 1.1. Section 53 (1) of the Madhya Pradesh Co-operative Societies Act, 1960 confers powers on the Registrar to pass an order to remove the Board of Directors and to appoint a person to manage the affairs of the society, subject to certain conditions. The second proviso to s. 53(1), specifically states that in the case of a Co-operative Bank, the order of supersession shall not be passed without previous consultation with the RBI. The proviso is clear and unambiguous and calls for no interpretation or explanation. The third proviso to s. 53(i) states that if no communication containing the views of

the RBI on the action proposed is received within thirty days of the receipt by the bank of the request soliciting consultation, it shall be presumed that the RBI agreed with the proposed action and the Registrar shall be free to pass such order, as he may deem fit. The second proviso to s. 53 (1) refers to the expression "order of supersession", which means that the final order of supersession to be passed by the Joint Registrar after complying with sub-s. (2) to s. 53. Second and third provisos, read together, would indicate that no order of supersession shall be passed without previous consultation with the RBI.The previous consultation is a condition precedent before forming an opinion by the Joint Registrar to supersede the Board of Directors or not. [para 14-16] [759-D-G, H; 760-A-B-C; 761-A]

Lalu Prasad Yadav and Another v. State of Bihar and Another **2009 (1) SCR 553 = (2009) 3 SCC 553; and** *Ansal Properties and Industries Limited v. State of Haryana and Another* **2010 (4) SCR 334 = (2010) 5 SCC 1 – referred to**

Sussex Peerage **case (1844) 11 CIT F.85 – referred to**

1.2. The mere serving a copy of the show-cause-notice on RBI with supporting documents is not what is contemplated under the second proviso to s. 53(1). For a meaningful and effective consultation, the copy of the reply filed by the Bank to the various charges and allegations levelled against them should also be made available to the RBI as well as the action proposed by the Joint Registrar, after examining the reply submitted by the Bank. Only then, there will be an effective consultation and the views expressed by the RBI will be a relevant material for deciding whether the elected Board be superseded or not. [para 16] [760-F-H]

1.3. While examining the meaning of the expression 'consultation', in addition to six propositions laid down

in the case of *Indian Administrative Services (SCS) Association, U.P.,* one more proposition that may be added is that when the outcome of the proposed action is to oust a democratically elected body and the expression used is "shall not be passed without previous consultation", it is to be construed as mandatory. [para 17] [761-B-C]

Indian Administrative Services (SCS) Association, U.P. v. Union of India **1992 (2) Suppl. SCR 389 = 1993 Supp (1) SCC 730 – relied on**

Reserve Bank of India v. Peerless Company **(1987) 2 SCR 1,** *State of Jammu and Kashmir v. A.R. Zakki and Others* **1991 (3) Suppl. SCR 216 =1992 Supp (1) SCC 548,** *Gauhati High Court and Another v. Kuladhar Phkan and Another* **2002 (2) SCR 808 = (2002) 4 SCC 524,** *Andhra Bank v. Andhra Bank Officers and Another* **(2008) 7 SCC 203 – referred to.**

1.4. This Court is of the view that the order of supersession dated 30.9.2011 is not only in clear violation of the second proviso to s.53(1) of the Act, but also the allegations raised in the show-cause-notice are deficiencies mostly relating to systems and procedures and are of general nature and not grave enough to overthrow a democratically elected Board of Directors. Both NABARD and RBI have expressed the view that the charges levelled against the Board of Directors do not provide strong ground to supersede the Board. In view of the views expressed by NABARD as well as RBI and the fact that the Joint Registrar himself had passed the order of supersession only after two and half years of the date of issuance of the show-cause-notice, it is evident that the Board of Directors was superseded illegally, and, therefore, they need to be put back in office and allowed to continue for the period they were put out of office. [para 22-23] [763-F-H; 764-A-B]

2.1. The statute has fixed the term of an elected Board of Directors as five years from the date on which first meeting of Board of Directors is held. Once a Board of Directors is illegally superseded, suspended or removed, the legislature in its wisdom ordained that the Board should complete their full term of five years, because electorate has elected the Board for five years. The proviso to s.49(7A)(i) lays down that where a Board of Directors superseded, suspended or removed under the Act is reinstated as a result of any order of any court or authority, the period during which the Board of Directors remained under supersession, suspension or out of office, shall be excluded in computing the period of the term. The legislative intention is clear. [para 24] [764-B-F]

2.2. The Board of Directors, in the instant case, took charge on 16.10.2007, therefore, they could continue in office till 15.10.2012. The Board of Directors was, however, superseded illegally on 30.9.2011 and, by virtue of the judgment dated 13.2.2012 of the Division Bench of the High Court, the Board should have been put back in office on 13.2.2012, but an Administrator was appointed. Going by the proviso to s. 49(7A)(i), the period during which the Board of Directors remained under supersession be excluded in computing the period of five years. In the facts and circumstances of the case, this Court is of the considered opinion that the duly elected Board of Directors should get the benefit of the proviso, which is statutory in nature. Therefore, this Court directs the Joint Registrar, Co-operative Societies to put the Board of Directors back in office so as to complete the period during which they were out of office. The State of Madhya Pradesh to pay an amount of Rs.1,00,000/- to the Madhya Pradesh Legal Services Authority by way of costs and to also impose a cost of Rs.10,000/- as against the Joint Registrar, Co-operative Societies, the officer who passed the order, which will be deducted from his salary

and be deposited in the respondent bank. [para 25, 26 and 34] [764-G-H; 765-A-B; 767-G-H]

2.3. The Division Bench of the High Court has rightly exercised its jurisdiction under Art. 226 of the Constitution and the alternative remedy of appeal is not bar in exercising that jurisdiction, since the order passed by the Joint Registrar was arbitrary and in clear violation of the second proviso to s.53(1) of the Act. [para 27] [765-C]

2.4. The Registrar/Joint Registrar, while exercising powers of supersession has to form an opinion and that opinion must be based on some objective criteria, which has nexus with the final decision. There may be situations where the Registrar/Joint Registrar are expected to act in the best interest of the society and its members, but in such situations, they have to act *bona fide* and within the four corners of the Statute. The impugned order will not fall in that category. There is sufficient evidence to conclude that the Joint Registrar was acting under extraneous influence and under dictation. A legally elected Board of Directors cannot be put out of the office in this manner by an illegal order. When an authority invested with the power purports to act on its own but in substance the power is exercised by external guidance or pressure, it would amount to non-exercise of power, statutorily vested. [para 28, 29 and 30] [765-D-E, G-H; 766-A-C-E]

2.5. Registrar/Joint Registrar is bound to follow the Judicial Precedents. *Ratio decidendi* has the force of law and is binding on all statutory authorities when they deal with similar issues. The Madhya Pradesh High Court in several judgments has explained the scope of the second proviso to s.53(1) of the Act. Joint Registrar, while passing the impugned order, has overlooked those binding judicial precedents. State of Madhya Pradesh did not show the grace to accept the judgment of the Division

Bench of the High Court. The State Government, Department of Co-operative Societies has taken so much interest in this litigation and has spent huge public money by litigating this matter even up to this Court, that too, without following the binding precedents of the Madhya Pradesh High Court, a practice this Court strongly deprecates. [para 28, 31- 33] [765-F; 766-F; 767-B-C, E]

Radheshyam Sharma v. Govt. of M.P. through C.K. Jaiswal and Ors. **1972 MPLJ 796,** *Board of Directors of Shri Ganesh Sahakari Vipnan (Marketing) Sanstha Maryadit and Another v. Deputy Registrar, Co-operative Societies, Khargone and Others* **1982 MPLJ 46 and** *Sitaram v. Registrar of Co-operative Societies and Another* **1986 MPLJ 567 – referred to.**

2.6. Co-operative philosophy on society must rest on free universal association, democratically governed and conditioned by equity and personal liberty. Large number of cases are coming up before this Court and the High Courts challenging the orders of supersession and many of them are being passed by the statutory functionaries due to external influence ignoring the fact that they are ousting a democratically elected Board, the consequence of which is also grave because the members of the Board of Directors would also stand disqualified in standing for the succeeding election as well. This Court gives general directions as enumerated in the judgment in view of the mushrooming of cases in various courts challenging orders of supersession of elected Committees. [para 10,29 and 35] [755-C-D; 766-A-B; 768-A]

Harbanslal Sahnia and Another v. Indian Oil Corpn. Ltd. and Others **(2003) 2 SCC 107,** *United Bank of India v. Satyawati Tondon and Others* **2010 (9) SCR 1 = (2010) 8 SCC 110 and** *Om Prakash Saini v. DCM Ltd. and Others* **(2010) 11 SCC 622 – cited.**

Case Law Reference:

(2003) 2 SCC 107	**cited**	**para 5**
2010 (9) SCR 1	**cited**	**Para 5**
(2010) 11 SCC 622	**cited**	**para 5**
2009 (1) SCR 553	**referred to**	**para 15**
2010 (4) SCR 334	**referred to**	**para 15**
1992 (2) Suppl. SCR 389	**relied on**	**para 17**
1991 (3) Suppl. SCR 216	**referred to**	**para 17**
(1987) 2 SCR 1	**referred to**	**para 17**
2002 (2) SCR 808	**referred to**	**para 17**
(2008) 7 SCC 203	**referred to**	**para 17**
1972 MPLJ 796	**referred to**	**para 31**
1982 MPLJ 46	**referred to**	**para 31**
1986 MPLJ 567	**referred to**	**para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4691 of 2013.

From the Judgment & Order dated 13.02.2012 of the High Court of Judicature of Madhya Pradesh, Principal Seat at Jabalpur in Writ Appeal No. 1065 of 2011.

WITH

C.A. No. 4692 of 2013.

Dr. Abhishek Manu Singhvi, V.K. Bali, Vivek Tankha, Ravindra Srivastava, C.D. Singh, Sunny Chaudhary, Abhimanyu Singh, Anshuman Srivastav, D.S. Parmar, Akshat Goel, Anil Kumar Gupta-II, Mahavir Singh, Samir Ali Khan, Rahul Kaushik, Harsh Parashar, A. Choudhary, H. Singh, Kuldeep S. Parihar,

H.S. Parihar, Pragati Neekhra, Suryanarayana Singh, Abha R. Sharma, Susheel Tomar, Alok Kumar, Neeraj Shekhar, Rohit Singh for the Appearing parties.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. Leave granted.

1. We are, in this case, concerned with the legality of an order passed by the Joint Registrar of the Cooperative Societies, Sagar Division, Sagar, M.P., superseding the Board of Directors of District Cooperative Central Bank Ltd., Panna without previous consultation with the Reserve Bank of India, as provided under the second proviso to Section 53(1) of the Madhya Pradesh Cooperative Societies Act, 1960 [for short 'the Act'].

2. The Board of Directors of the Bank challenged the above mentioned order on various grounds, including the ground of violation of the second proviso to Section 53(1) of the Act that is non-consultation with the Reserve Bank of India [RBI] before taking a decision to supersede the Board of Directors. The order was challenged by the Board of Directors by filing a writ petition before the High Court of Madhya Pradesh, Jabalpur Bench. Learned single Judge of the High Court disposed of the writ petition directing the parties to avail of the alternative remedy provided under Section 78 of the Act. But on appeal, the Division Bench of the High Court set aside the order of supersession dated 30.9.2011 on the ground of non-compliance of the second proviso to section 53(1) of the Act. Aggrieved by the same, the State of M.P., through its Principal Secretary, Department of Co-operation, the Commissioner Cum Registrar, Co-operative Societies, Bhopal and the Joint Registrar, Co-operative Societies, Sagar, have come up with **Civil Appeal No. 4691 of 2013** [arising out of SLP No. 6860 of 2012] and a private party filed **Civil Appeal No. 4692 of 2013** [arising out of SLP No. 13125 of 2012]

challenging the judgment of the High Court dated 13.2.2012, followed by lot of intervening applications.

3. As the question of laws involved in both the above mentioned appeals are common, we are disposing of both the appeals by a common judgment.

Facts and Arguments

4. The Board of Directors of the Bank was elected to Office on 16.10.2007 and while in office they were served with a show-cause-notice dated 2.3.2009 issued by the Joint Registrar, Co-operative Societies under Section 53(2) of the Act containing 19 charges. Detailed replies were sent by the Board of Directors on 6.5.2009 and 16.5.2011 stating that most of the charges levelled against them were related to the period of the previous Committee and the rest were based exclusively on an Audit Report dated 25.9.2008. It was pointed out that the Board of Directors on receipt of the Audit report took necessary action and a communication dated 5.12.2008 was sent to the Branch Managers of Primary Societies to take immediate follow-up action on the basis of the Audit report. After filing the detailed reply, nothing was heard from the Joint Registrar but due to political pressure and extraneous reasons after two and half years of the show cause notice, an order of supersession was served on the Board, followed by the appointment of an Administrator in gross violation of the second proviso to Section 53(1) of the Act.

5. Dr. Abhishek M. Singhvi, learned senior advocate appearing for the State, submitted that the High Court was not justified in interfering with the order of supersession passed by the Joint Registrar, while an alternative remedy was available under Section 78 of the Act by way of an appeal before the Co-operative Tribunal. Learned senior counsel placed reliance on the judgments of this Court in *Harbanslal Sahnia and Another v. Indian Oil Corpn. Ltd. and Others* (2003) 2 SCC 107, *United Bank of India v. Satyawati Tondon and Others* (2010)

8 SCC 110 and *Om Prakash Saini v. DCM Ltd. and Others* (2010) 11 SCC 622. Learned senior counsel also submitted that the Division Bench of the High Court has not correctly appreciated the scope of the second proviso to Section 53(1) of the Act. Learned senior counsel also pointed out that the Joint Registrar has forwarded the show-cause notice dated 23.2.2009 along with other materials to RBI seeking its views on the proposed action of supersession and the RBI through its communications dated 17.4.2009, 3.6.2009 and 8.12.2009 had only directed the Joint Registrar to indicate RBI of the action taken against the Board of Directors. Consequently, the Joint Registrar was only required to inform the RBI of the action taken against the Board of Directors. Learned senior counsel also submitted that the charges levelled against the Board of Directors were of serious nature and the order of supersession was passed *bona fide* and in public interest and the Division Bench of the High Court was not justified in interfering with the order of supersession.

6. Shri V. K. Bali, learned senior counsel appearing for the appellants in **Civil Appeal No. 4692 of 2013** [arising out of SLP No. 13125 of 2012], also submitted that the charges levelled against the Board of Directors were of serious nature and there was sufficient materials to establish those charges and the Joint Registrar has rightly passed the order of supersession and appointed the Collector, Panna as an Administrator of the Bank. Learned senior counsel also pointed out that the Joint Registrar had forwarded the show-cause-notice as well as the connected materials to RBI and RBI had failed to respond to the show-cause-notice within 30 days of the receipt of the same and, therefore, it would be presumed that RBI had agreed to the proposed action and the Joint Registrar had rightly passed the order of supersession. Shri Mahavir Singh, learned senior counsel appearing for the Interveners also submitted that the High Court has committed an error interfering with the order of supersession and, in any view, if any of the parties were aggrieved, they ought to have

availed of the alternate remedy available under the Act.

7. Shri Vivek Tankha, learned senior counsel appearing for the 1st respondent, submitted that the High Court has correctly understood the scope of the second proviso to Section 53(1) of the Act and rightly came to the conclusion that before passing the order of supersession, there should be a meaningful consultation with the RBI, therefore, the consultee could apply its mind and form an independent opinion as to whether the Board be superseded or not. Learned senior counsel submitted that merely forwarding the show cause notice along with other relevant materials is not sufficient compliance of the second proviso to Section 53(1) of the Act, so held by the Madhya Pradesh High Court in several judgments. Learned senior counsel submitted that the order of supersession was passed by the Joint Registrar after a period of two and half years of the issuance of the show-cause-notice and most of charges levelled against the Board of Directors were related to the period when the previous Committee was in office and even the charges based on the Audit Report dated 25.9.2008 were also rectified by the Board of Directors by addressing the primary societies. Learned senior counsel also submitted that the order was passed at the instance of respondents 2 and 3 herein on extraneous considerations and was actuated by *mala fide* and ulterior motive. Learned counsel submitted that the Joint Registrar had acted under the political pressure and was not exercising his powers in accordance with the provisions of the Act and the order of supersession was passed to disqualify the members of the Board of Directors from contesting the ensuing election. Learned senior counsel prayed that the Board of Directors be put back in office and be allowed to continue for the period they were put out of office illegally.

8. We heard learned counsel on either side at great length. When the matter came up for hearing before us on 17.10.2012, we passed the following order, the operative portion of which reads as under:

"We are informed that the period of the Managing Committee is already over and District Collector is acting as the Administrator of the Cooperative Bank vide this Court's order dated 23.02.2012. However, the legality of the order has to be tested. Before that we feel it appropriate to place the entire material before the Reserve Bank of India (for short, 'RBI') (Respondent NO. 7) for its opinion as per Section 53 of the Act. The RBI will take a final decision on that within a period of two months and forward the opinion to the Secretary General of this Court, who will place it before the Court."

RBI submitted its detailed report on 18.12.2012, in pursuance to the order passed by this Court. RBI, referring to the second proviso to Section 53(1) of the Act, took the view that the so-called consultation made by the Joint Registrar cannot be treated as previous consultation, as per law. RBI, after examining all the documents made available by the Joint Registrar including the show-cause-notice, reply filed by the Board of Directors opined as follows:

(i) The JRCS has alleged that Panna DCCB has not deducted tax on the interest paid to the depositors.

In terms of the CBDT circular No. 9/2002 dated 11-9-2002 tax is deductible at source from any payment of income by way of interest other than income by way of interest on securities. Clause (v) of sub-section (3) of section 194A exempts such income credited or paid by a co-operative society to a member thereof from requirement of TDS. Clause (viia) of sub-section (3) of section 194A exempts from the requirement of TDS such income credited or paid in respect of deposits (other than time deposits made on or after 1-7-1995) with a co-operative society engaged in carrying on the business of banking. It is not clear from observation of JRCS, Panna that the interest accrued and paid

was time deposit or saving bank deposit account made after 01.07.1995.

(ii) The amount collected as VAT was not remitted to the Government.

VAT is not applicable to the banking transactions. Hence collection itself is not correct.

(iii) In terms of Audit para 21 of Audit Report for the FY ended 2000-01, Panna DCCB in the year June 1997, without the approval of PACS' Committee had stored pesticides. These medicines expired on December 98 and August 99. Despite expiry, stock of medicines worth Rs.16.28 lakh was left over which could not be sold in the market. The amount should have been recovered from the employees of the bank.

As per the reply furnished by the bank, the present Board of Directors had initiated the process of recovery of dues of which the major portion of outstanding dues has already been recovered. The bank is effecting recovery from its 39 employees through monthly deductions of Rs.500 to Rs1000.

(iv) In terms of Audit para 32 of Audit Report for the FY ended 2000-01, an outstanding amount of Rs23200/- to be recovered from cashier Shri D.L. Tiwari is still pending for recovery.

It is seen from the records that the bank has initiated disciplinary proceedings against the erring employees besides filing a recovery suit with Civil Court, Powai.

(v) In terms of Audit para 16 of Audit Report for the FY ended 2000-01, Shri Jawaharlal Srivastav, Manager of Laxmipur PACs had committed fraud

of Rs.20.93 lacs thereby misappropriated the bank's funds. He has been removed from services and an amount of Rs.36,637/- has been recovered from his claims. Bank vide its letter dated 15.02.2002 has written to Kotwali Police Panna to register the case. No action has been initiated by the present Board in the matter.

The Bank has already registered a case against Shri Jawaharlal Srivastav. However, it appears from the records and reply furnished by the bank that no effective steps were taken after 15.02.2002 to lodge FIR in the matter. Even the present Board of Directors apparently has not taken any effective steps after it took over during the end of 2007.

(vi) In terms of Audit para 23 of Audit Report for the FY ended 2000-01, reconciliation of entries in the books of accounts of DCCB Panna was pending and it has not been resolved.

Non-reconciliation of books by DCCB Panna is an operational risk which has also been pointed out by NABARD in its inspection reports for the FY 2008-2009 and 2010-2011. Therefore, the compliance submitted by the bank does not appear to be satisfactory.

(vii) In terms of Audit para 13 of Audit Report for the FY ended 2003-04, fraud in respect of 37 Managers to the tune of Rs.43.34 lakh was mentioned and the cases are still pending. 27 Employees have been terminated from the services. Case against only one employee has been registered with police and the bank has not registered the cases against 27 employees.

From the records made available to us, we do not

observe any monitoring by JRCS, on the issue during the intervening period. It is evident that this matter was being discussed in the Board meetings of the present Board, some amount was already recovered, disciplinary action against the erring employees have been taken and the legal proceeding initiated against them is also pending.

(viii) As mentioned in Audit Report for the FY ended 2006-07, rectification of audit objections is not satisfactory. No action was taken on most of the audit objections and compliance submitted by the management is mere eyewash.

Compliance to Audit Report is an ongoing process which needs to be monitored on a continuous basis.

The table showing the allegations of the JRCS Panna, comments of Panna DCCB and the observation of RBI is enclosed herewith and marked as Exhibit – IX.

RBI, therefore, took the view that the deficiencies pointed out in the show-cause-notice were general in nature and did not warrant the supersession of the Board of Directors. RBI, however, opined that it would be desirable that new election of the Board of Directors be conducted in accordance with the provisions of the Act and the Management of the Bank be handed over to the newly elected body by the present administrator.

Legal Framework

9. The validity of the order of supersession has to be tested under the legal framework in which the Cooperative Bank and its controlling authorities have to function under the Act read with the provisions of the Reserve Bank of India Act, 1934 (for short

'RBI Act'), the Banking Regulation Act, 1949 (for short 'Regulation Act'), the Banking Law (Application to Cooperative Societies) Act, 1965 (23 of 1976), the Deposit Insurance and Credit Guarantee Corporation Act, 1961 (for short 'DICGC Act'), the National Bank for Agricultural and Rural Development Act, 1981 (for short 'NABARD Act') etc. Since the order impugned results in the supersession of a body elected to achieve social and economic democracy with emphasis on weaker sections of the society, as the preamble of the Act depicts, a close look at the powers of the functionaries instrumental in over-turning an elected body is of paramount importance.

10. Co-operative philosophy on society must rest on free universal association, democratically governed and conditioned by equity and personal liberty. First legislation in India relating to cooperative societies was the Co-operative Societies Act, 1904, established for the purpose of credit only, but to extend the privilege of credit societies to other societies also a legislation with wider scope and object, that is Cooperative Societies Act 1912, was passed which was applicable to the whole of British India, which was a Central Act. Later, after independence different States enacted separate Acts of which we are in this case concerned with the 1960 Act in force in the State of Madhya Pradesh.

11. We find, until the year 1965, the Cooperative Banks were not being regulated by the RBI but it was felt necessary to bring the cooperative societies carrying on the business of banking within the purview of the Regulation Act. Since, large number of cooperative societies were carrying on the banking business, and also to ensure the growth of cooperative banking on sound banking principles, the Parliament enacted the Act 23 of 1965, called the Banking Law (Application to Cooperative Societies) Act, 1965 and Part IV was introduced into the Regulation Act w.e.f. 1.3.1966. Section 55 of Part V provides for the application of the Regulation Act to Cooperative Banks. Any existing co-operative bank at the time of the

commencement of the Act 23 of 1965 was required to apply grant of license within a period of three months from the date of the commencement of the Act and obtain a license from RBI under Section 22 of RBI Act. Every co-operative bank is also obliged to comply with the provisions of the Regulation Act and directions/guidelines issued by RBI from time to time.

12. We may, in this connection, refer to certain provisions of the DICGC Act which also confers certain powers to the RBI to supersede the committee of the management of the co-operative Bank in public interest. The Act has been enacted to provide for the establishment of a Corporation for the purpose of insurance deposits and guaranteed credit facilities for allied purposes. Section 3 of the Act has empowered the Central Government to establish the Deposit Insurance Corporation, a wholly owned subsidiary of RBI. Section 2(gg)(iii) of DICGC Act states that "eligible co-operative bank" means a co-operative bank, the law for the time being governing, which provides that:

> "2(gg)(iii) If so required by the Reserve Bank of India in the public interest or for preventing the affairs of the bank being conducted in a manner detrimental to the interest of the depositors or for securing the proper management of the bank, an order shall be made for the supersession of the committee of management or other managing body (by whatever name called) of the bank and the appointment of an administrator therefor for such period or periods not exceeding five years in the aggregate as may from time to time be specified by the Reserve Bank."

RBI never thought it necessary to invoke the above mentioned provision as against the first respondent. NABARD Act has been enacted to provide and regulate credit facilities and for other related and individual matters. Section 3 of the Act has empowered the Central Government to establish such a National Bank, i.e. NABARD. Section 35 of the Regulation Act empowers the

RBI to conduct inspection of the affairs of a banking company. RBI has also got the power under Sub-section (b) of Section 35 of the Regulation Act to authorise NABARD to conduct inspection of the District Cooperative Bank.

13. Section 2(d) of the NABARD Act defines the term "Central Co-operative Bank". NABARD in exercise of the powers conferred on it, is also authorised to conduct inspection on the affairs of District Co-operative Banks.

14. We will now examine the scope of Section 53 of the Act, especially the second proviso to Section 53(1) of the Act, in the light of the above discussion. Section 53 relevant to our purpose is given below:

"**53. Supersession of Board of Directors-** (1) If in the opinion of the Registrar the Board of Directors of any society-(a) is negligent in the performance of the duties imposed on it by or under this Act or byelaws of the society or by any lawful order passed by the Registrar or is unwilling to perform such duties; or

(b) commits acts which are prejudicial to the interests of the society or its members; or

(c) violates the provisions of this Act or the rules made thereunder or byelaws of the society or any order passed by the Registrar. The Registrar may, by order in writing remove the Board of Directors and appoint a person or persons to manage the affairs of the society for a specified period not exceeding two years in the first instance:

Provided that if in opinion of the Registrar, the Board of Directors of any Primary Agriculture Credit Co-operative Society-

(i) incurs losses for three consecutive years; or

(ii) commits serious financial irregularities or fraud is identified; or

(iii) there is perpetual lack of quorum in the meetings of the Board of Directors.

The Registrar may, by order in writing remove the Board of Directors an appoint a person or persons to manage the affairs of the society for two months which may be extended by him for such period not exceeding six months for reasons to be recorded in writing:

Provided further that in case of Co-operative Bank, the order of supersession shall not be passed without previous consultation with the Reserve Bank;

Provided further that if no communication containing the views of the Reserve Bank of India on action proposed is received within thirty days of the receipt by that bank of the request soliciting consultation, it shall be presumed that the Reserve Bank of India agree with the proposed action and the Registrar shall be free to pass such order as he may deem fit.

Provided also that if a non-official is appointed in the Board of Directors of a primary society, he shall be from amongst the members of that society, entitled for such representation and in case of central or Apex society, if a person is appointed in the Board of Directors of such society, he shall be a member of one of its affiliated societies entitled for such representation.

(2) No order under sub-section (1) shall be passed unless a list of allegations, documents and witnesses in support of charges levelled against it has been provided and the Board of Directors has been given a reasonable opportunity of showing cause against the proposed order and representation, if any, made by it, is considered.

xxx xxx xxx

xxx xxx xxx

(7) Before taking action under sub-section (1) in respect of a financing bank or in respect of a society indebted to a financing bank, the Registrar shall consult, in the former case, the Madhya Pradesh State Co-operative Bank Limited and, in the latter case, the financing bank, counterved regarding such action. If the Madhya Pradesh State Co-operative Bank Limited or the financing bank, as the case may be, fails to communicate its views within thirty days of the receipt by such bank of the request soliciting consultation, it shall be presumed that the Madhya Pradesh State Co-operative Bank Limited or the financing bank, as the case may be, agreed with the proposed action."

Section 53 (1) confers powers on the Registrar to pass an order to remove the Board of Directors and to appoint a person to manage the affairs of the society, subject to certain conditions, of which, we are primarily concerned with the applicability of the second proviso to Section 53(1), which specifically states that in the case of a Co-operative Bank, the order of supersession shall not be passed without previous consultation with the RBI. The third proviso to Section 53 states that if no communication containing the views of the RBI on the action proposed is received within thirty days of the receipt by that bank of the request soliciting consultation, it shall be presumed that the RBI agreed with the proposed action and the Registrar shall be free to pass such order, as he may deem fit. Sub-section (2) to Section 53 of the Act specifically states that no order under Sub-section (1) (order of supersession) shall be passed unless a list of allegations, documents and witnesses in support of charges levelled against it has been provided and the Board of Directors has been given a reasonable opportunity of showing cause against the proposed order and representation, if any, made by it, is considered. The

second proviso to Section 53 (1) refers to the expression "order of supersession", means that the final order of supersession to be passed by the Joint Registrar after complying with sub-section (2) to Section 53. Second and third provisos, read together, would indicate that no order of supersession shall be passed without previous consultation with the RBI. Before passing an order of supersession, the show-cause-notice along with other relevant materials, including the reply received from the bank, has to be made available to the RBI for an effective consultation.

15. We have already quoted the second proviso to Section 53(1), the meaning of which is clear and unambiguous which, in our view, calls for no interpretation or explanation. In this respect, reference to the often quoted principle laid down by Tindal, C.J. in Sussex Peerage case (1844) 11 CIT F.85 is useful, which reads as follows: "If the words of the Statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in the natural and ordinary sense." Reference may also be made to the judgments of this Court in *Lalu Prasad Yadav and Another v. State of Bihar and Another* (2009) 3 SCC 553 and *Ansal Properties and Industries Limited v. State of Haryana and Another* (2010) 5 SCC 1.

16. The mere serving a copy of the show-cause-notice on RBI with supporting documents is not what is contemplated under the second proviso to Section 53(1). For a meaningful and effective consultation, the copy of the reply filed by the Bank to the various charges and allegations levelled against them should also be made available to the RBI as well as the action proposed by the Joint Registrar, after examining the reply submitted by the Bank. On the other hand, RBI should be told of the action the Joint Registrar is intending to take. Only then, there will be an effective consultation and the views expressed by the RBI will be a relevant material for deciding whether the elected Board be superseded or not. In other words, the

previous consultation is a condition precedent before forming an opinion by the Joint Registrar to supersede the Board of Directors or not.

17. This Court in *Indian Administrative Services (SCS) Association, U.P. v. Union of India* 1993 Supp (1) SCC 730, has laid down six propositions while examining the meaning of the expression 'consultation'. We may add one more proposition that when the outcome of the proposed action is to oust a democratically elected body and the expression used is "shall not be passed without previous consultation", it is to be construed as mandatory. Reference may also be made to the judgments of this Court in *Reserve Bank of India v. Peerless Company* (1987) 2 SCR 1, *State of Jammu and Kashmir v. A.R. Zakki and Others* 1992 Supp (1) SCC 548, *Gauhati High Court and Another v. Kuladhar Phkan and Another* (2002) 4 SCC 524, *Andhra Bank v. Andhra Bank Officers and Another* (2008) 7 SCC 203.

Discussion

18. District Cooperative Bank, Panna (for short 'Panna DCB"), a Bank registered under the Act, was issued a license to conduct the banking services in India by RBI on 3.6.2010 under Section 22 of the Regulation Act. Panna DCB is a Central Co-operative Bank as defined under Sub-section 2(d) of NABARD Act. NABARD had conducted an inspection of the Panna DCB under Section 35 of the Regulation Act, with reference to the financial position as on 31.3.2007, when the previous Board was in office and thirty six fraud cases at Primary Agricultural Credit Societies (PACS) involving Rs.37.05 lacs had been reported. Certain deficiencies in the bank's functioning, like non-adherence to the provisions of the Income Tax Act, lack of internal checks and control systems and unsatisfactory compliance to their previous inspection report, had also found a place in their inspection report, the copy of which was forwarded to the RBI vide their communication dated 1.2.2008.

19. The Joint Registrar, Co-operative Societies, as already stated, issued a notice to Panna DCB to show cause as to why the Board of Directors be not superseded and an Administrator be appointed. The show-cause-notice was sent to the RBI, which RBI received on 4.3.2009. RBI vide its letter dated 17.4.2009 requested the Joint Registrar to inform the action being taken on the reply submitted by the Board of Directors of Panna DCB. RBI vide its letter dated 30.3.2009 forwarded the copy of the show-cause-notice to the Chief General Manager, NABARD for their comments. Since, NABARD had conducted inspection of Panna DCB under Section 35 of the Regulation Act, NABARD vide its letter dated 29.6.2009 informed the same to the RBI and also opined as follows:

> "..... We are of the view that the deficiencies mostly relating to systems and procedures are of general nature, which do not provide strong ground for supersession of the Board as far as the inspection by NABARD is concerned."

20. RBI, again, vide its letter dated 3.6.2009 wrote to the Joint Registrar to inform RBI the outcome of the reply submitted by the Bank to the show-cause-notice. RBI, then sent a reminder on 22.7.2009 to the Joint Registrar, since no reply was received. RBI, it is seen has received a reply from the Joint Registrar on 10.8.2009. RBI, then sent a communication to the Joint Registrar vide its letter dated 8.5.2009 to know the action taken on the reply submitted by the Board of Directors. The Joint Registrar then sent a detailed reply dated 19.8.2009 to the RBI stating that in the case of a Co-operative Bank, order of supersession would not be issued without previous consultation with RBI, however, if no communication containing the views of RBI on the action was received within 30 days, it should be presumed that the RBI had agreed to the proposed action and the Registrar would be free to pass orders as might be deemed fit. It was further stated that in the case of District Co-operative Bank, the powers under Section 53(2) of the Act are vested with the Regional Joint Registrar and notice issued by the Joint

Registrar was not sent for the opinion of the State Government. Further, it was also pointed out that the Bank had submitted its reply on 8.5.2009 and internal decision would be taken as per the legal provisions and RBI would be informed accordingly. Yet, another letter dated 24.12.2009 was also received by the RBI, wherein it was stated that the hearing was going on and the RBI would be informed of the final decision. Later, without informing the RBI of the proposed action and also without forwarding the reply submitted by Panna DCB to the show-cause-notice to RBI, the order of supersession dated 30.9.2011 was passed by the Joint Registrar.

21. We find seven charges levelled against the Board of Directors were relating to the period of the previous Committee, for which the first respondent Board of Directors could not be held responsible. Further, even though the Board had taken charge in October 2007, the audit report was submitted before the Board only after nine months and that the Board of Directors took follow up action on the basis of the audit report dated 25.9.2008. The Joint Registrar, it seems, was found to be satisfied with the detailed replies dated 6.5.2009 and 16.5.2011submitted by the Board of Directors of the Bank, possibly, due to that reason, even though the show-cause-notice was issued on 22.3.2009, it took about two and half years to pass the order of supersession.

22. We are of the view that the order of supersession dated 30.9.2011 is not only in clear violation of the second proviso to Section 53(1) of the Act, but also the allegations raised in the show-cause-notice are deficiencies mostly relating to systems and procedures and are of general nature and not grave enough to overthrow a democratically elected Board of Directors. Both NABARD and RBI have expressed the view that the charges levelled against the Board of Directors do not provide strong ground to supersede the Board.

23. Learned senior counsel Shri Vivek Tankha submitted that since the Board of Directors was superseded illegally, they,

be put back in office and allow to continue, for the period they were put out of office. We find force in that contention, especially in view of the views expressed by NABARD as well as RBI and the fact that the Joint Registrar himself had passed the order of supersession only after two and half years of the date of issuance of the show-cause-notice.

24. The legislative intention is clear from the following statutory provisions. The statute has fixed the term of an elected Board of Directors as five years from the date on which first meeting of Board of Directors is held. Once a Board of Directors is illegally superseded, suspended or removed, the legislature in its wisdom ordained that the Board should complete their full term of five years, because electorate has elected the Board for five years. The proviso to Section 49(7A)(i) reads as follows:

> "7A(i) The term of the Board of Directors shall be five years from the date on which first meeting of the Board of Directors is held:
>
> Provided that where a Board of Directors superseded, suspended or removed under the Act is reinstated as a result of any order of any Court or authority, the period during which the Board of Directors remained under supersession, suspension out of office, as the case may be, shall be excluded in computing the period of the term aforesaid."

25. The Board of Directors, in the instant case, took charge on 16.10.2007, therefore, they could continue in office till 15.10.2012. The Board of Directors was, however, superseded illegally on 30.9.2011 and, by virtue of the judgment of the Division Bench of the High Court dated 13.2.2012, the Board should have been put back in office on 13.2.2012, but an Administrator was appointed. Going by the proviso referred to above, the period during which the Board of Directors remained under supersession be excluded in computing the period of five

years. In the facts and circumstances of this case, we are of the considered opinion that the duly elected Board of Directors should get the benefit of that proviso, which is statutory in nature.

26. In such circumstances, we direct the Joint Registrar, Co-operative Societies, Sagar to put the Board of Directors back in office so as to complete the period during which they were out of office.

27. The High Court, in our view, has therefore rightly exercised its jurisdiction under Article 226 of the Constitution and the alternative remedy of appeal is not bar in exercising that jurisdiction, since the order passed by the Joint Registrar was arbitrary and in clear violation of the second proviso to Section 53(1) of the Act.

28. We are of the view that this situation has been created by the Joint Registrar and there is sufficient evidence to conclude that he was acting under extraneous influence and under dictation. A legally elected Board of Directors cannot be put out of the office in this manner by an illegal order. If the charges levelled against the Board of Directors, in the instant case, were serious, then the Joint Registrar would not have taken two and half years to pass the order of supersession. State of Madhya Pradesh did not show the grace to accept the judgment of the Division Bench of the High Court and has brought this litigation to this Court spending huge public money, a practice we strongly deprecate.

Registrar/Joint Registrar and External Influence:

29. Statutory functionaries like Registrar/Joint Registrar of Co-operative Societies functioning under the respective Co-operative Act must be above suspicion and function independently without external pressure. When an authority invested with the power purports to act on its own but in substance the power is exercised by external guidance or pressure, it would amount to non-exercise of power, statutorily

vested. Large number of cases are coming up before this Court and the High Courts in the country challenging the orders of supersession and many of them are being passed by the statutory functionaries due to external influence ignoring the fact that they are ousting a democratically elected Board, the consequence of which is also grave because the members of the Board of Directors would also stand disqualified in standing for the succeeding election as well.

30. The Registrar/Joint Registrar, while exercising powers of supersession has to form an opinion and that opinion must be based on some objective criteria, which has nexus with the final decision. A statutory authority shall not act with pre-conceived notion and shall not speak his masters' voice, because the formation of opinion must be his own, not somebody else in power, to achieve some ulterior motive. There may be situations where the Registrar/Joint Registrar are expected to act in the best interest of the society and its members, but in such situations, they have to act *bona fide* and within the four corners of the Statute. In our view, the impugned order will not fall in that category.

Judicial Precedents

31. Registrar/Joint Registrar is bound to follow the Judicial Precedents. *Ratio decidendi* has the force of law and is binding on all statutory authorities when they deal with similar issues. The Madhya Pradesh High Court in several judgments has explained the scope of the second proviso to Section 53(1) of the Act. Reference may be made to the judgments in *Radheshyam Sharma v. Govt. of M.P. through C.K. Jaiswal and Ors.* 1972 MPLJ 796, *Board of Directors of Shri Ganesh Sahakari Vipnan (Marketing) Sanstha Maryadit and Another v. Deputy Registrar, Co-operative Societies, Khargone and Others*1982 MPLJ 46 and *Sitaram v. Registrar of Co-operative Societies and another* 1986 MPLJ 567.

32. We fail to see why the Joint Registrar has overlooked

those binding judicial precedents and the *ratio decidendi*. Judicial rulings and the principles are meant to be followed by the statutory authorities while deciding similar issues based on the legal principles settled by judicial rulings. Joint Registrar, while passing the impugned order, has overlooked those binding judicial precedents.

33. We fail to notice why the State Government, Department of Co-operative Societies has taken so much interest in this litigation. Joint Registrar in his letter dated 19.8.2009 to RBI stated that in the case of District Co-operative Bank, the powers under Section 53(2) of the Act are vested with Regional Joint Registrar and the notice issued by the Joint Registrar is not meant for the opinion of the State Government. Assuming, the State Government has powers under Section 49-C of the Act, no report has been forwarded by the Registrar to the State Government and no direction have been issued by the State Government with regard to the supersession of the Board. Sorry so note that the State Government has spent huge public money by litigating this matter even up to this Court, that too, without following the binding precedents of the Madhya Pradesh High Court on the scope of the second proviso to Section 53(1) of the Act.

34. In such circumstances of the case, we are inclined to dismiss both the appeals with costs directing re-instatement of the first respondent Board of Directors back in office forthwith and be allowed to continue for the period they were put out of office by the impugned order which has been quashed. We also direct the State of Madhya Pradesh to pay an amount of Rs.1,00,000/- to the Madhya Pradesh Legal Services Authority within a period of one month by way of costs and also impose a cost of Rs.10,000/- as against the Joint Registrar, Co-operative Societies, Sagar, the officer who passed the order, which will be deducted from his salary and be deposited in the Panna DCB within a period of two months from today. Ordered accordingly.

35. Further, we are inclined to give the following general directions in view of the mushrooming of cases in various Courts challenging orders of supersession of elected Committees:

(1) Supersession of an elected managing Committee/ Board is an exception and be resorted to only in exceptional circumstances and normally elected body be allowed to complete the term for which it is elected.

(2) Elected Committee in office be not penalised for the short-comings or illegalities committed by the previous Committee, unless there is any deliberate inaction in rectifying the illegalities committed by the previous committees.

(3) Elected Committee in Office be given sufficient time, say at least six months, to rectify the defects, if any, pointed out in the audit report with regard to incidents which originated when the previous committee was in office.

(4) Registrar/Joint Registrar are legally obliged to comply with all the statutory formalities, including consultation with the financing banks/Controlling Banks etc. Only after getting their view, an opinion be formed as to whether an elected Committee be ousted or not.

(5) Registrar/ Joint Registrar should always bear in mind the consequences of an order of supersession which has the effect of not only ousting the Board out of office, but also disqualify them for standing for election in the succeeding elections. Registrar/ Joint Registrar therefore is duty bound to exercise his powers *bona fide* and not on the dictation or direction of those who are in power.

(6) Registrar/Joint Registrar shall not act under political pressure or influence and, if they do, be subjected to disciplinary proceedings and be also held personally liable for the cost of the legal proceedings.

(7) Public money not to be spent by the State Government or the Registrar for unnecessary litigation involving disputes between various factions in a co-operative society. Tax payers money is not expected to be spent for settling those disputes. If found necessary, the same be spent from the funds available with the concerned Bank.

R.P. Appeals dismissed.

KASHMIRI LAL
v.
STATE OF HARYANA
(Criminal Appeal No. 1576 of 2009)

MAY 16, 2013

[DR. B. S. CHAUHAN AND DIPAK MISRA, JJ.]

NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT, 1985:

ss. 18 and 50 - Seizure of contraband from tool box of scooter of accused - Conviction and sentence of 10 years RI and fine of Rs. 1 lakh - Affirmed by High Court - Held: In the instant case, non-examination of independent witnesses does not affect prosecution case -- Evidence of official witnesses is reliable and absolutely trustworthy and court can act upon the same - In case of search of vehicle, s.50 is not attracted - Appeal having been filed in 1996, the 2001 amendment regarding determination of commercial or non-commercial quantity has no relevance -- Non-production of scooter in court is also of no avail as it has been established that the scooter belonged to appellant - Conviction and sentence upheld - Evidence - Non-examination of independent witnesses - Investigation - Notification SO No. 1055(E) dated 19.10.2001.

The appellant was convicted and sentenced to 10 years RI and to pay a fine of Rs. 1 lakh u/s 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985, as the charge that 5 ½ kg of opium was recovered from the tool box of his scooter, was found proved. The High Court affirmed the conviction and the sentence.

Disposing of the appeal, the Court

HELD: 1.1 As far as non-examination of independent witness is concerned, it is evincible from the evidence on

record that the police officials had requested the people present in the 'dhaba' to be witnesses, but they declined to cooperate and, in fact, did not make themselves available. That apart, there is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found reliable and trustworthy, the court can definitely act upon the same. In the instant case, there is no acceptable reason to discard the testimony of the official witnesses which is otherwise reliable and absolutely trustworthy. [para 9] [777-C-E, G]

State of U.P. v. Anil Singh **1988 Suppl. SCR 611 = 1988 Suppl. SCC 686,** *State, Govt. of NCT of Delhi v. Sunil and Another* **2000 (5) Suppl. SCR 144 = 2001 (1) SCC 652; and** *Ramjee Rai and Others v. State of Bihar* **2006 (5) Suppl. SCR 240 =2006 (13) SCC 229 - relied on.**

1.2 With regard to non-compliance of s.50 of the Act, there is no dispute over the fact that the seizure had taken place from the tool box of the scooter. When a vehicle is searched and not the person of an accused, s. 50 of the Act is not attracted. There is ample evidence on record that the scooter belongs to the appellant and the search and seizure was made in the tool box of the scooter. Therefore, non-production of the scooter in the court is of no avail. [para 10 and 15] [778-A-B; 780-F-G]

Ajmer Singh v. State of Haryana **2010 (2) SCR 785 = 2010 (3) SCC 746;** *Madan Lal v. State of H.P.* **2003 (2) Suppl. SCR 716 = 2003 (7) SCC 465; and** *State of H.P. v. Pawan Kumar* **2005 (3) SCR 417 = 2005(4) SCC 350;** *E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau* **2008 (4) SCALE 592;** *Basheer Alias N.P. Basheer v. State of Kerala* **2004 (2) SCR 224 = 2004 (3) SCC 609; and** *Nayak*

Ramesh Chandra Keshavlal v. State of Gujarat **(2004) 11 SCC 399 - relied on.**

1.3 So far as the contraband to be treated as non-commercial quantity, in the case at hand, the appeal was pending in 1996 and, therefore, the ameliorative provision brought by way of amendment in the year 2001 would not be applicable. [para 14] [780-C-D]

Case Law Reference:

1988 Suppl. SCR 611	**relied on**	**para 9**
2000 (5) Suppl. SCR 144	**relied on**	**para 9**
2006 (5) Suppl. SCR 240	**relied on**	**para 9**
2010 (2) SCR 785	**relied on**	**para 10**
2003 (2) Suppl. SCR 716	**relied on**	**para 10**
2005 (3) SCR 417	**relied on**	**para 10**
2008 (4) SCALE 592	**relied on**	**para 11**
2004 (2) SCR 224	**relied on**	**para 12**
(2004) 11 SCC 399	**relied on**	**para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1576 of 2009.

From the Judgment and Order dated 31.07.2008 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 543 SB of 1996.

Neeraj Kumar Jain, Sanjay Singh, Rajeev Singh for the Appellant.

Vikas Sharma, Manjit Singh, Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. This Appeal by Special Leave is directed against the judgment of conviction and order of sentence dated July 31, 2008 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 543-SB of 1996 whereby the learned Single Judge has given the stamp of approval to the conviction and sentence recoded by the learned Additional Sessions Judge, Kurukshetra in S.T. No. 15 of 1993 on 24.7.1996 whereby he, after finding the accused-appellant guilty of the offence punishable under Section 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for brevity 'the Act'), had sentenced him to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- and, in default of payment of fine, to suffer further rigorous imprisonment for a period of one year.

2. The factual matrix as has been undraped by the prosecution is that on 23.12.1992 about 10.00 A.M., Kaptan Singh, the Sub-Inspector, along with other police officials, was present near Deer Park, Pipli, in connection with excise checking in a Tata Mobile Vehicle. Receiving a secret and reliable information to the effect that the accused-appellant would come to the 'dhaba' situated on the G.T. Road, on his scooter, carrying opium and if a picket was held, he could be apprehended, he sent a V.T. message to the Additional Superintendent of Police to reach the place. Thereafter, Kaptan Singh, along with other police officials, went to the T-point of Jahajo Wali Road on G.T. Road and held a picket. In the meanwhile, the accused was seen coming on his scooter, bearing No. DLS-1756 and at that time Mohmad Akil, Additional S.P., Kurukshetra, along with his staff arrived at the spot. He was apprised of the situation and, thereafter, on his instructions search of the tool box of the scooter was conducted and a polythene bag containing of 5½ Kg. of opium was recovered. Ten grams opium was separated as sample and the remaining opium was put into a separate container. The sample

and the container, containing the remaining opium, were converted into parcels duly sealed with seals and taken into possession vide a separate recovery memo. The accused was arrested and a ruqa was sent to the police station on the basis whereof a formal FIR was registered. After completing the investigation the charge-sheet was submitted before the competent court.

3. Before the trial court the accused abjured his guilt, pleaded false implication and claimed to be tried.

4. The prosecution to substantiate its case examined Banarsi Das, Head Constable, PW-1, Dharam Singh, ASI, PW-2, Mam Chand, Constable, PW-3, Ram Udit, Head Constable, PW-4, Akil Mohamad, S.P., PW-5 and Kaptan Singh and the Investigating Officer, PW-6. The accused in his statement under Section 313 of the Code of Criminal Procedure stated that he was employed in the 'dhaba', namely, Man Driver Dhaba at village Teora and he had been apprehended from the 'dhaba' and falsely implicated. In support of his defence, he examined Karan Singh, DW-1, who had recorded the statements of PW-1 and PW-3.

5. Before the learned trial Judge, it was contended that the prosecution had miserably failed to bring home the charge by resting its case solely on the version of official witnesses and not examining any independent witness despite the fact that the accused was apprehended and alleged contraband articles were seized while he was in a 'dhaba'; that there had been non-compliance of Section 50 of the Act inasmuch as he was not properly informed about his right to be searched in presence of a gazetted officer or a Magistrate; that the recovery from the tool box of the scooter would not amount to conscious possession of the contraband article by the accused; and that the non-production of the scooter in court falsified the version of the prosecution. The learned trial Judge dealt with all the aspects and came to hold that the search and seizure was valid; that the accused had not been falsely implicated; and that

the non-production of the scooter did not in any manner affect the case of the prosecution. Being of this view, he found the accused guilty and sentenced him as has been stated hereinbefore.

6. Against the conviction and sentence the accused preferred an appeal before the High Court. Apart from raising the contentions which were raised before the learned trial Judge, a further submission was put forth that as per the report of the Forensic Science Laboratory morphine content contained in the sample was found only to be 1.66% and as the morphine percentage in the bulk of the opium was required to be taken into consideration, the alleged recovery of opium did not fall within the ambit of non-commercial quantity and hence, the sentence should have been imposed regard being had to the non-commercial quantity and not commercial quantity. The High Court concurred with the view expressed by the learned trial Judge and proceeded to deal with the additional submission and ultimately held that as the seizure had taken place on 23.12.1992, the amendment which has been brought into the Act in the year 2001 would not be attracted. Be it noted, the non-production of the scooter before the trial court was highlighted with immense vehemence but the learned Single Judge repelled the said submission being devoid of any substance and further directed confiscation of the scooter in question as envisaged under the provisions contained in Sections 60(3) and 63 of the Act. The aforesaid conclusions led to the dismissal of the appeal.

7. Questioning the legal substantiality of the judgment of conviction learned counsel for the appellant, has raised the following contentions: -

(i) It was incumbent on the part of the prosecution to examine the independent witnesses when the search and seizure had taken at a public place, i.e., in a 'dhaba' and not to rely exclusively on the official witnesses to prove the case against the accused.

(ii) There has been non-compliance of Section 50 of the Act as he had not been informed about his right to be searched in presence of a gazetted officer or a Magistrate and that vitiates the conviction.

(iii) The High Court has fallen into serious error by not treating the seized opium failing within non-commercial quantity despite the report of the Forensic Science Laboratory that the morphine content contained in the sample was 1.66%.

(iv) The non-production of the scooter creates an incurable dent in the foundation of the case of the prosecution and the said aspect having not been appositely dealt with by the learned trial Judge as well as by the High Court, the judgment of conviction and order of sentence are liable to be set aside.

8. Learned counsel for the State, resisting the aforesaid submissions, has advanced the following proponements: -

(a) The non-examination of independent witnesses in the case at hand does not affect the prosecution case, for there is no absolute rule that the prosecution cannot establish the charge against the accused by placing reliance on the official witnesses.

(b) As the contraband goods have been seized from the tool box of the scooter and not from the person of the accused, Section 50 of the Act has no applicability.

(c) The morphine content in the seized opium, in the case at hand, has no relevance to determine the commercial or non-commercial quantity regard being had to the fact that the occurrence had taken

place in the year 1992 whereas the amendment was incorporated in the statute book in 2001.

(d) The non-production of the scooter in the court cannot be a ground for setting aside the conviction since all the witnesses have specifically mentioned about the registration number of the scooter and there is no justification to discard their testimony.

9. As far as first submission is concerned, it is evincible from the evidence on record that the police officials had requested the people present in the 'dhaba; to be witnesses, but they declined to cooperate and, in fact, did not make themselves available. That apart, there is no absolute command of law that the police officers cannot be cited as witnesses and their testimony should always be treated with suspicion. Ordinarily, the public at large show their disinclination to come forward to become witnesses. If the testimony of the police officer is found to reliable and trustworthy, the court can definitely act upon the same. If in the course of scrutinising the evidence the court finds the evidence of the police officer as unreliable and untrustworthy, the court may disbelieve him but it should not do so solely on the presumption that a witness from the department of police should be viewed with distrust. This is also based on the principle of quality of the evidence weighs over the quantity of evidence. These aspects have been highlighted in *State of U.P. v. Anil Singh*[1], *State, Govt. of NCT of Delhi v. Sunil and Another*[2] and *Ramjee Rai and Others v. State of Bihar*[3]. Appreciating the evidence on record on the unveil of the aforesaid principles, we do not perceive any acceptable reason to discard the testimony of the official witnesses which is otherwise reliable and absolutely trustworthy.

10. The second plank of submission pertains to non-

1. 1988 Supp SCC 686.
2. (2001) 1 SCC 652.
3. (2006) 13 SCC 229.

compliance of Section 50 of the Act. There is no dispute over the fact that the seizure had taken place from the tool box of the scooter. There is ample evidence on record that the scooter belongs to the appellant. When a vehicle is searched and not the person of an accused, needless to emphasise, Section 50 of the Act is not attracted. This has been so held in *Ajmer Singh v. State of Haryana*[4], *Madan Lal v. State of H.P.*[5] and *State of H.P. v. Pawan Kumar*[6]. Thus, the aforesaid submission of the learned counsel for the appellant is without any substance.

11. The third limb of submission pertains to determination of commercial and non-commercial quantity. The learned counsel for the appellant has commended us to the decision in *E. Micheal Raj v. Intelligence Officer, Narcotic Control Bureau*[7]. In the said case it has been held as follows: -

"12. As a consequence of the Amending Act, the sentence structure underwent a drastic change. The Amending Act for the first time introduced the concept of 'commercial quantity' in relation to narcotic drugs or psychotropic substances by adding clause (viia) in Section 2, which defines this term as any quantity greater than a quantity specified by the Central Government by notification in the Official Gazette. Further, the term 'small quantity' is defined in Section 2, clause (xxiiia), as any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette. Under the rationalized sentence structure, the punishment would vary depending upon whether the quantity of offending material is 'small quantity', 'commercial quantity' or something in-between."

After so stating, the two learned Judges proceeded to state that the intention of the legislature for introduction of the

4. (2010) 3 SCC 746.
5. (2003) 7 SCC 465.
6. (2005) 4 SCC 350.
7. 2008 (4) SCALE 592.

amendment to punish the people who commit less serious offence with less severe punishment and those who commit great crimes, to impose more severe punishment. Be it noted, in the said case, the narcotic drug which was found in possession of the appellant as per the Analyst's report was 60 gms., which was more than 5 gms., i.e., small quantity, but less than 250 gms., i.e., commercial quantity.

12. In the case at hand, the High Court has opined that as the opium was seized on 23.12.2992, the amendment brought in the statute book would have no applicability. It is also wroth noting that the appeal was preferred in the year 1996. In *Basheer Alias N.P. Basheer v. State of Kerala*[8] while dealing with the constitutional validity of the proviso to sub-section (1) of Section 41 of the Narcotic Drugs and Psychotropic Substances (Amendment) Act, 2001 (Act 9 of 2001), this Court upheld the constitutional validity of the said provision and opined thus: -

> "In the result, we are of the view that the proviso to Section 41(1) of the amending Act 9 of 2001 is constitutional and is not hit by Article 14. Consequently, in all cases, in which the trial had concluded and appeals were pending on 2.10.2001, when amending Act 9 of 2001 came into force, the amendments introduced by the Amending Act 9 of 2001 would not be applicable and they would have to be disposed of in accordance with the NDPS Act, 1985, as it stood before 2.10.2001."

13. Yet again in *Nayak Ramesh Chandra Keshavlal v. State of Gujarat*[9] a contention was raised that when the quantity seized is small one, as enumerated in notification bearing SO No. 1055 (E) dated 19.10.2001, published in the Gazettee of India (Extra), Part II, Section 3(ii) dated 19.10.2011, the punishment should be less. The Court, while repealing the said submission expressed as follows: -

8. (2004) 3 SCC 609.

9. (2004) 11 SCC 399.

> "Proviso to Section 41 of the amending Act referred to above, lays down that the provisions of the amending Act shall not apply to cases pending in appeal, validity of which was challenged before this Court on the ground that the same, being discriminatory, was violative of Article 14 of the Constitution. But this Court in the case of Basheer upheld the validity of the said provision and, consequently, the provisions of the Amendment Act shall have no application in the present case, as on the date of coming into force of the amending Act, the case of the appellant was pending in appeal before the High Court."

14. As in the case at hand, the appeal was pending in 1996, the ameliorative provision brought by way of amendment in the year 2001 would not be applicable to the accused-appellant. Therefore, the submission advanced by the learned counsel for the appellant is devoid of any substratum and, accordingly, stands rejected.

15. The last contention urged relates to the non-production of the scooter in the court. The learned counsel for the appellant has harped and hammered on this submission and we must say that the vehemence of the argument reflected in this regard is much ado about nothing. All the documents pertaining to the scooter were seized and the witnesses had stated in a categorical manner about the registration number of the scooter. From the material brought on record, it is crystal clear that the scooter belonged to the appellant and the search and seizure was made in the tool box of the scooter. Under these circumstances, it can safely be concluded that the submission that the scooter was not produced in the court is entirely devoid of merit and, in fact, it amounts to an effort which is like building a castle in Spain. Thus, we unhesitatingly repel the aforesaid contention.

16. Resultantly, the appeal, being devoid of merit, stands dismissed.

R.P. Appeal dismissed.

SAMRENDRA BEURA
v.
U.O.I. & OTHERS
(Writ Petition (Crl.) No. 78 of 2013)

MAY 20, 2013

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Air Force Act, 1950:

s.164 – Sentence of imprisonment – Commencement of – Pre-trial detention – Claim for setting if off against imprisonment – Held: s.164 makes it clear that period of commencement of imprisonment is to be reckoned to commence on the day on which original proceedings were signed by Presiding Officer – Pre-trial detention cannot be set off against sentence of imprisonment passed by court martial – Therefore, there is no illegal detention warranting issue of writ of habeas corpus – Keeping in view the amendments made in this regard in Army Act and Navy Act, Union of India may seriously consider to bring a similar amendment in Air Force Act also – Legislation – Need for – Army Act, 1950 – s.169-A – Navy Act, 1957 – s.151- Constitution of India, 1950 – Art. 32 – Writ of habeas corpus.

The petitioner, as a Mechanical Transport Driver in the Indian Air Force, was found guilty of unauthorized absence and was imposed the sentence of rigorous imprisonment for three months u/s 39(a) of the Air Force Act, 1950, apart from dismissal from service and reduction in rank. The order was affirmed by competent authority. In the instant writ petition, the petitioner prayed for issue of a writ of habeas corpus directing the respondents to release him as he continued in illegal detention because he had already spent one and half months in custody before the conviction was recorded by the court-martial.

The question for consideration before the Court was: "whether the period of custody prior to the date of passing and signing of the order by the district court-martial is to be set off in respect of the sentence imposed."

Disposing of the writ petition, the Court

HELD: 1. On a plain reading of s.164 of the Air Force Act, 1950, it is clear that the period of imprisonment is to be reckoned to commence on the day on which the original proceedings were signed by the Presiding Officer. In view of the enunciation of law by this Court, there can be no scintilla of doubt that the pre-trial detention cannot be set off against the sentence of imprisonment passed by the court-martial for the offence u/s 39(a) which has been affirmed u/s 161(1) of the Act and the period of sentence shall commence from the date when the original proceeding was signed by the Presiding Officer. Thus, there is no illegal detention warranting issue of writ of habeas corpus. However, the Competent Authority is directed to decide expeditiously the representation of the petitioner u/s 180(1) read with s.184 of the Act. [para 10, 12 and 13] [786-F; 788-D-F]

Ajmer Singh and Others v. Union of India and Others **1987 (3) SCR 84 = 1987 (3) SCC 340;** *Bhuwaneshwar Singh v. Union of India and Others* **1993 (2) Suppl. SCR 56 = 1993 (4) SCC 327 - relied on.**

2. Keeping in view the amendments in the Army Act and the Navy Act wherein provisions have been inserted to set off the period of custody against imprisonment, regard being had to the purpose of the amendment and the totality of the circumstances, it is apt to recommend that Union of India seriously considers to bring an amendment in the Act so that the hardships faced by the

persons convicted by the court-martial are avoided. [para 14-16] [788-G-H; 790-B]

Case Law Reference:

1987 (3) SCR 84	**relied on**	**para 10**
1993 (2) Suppl. SCR 56	**relied on**	**para 11**

CRIMINAL ORIGINAL JURISDICTION : Under Article 32 of the Constitution of India.

Writ Petition (Criminal) No. 78 of 2013.

Merusagar Samantaray for the petitioner.

Rakesh K. Khanna, ASG, Chandan Kumar, B.V. Balram Das, R. Balasubramanian for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. In this writ petition, preferred under Article 32 of the Constitution of India, the petitioner, an employee of Indian Air Force, who has been found guilty of the offence under Section 39(a) of The Air Force Act, 1950 (for brevity "the Act") and has been awarded sentence to suffer rigorous imprisonment for three months along with other punishments by order dated 15.3.2013 which has been affirmed by the Competent Authority under Section 161(1) of the said enactment, has prayed for issue of a writ of habeas corpus directing the respondents to release him as he is in illegal detention because he had already spent one and half months in custody before the conviction was recorded by the court-martial.

2. The factual score, as depicted, is that the petitioner was appointed as a Mechanical Transport Driver in the Indian Air Force on 16.12.2002. As he absented himself without leave from 9.10.2012 to 1.2.2013, a court-martial proceeding was initiated against him and, eventually, by order dated 15.3.2013,

he was found guilty and was imposed the sentence of rigorous imprisonment for three months apart from dismissal from service and reduction of rank. It is put forth in the petition that the petitioner had surrendered before the Competent Authority whereafter he was charged for the offence under Section 39(a) of the Act. It is contended that the sentence imposed under Section 39(a) should take into consideration the period commencing 1.2.2003 as he had surrendered to custody before the Competent Authority.

3. As the respondents have been represented and the issue involved exclusively relates to pure realm of law, we have heard Mr. Merusagar Samantary, learned counsel for the petitioner, and Mr. Rakesh Khanna, learned Additional Solicitor General, and Mr. Balasubramanian, learned counsel for the respondents.

4. It is the admitted fact that the petitioner surrendered to custody on 1.2.2013. There is a dispute with regard to the date of the order passed by the Competent Authority, namely, district court-martial. The learned counsel for the petitioner would contend that it was passed on 15.3.2013 whereas Mr. Khanna would submit that it was passed on 18.3.2013. The said disputed fact is neither material one nor would it have any impact on the adjudication of the writ petition inasmuch as the fulcrum of the matter is whether the period of custody prior to the date of passing and signing of the order by the district court-martial is to be set off in respect of the sentence imposed.

5. Section 39 which provides for absence without leave stipulates that any one who commits any offence falling under clauses 39(a) to (g) shall, on conviction by court-martial, be liable to suffer imprisonment for a term which may extend to three years or such less punishment as the Act mentions. Chapter IX deals with arrest and proceedings before trial. Section 102, which occurs in this Chapter, deals with custody of offenders and reads as follows: -

"**102. Custody of offenders.** – (1) Any person subject to this Act who is charged with an offence may be taken into air force custody.

(2) Any such person may be ordered into air force custody by any superior officer.

(3) Any officer may order into air force custody any officer, though he may be of a higher rank, engaged in a quarrel, affray or disorder."

6. Section 103 deals with duty of commanding officer in regard to detention and Section 104 provides for interval between committal and court-martial. It reads as follows: -

"**104. Interval between committal and court-martial.** – In every case where any such person as is mentioned in section 102 and as is not on active service remains in such custody for a longer period than eight days, without a court-martial for his trial being ordered to assemble, a special report giving reasons for the delay shall be made by his commanding officer in the manner prescribed; and a similar report shall be forwarded every eight days until a court-martial assembled or such person is released from custody."

7. Section 107 deals with inquiry into absence without leave. Sub-section (1) of the said Section provides that when any person has been absent from duty without due authority for a period of 30 days, a court of inquiry shall, as soon as practicable, be assembled and such court shall, on oath or affirmation administered in the prescribed manner, inquire regarding the absence of the person. The rest of the provision need not be adverted to.

8. Section 109 deals with different kinds of court-martial and clause (b) of the said Section relates to district court-martial. Section 119 deals with the powers of district court-

martial. Chapter XI commencing from Sections 127 to 151 deals with the procedure of court-martial. Section 152, which occurs in Chapter XII, deals with confirmation and revision and provides that no finding or sentence of a general, district or summary general court-martial shall be valid except so far as it may be confirmed as provided by the Act. Section 154 deals with the power to confirm finding and sentence of district-court martial.

9. In the case at hand, after the sentence was imposed, the Air Officer Commanding-in-Chief confirmed the order on 20.4.2013. The learned counsel for the petitioner would propone that the sentence of imprisonment of three months should commence from 1.2.2013, the date on which he surrendered and was taken into custody. In this context, Mr. Khanna has drawn our attention to Section 164 of the Act. It reads as follows: -

"**164. Commencement of sentence of transportation or imprisonment**. – Whenever any person is sentenced by a court-martial under this Act to transportation, imprisonment or detention the term of his sentence shall, whether it has been revised or not, be reckoned to commence on the day on which the original proceedings were signed by the presiding officer."

10. On a plain reading of the said provision, it is clear as day that the period of imprisonment is to be reckoned to commence on the day on which the original proceedings were signed by the Presiding Officer. The Presiding Officer has signed, as submitted by Mr. Khanna, on 18.3.2013 and, therefore, the petitioner has to suffer three months imprisonment from that date. In this context, we may usefully refer to a two-Judge Bench decision in *Ajmer Singh and Others v. Union of India and Others*[1]. The issue before this Court was regarding the applicability of Section 428 of the Code of

1. (1987) 3 SCC 340.

Criminal Procedure to a person sentenced to undergo imprisonment by general court-martial under the Army Act, 1950 (for short "the 1950 Act"). The two learned Judges observed that the position in the Army Act would equally govern the person sentenced to undergo rigorous imprisonment by the court-martial under the Navy Act, 1957 (for short "the 1957 Act") and the Air Force Act. The two-Judge Bench referred to the divergence of views between different High Courts pertaining to the applicability of Section 428 of the Code and, thereafter, the interpreted Section 167 of the 1950 Act and came to hold as follows:-

> **"9.** Section 167 of the Act specifically lays down that whenever a person is sentenced by a court martial under the Act to imprisonment, the term of his sentence shall, whether it has been revised or not, be reckoned to commence on the day on which the original proceedings were signed by the Presiding Officer or, in the case of a summary court martial, by the Court. In the face of this categorical provision laying down that the sentence of imprisonment shall be deemed to have commenced only on the day when the court martial proceeding was signed by the Presiding Officer or by the Court as the case may be, it is in our opinion futile to contend that the Army Act is silent with respect to the topic as to the date with effect from which the period of imprisonment covered by the sentence is to be reckoned. We state this only for the reason that an ingenious argument was advanced before us by counsel for the appellants that Section 5 of the Code of Criminal Procedure only lays down that nothing in the Code shall *affect* any special or local law and hence in the absence of any specific provision in the special or local law covering the particular subject-matter, the provisions of the Code would get attracted. Even if this argument is to be assumed to be correct (which assumption we shall presently show is wholly unwarranted), inasmuch as Section 167 of the Act specifically deals with the topic of the date of commencement of the sentence of imprisonment, there is absolutely no scope for invoking the aid of Section 428 of the Code of Criminal Procedure in respect of prisoners convicted by court martial under the Act."

11. In *Bhuwaneshwar Singh v. Union of India and Others*[2], the Court referred to the pronouncement in *Ajmer Singh* (supra) and opined that as far as set off of the period of pre-trial detention against the period of sentence is concerned, Section 428 of the Code is not attracted to the cases of persons convicted by the court-martial to undergo imprisonments.

12. In view of the aforesaid enunciation of law, there can be no scintilla of doubt that the pre-trial detention cannot be set off against the sentence of imprisonment passed by the court-martial for the offence under Section 39(a) which has been affirmed under Section 161(1) of the Act and the period of sentence shall commence from the date when the original proceeding was signed by the Presiding Officer. Thus, there is no illegal detention warranting issue of writ of habeas corpus.

13. We have been apprised that the petitioner has submitted a representation under Section 180(1) read with Section 184 of the Act. Without expressing any opinion on the merits of the said representation, we direct the Competent Authority to decide the same within a period of seven days from today.

14. Before parting with this case, it is necessary to note that in the 1950 Act, the Parliament has incorporated Section 169-A to avoid hardship to the persons convicted by the court-martial. The said provision is as follows: -

> "169-A. *Period of custody undergone by the officer or person to be set off against the imprisonment*.— When a person or officer subject to this Act is sentenced by a

2. (1993) 4 SCC 327.

court-martial to a term of imprisonment, not being an imprisonment in default of payment of fine, the period spent by him in civil or military custody during investigation, inquiry or trial of the same case and before the date of order of such sentence, shall be set off against the term of imprisonment imposed upon him, and the liability of such person or officer to undergo imprisonment on such order of sentence shall be restricted to the remainder, if any, of the term of imprisonment imposed upon him."

15. Similarly, Section 151 of the 1957 Act which deals with commencement of sentence has been amended by Act 23 of 2005 with effect from 23.6.2005. For the present purpose, it is requisite to reproduce Section 151(1) and (3): -

"**151. Commencement of sentence.** – (1) Subject to the provisions of sub-sections (2) and (3) every term of imprisonment or detention awarded in pursuance of this Act shall be reckoned as commencing on the day on which the sentence was awarded.

(4) .....

(5) Whenever any offender is sentenced by a court-martial to a term of imprisonment, in pursuance of this Act, not being imprisonment in default of payment of fine, the period spent by him in civil or naval custody during investigation, inquiry or trial of the same case, and before the date of order of such sentence, shall be set off against the terms of imprisonment imposed upon him, and the liability of such offender to undergo imprisonment on such order of sentence shall be restricted to the remainder, if any, of the term of imprisonment imposed upon him."

16. Though such amendments have been made by the Parliament under the 1950 Act and the 1957 Act, yet no such amendment has been incorporated in the Air Force Act, 1950. The aforesaid provisions, as we perceive, have been

incorporated in both the statutes to avoid hardship to persons convicted by the court-martial. Similar hardship is suffered by the persons who are sentenced to imprisonment under various provisions of the Act. Keeping in view the aforesaid amendment in the other two enactments and regard being had to the purpose of the amendment and the totality of the circumstances, we think it apt to recommend the Union of India to seriously consider to bring an amendment in the Act so that the hardships faced by the persons convicted by the court-martial are avoided.

17. The writ petition is accordingly disposed of.

R.P. Writ Petition disposed of.

RAM SWAROOP
v.
STATE (GOVT. NCT) OF DELHI
(Criminal Appeal No. 1327 of 2010)

MAY 21, 2013

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – Search and seizure – Reliance placed only on the testimony of official witnesses / police officials – Non-examination of independent witnesses – Effect – Held: There is no absolute rule that police officers cannot be cited as witnesses and their depositions should be treated with suspect – Generally the public at large are reluctant to come forward to depose before the court and, therefore, the prosecution case cannot be doubted for non-examining the independent witnesses – In the case at hand, the evidence of PW-7 (Sub Inspector) was supported by PW-5 (Constable), as well as other witnesses – It has come in the evidence of PW-7 that he had asked the passerby to be witnesses but none of them agreed and left without disclosing their names and addresses – The evidence of PW-5 and 7 being absolutely unimpeachable, no reason to hold that non-examination of independent witnesses affected the prosecution case.

Narcotic Drugs and Psychotropic Substances Act, 1985 – s.50 – Applicability of – Held: On facts, 32 bags of poppy straw powder weighing 64 Kgs. had been seized from two bags belonging to the accused-appellant – There was no seizure from the person of appellant – Clearly therefore s.50 of the Act was not attracted and consequently compliance with s.50 of the Act was not required in the facts and circumstances of the case.

While on patrolling duty, two police officials, PWs 5

and 7 found the accused-appellant sitting on two white coloured bags. On search of the bags, it was found that those contained 64 Kgs. of poppy straw powder packed in 32 bags of polythene. The appellant was convicted under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act") and sentenced to undergo rigorous imprisonment for ten years and further directed to pay a fine of rupees one lakh.

In the instant appeal, the appellant raised two contentions, namely, (i) though the alleged seizure had taken place at a crowded place, yet the prosecution chose not to examine any independent witness and in the absence of corroboration from independent witnesses the evidence of only police officials should not have been given credence to and that (ii) there was non-compliance of Section 50 of the NDPS Act inasmuch as the accused was not informed his right to be searched in presence of a gazetted officer or a Magistrate despite the mandatory nature of the provision and, therefore, the conviction was vitiated.

Dismissing the appeal, the Court

HELD: 1. The evidence of PW-7 (Sub-Inspector) has been supported by, PW-5 (Constable), as well as other witnesses. It has come in the evidence of PW7 that he had asked the passerby to be witnesses but none of them agreed and left without disclosing their names and addresses. On a careful perusal of their version this Court does not notice anything by which their evidence can be treated to be untrustworthy. On the contrary it is absolutely unimpeachable. There is no absolute rule that police officers cannot be cited as witnesses and their depositions should be treated with suspect. Generally the public at large are reluctant to come forward to depose before the court and, therefore, the prosecution case cannot be doubted for non-examining the independent

witnesses. It can safely be stated that in the case at hand there is no reason to hold that non-examination of the independent witnesses affected the prosecution case. [Paras 7, 10] [796-E-H; 797-A; 798-C]

State of U.P. v. Anil Singh **1988 Supp SCC 686: 1988 Suppl. SCR 611;** *State, Govt. of NCT of Delhi v. Sunil and Another* **(2001) 1 SCC 652: 2000 (5) Suppl. SCR 144 and** *Ramjee Rai and Others v. State of Bihar* **(2006) 13 SCC 229: 2006 (5) Suppl. SCR 240 – relied on.**

2. In regard to the issue pertaining to non-compliance of Section 50 of the NDPS Act, the appellant has strenuously urged that the provision, being mandatory, there has to be strict compliance. But, a significant one, in the case at hand 32 bags of poppy straw powder weighing 64 Kgs. had been seized from two bags. It has not been seized from the person of the accused-appellant. It has been established by adducing cogent and reliable evidence that the bags belonged to the appellant. Thus, applying the interpretation of the word "search of person" as laid down by this Court in earlier decisions, to facts of present case, it is clear that the compliance with Section 50 of the Act is not required. [Paras 13, 14] [799-F-G; 800-B-C, D-E]

Ajmer Singh v. State of Haryana **(2010) 3 SCC 746: 2010 (2) SCR 785;** *Madan Lal v. State of H.P.* **(2003) 7 SCC 465: 2003 (2) Suppl. SCR 716 and** *State of H.P. v. Pawan Kumar* **(2005) 4 SCC 350: 2005 (3) SCR 417 – relied on.**

Vijaysinh Chandubha Jadeja v. State of Gujarat **(2011) 1 SCC 609;** *State of Punjab v. Baldev* **(1999) 6 SCC 172:2010 (13) SCR 255;** *Karnail Singh v. State of Haryana* **(2009) 8 SCC 539: 2009 (11) SCR 470:** *Joseph Fernandez v. State of Goa* **(2000) 1 SCC 707;** *Prabha Shankar Dubey v. State of M.P.* **(2004) 2 SCC 56: 2003 (6) Suppl. SCR 444;** *Myla Venkateswarlu v. State of Andhra Pradesh* **(2012) 5 SCC**

226 and *Ashok Kumar Sharma v. State of Rajasthan* **(2013) 2 SCC 67 – referred to.**

Case Law Reference:

1988 Suppl. SCR 611	**relied on**	**Para 7**
2000 (5) Suppl. SCR 144	**relied on**	**Para 8**
2006 (5) Suppl. SCR 240	**relied on**	**Para 9**
(2011) 1 SCC 609	**referred to**	**Para 11**
2010 (13) SCR 255	**referred to**	**Para 11, 12**
2009 (11) SCR 470	**referred to**	**Para 11**
(2000) 1 SCC 707	**referred to**	**Para 12**
2003 (6) Suppl. SCR 444	**referred to**	**Para 12**
(2012) 5 SCC 226	**referred to**	**Para 12**
(2013) 2 SCC 67	**referred to**	**Para 12**
2010 (2) SCR 785	**relied on**	**Para 13**
2003 (2) Suppl. SCR 716	**relied on**	**Para 13**
2005 (3) SCR 417	**relied on**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1327 of 2010.

From the Judgment & Order dated 04.05.2009 of the High Court of Delhi at New Delhi in Criminal Appeal No. 394 of 2007.

Susmita Lal for the Appellant.

Rakesh Kumar Khanna, ASG, Vivek Chib, Harsh Prabhakar, Joby P. Varghese, Anil Katiyar, Chandra Bhushan Prasad for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The appellant herein has been found guilty of the offence under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act") and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of rupees one lakh and, in default of payment of fine, to suffer simple imprisonment for two years.

2. On 22.7.2005, Ritesh Kumar, a Sub-Inspector, while patrolling reached at the outer gate of ISBT where Constable Balwant Singh met him and both of them found the accused-appellant sitting on two white coloured bags on the left side of the footpath. On seeing the police party he tried to run away leaving the bags which raised a suspicion in the mind of the Sub-Inspector and that led to the apprehension and interrogation of the accused. Eventually, on search of the bags, it was found that those contained 64 Kgs. of poppy straw powder packed in 32 bags of polythene. After the search was carried out samples were sealed and sent to the Forensic Science Laboratory for examination. The investigating agency on completion of other formalities filed the charge-sheet before the trial Court.

3. The accused pleaded false implication and claimed to be tried.

4. On behalf of the prosecution eight witnesses were examined including the Sub-Inspector, Ritesh Kumar, and Constable Balwant Singh. The learned Additional Sessions Judge, Delhi in Sessions Case No. 90 of 2006, considering the material on record, found the accused guilty of the offence and imposed the sentence as has been stated hereinbefore.

5. Ms. Sushmita Lal, learned counsel for the appellant, has raised two contentions, namely, (i) though the alleged seizure had taken place at a crowded place, yet the prosecution chose not to examine any independent witness and in the absence

of corroboration from independent witnesses the evidence of only police officials should not have been given credence to and (ii) there has been non-compliance of Section 50 of the NDPS Act inasmuch as the accused was not informed his right to be searched in presence of a gazetted officer or a Magistrate despite the mandatory nature of the provision and, therefore, the conviction is vitiated.

6. Per contra, it is urged by Mr. Rakesh Khanna, learned Additional Solicitor General and Mr. Vivek Chib, learned advocate appearing for the respondent, state that the learned trial Judge as well as the High Court has correctly placed reliance on the testimony of the official witnesses and there is no mandatory rule that non-examination of independent witnesses in all circumstances would vitiate the trial. It is their further submission that Section 50 of the NDPS Act is not attracted to the case at hand as two bags were searched and not the person of the accused-appellant.

7. To appreciate the first limb of submission, we have carefully scrutinized the evidence brought on record and perused the judgment of the High Court and that of the trial Court. It is noticeable that the evidence of PW-7, namely, Ritesh Kumar, has been supported by Balwant Singh, PW-5, as well as other witnesses. It has come in the evidence of Ritesh Kumar that he had asked the passerby to be witnesses but none of them agreed and left without disclosing their names and addresses. On a careful perusal of their version we do not notice anything by which their evidence can be treated to be untrustworthy. On the contrary it is absolutely unimpeachable. We may note here with profit there is no absolute rule that police officers cannot be cited as witnesses and their depositions should be treated with suspect. In this context we may refer with profit to the dictum in *State of U.P. v. Anil Singh*[1], wherein this Court took note of the fact that generally the public at large are reluctant to come forward to depose before the

1. 1988 Supp. SCC 686.

court and, therefore, the prosecution case cannot be doubted for non-examining the independent witnesses.

8. At this juncture a passage from *State, Govt. of NCT of Delhi v. Sunil and Another*[2] is apt to quote : -

> "21. We feel that it is an archaic notion that actions of the police officer should be approached with initial distrust. We are aware that such a notion was lavishly entertained during the British period and policemen also knew about it. Its hangover persisted during post-independent years but it is time now to start placing at least initial trust on the actions and the documents made by the police. At any rate, the court cannot start with the presumption that the police records are untrustworthy. As a proposition of law the presumption should be the other way around. That official acts of the police have been regularly performed is a wise principle of presumption and recognised even by the legislature. Hence when a police officer gives evidence in court that a certain article was recovered by him on the strength of the statement made by the accused it is open to the court to believe the version to be correct if it is not otherwise shown to be unreliable. It is for the accused, through cross-examination of witnesses or through any other materials, to show that the evidence of the police officer is either unreliable or at least unsafe to be acted upon in a particular case. If the court has any good reason to suspect the truthfulness of such records of the police the court could certainly take into account the fact that no other independent person was present at the time of recovery. But it is not a legally approvable procedure to presume the police action as unreliable to start with, nor to jettison such action merely for the reason that police did not collect signatures of independent persons in the documents made contemporaneous with such actions."

2. (2001) 1 SCC 652.

9. In *Ramjee Rai and Others v. State of Bihar*[3], it has been opined as follows: -

> "26. It is now well settled that what is necessary for proving the prosecution case is not the quantity but quality of the evidence. The court cannot overlook the changes in the value system in the society. When an offence is committed in a village owing to land dispute, the independent witnesses may not come forward."

10. Keeping in view the aforesaid authorities, it can safely be stated that in the case at hand there is no reason to hold that non-examination of the independent witnesses affect the prosecution case and, hence, we unhesitatingly repel the submission advanced by the learned counsel for the appellant.

11. The second limb of proponement of the learned counsel for the appellant pertains to non-compliance of Section 50 of the NDPS Act. In this context, the learned counsel has drawn inspiration from the pronouncement of the Constitution Bench in *Vijaysinh Chandubha Jadeja v. State of Gujarat*[4]. The larger Bench after referring to Objects and Reasons of the NDPS Act and various provisions, namely, Sections 41, 42 and 50 of the said Act, to the earlier Constitution Bench decisions in *State of Punjab v. Baldev*[5] and *Karnail Singh v. State of Haryana*[6], and certain other authorities, eventually, opined thus:-

> "**29.** In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise

3. (2006) 13 SCC 229.
4. (2011) 1 SCC 609.
5. (1999) 6 SCC 172.
6. (2009) 8 SCC 539.

the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision."

12. The principle of substantial compliance, as laid down in *Joseph Fernandez v. State of Goa*[7] and *Prabha Shankar Dubey v. State of M.P.*[8], was not accepted as the ratio laid therein was not in consonance with the dictum laid down in *Baldev Singh's* case (supra). Similar principle has been reiterated in *Myla Venkateswarlu v. State of Andhra Pradesh*[9] and *Ashok Kumar Sharma v. State of Rajasthan*[10].

13. We have referred to the aforesaid decisions as the learned counsel has strenuously urged that the provision, being mandatory, there has to be strict compliance. But, a significant one, in the case at hand 32 bags of poppy straw powder weighing 64 Kgs. had been seized from two bags. It has not been seized from the person of the accused-appellant. It has been established by adducing cogent and reliable evidence that the bags belonged to the appellant. In *Ajmer Singh v. State of*

7. (2000) 1 SCC 707.
8. (2004) 2 SCC 56.
9. (2012) 5 SCC 226.
10. (2013) 2 SCC 67.

Haryana[11] the appellant was carrying a bag on his shoulder and the said bag was searched and contraband articles were seized. While dealing with the applicability of Section 50 of the NDPS Act, two learned Judges referred to the decisions in *Madan Lal v. State of H.P.*[12] and *State of H.P. v. Pawan Kumar,*[13] and came to hold as follows: -

"Thus, applying the interpretation of the word "search of person" as laid down by this Court in the decision mentioned above, to facts of present case, it is clear that the compliance with Section 50 of the Act is not required. Therefore, the search conducted by the investigating officer and the evidence collected thereby, is not illegal. Consequently, we do not find any merit in the contention of the learned counsel of the appellant as regards the non-compliance with Section 50 of the Act."

14. Tested on the bedrock of the aforesaid dictum, the contention, so assiduously raised, that there has been non-compliance of Section 50 of the NDPS Act is wholly sans substance.

15. In view of the aforesaid premised reasons, the appeal, being devoid of merit, stands dismissed.

B.B.B. Appeal dismissed.

11. (2010) 3 SCC 746.
12. (2003) 7 SCC 465.
13. (2005) 4 SCC 350.

RUMI BORA DUTTA
v.
STATE OF ASSAM
(Criminal Appeal No. 737 of 2006 etc.)

MAY 24, 2013

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Penal Code, 1860:

s.302/34 – Murder – Circumstantial evidence – Conviction and life sentence awarded by courts below – Held: The circumstances clearly establish that the prosecution has proved the guilt of the accused-appellants and the circumstances are conclusive in nature to exclude every hypothesis but the one proposed to be proved — The chain of evidence is absolutely complete — Conviction and sentence upheld – Criminal law – Motive – Evidence Act, 1872 – s.27 – Code of Criminal Procedure, 1973 – s.313.

The appellants - the aunt and the nephew - were prosecuted for causing the death of the bread winner of the family. The prosecution case was that on the day of occurrence, the police learnt about hospitalization of a person because of bullet injuries. When the police reached the hospital, they were informed that the victim was brought dead at 1.30 a.m. The police then reached the house of the deceased and finding the narration of his wife absolutely false, arrested the appellants. In the investigation, illicit relationship between the two accused-appellants surfaced. Both of them confessed to the Investigating Officer, which led to recovery of a knife, a skipping rope and its missing handle from the house. The post-mortem report indicated that the death was caused by strangulation, and there was no bullet injury on the chest but it was a stab injury with a knife. The trial court

convicted both the accused u/s 302/34 IPC and sentenced them to life imprisonment. The High Court dismissed their appeal.

Dismissing the appeals, the Court

HELD: 1.1. The whole case of the prosecution rests on the circumstantial evidence and, as such, it is the duty of the court to see that the circumstances which lead towards the guilt of the accused have been fully established and they must lead to a singular conclusion that the accused is guilty of the offence and rule out the probabilities which are likely to allow the presumption of innocence of the accused. [para 10] [908-D-F]

Hanumant Govind Nargundkar v. State of M.P. **1952 SCR 1091 = AIR 1952 SC 343;** *Sharad Birdhichand Sarda v. State of Maharashtra* **1985 (1) SCR 88 = 1984 (4) SCC 116;** *C. Chenga Reddy and Others v. State of A.P.* **1996 (3) Suppl. SCR 479 = 1996 (10) SCC 193 – referred to.**

1.2. On a studied scrutiny of the evidence on record, this Court is convinced that the circumstances that have been proven are that (i) occurrence took place about 1.30 a.m.; (ii) the deceased was found lying dead on his bed; (iii) the accused appellants lived with him in his house and were present at the time the incident took place; (iv) accused-appellant (nephew) made a statement u/s 27 of the Evidence Act and led the police to recover the knife, the weapon of assault, and the missing handle of the skipping rope; (v) the skipping rope was found in the bed room and was recovered at the instance of the wife; (vi) the wife of deceased gave a false information and tried to mislead the police; (vii) she disowned the information in her statement u/s 313 Cr.P.C; (viii) that the accused persons had not offered any explanation with regard to recovery of weapons from their house except making a bald denial; (ix) there is evidence on record that the wife

had developed an illicit relationship with the nephew of the deceased, which provides a motive; (x) nothing had been stated in their examination u/s 313 that any one had any animosity with the deceased; (xi) nothing was stolen from the house; and (xii) the child (who was stated to have been taken by miscreants as stated by wife) was immediately found from the road. [para 23] [813-E-H; 814-A-B]

1.3. Besides, the doctor (PW-6), who conducted the post-mortem, in his report opined that the cause of death was due to asphyxia following strangulation and the same was caused with a rope. It is further opined that the injury on the chest of the deceased was caused with some pointed weapon like dagger. Thus, from the post mortem report it is manifest that the FIR lodged by the wife was a maladroit attempt to save her skin. It was totally false. [para 9] [808-B-D]

State of Maharashtra v. Damu S/o Gopinath Shinde and Others **2000 (3) SCR 880 = 2000 (6) SCC 269;** *State of Punjab v. Gurnam Kaur and Others* **2009 (3) SCR 1195 = 2009 (11) SCC 225;** *Aftab Ahmad Anasari v. State of Uttaranchal* **2010 (1) SCR 1027 = 2010 (2) SCC 583;** *Bhagwan Dass v. State (NCT) of Delhi* **AIR 2011 SC 1863;** *Manu Sharma v. State* **2010 (4) SCR 103 = 2010 (6) SCC 1; and** *State of Maharashtra v. Suresh* **1999 (5) Suppl. SCR 215 = 2000 (1) SCC 471 – referred to.**

1.4. The circumstances clearly establish that the prosecution has proved the guilt of the accused-appellants and the circumstances are conclusive in nature to exclude every hypothesis but the one proposed to be proved. The chain of evidence is absolutely complete. The conviction and sentence is upheld. [para 24] [814-B-C]

Case Law Reference:

1952 SCR 1091	**referred to**	**para 11**
1985 (1) SCR 88	**referred to**	**para 12**
1996 (3) Suppl. SCR 479	**referred to**	**para 13**
2000 (3) SCR 880	**referred to**	**para 16**
2009 (3) SCR 1195	**referred to**	**para 17**
2010 (1) SCR 1027	**referred to**	**para 18**
AIR 2011 SC 1863	**referred to**	**para 19**
2010 (4) SCR 103	**referred to**	**para 19**
1999 (5) Suppl. SCR 215	**referred to**	**para 21**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 737 of 2006.

From the Judgment & Order dated 23.06.2005 of the High Court of Assam at Gauhati in Criminal Appeal No. 16 of 2002.

WITH

Crl. A. No. 738 of 2006.

Kiran Bhardwaj (A.C.) for the Appellant.

Navnit Kumar (for Corporate Law Group) for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The factual score from which the present appeals arise has a sad and sordid story to tell reflecting the morbid obsession of the appellants with lust, abandonment of kernel of all human virtues and deep addiction with carnal desires. The deceased- husband, as expected, trusted the wife, Ruma Bora, and such an emotional trust has

always been regarded as a great complement to any person. The other appellant, Probal, nephew of the deceased, was shown affection, a beautiful and sacred sentiment in a human being and also charity, the wonder of life without a ceremony, and kept at his home to prosecute his studies but, an obnoxious one, the infidelity of the wife with incurable sensuality and the monstrous ingratitude of the nephew, brought his tragic end. The falsehood of both the wife and the nephew culminated in the murder of the deceased, an Upper Division Clerk in the office of the Deputy Superintendent of Schools, Jorhat. The wife, a teacher in the school and the nephew, a student of Class-X, ultimately faced trial and being convicted by the learned trial Judge under Section 302 read with 34 of Indian Penal Code (for short 'IPC') and sentenced to undergo rigorous imprisonment of life and to pay a fine of Rs.10,000/-, in default of payment of fine, to suffer further rigorous imprisonment for three months, preferred Criminal Appeal No. 16 of 2002 before the Gauhati High Court which affirmed the conviction and the sentence. Hence, they have preferred the present appeals by special leave.

2. Shorn of details, the prosecution case is that on 4.6.1997 about 4.30 a.m. the police came to know that at 1.30 a.m. one Naren Dutta had been hospitalized on being hit by a bullet by the unknown miscreants. The police rushed to the hospital and found him dead. A general diary entry was made on 4.6.1997 and thereafter the police moved to the house of the deceased at Gajpuria Village. When the Investigating Officer reached the house, wife of the deceased lodged a written FIR, Ext.-2, stating that about 1.30 a.m. three unknown persons with their faces covered with black clothes had entered into the house, tied her up with the point of pistol and while one guarded her, two others entered their bed room and after 15 minutes they came out. As alleged, they lifted their child, Pranjal, and took him out. When she shouted, her nephew Probal Dutta, who was inside the house, came out and both of them looked for the child first and found him from the road.

Thereafter, they proceeded to the bed room where the deceased was lying on the bed and a rope had been fastened around his neck. They moved him to the civil hospital where he was declared brought dead by the doctor. The Investigating Officer on enquiry found the story narrated, vide Ext. P-2, to be absolutely false, concocted and incredible and, accordingly, arrested the accused persons. In course of investigation Probal Dutta confessed before the police that he along with his aunt had strangulated the deceased and he had stabbed him on his chest. Similar confession was made by the wife. Thereafter a case under Section 302/34 IPC was registered and during investigation Probal Dutta, in pursuance of his disclosure statement, Ext.-6, led to discovery of the two pieces of handle of the skipping rope and the knife hidden inside the house. The wife led to the discovery of the skipping rope that was used for strangulation. Thereafter, the investigating agency got the post mortem done, recorded the statements of the witnesses and after completing all the formalities placed the charge-sheet before the competent court which, in turn, committed the matter to the court of Session.

3. The accused persons abjured their guilt and claimed to be tried.

4. The prosecution, in order to bring home the charge, examined nine witnesses and two witnesses were examined as court witnesses. The defence chose not to adduce any evidence.

5. The trial court, appreciating the material brought on record, came to hold that death was homicidal in nature; that there was no bullet injury on the chest but a stab injury with the knife that had been seized; that though the confession made before the police officer was not admissible in evidence, yet the statement that provided information pertaining to recovery was admissible; that the recovery made by the prosecution was absolutely believable; that the story put forth by the wife being disowned by her was a circumstance against the accused to

be taken note of; and that there was motive as the evidence on record would show existence of illicit relationship between the accused persons and, accordingly, found them guilty and imposed the sentence as has been stated hereinbefore.

6. On an appeal being preferred the High Court re-appreciated the evidence, took note of all the circumstances and opined that the prosecution had proven the charge to the hilt and consequently declined to interfere with the impugned judgment of conviction.

7. We have heard Ms. Kiran Bhardwaj, learned counsel for the appellant, and Mr. Navnit Kumar, learned counsel for the respondent-State.

8. First we shall refer to the post mortem report conducted by Dr. Narayan Bardoloi, PW-6. The relevant part of the report is as follows: -

"(1) The dead body was in stout condition. One stab wound on the right side of the chest wall, size 5 c.m. lateral to the sternum, measuring 1 c.m. in length and 1.5 c.m., in length and 1.5 c.m. in depth. The wound is gapping. Clotted blood seen at the external margin and at the level of the rib. Underlying bony cage is intact.

(2) One transverse, continuous ligature mark seen around the neck at the level of thyroid cartel edge. The breadth of the mark is about 4 m.m. The base of the mark is redid and there is achymosis at the edges of the ligature mark. On dissection – the subcutenous tissue is found acchymosed.

The head and the facre are congested. The tongue is swelled.

The scalp, membrance and brain are all congested

Pleaurae, lungs, pericardium and heart are all congested (affected)

Paritonium, stomach, intestine are also congested.

The injuries were ante mortem."

9. In his report he has opined that the cause of death is due to asphyxia following strangulation and the same was caused with a rope. It is further opined that the injury on the chest of the deceased was caused with some pointed weapon like dagger. Thus, from the post mortem report it is manifest that the FIR lodged by the wife was a maladroit attempt to save her skin. It was totally false. It is interesting to note that she in her statement under Section 313 of the Code of Criminal Procedure has disowned the same. We would advert to the effect of the same at a later stage.

10. It is seemly to state here that the whole case of the prosecution rests on the circumstantial evidence. The learned trial Judge as well as the High Court has referred to certain circumstances. When a case is totally hinges on the circumstantial evidence, it is the duty of the Court to see that the circumstances which lead towards the guilt of the accused have been fully established and they must lead to a singular conclusion that the accused is guilty of the offence and rule out the probabilities which are likely to allow the presumption of innocence of the accused.

11. More than six decades back this Court in *Hanumant Govind Nargundkar v. State of M.P.*[1], had laid down the principles as under:-

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the facts so

1. AIR 1952 SC 343.

established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

12. In *Sharad Birdhichand Sarda v. State of Maharashtra*[2], the five golden principles which have been stated to constitute the panchsheel of the proof of the case based on circumstantial evidence are (i) the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely 'may be' fully established, (*ii*) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (*iii*) the circumstances should be of a conclusive nature and tendency, (*iv*) they should exclude every possible hypothesis except the one to be proved, and (*v*) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

13. In *C. Chenga Reddy and Others v. State of A.P.*[3], it has been held that in a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances

2. (1984) 4 SCC 116.

3. (1996) 10 SCC 193.

must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

14. Keeping the aforesaid principles in view the circumstances that have been established in the present case are required to be scrutinized.

15. The principal criticism advanced against the analysis in the impugned judgments by the learned counsel, appearing for the appellant, is that the trial court and the High Court have misdirected themselves in accepting the factum of recovery as admissible in evidence. It is her further submission that the recovery part being a part of the confession before a police officer should have been discarded and once the said fact is kept out of consideration, the dents into other circumstances would be manifest and the chain of circumstances would be incomplete to establish the charge against the accused-appellants.

16. In this context, we may refer with profit to the ruling in *State of Maharashtra v. Damu S/o Gopinath Shinde and Others*[4] wherein it has been observed that the basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence, the legislature has permitted such information to be used as evidence by restricting the admissible portion to the minimum. Thereafter, the two learned Judges proceeded to state as follows: -

"It is now well settled that recovery of an object is not discovery of a fact as envisaged in the section. The

4. (2000) 6 SCC 269.

decision of the Privy Council in *Pulukuri Kottaya v. Emperor*[5] is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

17. In *State of Punjab v. Gurnam Kaur and Others*[6], it has been laid down that if by reason of statements made by an accused some facts have been discovered, the same would be admissible against the person who had made the statement in terms of Section 27 of the Evidence Act.

18. In *Aftab Ahmad Anasari v. State of Uttaranchal*[7], after referring to earlier decision in *Pulukuri Kotayya* (supra), a two-Judge Bench opined in the context of the said case that when the accused was ready to show the place where he had concealed the clothes of the deceased, the same was clearly admissible under Section 27 of the Evidence Act because the same related distinctly to the discovery of the clothes of the deceased from that very place.

19. In *Bhagwan Dass v. State (NCT) of Delhi*[8], relying on the decisions in *Aftab Ahmad Anasari* (supra) and *Manu Sharma v. State*[9], the Court opined that when the accused had given a statement that related to discovery of an electric wire by which the crime was committed, the said disclosure statement was admissible as evidence.

20. In the case at hand, both the accused have led to discovery of the knife and the skipping rope used in the crime. It was within their special knowledge. The medical evidence

5. AIR 1947 PC 67.
6. (2009) 11 SCC 225.
7. (2010) 2 SCC 583.
8. AIR 2011 SC 1863.
9. AIR 2010 SC 2352.

corroborates the fact that the deceased died because of strangulation and further there was a stab injury on his chest. Thus, the weapon and the other articles have direct nexus with the injuries found in the post mortem report.

21. At this juncture, as mentioned earlier we proceed to advert to the issue pertaining to falsehood. In this context we may fruitfully refer to the authority in *State of Maharashtra v. Suresh*[10], wherein it has been held that a false answer offered by the accused when his attention is drawn to the circumstances, it renders the circumstances can be of inculpating nature. In such a situation a false answer can also be counted as providing "a missing link" for completing the chain. In the case at hand, the factum of recovery through the witnesses has been proven that the accused-persons had led to recovery. When it was put to them they had given an answer in the negative in a non-challant manner. The incriminating materials were concealed and they were discovered being led by the accused persons. In the case of *Suresh* (supra) it has been held that there are three possibilities when an accused points out the place where the incriminating material is concealed without stating that it was concealed by himself. Elaborating on the three possibilities the Court proceeded to state as follows: -

> "One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else

10. (2000) 1 SCC 471.

he came to know of it, the presumption is well-justified course to be adopted by the criminal court that the concealment was made by himself"

22. Tested on the anvil of the aforesaid principle the factum of recovery is proven beyond reasonable doubt by the prosecution.

23. Presently to the cumulative effect of the circumstances brought by way of evidence. The prosecution witnesses have clearly deposed that the deceased was lying on the bed and they were told about the arrival of the miscreants and causing the injury. It is also brought in evidence that apart from the appellants the old mother of the deceased was in the house. The learned trial Judge as well as the High Court has rightly disbelieved the attack by any miscreant. It is also interesting to note that the child was immediately recovered by the accused Probal from the road. All probabilities thought to be covered by the accused-appellants gradually melted and their complicity in the crime and the criminality of the mind stood revealed. On a studied scrutiny of the evidence on record, we are convinced that the circumstances that have been proven are that (i) occurrence took place about 1.30 a.m.; (ii) the deceased was found lying dead on his bed; (iii) the accused appellants lived with him in his house and were present at the time the incident took place; (iv) accused Probal made a statement under Section 27 of the Evidence Act and led the police to recover the knife, the weapon of assault and the missing handle of the skipping rope; (v) the skipping rope was found in the bed room and was recovered at the instance of the wife; (vi) the accused-appellant Rumi Bora gave a false information and tried to mislead the police; (vii) the wife had disowned the information in her statement under Section 313 Cr.P.C; (viii) that the accused persons had not offered any explanation with regard to recovery of weapons from their house except making a bald denial; (ix) there is evidence on record that the wife had developed an illicit relationship with the

nephew of the deceased, which provides a motive; (x) nothing had been stated in their examination under Section 313 that any one had any animosity with the deceased; (xi) nothing was stolen from the house; and (xii) the child was immediately found from the road.

24. The aforesaid circumstances clearly establish that the prosecution has proved the guilt of the accused-appellants and the circumstances are conclusive in nature to exclude every hypothesis but the one proposed to be proved. The chain of evidence is absolutely complete. Thus, we have no hesitation in affirming the judgment of conviction and order of sentence passed by the learned trial Judge that has been given the stamp of approval by the High Court.

25. Consequently, the appeals, being devoid of merit, stand dismissed.

R.P. Appeals dismissed.

KUSTI MALLAIAH
v.
THE STATE OF ANDHRA PRADESH
(Criminal Appeal No. 642 of 2008)

MAY 28, 2013

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Penal Code, 1860:

ss.302/34 and 404/34 – Two accused-appellants killed a woman and took away her ornaments – The witness accompanying them revealed the incident to I.O. during investigation – Conviction by trial court and sentence of life imprisonment – Affirmed by High Court – Held: Evidence of sole eye-witness is cogent and trust worthy and has been corroborated by medical evidence and proven by recoveries — Minor discrepancies in the evidence of other witnesses cannot be termed even as minor contradictions – Conviction and sentence upheld – Evidence.

Evidence:

Deposition of sole eye-witness – Held: Conviction can be recorded on the testimony of a single witness if his version is clear and reliable, for the principle is that the evidence has to be weighed and not counted – Process to evaluate the evidence of single witness, explained.

FIR

Delay in registration of FIR – Held: In the instant case process u/s 174 CrPC was followed after the dead body was located — Relatives of deceased were searching for it – They subsequently identified her photograph and her belongings – In the circumstances, it cannot be said that there has been

delay in lodging the FIR – Code of Criminal Procedure, 1973 — s.174 – Delay/Laches.

The appellant was prosecuted along with A-1 for committing murder of a woman and taking away her ornaments. The prosecution case was that A-1 and the appellant took the deceased to a hillock. PW-6 also accompanied them. A-1 and the appellant committed sexual intercourse with the deceased. Thereafter they brutally assaulted her with stones, which resulted in her death, and took away her ornaments. The body of the deceased was found on the following day and the police sent it for post-mortem complying with the procedure provided u/s 174 CrPC. Subsequently, when the husband and the daughter of the deceased identified her photograph and belongings, their statements were recorded. The accused were arrested with the ornaments of the deceased. The trial court convicted them u/ss 302 and 404 read with s.34 IPC and sentenced them to rigorous imprisonment for life. The appeal of A-1 was dismissed by the High Court. Thereafter the appellant filed his appeal which was also dismissed by the High Court by the judgment impugned in the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1. As regards the delay in lodging of the FIR, it is evident that the occurrence took place on 10.2.1997; the FIR was lodged by PW-1 stating that dead body of a woman was lying in the forest and on its basis, a report u/s 174 CrPC was registered and the body was sent for post-mortem. The evidence on record shows that when the deceased did not return from her parental home as per schedule, her husband (PW-4) sent a man to his father-in-law's house and on coming to know that the deceased had not reached there, they searched for her and in the process, on 18.2.1997, PW-4 and his daughter

(PW-5) went to the police station where they were shown the photograph of the deceased and a small cloth purse which they identified to be that of the deceased and, thereafter, the investigation commenced for offences punishable u/ss 302 and 404 read with 34 IPC. Regard being had to the totality of the circumstances, it cannot be said that there has been delay in lodging of the FIR. [para 9-10] [822-G-H; 823-G-H; 824-A-C, D-E]

1.2. With regard to contradictions in the statements recorded u/s 161 of CrPC and the depositions in court and further in the evidence of PW-4 and PW-5, true it is, there are certain minor discrepancies but they are absolutely minor, and even cannot earn the status of minor contradictions. Neither PW 4 nor has PW 5 made any endeavor to make any attempt to materially improve their earlier statement in their deposition before the court to make their evidence acceptable. It is also not a case where it can be said that they had withheld something material during investigation and embellished certain aspects during their deposition in court. Therefore, it cannot be said that there are such material contradictions which discredit the testimony of said witnesses. [para 11 and 15] [824-E-F; 825-D; 826-D-F]

Ousu Varghese v. State of Kerala **(1974) 3 SCC 767;** *State of Rajasthan v. Smt. Kalki and Another* **1981 (3) SCR 504 =1981 (2) SCC 752;** *State of U.P. v. M.K. Anthony* **1985 (1) SCC 505; and** *State Rep. by Inspector of Police v. Saravanan & Anr.* **2008 (14) SCR 405 = 2009 AIR 152 - referred to.**

2.1. So far as the plea that the evidence of PW-6 is not beyond reproach, it is manifest from the evidence brought on record that PW-6 had accompanied the accused. He had witnessed the occurrence from a distance. The illicit relationship between the deceased

and A-1 has been unequivocally stated by PWs-4 and 5. PW-6 has also deposed about the stealing of ornaments from the deceased. There has been recovery of the ornaments from the accused persons in presence of PW-9. The post-mortem report clearly mentions that the deceased died on account of head injury. PW-6, having accompanied the accused persons and witnessed the incident, it is natural that a sense of fear would creep in. In such circumstances, the delay in recording of his statement by the Investigating officer would not corrode the version of the prosecution. [para 16] [826-G; 827-A-E, H; 828-A]

2.2. There is no legal hurdle in convicting a person on the sole testimony of a single witness if his version is clear and reliable, for the principle is that the evidence has to be weighed and not counted. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories, there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness. On the analysis of evidence of PW-6, it is found that his evidence is cogent and trustworthy and further gets corroboration from the medical evidence and the factum of recovery of gold and silver ornaments which has been clearly proven by PW-9. [para 17 and 19] [828-D, E-G; 829-B]

Vadivelu Thevar v. The State of Madras **1957 SCR 981 =1957 AIR 614;** *Lallu Manjhi and Another v. State of Jharkhand* **2003 (1) SCR 1 = 2003 (2) SCC 401,** *Prithipal Singh and Others v. State of Punjab and Another* **2012 (14)**

SCR 862 = 2012 (1) SCC 10 and *Jhapsa Kabari and Others v. State of Bihar* **2001 (10) SCC 94 – relied on.**

3. There is no error in the judgment of conviction and order of sentence passed by the trial court that has been affirmed by the High Court. [para 20] [829-C]

Case Law Reference:

(1974) 3 SCC 767	**referred to**	**para 12**
1981 (3) SCR 504	**referred to**	**para 12**
1985 (1) SCC 505	**referred to**	**para 13**
2008 (14) SCR 405	**referred to**	**para 14**
1957 SCR 981	**relied on**	**para 18**
2003 (1) SCR 1	**relied on**	**para 18**
2012 (14) SCR 862	**relied on**	**para 18**
2001 (10) SCC 94	**relied on**	**para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 642 of 2008.

From the Judgment & Order dated 10.07.2006 of the High Court of Judicature, Andhra Pradesh at Hyderbad in Criminal Appeal No. 990 of 2005.

Rachana Joshi Issar, Ambreen Rusool for the Appellant.

D. Mahesh Babu, Amjit Mazbool, B. Ramakrishna Rao for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Calling in question the legal propriety of the judgment of conviction and order of sentence passed in Criminal Appeal No. 990 of 2005 by the High Court of Judicature, Andhra Pradesh whereby the Division Bench has

concurred with the conviction and the imposition of sentence by the learned Principal Sessions Judge, Medak at Sangareddy in S.C. No. 79 of 1998 wherein the learned trial Judge, after finding the appellant along with one Koninti @ Yerrolla Veeraiah, A-1, guilty of the offences punishable under Sections 302 and 404 read with 34 of the Indian Penal Code (for short "IPC"), had sentenced each of them to undergo rigorous imprisonment for life on the first count and three years on the second score.

2. Shorn of unnecessary details, the case of the prosecution as unfolded is that on 9.2.1997 in the morning hours Koninti @ Yerrolla Veeraiah, A-1, and Kusti Malliah, A-2, took the deceased, Neelagiri Parvamma, with them Shiver in the Thimmaiapally hillocks. Kusti Yellaiah, PW-6, eye witness to the occurrence, had accompanied them. The accused persons and the deceased consumed liquor and, thereafter, both the accused removed her clothes, ravished her and assaulted her. The said action of the A-1 and A-2 was objected to by PW-6, but he was pushed away and being scared he went and stood at a distance of approximately 300 yards. Thereafter, both the accused persons stole the gold and silver ornaments and brutally assaulted with stones, as a consequence of which she sustained injuries and succumbed to the same. PW-6, being panicky- stricken, ran away from the spot. On the next day, i.e., 11.2.1997 about 8.00 a.m. PW-1, P. Vittal Reddy, the Village Administrative Officer, Thammaiahapally, coming to know about the dead body of a woman lying in the forest, from a village shepherd, rushed there and found the dead body of the deceased lying half naked. He returned from the forest and about 11.30 a.m. and gave the information at Papannapet Police Station. On the basis of said information the investigating agency proceeded to the spot, prepared the inquest report, registered an FIR under Section 302, IPC, sent the dead body for post mortem and after PW-4, Neelagiri Bhoomiah, husband of the deceased and PW-5, Neelagiri Mogulamma, daughter of the deceased, identified the photograph and small cloth

purse to be that of the deceased, recorded their statements . On 7.5.1997, the accused persons were arrested and 30 gold gundlu weighing about half tula was seized from the custody of A-1 and two silver anklets and one hand bolukada weighing about 22 tulas from the possession of A-2. On that day itself the statement of PW-6, who was an eye witness to the incident, was recorded. After completion of investigation charge-sheet was laid before the competent Magistrate who, in turn, committed the case to the Court of Session. The accused persons denied the charges, pleaded innocence and claimed to be tried.

3. The prosecution, in order to bring home the charges, examined as many as 14 witnesses and got marked exhibits P-1 to P-11 and also MO-1 to MO-9. On behalf of the accused Ext. D-1 to D-3, the contradictions in the statements of PWs-4 and 5 were marked.

4. The learned trial Judge, after considering the evidence on record, came to the conclusion that the prosecution had been able to establish the guilt of the accused persons for the offences punishable under Sections 302 and 404 read with 34 IPC and convicted them to suffer imprisonment as has been referred to hereinbefore.

5. Challenging the judgment of conviction and order of sentence, A-1 preferred Criminal Appeal No. 909 of 2002 wherein the High Court, analyzing and appreciating the ocular and documentary evidence on record, came to hold that the finding of guilt recorded by the learned trial Judge on the basis of the sole testimony of PW-6 could not be faulted. Being of this view the High Court dismissed the appeal and confirmed the conviction and sentence. It is worthy to note that the said appeal was disposed of on 21.9.2004. Thereafter, A-2, the present appellant, preferred Criminal Appeal No. 990 of 2005 which has been dismissed relying on the earlier judgment on 10.7.2006.

6. We have heard Mrs. Rachana Joshi Issar, learned counsel for the appellant, and Mr. D. Mahesh Babu, learned counsel for the respondent-State.

7. It is urged by the learned counsel for the appellant that there are material contradictions in the evidence of PWs-4 and 5, namely, the husband and daughter of the deceased, and further their statements under Section 161 of the Code of Criminal Procedure and the depositions in court being irreconcilable, their version should be treated as totally untrustworthy and unreliable. It is canvassed by her that the learned trial Judge as well as the High Court has completely erred in relying on the ocular testimony of PW-6 as his evidence is not beyond reproach. The learned counsel would emphatically submitt that there is delay in lodging the FIR which would clearly reflect that the appellant has been roped in as the husband of the deceased had harboured some kind of suspicion relating to his relationship with the deceased and, therefore, the prosecution story deserves to be thrown overboard.

8. Resisting the aforesaid submissions it is urged by Mr. Babu that there are no contradictions which would make the prosecution version unreliable and further there is no reason to discard the evidence of husband and daughter. That apart, contends the learned counsel for the respondent, the evidence of PW-6 being absolutely credible the High Court, after analyzing it, given due acceptation and hence, judgment of conviction does not call for any interference.

9. First, we shall deal with the submission pertaining to the delay in lodging of the FIR. The occurrence, as has been stated, took place on 10.2.1997. The FIR was lodged by Vittal Reddy, PW-1, and it contained that dead body of a woman was lying naked in the forest and it had been noticed by a shepherd who was grazing the cattle and on the basis of the same a report under Section 174 of the Code of Criminal Procedure was registered and, accordingly, the body was sent for post mortem.

The post mortem report revealed the following external and internal injuries:

"External injuries:

1. Lacerated injury fore head left side 2½" x ½"communicating into the cavity of skull.
2. Lacerated injury right temple 1½" x ¼" x 1/8"
3. Incised wound right cheek ½" x ¼" x ¼"
4. Contusion front of chest right side 2" x ½"
5. Contusion right thigh upper 1/3" x 2" x 1"
6. Lacerated injury dorsum of the left foot 2½" x ½" x ½"
7. Incised wound Labinamejorce left ½" x ¼" x ¼"
8. Incised wound left inguinal region in 2" x ½" x ¼".

Internal Injuries:

1. Fracture frontal bone
2. Clotted blond was found over the frontal area of brain.
3. Fracture 1st metatarsal bone.

All the above injuries were ante mortem in nature."

10. Be it noted, the autopsy was done and photograph of the deceased, Ext. P-8, was taken by PW-14, the photographer. It is clear from the evidence on record that when the wife of PW-4 and mother of PW-5 did not come back from her parental home after two days as per schedule, the husband requested one of the villagers to go to his father-in-law's house and ask his wife to return to her matrimonial home. After the information

was sent, on the next day his mother-in-law and sister-in-law came to the house and informed that the deceased had not come to their house. Thereafter, his brother, Lingaiah, and he searched for her and on 18.2.1997 they came to know that some woman was found dead in Thammaiahapally and the police had been informed. Thereafter, he along with his daughter went to the police station where they were shown the photograph of the deceased and a small cloth purse which they identified to be that of the deceased and, thereafter, the investigation commenced for offences punishable under Sections 302 and 404 read with 34 IPC was registered. Thus, the chronology of events clearly shows that the police, on the basis of the report recorded under Section 174 CrPC, conducted the inquest and after the PW-4 and his daughter, PW5, identified the photograph, commenced the investigation. During this time the husband and his brother was searching for the deceased. Regard being had to the totality of the circumstances, the submission that there has been delay in lodging of the FIR and for that reason the entire prosecution story should be thrown overboard does not deserve acceptance.

11. The next ground of assail pertains to material contradictions in the statement recorded under Section 161 of CrPC and the depositions in court and further in the evidence of PW-4 and PW-5. It is urged that the said contradictions destroy the very marrow of the prosecution case. To appreciate the said submission, we have scrutinized the statement recorded under Section 161 CrPC of PW-4 and noticed that he has said everything in detail about whatever he has stated in his deposition in court except that his wife and he had a quarrel on the date of Ramjan festival. We do not really perceive any contradiction which can be called material contradiction. We say so as the omission in the statement of PW-4 recorded under Section 161 CrPC is not a significant omission so that it can be regarded as a contradiction so significant and glaring that the prosecution case should be

disbelieved. As far the contradiction in the evidence of PWs-4 and 5 is concerned, on a studied scrutiny of the same we find that there are minor discrepancies. For the aforesaid purpose, we proceed to analyse the evidence of PWs-4 and 5. The husband of the deceased, PW-4, has deposed that A-1 had wanted to marry his daughter and A-1 had illicit relationship with his wife. He had clearly stated that he had identified the gold and silver ornaments. He had also identified the small cloth purse and the photograph in court. The version of the daughter, PW-5, is that prior to the day of death when her mother left the house there was a quarrel between her parents. She has also identified the ornaments of her mother. Thus, there is no material contradiction which would make their version untrustworthy. True it is, there are certain minor discrepancies regarding the timing, the factum of meeting of A-1 and the deceased in the market by the daughter, the quarrel between the husband and the wife but they are absolutely minor. They even cannot earn the status of minor contradictions.

12. In *Ousu Varghese v. State of Kerala*[1], it has been opined that the minor variations in the accounts of witnesses are often the hallmark of the truth of the testimony. In *State of Rajasthan v. Smt. Kalki and Another*[2], it has been observed that material discrepancies are those which are not normal, and not expected of a normal person.

13. At this juncture, it is also apt to reproduce a passage from *State of U.P. v. M.K. Anthony*[3], wherein it has been laid down as follows:

> "10. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view thedeficiencies, drawbacks and infirmities pointedout in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by thewitness and whether the earlier evaluation of the evidence is shaken as to render it unworthyof belief. Minor discrepancies on trivial matters not touching the core of the case, hyper- technical approach by taking sentences torn outof context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not goingto the root of the matter would not ordinarilypermit rejection of the evidence as a whole."

14. Similar view has been reiterated in *State Rep. by Inspector of Police v. Saravanan & Anr.*[4]

15. In the case at hand neither PW 4 nor PW 5 has made any endeavor to make any attempt to materially improve their earlier statement in their deposition before the court to make their evidence acceptable. It is also not a case where it can be said that they had withheld something material during investigation and embellished certain aspects during their deposition in court. That being the position we are unable to agree with the submission of the learned counsel for appellant that there are such material contradictions which discredit the testimony of said witnesses and accordingly the said submission is rejected.

16. The last limb of submission pertains to the credibility of the testimony of PW-6. The learned counsel has seriously criticized the evidence of the said witness on the ground that he had not told anyone about the incident and only revealed it when the dead body was identified. Criticism is also advanced against the investigating agency that it recorded his statement after ten days. As is manifest from the evidence brought on

1. (1974) 3 SCC 767.
2. (1981) 2 SCC 752.
3. (1985) 1 SCC 505.
4. AIR 2009 SC 152.

record, he had accompanied the accused on the fateful night. He has deposed that A-1 and A2 consumed liquor along with the deceased and after ravishing her hit her with a big stone. The scare compelled him to run away from the scene but he witnessed the occurrence from a distance of approximately 300 yards. The principal attack is that it is quite unnatural that he would not reveal the incident to anyone. It is worth noting that he had accompanied the accused persons and the deceased. The illicit relationship between the deceased and A-1 has been unequivocally stated by PWs-4 and 5. As per the evidence of PW-6, the three consumed liquor and thereafter the whole episode took place. This witness has deposed about the stealing of ornaments from the deceased. There has been recovery of the ornaments from the accused persons and the same have been recovered from their custody in presence of PW-9. The seizure memo, Ext. P-6, has been duly proven and there is nothing on record to disbelieve the testimony of PW-9 or to discard Ext.P-6. Proper procedure has been followed as per the deposition of the Investigating Officer, PW-13. The post mortem report, Ext.P-7, clearly mentions that the deceased died on account of head injury. Thus, the testimony of PW-6 gets corroboration from the medical evidence and also from the factum of recovery. That apart, nothing was suggested to him that he had any animosity with the accused persons. Thus, the cumulative nature and character of the evidence of this witness is difficult to ignore solely on the ground that he did not tell the incident to any one and only revealed after the police examined him. It is common knowledge that people react to situations in different manner. As is evincible, he had accompanied the accused persons along with the deceased. As deposed by the husband and daughter, the deceased had an illicit relationship with A-1. Three of them consumed liquor and she was ravished by the accused persons and, eventually, there was assault. Having accompanied them and witnessing the incident it is natural that a sense of fear would creep in. In such circumstances the delay in recording of his statement by the

Investigating officer would not corrode the version of the prosecution. That apart, nothing has been put to him in the cross-examination that he was not present at the spot or he was involved in the crime along with the accused persons. The roving cross-examination only concentrated on his seeing the occurrence from 300 yards away because of darkness, which we think is absolutely immaterial, for they belonged to the same village, he had accompanied them and there was no one else except the accused persons and the deceased at that distance. That apart he has categorically stated that he was able to see the assault by the accused persons and removing the gold and silver ornaments. Thus, there is no impediment to place reliance on his evidence as it is trustworthy and unimpeachable.

17. It has been held in catena of decisions of this Court that there is no legal hurdle in convicting a person on the sole testimony of a single witness if his version is clear and reliable, for the principle is that the evidence has to be weighed and not counted. In *Vadivelu Thevar v. The State of Madras*[5], it has been held that if the testimony of a singular witness is found by the court to be entirely reliable, there is no legal impediment in recording the conviction of the accused on such proof. In the said pronouncement it has been further ruled that the law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and (iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness.

18. Similar view has been expressed in *Lallu Manjhi and*

5. AIR 1957 SC 614.

Another v. State of Jharkhand[6], *Prithipal Singh and Others v. State of Punjab and Another*[7] and *Jhapsa Kabari and Others v. State of Bihar*[8].

19. On the analysis of evidence of PW-6 we find that his evidence is cogent and trustworthy and further gets corroboration from the medical evidence and also for the factum of recovery of gold and silver ornaments which has been clearly proven by PW-9.

20. In view of the aforesaid analysis, we do not perceive any error in the judgment of conviction and order of sentence passed by the learned trial Judge that has been affirmed by the High Court and, accordingly, the appeal, being devoid of merit, stands dismissed.

R.P. Appeal dismissed.

6. (2003) 2 SCC 401.
7. (2012) 1 SCC 10.
8. (2001) 10 SCC 94.

SUJIT BISWAS
v.
STATE OF ASSAM
(Criminal Appeal No. 1323 of 2011)

MAY 28, 2013

[DR. B.S. CHAUHAN AND DIPAK MISRA. JJ.]

Penal Code, 1860 – s.376(2)(f) and 302 – Rape and murder of minor girl – Circumstantial evidence – Appreciation of – Standard of proof – Mental distance between 'may be' and 'must be' – Held: Suspicion, however grave, cannot take the place of proof –Large difference between something that 'may be' proved, and something that 'will be proved' – Vital distance between mere conjectures and sure conclusions – The court must draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion, that the accused alone is the perpetrator of the crime in question – The instant case is one of circumstantial evidence, and only two circumstances appeared against the accused-appellant, namely, a) that he had been able to point out the place where the deceased girl was lying, after his demand for Rs.20/- had been accepted; and b) that subsequently, he had left the said place and boarded a bus immediately – However, the most material piece of evidence which could have been used against the appellant was that the blood stains found on his underwear matched the blood group of the deceased girl – However, the said circumstance was not put to the appellant while he was being examined u/s.313 CrPC by the trial court, and in view thereof, the same cannot be taken into consideration – Hence, even by a stretch of the imagination, it cannot be held that the circumstances clearly point towards the guilt of the

appellant – Burden lies not only on the accused to prove his innocence, but also upon the prosecution, to prove its case beyond all reasonable doubt – In a case of circumstantial evidence, the burden of proof on the prosecution is much greater – Conviction of appellant (as recorded by courts below) set aside – Evidence.

Code of Criminal Procedure, 1973 – s.313 – Examination of accused person u/s.313 CrPC – Purpose – Held: Is to meet the requirement of the principles of natural justice, i.e. audi alteram partem – No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him – Circumstances not put to the accused in his examination u/s.313 CrPC, cannot be used against him and must be excluded from consideration.

Evidence – Conduct of the accused – Act of absconding – Effect – Held: Mere abscondance of an accused does not lead to a firm conclusion of his guilty mind – An innocent man may also abscond in order to evade arrest –In a given situation, such an action may be part of the natural conduct of the accused – Abscondance is in fact relevant evidence, but its evidentiary value depends upon the surrounding circumstances, and hence, the same must only be taken as a minor item in evidence for sustaining conviction.

Evidence Act, 1872 – s.11 – Omission of important facts affecting the probability of the case – Held: Is a relevant factor u/s.11 to judge the veracity of the case of the prosecution.

Criminal Trial – Adverse inference against the accused – When drawn – Held: Adverse inference can be drawn against the accused only and only if the incriminating material stands fully established, and the accused is not able to furnish

any explanation for the same – However, the accused has the right to remain silent, as he cannot be forced to become a witness against himself.

A three year old minor girl went missing and was later found gasping, wrapped in a jute-sack (gunny bag), the mouth of which was closed. The girl was taken to a nursing home and then to a medical college where she subsequently died. On post-mortem examination, various injuries were found on her body, including an injury to her vagina.

The prosecution alleged that the appellant had raped and caused the death of the girl. The trial court convicted the appellant under Sections 376(2)(f) and 302 IPC sentencing him to death. The High Court commuted the death sentence of the appellant to life imprisonment, with a direction that the appellant would breathe his last in jail, and that he would not be given the benefit of remissions etc. under Sections 432 and 433-A of CrPC. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. Suspicion cannot take the place of proof, and there is a large difference between something that 'may be' proved, and something that 'will be proved'. The mental distance between 'may be' and 'must be' is quite large, and divides vague conjectures from sure conclusions which must be through cogent reasoning. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. [Para 6] [841-D-E, G-H, 842-A]

1.2. In a case of circumstantial evidence, the judgment remains essentially inferential. Inferences must be drawn from established facts, as the circumstances lead to particular inferences. The Court must draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion, that the accused alone is the perpetrator of the crime in question. [Para 10] [833-B-C]

Hanumant Govind Nargundkar & Anr. v. State of M.P. **AIR 1952 SC 343: 1952 SCR 1091;** *State through CBI v. Mahender Singh Dahiya* **AIR 2011 SC 1017: 2011 (1) SCR 1104;** *Ramesh Harijan v. State of U.P.* **AIR 2012 SC 1979: 2012 (6) SCR 688;** *Kali Ram v. State of Himachal Pradesh* **AIR 1973 SC 2773: 1973 (3) SCR 424;** *Sharad Birdhichand Sarda v. State of Maharashtra* **AIR 1984 SC 1622: 1985 (1) SCR 88;** *M.G. Agarwal v. State of Maharashtra* **AIR 1963 SC 200: 1963 SCR 405 and** *Babu v. State of Kerala,* **(2010) 9 SCC 189: 2010 (9) SCR 1039 – relied on.**

2. It is a settled legal proposition that in a criminal trial, the examination of the accused person under Section 313 Cr.P.C., must adhere to the principles of natural justice, i.e. audi alteram partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his

examination under Section 313 Cr.P.C., cannot be used against him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement. [Para 12] [844-G-H; 845-A-D]

Hate Singh Bhagat Singh v. State of Madhya Pradesh **AIR 1953 SC 468;** *Shamu Balu Chaugule v. State of Maharashtra* **AIR 1976 SC 557;** *Harijan Megha Jesha v. State of Gujarat* **AIR 1979 SC 1566; and** *Sharad Birdhichand Sarda v. State of Maharashtra* **AIR 1984 SC 1622: 1985 (1) SCR 88 – relied on.**

3. The mere abscondance of an accused does not lead to a firm conclusion of his guilty mind. An innocent man may also abscond in order to evade arrest. Abscondance is in fact relevant evidence, but its evidentiary value depends upon the surrounding circumstances. [Para 15] [847-C-D]

Bipin Kumar Mondal v. State of West Bengal **AIR 2010 SC 3638: 2010 (8) SCR 1036;** *Paramjeet Singh @ Pamma v. State of Uttarakhand* **AIR 2011 SC 200: 2010 (11) SCR 1064 and** *Sk. Yusuf v. State of West Bengal* **AIR 2011 SC 2283 : 2011 (8) SCR 83 – relied on.**

Matru alias Girish Chandra v. State of U.P. **AIR 1971 SC 1050 and** *State of M.P. thr. CBI & Ors. v. Paltan Mallah & Ors.* **AIR 2005 SC 733: 2005 (1) SCR 710 – referred to.**

4. The FIR lodged has disclosed the previous statement of the informant, which can only be used to corroborate or contradict the maker of such statement. The omission of important facts affecting the probability of the case, is a relevant factor under Section 11 of the

Evidence Act to judge the veracity of the case of the prosecution. [Para 16] [847-F-G]

Ram Kumar Pandey v. The State of Madhya Pradesh **AIR 1975 SC 1026: 1975 (3) SCR 519 – relied on.**

5. An adverse inference can be drawn against the accused only and only if the incriminating material stands fully established, and the accused is not able to furnish any explanation for the same. However, the accused has the right to remain silent, as he cannot be forced to become a witness against himself. [Para 17] [847-H; 848-A-B]

6. The instant case is one of circumstantial evidence, and only two circumstances have appeared against the appellant. However, the most material piece of evidence, which could have been used against the appellant was not put to the appellant while he was being examined under Section 313 Cr.P.C. by the trial court, and in view thereof, the same cannot be taken into consideration. Hence, it cannot be held that the aforementioned circumstances clearly point towards the guilt of the appellant, and in light of such a fact situation, the burden lies not only on the accused to prove his innocence, but also upon the prosecution, to prove its case beyond all reasonable doubt. In a case of circumstantial evidence, the aforementioned burden of proof on the prosecution is much greater. The appellant has been in jail for the last six years, he must be released forthwith, unless wanted in some other case. [Para 18] [848-C, E-G; 849-A]

Case Law Reference:

1952 SCR 1091	**relied on**	**Para 6**
2011 (1) SCR 1104	**relied on**	**Para 6**

2012 (6) SCR 688	**relied on**	**Para 6**
1973 (3) SCR 424	**relied on**	**Para 7**
1985 (1) SCR 88	**relied on**	**Para 8, 9, 13**
1963 SCR 405	**relied on**	**Para 9**
2010 (9) SCR 1039	**relied on**	**Para 11**
AIR 1953 SC 468	**relied on**	**Para 13**
AIR 1976 SC 557	**relied on**	**Para 13**
AIR 1979 SC 1566	**relied on**	**Para 13**
2010 (8) SCR 1036	**relied on**	**Para 14**
AIR 1971 SC 1050	**referred to**	**Para 14**
2005 (1) SCR 710	**referred to**	**Para 14**
2010 (11) SCR 1064	**relied on**	**Para 15**
2011 (8) SCR 83	**relied on**	**Para 15**
1975 (3) SCR 519	**relied on**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1323 of 2011.

From the Judgment & Order dated 23.04.2010 of the High Court at Gauhati in Crl. Appeal No. 13 (J) of 2010.

Ratnakar Dash, B.D. Sharma (A.C.) for the Appellant.

Vartika S. Waila (for Corporate Law Group) for the Respondent.

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 23.4.2010, passed by the High Court of Guwahati in Criminal Appeal No. 13(J) of 2010 rejecting Death Reference No. 1 of 2010 made by the Additional Sessions Judge (FTC), No. 3, Kamrup, Guwahati on 21.12.2009 in Sessions Case No. 309(K) of 2009, convicting the appellant under Sections 376(2)(f) and 302 of the Indian Penal Code, 1860 (hereinafter referred to as 'the IPC'), sentencing him to death. The High Court commuted the death sentence of the appellant to life imprisonment, with a direction that the appellant would breathe his last in jail, and that he would not be given the benefit of remissions etc. under Sections 432 and 433-A of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.').

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

A. On 17.10.2007 at about 7.00 P.M., Sultana Begum Khatoon (PW.8), aged 12 years, was enjoying the celebrations of the festival of Durga Pooja alongwith her sister Sima Khatoon, aged 3 years, at the Nepali Mandir, Guwahati. The appellant was alleged to have been standing behind them at such time. After a shortwhile, Sultana Begum Khatoon (PW.8) noticed that her sister Sima Khatoon was missing, and she also happened to notice that the appellant had disappeared as well. Sultana Begum Khatoon (PW.8) thus began to look for her sister, and when she could not find her in the nearby areas, she went back to her house and informed her brother Gulzar Ali (PW.3) and her parents etc. of the said incident.

B. Apin Dulal (PW.1) and Gulzar Ali (PW.3) therefore began to search for Sima Khatoon, and while doing so, they came across the appellant and asked him whether he had seen Sima Khatoon. The appellant allegedly demanded a sum of Rs.20/- to pay for his evening food, in lieu of showing them the place where Sima Khatoon could be found. Apin Dulal (PW.1)

agreed to pay him the said amount and thus, the appellant pointed to a place by the side of a municipal canal. Apin Dulal (PW.1) and Gulzar Ali (PW.3) thus began to approach the said place, and at such time, the appellant ran away and boarded a bus. Apin Dulal (PW.1) chased him and managed to catch hold of him, forcing him to get off the bus. Apin Dulal (PW.1) and Gulzar Ali (PW.3) thereafter succeeded in locating the girl, who they found gasping, wrapped in a jute-sack (gunny bag). The mouth of the bag had been closed. Sima Khatoon was alive, but in a critical condition. She was then taken by her brother Gulzar Ali (PW.3) to the house. The appellant was also taken there. Sima Khatoon was taken to a Nursing Home, and then to the Guwahati Medical College where she breathed her last at about 1.30 A.M. i.e., in the intervening night of 17/18.10.2007.

C. Father of the deceased Sima Khatoon approached the Paltan Bazar police station, where a report was endorsed only in the General Diary. After the death of Sima Khatoon, her father also lodged an FIR at the said police station on 18.10.2007. The appellant was taken to the police station by the relatives of Sima Khatoon, and he had thus been arrested on 17.10.2007 itself.

D. The post-mortem examination of the dead body of Sima Khatoon was conducted by Dr. Pradeep Thakuria, who found various injuries on her body, including an injury to her vagina. However, the doctor has stated that the vaginal smears taken had tested negative for spermatozoa.

E. The blood stained jute-sack in which the Sima Khatoon had been found, the blood stained underwear of the appellant, as well as the apparel i.e., frock of Sima Khatoon were taken into custody. It was noted that she was not wearing any undergarment at the said time. All the seized material objects were sent to the Forensic Science Laboratory, and the report

received thereafter, revealed that the blood group of the blood found on the underwear of the appellant, was the same as the blood group of the victim, Sima Khatoon.

F. After the conclusion of the investigation, a chargesheet was filed against the appellant under Sections 376(2)(f) and 302 IPC. As the appellant denied all charges, criminal trial commenced.

G. In the course of the trial, the prosecution examined 10 witnesses in support of its case, and a large number of material objects were also exhibited. The appellant in his defence, denied his involvement in entirety. In his statement under Section 313 Cr.P.C., the appellant has stated that he was a resident of Kuch-Bihar (West Bengal), and that he had come to Guwahati three years prior to the incident, to earn his livelihood as a rickshaw puller. On the date of the said incident, when he had gone to the place of occurrence to answer the call of nature, he had found Sima Khatoon lying on the ground. When he returned from the said place, and while he had been waiting near the Nepali Mandir, Apin Dulal (PW.1) and Gulzar Ali (PW.3) had asked him whether he had seen one Sima Khatoon, and thus, he had taken them to the place where Sima Khatoon had been lying. He had then boarded a bus, but had been asked by Apin Dulal (PW.1) to get off the same, and many people had gathered there. They had beaten him severely, and had handed him over to the police, though he was completely innocent.

H. After the conclusion of the trial, the learned Sessions Judge vide judgment and order dated 21.12.2009, found the appellant guilty for the offences punishable under Sections 376 (2)(f) and 302 IPC, and awarded him the sentence of death as has been referred to hereinabove.

I. The appellant preferred Criminal Appeal No. 13(J) of 2010, which was heard alongwith Death Reference No. 1 of

2010. The High Court disposed of the said appeal vide its judgment and order dated 23.4.2010, and commuted the death sentence to life imprisonment, with directions as have been referred to hereinabove.

Hence, this appeal.

3. Shri Ratnakar Dash, learned senior counsel, Amicus Curiae, has submitted that the same is a case of circumstantial evidence. The courts below, while convicting the appellant for the offences punishable under Sections 376(2)(f) and 302 IPC, have not followed the parameters laid down by this court that are to be followed for conviction in a case of circumstantial evidence. There are material discrepancies which go to the root of the case, and the courts below have simply brushed them aside, without giving any satisfactory explanation for not considering the same in correct perspective. The circumstances against the appellant, as per the case of the prosecution are, that he had demanded Rs.20/- to point out the place where Sima Khatoon had been found and immediately thereafter, he had run away from the said place and had boarded a bus. No other evidence exists to connect the appellant to the said crime. Furthermore, the trial court has put a large number of irrelevant and unconnected questions to the appellant under Section 313 Cr.P.C., while failing to put the most incriminating circumstance to the appellant, i.e. questions regarding the fact that the underwear of the appellant bore upon it, blood stains of the same blood group as that of the victim. Thus, the appellant had no opportunity to provide any explanation with respect to the same. It was not permissible for the courts below to rely entirely on such a circumstance, without verification of the same. The High Court was also not competent to issue a direction to the effect that the appellant should not be given the benefits available under Sections 432 and 433-A Cr.P.C. Therefore, the appeal deserves to be allowed.

4. On the contrary, Ms. Vartika Sahay Walia, learned counsel appearing on behalf of the State has opposed the appeal, contending that the prosecution had fully met the standard of proof required to convict a person in a case of circumstantial evidence. The circumstances relied upon by the courts below have fully established the involvement of the appellant, and the chain of evidence furnished by the circumstances is also complete. The appeal thus lacks merit, and is liable to be rejected.

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

6. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that 'may be' proved, and something that 'will be proved'. In a criminal trial, suspicion no matter how strong, cannot and must not be permitted to take place of proof. This is for the reason that the mental distance between 'may be' and 'must be' is quite large, and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between 'may be' true and 'must be' true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between 'may be' true and 'must be' true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the

accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. (Vide: *Hanumant Govind Nargundkar & Anr. v. State of M.P.,* AIR 1952 SC 343; *State through CBI v. Mahender Singh Dahiya,* AIR 2011 SC 1017; and *Ramesh Harijan v. State of U.P.,* AIR 2012 SC 1979).

7. In *Kali Ram v. State of Himachal Pradesh,* AIR 1973 SC 2773, this Court observed as under:

> "Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence."

8. In *Sharad Birdhichand Sarda v. State of Maharashtra,* AIR 1984 SC 1622, this Court held as under:

> *"The facts so established should be consistent only with the hypothesis of the ?guilt of the accused. There should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

9. In *M.G. Agarwal v. State of Maharashtra,* AIR 1963 SC 200, this Court held, that if the circumstances proved in a case are consistent either with the innocence of the accused, or with his guilt, then the accused is entitled to the benefit of doubt.

When it is held that a certain fact has been proved, then the question that arises is whether such a fact leads to the inference of guilt on the part of the accused person or not, and in dealing with this aspect of the problem, benefit of doubt must be given to the accused, and a final inference of guilt against him must be drawn only if the proved fact is wholly inconsistent with the innocence of the accused, and is entirely consistent with his guilt.

Similarly, in *Sharad Birdhichand Sarda* (Supra), this Court held as under:

> *"Graver the crime, greater should be the standard of proof. An accused may appear to be guilty on the basis of suspicion but that cannot amount to legal proof. When on the evidence two possibilities are available or open, one which goes in the favour of the prosecution and the other benefits an accused, the accused is undoubtedly entitled to the benefit of doubt. The principle has special relevance where the guilt or the accused is sought to be established by circumstantial evidence."*

10. Thus, in view of the above, the Court must consider a case of circumstantial evidence in light of the aforesaid settled legal propositions. In a case of circumstantial evidence, the judgment remains essentially inferential. Inferences are drawn from established facts, as the circumstances lead to particular inferences. The Court must draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion, that the accused alone is the perpetrator of the crime in question. All the circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused.

11. This Court in *Babu v. State of Kerala,* (2010) 9 SCC

189 has dealt with the doctrine of innocence elaborately, and held as under:

> *"27. Every accused is presumed to be innocent unless the guilt is proved. The presumption of innocence is a human right. However, subject to the statutory exceptions, the said principle forms the basis of criminal jurisprudence. For this purpose, the nature of the offence, its seriousness and gravity thereof has to be taken into consideration. The courts must be on guard to see that merely on the application of the presumption, the same may not lead to any injustice or mistaken conviction. Statutes like the Negotiable Instruments Act, 1881; the Prevention of Corruption Act, 1988; and the Terrorist and Disruptive Activities (Prevention) Act, 1987, provide for presumption of guilt if the circumstances provided in those statutes are found to be fulfilled and shift the burden of proof of innocence on the accused. However, such a presumption can also be raised only when certain foundational facts are established by the prosecution. There may be difficulty in proving a negative fact.*
>
> *28. However, in cases where the statute does not provide for the burden of proof on the accused, it always lies on the prosecution. It is only in exceptional circumstances, such as those of statutes as referred to hereinabove, that the burden of proof is on the accused. The statutory provision even for a presumption of guilt of the accused under a particular statute must meet the tests of reasonableness and liberty enshrined in Articles 14 and 21 of the Constitution."*

12. It is a settled legal proposition that in a criminal trial, the purpose of examining the accused person under Section 313 Cr.P.C., is to meet the requirement of the principles of natural justice, i.e. *audi alterum partem.* This means that the

accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. **The circumstances which are not put to the accused in his examination under Section 313 Cr.P.C., cannot be used against him** and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement.

13. In *Hate Singh Bhagat Singh v. State of Madhya Pradesh,* AIR 1953 SC 468, this Court held, that any circumstance in respect of which an accused has not been examined under Section 342 of the Code of Criminal Procedure, 1898 (corresponding to Section 313 Cr.P.C.), cannot be used against him. The said judgment has subsequently been followed in catena of judgments of this court uniformly, taking the view that unless a circumstance against an accused is put to him in his examination, the same cannot be used against him. (See also: *Shamu Balu Chaugule v. State of Maharashtra,* AIR 1976 SC 557; *Harijan Megha Jesha v. State of Gujarat,* AIR 1979 SC 1566; and *Sharad Birdhichand Sarda* (Supra).

14. Whether the abscondance of an accused can be taken as a circumstance against him has been considered by this Court in *Bipin Kumar Mondal v. State of West Bengal,* AIR 2010 SC 3638, wherein the Court observed:

"27. In Matru alias Girish Chandra v. State of U.P., AIR

1971 SC 1050, this Court repelled the submissions made by the State that as after commission of the offence the accused had been absconding, therefore, the inference can be drawn that he was a guilty person observing as under:

> *'19. The appellant's conduct in absconding was also relied upon. Now, mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused. In the present case the appellant was with Ram Chandra till the FIR was lodged. If thereafter he felt that he was being wrongly suspected and he tried to keep out of the way we do not think this circumstance can be considered to be necessarily evidence of a guilty mind attempting to evade justice. It is not inconsistent with his innocence.'*

28. Abscondence by a person against whom FIR has been lodged, having an apprehension of being apprehended by the police, cannot be said to be unnatural. Thus, in view of the above, we do not find any

force in the submission made by Shri Bhattacharjee that mere absconding by the appellant after commission of the crime and remaining untraceable for such a long time itself can establish his guilt. Absconding by itself is not conclusive either of guilt or of guilty conscience."

While deciding the said case, a large number of earlier judgments were also taken into consideration by the Court, including *Matru* (supra); and *State of M.P. thr. CBI & Ors. v. Paltan Mallah & Ors.,* AIR 2005 SC 733.

15. Thus, in a case of this nature, the mere abscondance of an accused does not lead to a firm conclusion of his guilty mind. An innocent man may also abscond in order to evade arrest, as in light of such a situation, such an action may be part of the natural conduct of the accused. Abscondance is in fact relevant evidence, but its evidentiary value depends upon the surrounding circumstances, and hence, the same must only be taken as a minor item in evidence for sustaining conviction. (See: *Paramjeet Singh @ Pamma v. State of Uttarakhand,* AIR 2011 SC 200; and *Sk. Yusuf v. State of West Bengal,* AIR 2011 SC 2283).

16. Undoubtedly, the FIR lodged has disclosed the previous statement of the informant which can only be used to other corroborate or contradict the maker of such statement. However, in the event that the informant is a person who claims to know the facts, and is also closely related to the victim, it is expected that he would have certainly mentioned in the FIR, all such relevant facts. The omission of important facts affecting the probability of the case, is a relevant factor under Section 11 of the Evidence Act to judge the veracity of the case of the prosecution. (Vide: *Ram Kumar Pandey v. The State of Madhya Pradesh,* AIR 1975 SC 1026).

17. An adverse inference can be drawn against the

accused only and only if the incriminating material stands fully established, and the accused is not able to furnish any explanation for the same. However, the accused has the right to remain silent, as he cannot be forced to become a witness against himself.

18. The present case is required to be examined in light of the aforesaid settled legal propositions. The instant is one of circumstantial evidence, and only two circumstances have appeared against the appellant, namely,

I. That he had been able to point out the place where Sima Khatoon was lying, after his demand for Rs.20/- had been accepted; and

II. That subsequently, he had left the said place and boarded a bus immediately.

The aforesaid circumstances in isolation, point out conclusively, that the appellant has in fact committed the said offence. Furthermore, the most material piece of evidence which could have been used against the appellant was that the blood stains found on his underwear matched the blood group of Sima Khatoon. However, the said circumstance was not put to the appellant while he was being examined under Section 313 Cr.P.C. by the trial court, and in view thereof, the same cannot be taken into consideration. Hence, even by a stretch of the imagination, it cannot be held that the aforementioned circumstances clearly point towards the guilt of the appellant, and in light of such a fact situation, the burden lies not only on the accused to prove his innocence, but also upon the prosecution, to prove its case beyond all reasonable doubt. In a case of circumstantial evidence, the aforementioned burden of proof on the prosecution is much greater.

In view of the above, the appeal succeeds and is allowed. The judgments and orders passed by the courts below

impugned before us, are set aside. The appellant has been in jail for the last six years, he must be released forthwith, unless wanted in some other case.

Before parting with the case, we feel that it is our duty to appreciate the services rendered by Shri Ratnakar Dash, learned senior counsel, who acted as amicus curiae.

B.B.B. Appeal allowed.

STATE OF MAHARASHTRA THROUGH C.B.I.
v.
MAHESH G. JAIN
(Criminal Appeal No. 2345 of 2009)

MAY 28, 2013.

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Prevention of Corruption Act, 1988:

s.19(1) read with ss. 7, 13(1)(d) and 2 – Public servant – Sanction for prosecution – Demand and acceptance of illegal gratification – Trial court on merits holding against accused, but acquitting him solely on the ground that sanction order was defective – Hih Court declining leave to appeal prayed by prosecution – Held: When there is an order of sanction by competent authority indicating application of mind, the same should not be lightly dealt with — Minor irregularities and flimsy technicalities are to be ignored and cannot be allowed to become tools in the hands of accused — While sanctity attached to an order of sanction should never be forgotten, but simultaneously rampant corruption in society has to be kept in view — In the obtaining factual matrix, in the instant case the approach of trial Judge as well as that of single Judge of High Court is wholly incorrect and does not deserve acceptance – Since trial court has also recorded its conclusions on merits dealing with every aspect and there has been no deliberation on merits by High Court, matte remanded to High Court.

s.19(1) – Public servant – Sanction for prosecution – Principles culled out.

Appeal – Power of appellate court – Explained.

On a complaint of a transporter, who had given his

vehicles to State Bank of India on contract basis and was asked by the accused-respondent to pay illegal gratification for getting his cheques and Tax Deducted at Source certificates, the CBI took up the investigation and after successful trap operation, obtained the sanction order and filed the charge-sheet before the Special Judge for commission of offences u/ss 7 and 13 (1) (d) read with s. 2 of the Prevention of Corruption Act, 1988. The Special Judge found the case proved against the accused, but acquitted him solely on the ground that the sanction order was defective and illegal. The CBI filed an application for grant of leave, which was declined by the single Judge of the High Court.

In the instant appeal filed by the CBI, the question for consideration before the Court was: "whether the High Court was justified in refusing to grant leave to file an appeal by the Central Bureau of Investigation, to assail the judgment and order of acquittal passed by the Court of Special Judge?"

Allowing the appeal, the Court

HELD: 1.1. Section 19(1) of the Prevention of Corruption Act, 1988 postulates that no court shall take cognizance of an offence punishable u/ss 7, 10, 11, 13 and 15 alleged to have been committed by a public servant except with the previous sanction. The said provision enumerates about the competent authorities. In the case at hand, the competence of the authority who has granted sanction is not in question. [para 5] [857-C]

Jaswant Singh v. State of Punjab **1958 SCR 762 = 1958 AIR 124; and** *Basdeo Agarwala v. Emperor* **AIR 1945 FC 18 - referred to**

Gokulchand Dwarkadas Morarka v. The King **AIR 1948 PC 84 - referred to**

1.2. From the decision of this Court, the following principles can be culled out:

(a) It is incumbent on the prosecution to prove that the valid sanction has been granted by the sanctioning authority after being satisfied that a case for sanction has been made out.

(b) The sanction order may expressly show that the sanctioning authority has perused the material placed before him and, after consideration of the circumstances, has granted sanction for prosecution.

(c) The prosecution may prove by adducing the evidence that the material was placed before the sanctioning authority and his satisfaction was arrived at upon perusal of the material placed before him.

(d) Grant of sanction is only an administrative function and the sanctioning authority is required to prima facie reach the satisfaction that relevant facts would constitute the offence.

(e) The adequacy of material placed before the sanctioning authority cannot be gone into by the court as it does not sit in appeal over the sanction order.

(f) If the sanctioning authority has perused all the materials placed before him and some of them have not been proved, that would not vitiate the order of sanction.

(g) The order of sanction is a pre-requisite as it is intended to provide a safeguard to public servant against frivolous and vexatious litigants, but

simultaneously an order of sanction should not be construed in a pedantic manner and there should not be a hyper-technical approach to test its validity. [para 13] [860-G; 861-A-G]

Mohd. Iqbal Ahmed v. State of Andhra Pradesh **1979 (2) SCR 1007 = 1979 AIR 677 - relied on.**

Superintendent of Police (C.B.I.) v. Deepak Chowdhary and others **1995 (2) Suppl. SCR 818 = 1995 (6) SCC 225;** *C.S. Krishnamurthy v. State of Karnataka* **2005 (2) SCR 1163 = 2005 (4) SCC 81;** *R. Sundararajan v. State by DSP, SPE, CBI, Chennai* **2006 (7) Suppl. SCR 499 = 2006 (12) SCC 749;** *State of Karnata v. Ameerjan* **2007 (9) SCR 1105 = 2007 (11) SCC 273; and** *Kootha Perumal v. State through Inspector of Police, Vigilance and Anti-Corruption* **2010 (14) SCR 864 = 2011 (1) SCC 491- referred to.**

1.3. In the instant case, the sanctioning authority has referred to the demand and the acceptance of illegal gratification by the accused before the panch witnesses and his being caught red handed, and has fully examined the material documents, namely, the FIR, CFSL report, other relevant documents placed in regard to the allegations and the statements of witnesses recorded u/s 161 CrPC and thereafter being satisfied, has passed the order of sanction. The trial Judge has held that the sanctioning authority has not referred to the elementary facts and there is no objective material to justify a subjective satisfaction. The reasonings in the considered opinion of this Court, are absolutely hyper-technical and indicate as if the trial court is sitting in appeal over the order of sanction. When there is an order of sanction by the competent authority indicating application of mind, the same should not be lightly dealt with. Minor irregularities and flimsy technicalities are to be ignored and cannot be

allowed to become tools in the hands of an accused. While sanctity attached to an order of sanction should never be forgotten, but simultaneously the rampant corruption in society has to be kept in view. In the obtaining factual matrix, in the instant case, the approach of the trial Judge as well as that of the single Judge of the High Court is wholly incorrect and does not deserve acceptance. [para 16-17] [864-D-H; 865-A-C]

1.4. The trial Judge had recorded his conclusions on every aspect. He has not rested his conclusion exclusively on sanction. True it is, he has acquitted the accused on the ground that the order of sanction is invalid in law but simultaneously he has dealt with other facets. Thus, remitting the matter to the trial court is not warranted. The High Court has declined to grant leave solely on the ground that the conclusion reached by the trial Judge pertaining to validity of sanction is justified. There has been no deliberation on the merits of the case. If the High Court thinks it apt to grant leave, it has ample power to deal with the appeal from all the spectrums. It is well settled in law that it is obligatory on the part of the appellate court to scrutinize the evidence and further its power is coextensive with the trial court. Therefore, the judgment of the High Court and the conclusion of the trial Judge pertaining to the validity of sanction are set aside and the matter is remitted to the High Court. [para 18-20] [865-G; 866-B-D; 867-A-B]

Laxman Kalu v. State of Maharashtra **1968 SCR 685 = 1968 AIR 1390;** *Keshav Ganga Ram Navge v. The State of Maharashtra* **1971 AIR 953 – relied on.**

Case Law Reference:

1958 SCR 762	**referred to**	**para 6**
AIR 1945 FC 18	**referred to**	**para 6**

AIR 1948 PC 84	**referred to**	**para 6**
1979 (2) SCR 1007	**relied on**	**para 7**
1995 (2) Suppl. SCR 818	**referred to**	**para 8**
2005 (2) SCR 1163	**referred to**	**para 9**
2006 (7) Suppl. SCR 499	**referred to**	**para 10**
2007 (9) SCR 1105	**referred to**	**para 11**
2010 (14) SCR 864	**referred to**	**para 12**
1968 SCR 685	**relied on**	**para 19**
1971 AIR 953	**relied on**	**para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2345 of 2009.

From the Judgment & Order dated 29.04.2008 of the High Court of Judicature at Bombay in Criminal Application No. 2648 of 2007.

Sidharth Luthra, ASG, R. Nedumaran, Devina S., B.V.B. Das, B. Krishna Prasad for the Appellant.

V.N. Bachawat, Syed Hasan, K.V. Bharathi Upadhyaya for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The singular question that emanates for consideration in this appeal is whether the High Court of Judicature at Bombay in Criminal Application No. 2648 of 2007 is justified in refusing to grant leave to file an appeal by the Central Bureau of Investigation, Anti Corruption Branch, Mumbai (for short "the CBI") to assail the judgment and order dated 8th September, 2006 in Special Case No. 62 of 2000 by the Court of Special Judge for Greater Bombay whereby the learned Special Judge had acquitted the respondent No. 1 under Sections 7, 13 (1) (d) read with 2 of the Prevention of Corruption Act, 1988 (For brevity "the Act") principally on the foundation that the sanction granted by the competent authority was defective and illegal as there was non-application of mind which would show lack of satisfaction.

2. At the very outset, it is condign to state that as we are only dealing with a singular issue it is not necessary to state the facts in detail. Suffice it to state one Satish P. Doshi, proprietor of Shree Travels, the complainant, had given his vehicles to State Bank of India on contract basis and was entitled to receive hire charges for his vehicles periodically. The complainant experienced certain difficulties in getting his cheques and Tax Deducted at Source certificates. When he approached the accused- respondent, he demanded illegal gratification which was not acceded to by the complainant. Despite consistent refusal by the complainant, the demand of the accused was persistent which constrained the complainant to approach the CBI with a written complaint. The CBI took up the investigation and the raiding party carried out a trap operation, seized the bribe amount of Rs.1000/-, sent the seized article to the CFSL, obtained the sanction order and ultimately on 5.10.2000 filed the charge-sheet before the learned Special Judge. After the trial was over the learned Special Judge adverted to all the issues and answered all of them in the affirmative against the accused but acquitted him solely on the base that the sanction order was defective and illegal and that went to the very root of jurisdiction of the court.

3. Grieved by the aforesaid judgment of acquittal, the CBI filed an application for grant of leave and the learned single Judge of the High Court of Bombay declined to grant leave on the ground that it was doubtful whether the sanctioning authority had, in fact, actually applied its mind while granting sanction. The High Court further opined that the view taken by the learned Special Judge in that regard was a plausible one being not

contrary to material on record and hence, it did not require any interference.

4. We have heard Mr. Sidharth Luthra, learned Additional Solicitor General appearing for the appellant, and Mr. V.N. Bachawat, learned senior counsel appearing for the respondent.

5. Section 19(1) of the Act postulates that no court shall take cognizance of an offence punishable under Sections 7, 10, 11, 13 and 15 alleged to have been committed by a public servant except with the previous sanction. The said provision enumerates about the competent authorities. In the case at hand, the competence of the authority who has granted sanction is not in question. The only aspect that is required to be scrutinized whether the order granting sanction is valid in law.

6. Grant of sanction is irrefragably a sacrosanct act and is intended to provide safeguard to public servant against frivolous and vexatious litigations. Satisfaction of the sanctioning authority is essential to validate an order granting sanction. This Court in *Jaswant Singh v. State of Punjab*[1] was considering the validity and effect of the sanction given under Section 6(1) of the Prevention of Corruption Act, 1947. After referring to the decisions in *Basdeo Agarwala v. Emperor*[2] and *Gokulchand Dwarkadas Morarka v. The King*[3], the Court opined as follows:

> "It should be clear from the form of the sanction that the sanctioning authority considered the evidence before it and after a consideration of all the circumstances of the case sanctioned the prosecution, and therefore unless the matter can be proved by other evidence, in the sanction itself the facts should be referred to indicate that the

1. AIR 1958 SC 124.
2. AIR 1945 FC 18.
3. AIR 1948 PC 84.

> sanctioning authority had applied its mind to the facts and circumstancesof the case."

In the said case, the two-Judge Bench had reproduced the order of sanction and opined that if the same, strictly construed, indicated the consideration by the sanctioning authority of the facts relating to the receiving of the illegal gratification by the accused. We think it apt to reproduce the order of sanction in that case: -

> "Whereas I am satisfied that Jaswant SinghPatwari son of Gurdial Singh Kamboh of villageAjaibwali had accepted an illegal gratification of Rs.50 in 5 currency notes of Rs.10 denomination each from one Pal Singh son of S. Santa Singh of village Fatehpur Rajputan, TehsilAmritsar for making a favourable report on anapplication for allotment of an ahata to S. SantaSingh father of the said S. Pal Singh.
>
> And whereas the evidence available in this case clearly discloses that the said S. JaswantSingh Patwari had committed an offence under S. 5 of the Prevention of Corruption Act.
>
> Now therefore, I, N.N. Kashyap, Esquire I.C.S. Deputy Commissioner, Asr, as required by S. 6 of the Prevention of Corruption Act of 1947, hereby sanction the prosecution of the said S. Jaswant Singh Patwari under S. 5 of the said Act."

We have quoted the aforesaid order only to highlight the approach of this Court pertaining to application of mind that is reflected in the order.

7. In *Mohd. Iqbal Ahmed v. State of Andhra Pradesh*[4] this Court lucidly registered the view that it is incumbent on the prosecution to prove that a valid sanction has been granted by

4. AIR 1979 SC 677.

the sanctioning authority after being satisfied that a case for sanction has been made out constituting an offence and the same should be done in two ways; either (i) by producing the original sanction which itself contains the facts constituting the offence and the grounds of satisfaction and (ii) by adducing evidence aliunde to show the facts placed before the Sanctioning Authority and the satisfaction arrived at by it. It is well settled that any case instituted without a proper sanction must fail because this being a manifest defect in the prosecution, the entire proceedings are rendered void ab initio.

8. In *Superintendent of Police (C.B.I.) v. Deepak Chowdhary and Others*[5] it has been ruled that the grant of sanction is only an administrative function, though it is true that the accused may be saddled with the liability to be prosecuted in a court of law. What is material at that time is that the necessary facts collected during investigation constituting the offence have to be placed before the sanctioning authority and it has to consider the material. Prima facie, the authority is required to reach the satisfaction that the relevant facts would constitute the offence and then either grant or refuse to grant sanction.

9. In *C.S. Krishnamurthy v. State of Karnataka*[6] it has been held as follows:

> "...sanction order should speak for itself and incase the facts do not so appear, it should beproved by leading evidence that all the particulars were placed before the sanctioningauthority for due application of mind. In case the sanction speaks for itself then the satisfaction of the sanctioning authority is apparent by reading the order."

10. In *R. Sundararajan v. State by DSP, SPE, CBI, Chennai*[7], while dealing with the validity of the order of sanction,

5. (1995) 6 SCC 225.
6. (2005) 4 SCC 81.
7. (2006) 12 SCC 749.

the two learned Judges have expressed thus:

> "it may be mentioned that we cannot look intothe adequacy or inadequacy of the material before the sanctioning authority and we cannotsit as a court of appeal over the sanction order. The order granting sanction shows that all theavailable materials were placed before the sanctioning authority who considered the samein great detail. Only because some of the saidmaterials could not be proved, the same byitself, in our opinion, would not vitiate the order of sanction. In fact in this case there was abundant material before the sanctioningauthority, and hence we do not agree that thesanction order was in any way vitiated."

11. In *State of Karnata v. Ameerjan*[8] it has been opined that an order of sanction should not be construed in a pedantic manner. But, it is also well settled that the purpose for which an order of sanction is required to be passed should always be borne in mind. Ordinarily, the sanctioning authority is the best person to judge as to whether the public servant concerned should receive the protection under the Act by refusing to accord sanction for his prosecution or not.

12. In *Kootha Perumal v. State through Inspector of Police, Vigilance and Anti-Corruption*[9], it has been opined that the sanctioning authority when grants sanction on an examination of the statements of the witnesses as also the material on record, it can safely be concluded that the sanctioning authority has duly recorded its satisfaction and, therefore, the sanction order is valid.

13. From the aforesaid authorities the following principles can be culled out:-

(a) It is incumbent on the prosecution to prove that the valid sanction has been granted by the sanctioning

8. (2007) 11 SCC 273 .
9. (2011) 1 SCC 491.

authority after being satisfied that a case for sanction has been made out.

(b) The sanction order may expressly show that the sanctioning authority has perused the material placed before him and, after consideration of the circumstances, has granted sanction for prosecution.

(c) The prosecution may prove by adducing the evidence that the material was placed before the sanctioning authority and his satisfaction was arrived at upon perusal of the material placed before him.

(d) Grant of sanction is only an administrative function and the sanctioning authority is required to prima facie reach the satisfaction that relevant facts would constitute the offence.

(e) The adequacy of material placed before the sanctioning authority cannot be gone into by the court as it does not sit in appeal over the sanction order.

(f) If the sanctioning authority has perused all the materials placed before him and some of them have not been proved that would not vitiate the order of sanction.

(g) The order of sanction is a pre-requisite as it is intended to provide a safeguard to public servant against frivolous and vexatious litigants, but simultaneously an order of sanction should not be construed in a pedantic manner and there should not be a hyper-technical approach to test its validity.

14. Keeping in view the aforesaid principles it is to be seen

whether the order of sanction granted by the sanctioning authority withstands scrutiny or not. For the aforesaid purpose it is necessitous to reproduce the order of sanction in entirety:"

> WHEREAS, it is alleged that Shri Mahesh Gandmal Jain, Accounts Clerk working in Office Administration Department, State Bank of India, Corporate Centre, Mumbai while working as such on 03.04.2000, abused his official position, in as much as demanded and accepted illegalgratification from Satish P. Doshi, Proprietor ofShree Travels, Matunga, Mumbai for handling over TDS Certificates in the form of 16A of Income Tax Act, in respect of Shree Travels.
>
> WHEREAS, it is alleged that in pursuanceof aforesaid demand, Shri Mahes Gandmal Jain, Accourt Clerk, on 03.04.2000 accepted the illegal gratification of Rs. 1000/-from Shri Satish P. Doshi for the aforesaid purpose at the officeof Shree Travels situated at 445, Mahilashram Road, Somaya Building No. 2, Matunga CentralRailway, Mumbai-19, before the panch witnesswhen Mahesh Gandmal Jain was caught red handed by the officers of CBI, ACB, Mumbai.
>
> AND WHEREAS, the said acts on the part ofShre Mahesh Gandmal Jain constitute offences punishable under Section 7, 13 (2) r/w. 13(1)(d) of Prevention of Corruption Act, 1988.
>
> AND WHEREAS, I, Shri Yeshwant Balkrishna Kelkar, Asst. General Manager, Office Administration Dept., State Bank of India, Corporate Centre, Mumbai, being the authority competent to remove the said Shri Mahesh Gandmal Jain, Accounts Clerk, Office Administration Dept., State Bank of India, Corporate Centre, Mumbai from office after fullyexamining the material, documents i.e. Statement of witnesses under the provisions ofSection 161 of Criminal Procedure Code

1973, FIR, CFSL Opinion and other relevant documentsplaced before me in regard to the said aboveallegations and the facts and circumstances ofthe case, consider that the said Shri Mahesh Gandmal Jain has committed the offences and he should be prosecuted in the court of law forthe said offences.

NOW, therefore, I, Shri Yeshwant Balkrishna Kelakar, Asst. General Manager, Office Administration Dept., State of Bank of India, Corporate Centre, Mumbai, do herebyaccord sanction under Section 19(1)(c) of thePrevention of Corruption Act, 1988 for the prosecution of the said Shri Mahesh GandmalJain for the said offences and any other offencespunishable under the provisions of any law in respect of the acts aforesaid and for takingcognizance of the said offences by the court ofcompetent jurisdiction.

Date : 04.10.2000 (Illegible)

(SHRI Y.B. KELKAR)
ASST. GENERAL MANAGER (OAD)
& APPOINTING AUTHORITY"

15. Reserving our opinion on the same for the present we shall proceed to deal with the reasons for treating the said order of sanction as invalid and improper by the learned trial Judge. The learned trial Judge has referred to the sanction order Ext.13 and the forwarding letter Ext. 14 and, thereafter, proceeded to observe that the order of sanction is completely bereft of elementary details; that though the date is not mentioned in the FIR, the authority has mentioned the date in the sanction order; that the order of sanction is delightfully vague; that the amount of bribe that finds place in the sanction order was told to him and he had no personal knowledge about it; that the minimum discussion is absent in the order of sanction; that grant of sanction being not an idle formality it was incumbent on the

competent authority to ascribe proper reasons on perusal of the materials; that there is no material to show the existence of objective material to formulate the subjective satisfaction; that the authority has granted sanction in an absolute mechanical manner; and that the order of sanction does not reflect sincerity of approach. The High Court, while dealing with the said reason, has really not discussed anything except stating that a possible view has been taken by the learned trial Judge and in appeal it cannot substitute the findings merely because any other contrary opinion can be rendered in the facts of the case.

16. Presently, we shall proceed to deal with the contents of the sanction order. The sanctioning authority has referred to the demand of the gratification for handing over TDS certificate in Form 16A of the Income-tax Act, the acceptance of illegal gratification by the accused before the panch witnesses and how the accused was caught red handed. That apart, as the order would reveal, he has fully examined the material documents, namely, the FIR, CFSL report and other relevant documents placed in regard to the allegations and the statements of witnesses recorded under Section 161 of the Code and, thereafter, being satisfied he has passed the order of sanction. The learned trial Judge, as it seems, apart from other reasons has found that the sanctioning authority has not referred to the elementary facts and there is no objective material to justify a subjective satisfaction. The reasonings, in our considered opinion, are absolutely hyper-technical and, in fact, can always be used by an accused as a magic trick to pave the escape route. The reasons ascribed by the learned trial Judge appear as if he is sitting in appeal over the order of sanction. True it is, grant of sanction is a sacrosanct and sacred act and is intended to provide a safeguard to the public servant against vexatious litigation but simultaneously when there is an order of sanction by the competent authority indicating application of mind, the same should not be lightly dealt with. The flimsy technicalities cannot be allowed to

become tools in the hands of an accused. In the obtaining factual matrix, we must say without any iota of hesitation that the approach of the learned trial Judge as well as that of the learned single Judge is wholly incorrect and does not deserve acceptance.

17. At this stage, we think it apposite to state that while sanctity attached to an order of sanction should never be forgotten but simultaneously the rampant corruption in society has to be kept in view. It has come to the notice of this Court how adjournments are sought in a maladroit manner to linger the trial and how at every stage ingenious efforts are made to assail every interim order. It is the duty of the court that the matters are appropriately dealt with on proper understanding of law of the land. Minor irregularities or technicalities are not to be given Everestine status. It should be borne in mind that historically corruption is a disquiet disease for healthy governance. It has the potentiality to stifle the progress of a civilized society. It ushers in an atmosphere of distrust. Corruption fundamentally is perversion and infectious and an individual perversity can become a social evil. We have said so as we are of the convinced view that in these kind of matters there has to be reflection of promptitude, abhorrence for procrastination, real understanding of the law and to further remain alive to differentiate between hyper-technical contentions and the acceptable legal proponements.

18. We shall presently deal with the course of action that is required to be undertaken in the case at hand. Had the High Court dealt with the appeal on merits, we would have proceeded to deal with justifiability of the same. The High Court has declined to grant leave solely on the ground that the conclusion reached by the learned trial Judge pertaining to validity of sanction being justified, the judgment of acquittal did not warrant interference. There has been no deliberation on the merits of the case.

19. At this juncture, we may note that Mr. Luthra submitted

that the matter should be remitted to the High Court to deal with the application for grant of leave as per law. Per contra, Mr. Bachawat, learned senior counsel, submitted that if this Court would think of remitting the entire matter it should be remanded to the learned trial Judge as he has not appropriately dealt with the real issues, for he has been guided by the impropriety and validity of sanction. On a perusal of the judgment of the learned trial Judge we find that he had recorded his conclusions on every aspect. He has not rested his conclusion exclusively on sanction. True it is, he has acquitted the accused on the ground that the order of sanction is invalid in law but simultaneously he has dealt with other facets. Thus, remitting the matter to the trial court is not warranted. If the High Court thinks it apt to grant leave, it has ample power to deal with the appeal from all the spectrums. It is well settled in law that it is obligatory on the part of the appellate court to scrutinize the evidence and further its power is coextensive with the trial court. It has power to consider all the matters which weighed with the trial court and the reasons ascribed by it for disbelieving or accepting the witnesses. This has been so held in *Laxman Kalu v. State of Maharashtra*[10] and *Keshav Ganga Ram Navge v. The State of Maharashtra*[11]. Needless to emphasise that the High Court, while hearing an appeal against conviction, can scan the evidence and weigh the probabilities. It is incumbent on the High Court to analyse the evidence, deal with the legal issues and deliver a judgment. Thus, there is no merit in the submission that it should be remanded to the learned trial Judge. Apart from the aforesaid reason, we are also not inclined to remit the matter to the learned trial Judge as there would be another round of hearing before the learned trial Judge which is avoidable. It has to be kept uppermost in mind that remit to the trial court has to be done in very rare circumstances, for it brings in procrastination in the criminal justice dispensation system which is not appreciated.

10. AIR 1968 SC 1390.

11. AIR 1971 SC 953 .

20. Consequently, the appeal is allowed, the judgment of the High Court and the conclusion of the learned trial Judge pertaining to the validity of sanction are set aside and the matter is remitted to the High Court. As we have not dealt with any other finding recorded by the learned trial Judge, it has to be construed that there has been no expression of opinion on the merits of the case on those counts. The High Court shall be well advised to consider all the aspects barring what has been dealt with in this appeal while dealing with the application for grant of leave.

R.P. Appeal allowed.

G. JAYALAL

v.

UNION OF INDIA AND OTHERS

(Civil Appeal No. 4665 of 2013)

MAY 29, 2013

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Service Law:

Selection – Panel not indicating preference – Effect of – Post of Director General, All India Radio – Committee recommending a panel of three persons with name of appellant at Sl. No. 1 – When asked, Selection Committee, subsequently, shortlisted the candidates and made recommendation in order of preference – Name of fourth respondent shown at sl. No. 1 – Held: The panel sent earlier does not specifically state that the recommendations were in order of merit or in order of preference as determined by the Board — On the contrary, it is suggestive of the fact that the Board has placed the names in the same order as sent by the department for consideration – The subsequent recommendation was made in order of preference by deliberation – Even after three members were substituted, it would not have made any difference as majority of the earlier Members were there and they had given preference in favour of fourth respondent — Therefore, there is no flaw in the three Members participating in the short-listing of the names and giving preference — There is no element of legal malice.

Selection – Recommendation in order of preference – The term 'preference' – Connotation of.

Advertisements were issued to fill up the posts of Director General in All India Radio and Doordarshan on 20.10.2010 and 20.12.2010 respectively. The Committee

constituted to make the recommendations for appointment to the said two posts forwarded three names for the post of Director General, Doordarshan and names of two persons, viz. the appellant and the fourth respondent, for the post of Director General, All India Radio. On receipt of the recommendations, a letter dated 21.3.2011 was circulated by the Officer on Special Duty in Prasar Bharati to all the Members of the Selection Committee stating therein that since the names recommended were not put in any particular order of preference, the same be put in the order of preference. Thereafter, the majority of the members of the Selection Committee placed the fourth respondent in order of preference at No. 1 for the post of Director General, All India Radio. The recommendations were sent to Government of India as per letter dated 21.3.2011.

The appellant preferred an O.A. before the Tribunal seeking quashment of the recommendations dated 21.3.2011 and also sought for issuance of a direction to the respondents to act as per the recommendations dated 15.3.2011 contending that therein he was placed at No. 1 in order of preference for appointment to the post of Director General, All India Radio. The Tribual as well as the High Court did not accept the case of the appellant.

Dismissing the appeal, the Court

HELD: 1.1. Conceptual preference, fundamentally, would mean that all aspects, namely, merit, suitability, fitness, etc. being equal, preference is given regard being had to some other higher qualifications or experience, etc. [para 12] [878-G]

Secretary, A.P. Public Service Commission v. Y.V.V.R. Srinivasulu and Others **2003 (3) SCR 742 = 2003 (5) SCC 341 - referred to**

1.2. In the case at hand, it is not disputed that both the candidates were eligible. If the minutes of the meeting are minutely studied, it is perceptible that three departmental candidates were interviewed for the post of Director General, All India Radio. The names of the appellant and the fourth respondent were placed at serial Nos. 1 and 2 respectively. When the Committee gave its recommendations, it also placed them in the same seriatim. The language used in paragraph 4 of the minutes states that taking into account the consideration of overall merit and experience and with due regard to the assessment of suitability, the Board decided to forward the recommendations to the Government of India. But it does not specifically state that the recommendations were in order of merit or in order of preference as determined by the Board. On the contrary, it is suggestive of the fact that the Board has placed the names in the same order as sent by the department for consideration. [para 13] [879-D-G]

1.3. It cannot be said that any wrongful act has been done to inflict any legal injury on the appellant. It is difficult to hold that any act has been done to disregard or defeat his legal rights. What has been stated by the OSD is basically requiring the Board to short-list the names in order of preference. The Members of the Board could have reiterated that they had earlier recommended the names in accordance with preference. They did not say that the recommendations already made were in order of preference but gave the preference initially by circulation and when it was set aside by the tribunal, thereafter, by deliberation. Thus, there is no element of legal malice. [para 16] [881-A-C]

State of A.P. and Others v. Goverdhanlal Pitti **2003 (2) SCR 908 = 2003 (4) SCC 739**; *West Bengal State Electricity Board v. Dilip Kumar Ray* **2006 (9) Suppl.**

SCR 554 = 2007 (14) SCC 568 and *Kalabharati Advertising v. Hemant Vimalnath Narichania and Other* **2010 (10) SCR 971 = 2010 (9) SCC 437 - referred to**

1.4. There is no dispute from any quarter that three Members had to be substituted because some had retired and the tenure of some had expired. There is no cavil that three Members, who have been appointed, have been validly appointed. By efflux of time, some of the Members of the Board were substituted and different Members were inducted. The tribunal thought it appropriate to remit the matter to the Board to reconsider the matter after due deliberation. Keeping in view the minutes of the meeting, it is manifest that the Board has gone through the whole deliberations by the recommending authority and expressed the view. Thus, it was not necessary to hold a further interview to find out the preference as the minutes were absolutely clear that no preference was given. Therefore, there is no flaw in the three Members participating in the short-listing of the names and giving preference. That apart, the majority of the earlier Members were there and they had given preference in favour of the fourth respondent and, therefore, factually, it would not have made any difference. [para 17 and 19] [881-E; 882-E-H; 883-A-B]

Case Law Reference:

1987 (1) SCR 1054	**held inapplicable**	**para 9**
2003 (3) SCR 742	**referred to**	**para 12**
2003 (2) SCR 908	**referred to**	**para 14**
2006 (9) Suppl. SCR 554	**referred to**	**para 15**
2010 (10) SCR 971	**referred to**	**para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4665 of 2013.

From the Judgment and Order dated 17.02.2012 of the High Court of Delhi at New Delhi in Civil Writ Petition No. 61 of 2012.

M.N. Krishnamani, Sanjai Kumar Pathak for the Appellant.

Paras Kuhad, ASG, Vikas Singh, Swati Vijaywargiya, Jitin Chaturvedi, Rekha Pandey, D.S. Mahra, Rajeev Sharma, Sahil Bhaiaik, Uddyam Mukherjee, Sanket, Deepika Kalia, M.C. Dhingra, Rajesh Srivastava for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. In this appeal, the pregnability of the order dated 17.2.2012 passed by the High Court of Delhi in WP (C) No. 61 of 2012 affirming the order dated 30.11.2011 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (for short "the Tribunal") in O.A. No. 1290 of 2011 is called in question.

2. The facts, as have been exposited, are that advertisements were issued to fill up the posts of Director General in All India Radio and Doordarshan on 20.10.2010 and 20.12.2010 respectively. A Committee headed by the Chairperson, Prasar Bharati Board, was constituted to make the recommendations for appointment to the aforesaid two posts. Names of nine persons including that of the appellant and the fourth respondent herein were recommended to be interviewed by the Selection Committee. The recommendations of the Selection Committee were forwarded to the Government of India vide letter dated 16.3.2011 by the Member (Personnel), Prasar Bharati. The Committee forwarded three names for the post of Director General, Doordarshan and names of two persons, that of the appellant and the fourth respondent, for the post of Director General, All India Radio. On receipt of the recommendations, a letter dated 21.3.2011 was circulated by the Officer on Special Duty in Prasar Bharati to all the Members of the Selection Committee. It was mentioned in the letter that

in the special meeting held on 15.3.2011, the Selection Board, after interviewing the candidates and taking into account all the relevant factors, had decided to recommend a panel of candidates for the two posts but as the names recommended were not put in any particular order of preference by the Selection Board, the Government had desired that the names in the panel be put in the order of preference. After receipt of the letter, it was decided by the Board to short-list the candidates in order of preference by way of circulation. Thereafter, each Member of the Selection Committee gave his recommendation by way of separate endorsement. Eight Members of the Selection Committee, that constituted of nine Members, placed the fourth respondent at serial No. 1 and the appellant at serial No. 2 in order of preference for the post of Director General, All India Radio. Five out of nine Members of the Committee placed Shri Tripurari Sharan at serial No. 1, Shri Ram Subhag Singh at serial No. 2, and Shri L.D. Mandloi at serial No. 3 in the said order of preference for the post of Director General, Doordarshan. It is evident from the record that the majority of the members of the Selection Committee placed the fourth respondent in order of preference at No. 1 for the post of Director General, All India Radio and Shri Tripurari Sharan for the post of Director General, Doordarshan. Be it noted, the name of the appellant was also recommended for the post of Director General, Doordarshan. The aforesaid recommendations of the Selection Committee indicating preference were sent to the Government of India as per letter dated 21.3.2011 by the Joint Secretary (B), Ministry of Information and Broadcasting.

3. At that stage, the appellant preferred O.A. No. 1290 of 2011 before the tribunal seeking quashment of the recommendations dated 21.3.2011 and also sought for issuance of a direction to the respondents to act as per the recommendations dated 15.3.2011. Such a prayer was made as the stand of the appellant was that he was placed at No. 1 in order of preference for appointment to the post of Director

General, All India Radio. The tribunal did not accept the contentions raised by the appellant pertaining to placing of names in order of preference. The plea of mala fide pertaining to the act of any authority in the Government in changing the decision of the Selection Committee was also not accepted. However, the tribunal opined that the order of preference that has been decided on 21.3.2011 could not have been so decided by circulation and a meeting of Prasar Bharati Board (Selection Committee) was required to be held for the said purpose and the decision was required to be taken after due deliberations and consultations amongst the Members of the Board. Being of this view, the tribunal directed the respondents to convene a meeting of the Board to determine the order of merit of the candidates. It was further observed by the tribunal that if the outcome of the meeting would result in the endorsement of the earlier view, nothing more was required to be done. In pursuance of the order passed by the tribunal, a meeting of the Board was convened and the decision that was taken by circulation was reiterated.

4. Being dissatisfied with the said confirmation, the appellant approached the High Court as the tribunal had foreclosed the issue by stating that if there would be confirmation or endorsement of the earlier view, nothing more was required to be done. Be it noted, by the time the tribunal decided the Original Application, the tenure of three Members had come to an end either by virtue of retirement or expiry of the term. It was urged before the High Court that since three new Members of the Board had not interviewed the candidates, they were not in a position to take an informed view with respect to the merits of the candidates. The High Court declined to enter into the said arena by holding that if the appellant is aggrieved by the decision taken in the meeting of the Board convened pursuant to the direction of the tribunal, it was open to file an application before the tribunal. The High Court adverted to the singular issue whether the Selection Committee, in its meeting held on 15.3.2011, had placed the appellant

herein, in order of preference, for the post of Director General, All India Radio, or not. After perusing the minutes of the meeting, the High Court opined that the recommendations could not be interpreted to mean that the person whose name was shown at No. 1 ranked first in order of merit. The allegation that someone in the Government was instrumental in influencing the Members of the Selection Committee to change the recommendation as decided in the meeting on 15.3.2011 to deprive the appellant of a legitimate claim was not accepted. The High Court proceeded to deal with the allegation of mala fide and opined that as no particulars were given about any Governmental authority showing any favour to any particular candidate, the said allegations were not acceptable. The plea of legal malice to the effect that the Government directed Prasar Bharati Board to act in a particular manner was repelled by the High Court as the same was not based on any material. Being of this view, the High Court dismissed the writ petition.

5. We have heard Mr. M.N. Krishnamani, learned senior counsel for the appellant, Mr. Paras Kuhad, learned Additional Solicitor General, Mr. Vikas Singh, learned senior counsel for the fifth respondent, Mr. M.C. Dhingra, learned counsel for the fourth respondent, Mr. Rajeev Sharma and Mr. Rajesh Srivastava, learned counsel for the respondents.

6. Mr. Krishnamani, learned senior counsel appearing for the appellant, has basically raised three contentions, namely, (i) on a perusal of the recommendations of the Selection Committee, it is clearly demonstrable that it had sent the names in order of preference, regard being had to the seniority, merit and suitability, but the same was changed by the Board which had no authority to do so; (ii) after the tribunal had quashed the decision taken by way of circulation, the matter was directed to be reconsidered by proper deliberation but three Members of the Selection Committee who had not interviewed the candidates had been replaced and hence, the decision of the Board is vitiated; and (iii) the Government has indirectly

influenced the decision by a proposal and the same tantamounts to legal malice which makes the selection vulnerable in law.

7. Mr. Paras Kuhad, learned Additional Solicitor General, has submitted that the recommendations did not indicate any preference based on merit and, therefore, the presumption in that regard is absolutely erroneous. It is urged by him that the Officer on Special Duty had clarified the position before the tribunal that as per his understanding, there was no preference and there was no interference by the Government requiring the Committee to do any act in any particular manner and hence, there is nothing to suggest any legal malice. He has produced the proceedings of selection before this Court.

8. Mr. Dhingra, learned counsel appearing for the fourth respondent, has submitted that the order passed by the High Court is absolutely impregnable and defensible and does not warrant any interference by this Court.

9. Mr. Vikas Singh, learned senior counsel appearing for the fifth respondent, the Director General, Doordarshan, submitted that there was no recommendation by preference and further non-availability of the three Members due to their retirement or expiry of tenure and constitution of the Board by inducting three new Members would not vitiate the selection. For the aforesaid purpose, he has placed reliance on Section 4(2) of the Prasar Bharati (Broadcasting Corporation of India) Act, 1990 (for short "the Act") and commended us to the decision in *B.K. Srinivasan and Others v. State of Karnataka and Others*[1].

10. To appreciate the aforesaid submissions, we shall refer to the minutes of the meeting dated 15.3.2011. The relevant part of the minutes reads as under: -

"2. The Board interviewed the following officers (who

1. (1987) 1 SCC 658.

responded to the intimation in respect of the interview) for the post of Director General, All India Radio: -

i. Shri G. Jayalal

ii. Shri L.D. Mandloi

iii. Shri Ashok Jailkhani

3. The Board interviewed the following officers (who responded to the intimation in respect of the interview) for the post of Director General, Doordarshan: -

EXTERNAL CANDIDATES

(i) Shri Sunil Kumar Singh

(ii) Shri Ram Subhag Singh

(iii) Shri Anil Kumar Aggarwal

(iv) Shri Manoj Kumar Panda

(v) Shri Jagmohan Singh Raju

(vi) Shri Tripurari Sharan

DEPARTMENTAL CANDIDATES

(i) Shri G. Jayalal

(ii) Shri L.D. Mandloi

(iii) Shri Ashok Jailkhani

4. Taking into account the considerations of overall merit and experience and with due regard to an assessment of suitability, the Board decided to forward recommendations to the Government of India, as given below: -

For the post of Director General, Doordarshan

1. Sh. L.D. Mandloi

2. Sh. Tripurari Sharan

3. Sh. Ramsubhag Singh

For the post of Director General, All India Radio

1. Sh. G. Jayalal

2. Sh. L.D. Mandloi"

11. It has been contended that it was a recommendation in order of preference. On a perusal of the file, it is perceptible that after the recommendations were sent, the OSD circulated a letter stating that the Board had not sent the names in order of merit or preference and, therefore, it was necessary that the names should be short-listed in order of preference. It is also evident from the record that each of the Members of the Selection Committee gave his recommendation separately on the proposed decision circulated by the OSD. No Member of the Selection Committee, while giving his recommendation, stated that in the meeting held on 15.3.2011, the Board had recommended the names in order of merit. It is also noticeable that one of the Members, namely, Dr. George Verghese, who had recommended the appellant to be placed at No. 1, had also not mentioned that the names had already been placed in order of preference of merit. We have only referred to the same to indicate that the Members of the Board had understood the minutes in that perspective.

12. At this juncture, we think it appropriate to advert to when preference is given on the basis of merit and suitability. Conceptual preference, fundamentally, would mean that all aspects, namely, merit, suitability, fitness, etc. being equal, preference is given regard being had to some other higher qualifications or experience, etc. In this regard, we may refer with profit to the dictum in *Secretary, A.P. Public Service Commission v. Y.V.V.R. Srinivasulu and Others*[2] wherein a

2. (2003) 5 SCC 341.

two-Judge Bench stated about the preference. Though the principle was laid down in the context of a particular rule, yet we reproduce the same with profit: -

> "Whenever, a selection is to be made on the basis of merit performance involving competition, and possession of any additional qualification or factor is also envisaged to accord preference, it cannot be for the purpose of putting them as a whole lot ahead of others, dehors their intrinsic worth or proven inter se merit and suitability, duly assessed by the competent authority. Preference, in the context of all such competitive scheme of selection would only mean that other things being qualitatively and quantitatively equal, those with the additional qualification have to be preferred."

13. In the case at hand, it is not disputed that both the candidates were eligible. If the minutes of the meeting which we have reproduced hereinbefore are minutely studied, it is perceptible that three departmental candidates were interviewed for the post of Director General, All India Radio. The names of the appellant and the fourth respondent were placed at serial Nos. 1 and 2 respectively. When the Committee recommended, it also placed them in the same seriatim. The language used in paragraph 4 of the minutes states that taking into account the consideration of overall merit and experience and with due regard to the assessment of suitability, the Board decided to forward the recommendations to the Government of India. But it does not specifically state that the recommendations were in order of merit or in order of preference as determined by the Board. On the contrary, it is suggestive of the fact that the Board has placed the names in the same order as sent by the department for consideration. Thus, the submission of Mr. Krishnamani that the names were sent in order of merit or preference does not merit acceptance.

14. The next limb of argument is that there was interference by the Government to take the decision in a particular manner. The said aspect is linked with legal malice and hence, it is

necessary to deal with both the aspects in a singular compartment. The High Court has referred to the facts in detail after referring to the affidavit filed by the Officer on Special Duty. In the letter circulated on 21.3.2011 by the Officer on Special Duty, he had only suggested that the Board was required to short-list the candidates in order of preference. The decision in entirety was left to the Board. No suggestion was given. Mr. Krishnamani has very fairly stated that the appellant does not intend to allege any kind of personal mala fide but legal malice as the suggestion had been given for short-listing the candidates which was absolutely unnecessary. In essence, the submission of the learned senior counsel is that the action of the authorities is not bonafide in law. In this context, we may refer with profit to the decision in *State of A.P. and Others v. Goverdhanlal Pitti*[3] wherein this Court has ruled thus: -

> " "Legal malice" or "malice in law" means "something done without lawful excuse". In other words, "it is an act done wrongfully and wilfully without reasonable or probable cause, and not necessarily an act done from ill feeling and spite. It is a deliberate act in disregard of the rights of others". (See *Words and Phrases Legally Defined*, 3rd Edn., London Butterworths, 1989.)"
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> xxx xxx xxx
>
> "Where malice is attributed to the State, it can never be a case of personal ill-will or spite on the part of the State. If at all it is malice in legal sense, it can be described as an act which is taken with an oblique or indirect object."

15. Similar view has been expressed in *West Bengal State Electricity Board v. Dilip Kumar Ray*[4] and *Kalabharati Advertising v. Hemant Vimalnath Narichania and Others*[5].

3. (2003) 4 SCC 739.
4. (2007) 14 SCC 568.
5. (2010) 9 SCC 437.

16. Tested on the anvil of the aforesaid principles of law, it cannot be said that any wrongful act has been done to inflict any legal injury on the appellant. It is difficult to hold that any act has been done to disregard or defeat his legal rights. What has been stated by the OSD is basically requiring the Board to short-list the names in order of preference. The Members of the Board could have reiterated that they had earlier recommended the names in accordance with preference. They, we are inclined to think correctly, did not say that the recommendations already made were in order of preference but gave the preference initially by circulation and when it was set aside by the tribunal, thereafter, by deliberation. Thus, the submission pertaining to legal malice, being sans substratum, stands repelled.

17. The last plank of argument of the learned senior counsel is that the inclusion of three new Members who had not interviewed the candidates would vitiate the decision of the Board. The High Court has not dealt with it and opined that if the said decision was required to be assailed, it was open to the appellant to knock at the doors of the tribunal. There is no dispute from any quarter that three Members had to be substituted because some had retired and the tenure of some had expired. Section 4 of the Act deals with appointment of Chairman and other Members. Sub-sections (1) and (2) of Section 4 read thus: -

"**4. Appointment of Chairman and other Members**. – (1) The Chairman and the other Members, except the *ex officio* Members, the nominated Member and the elected Members shall be appointed by the President of India on the recommendation of a committee consisting of-

(a) the Chairman of the Council of States, who shall be the Chairman of the Committee;

(b) the Chairman of the Press Council of India established

under section 4 of the Press Council Act, 1978 (37 of 1978); and

(c) one nominee of the President of India.

(2) No appointment of Member shall be invalidated merely by reason of any vacancy in, or any defect in the constitution of, the committee appointed under sub-section (1)."

18. Regulation 5 of the Prasar Bharati (Broadcasting Corporation of India) Director General (Akashvani) and Director General (Doordarshan) (Recruitment) Regulations, 2001 reads as follows: -

"5. Appointing Authority : The appointment to the post specified in column 1 of the Schedule shall be made by the Corporation, after consultation with the Recruitment Board established under sub-section (1) of Section 10 of the Act."

19. There is no cavil that three Members, who have been appointed, have been validly appointed. Though Mr. Vikas Singh, learned senior counsel, has drawn inspiration from the concept of principle of "Ganga" clause as enshrined in *B.K. Srinivasan* (supra), yet the same need not be adverted to as neither the appointment of the Member of the Board nor their holding the office as Member is called in question. The issue is slightly different. By efflux of time, some of the Members of the Board were substituted and different Members were inducted. The tribunal thought it appropriate to remit the matter to the Board to reconsider the matter after due deliberation. Keeping in view the minutes of the meeting, it is manifest that the Board has gone through the whole deliberations by the recommending authority, as we find from the records, and expressed the view. Thus, it was not necessary to hold a further interview to find out the preference as the minutes were absolutely clear as day that no preference was given. Therefore,

we do not find any flaw in the three Members participating in the short-listing of the names and giving preference. That apart, the majority of the earlier Members were there and they had given preference in favour of the fourth respondent and, therefore, factually, it would not have made any difference. Thus analysed, we perceive no merit in this contention.

20. In view of the aforesaid premised reasons, the appeal is devoid of any substance and, accordingly, stands dismissed without any order as to costs.

R.P. Appeal dismissed.

ROHTASH KUMAR
v.
STATE OF HARYANA
(Criminal Appeal No. 896 of 2011)

MAY 29, 2013

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Penal Code, 1860:

s.302 – Murder of wife by husband – Circumstantial evidence – Conviction and sentence of life imprisonment awarded by courts below – Upheld – Principles, including the last seen theory, to be applied while convicting the accused on the basis of circumstantial evidence and the issues pertaining to number of witnesses to be examined, discrepancies in depositions, evidence of hostile witness, police official as a witness, motive and explanation of accused u/s 313 CrPC, discussed – Criminal law – Motive – Evidence – Circumstantial evidence – Last seen theory – Evidence of hostile witness – Evidence of police witness – Discrepancies in depositions.

The appellant was prosecuted for committing the murder of his wife. The prosecution case was that it was an inter-caste marriage, and not approved by family members of the bride. The married life of the couple was not happy and they filed a petition for divorce by mutual consent. The first motion was complete and the second motion was fixed for 3.9.2004. On 2.9.2004, the appellant visited the girls hostel where his wife was residing and met her. After an hour the appellant left alone. Later, the dead body of the wife was found in the hostel premises. Considering the circumstantial evidence, medical evidence and the recoveries made, the trial court convicted the appellant u/s 302 IPC and sentenced him

to life imprisonment. The High Court dismissed his appeal.

Dismissing the appeal, the Court

HELD:

Circumstantial evidence:

1.1. The instant case is of circumstantial evidence, as there exists no eye-witness to the occurrence. This Court, in *R. Shaji's case,* enumerated principles to be considered while convicting a person on the basis of the circumstantial evidence. In the instant case, in view of the evidence, the facts that emerge are: (i) The appellant and the deceased were classmates of different castes and had developed intimacy and got married; (ii) Their marriage was not cordial and within a year they filed a petition for divorce by mutual consent. Just before the second motion, the appellant met the deceased, and assured her that he would agree to the said divorce; (iii) This information was furnished by deceased to her mother (PW.3). PW.1, the father of the deceased, went to meet her; (iv) PW.1, on reaching at the place of deceased, was informed that the appellant had come to meet the deceased and that she was lying dead in the garden. PW.8 also furnished him with all the requisite details, as regards the visit of the appellant. PW-1 then lodged an FIR; (v) The Police recovered the dead body, as well as various material objects lying near it, including a rope; (vi) The post-mortem report suggests that the deceased had died of asphyxia caused as a result of smothering and throttling; (vii and ix) The appellant stayed at a Guest House with a fictitious name and address, and the following day tried to commit suicide. He was chased by the Guest House staff, but he managed to run away. He left a diary, a wrist watch and a letter, and recovery thereof was proved; (viii) On 2.9.2004, the appellant had

made certain telephone calls from the mobile phone belonging to the deceased to the mother as well as to several other relatives of the deceased, informing them about her murder that had been committed by him, and further stated that he would commit suicide; (x) The appellant remained absconding for several days, and on his arrest and disclosure statement, the mobile phone belonging to deceased was recovered from a shop; (xi) The call records clearly prove that the mobile phone belonging to deceased, was used even after her death and that the same was in the possession of the appellant; (xii) During the investigation, the appellant refused to participate in the Test Identification Parade, as he could have been identified by Hostel staff as well as by the staff of the Guest House; (xiii) PW.2 though turned hostile, has provided material information, and has also accepted his signatures on the recovery memo and his statements, as well as those of the other attendant; (xiv)The appellant gave a specimen of his hair to be compared with the hair recovered from the place of occurrence, and the FSL report showed that the hair was similar in its morphological and microscopical characteristics, to that of the accused. [para 6, 7 and 36] [896-F-G; 910-G-H; 911-A-H; 912-A-G; 913-A-D]

R. Shaji v. State of Kerala, **AIR 2013 SC 651;** *Sharad Birdhichand Sarda v. State of Maharashtra,* **1985 (1) SCR 88 = 1984 AIR 1622 ; AIR 1984 SC 1622; and** *Paramjeet Singh @ Pamma v. State of Uttarakhand*, **2010 (11) SCR 1064 = AIR 2011 SC 200 – referred to.**

All witnesses need not be examined:

1.2. Prosecution is not bound to examine all the cited witnesses, and it can drop witnesses to avoid multiplicity or plurality of witnesses. The accused can examine the unexamined witnesses in his defence. Non-examination of the shop-owner, from whose shop the mobile phone

was recovered, is not fatal for the reason that the recovery memo bears the signature of the appellant. Similarly, non-examination of the named persons from the girls' hostel, or from the Guest House does not warrant any adverse inference, as there is no need to provide the same evidence in multiplicity. [para 17 and 39] [902-B, 914-G-H; 915-H]

Abdul Gani & Ors. v. State of Madhya Pradesh, **AIR 1954 SC 31;** *Sardul Singh v. State of Bombay* **1958 SCR 161 = AIR 1957 SC 747;** *Masalti v. State of U.P.* **1964 SCR 133 = AIR 1965 SC 202;** *Bir Singh & Ors. v. State of U.P.* **1977 (1) SCR 665 = (1977) 4 SCC 420;** *Darya Singh & Ors. v. State of Punjab,* **1964 (7) SCR 397 = AIR 1965 SC 328;** *Raghubir Singh v. State of U.P.,* **AIR 1971 SC 2156;** *Harpal Singh v. Devinder Singh & Anr.*, **1997 (1) Suppl. SCR 648 = AIR 1997 SC 2914;** *Mohanlal Shamji Soni v. Union of India & Anr.,* **1991 (1) SCR 712 = AIR 1991 SC 1346;** *Banti @ Guddu v. State of M.P.,* **2003 (5) Suppl. SCR 119 = AIR 2004 SC 261;** *Vadivelu Thevar v. State of Madras*; **1957 SCR 981 = AIR 1957 SC 614; and** *Kishan Chand v. State of Haryana* **JT 2013(1) SC 222– referred to.**

Discrepancies in depositions:

1.3. Minor discrepancies on trivial matters which do not affect the core of the case of the prosecution must not prompt the court to reject the evidence of a witness in its entirety. The discrepancies pointed out by the defence have been explained by the prosecution. However, the same have not been put to the Investigating Officer (PW.20) in cross-examination. He answered all questions that were put to him. [para 18 and 41] [902-F-G; 916-C]

State of U.P. v. M.K. Anthony, **AIR 1985 SC 48;** *State rep. by Inspector of Police v. Saravanan & Anr.*, **2008 (14) SCR 405 = AIR 2009 SC 152; and** *Vijay @ Chinee v. State of M.P.,* **(2010) 8 SCC 191 – referred to.**

Evidence of hostile witness:

1.4. Evidence of a prosecution witness cannot be rejected in toto, merely because the prosecution chose to treat him as hostile and cross examined him. Law permits the court to take into consideration the deposition of a hostile witness. [para 19-20]

State of U.P. v. Ramesh Prasad Misra & Anr., **1996 (4) Suppl. SCR 631 =AIR 1996 SC 2766;** *C. Muniappan & Ors. v. State of Tamil Nadu,* **2010 (10) SCR 262 = AIR 2010 SC 3718;** *Himanshu @ Chintu v. State (NCT of Delhi),* **2011 (1) SCR 48 = (2011) 2 SCC 36; and** *Ramesh Harijan v. State of U.P.* **2012 (6) SCR 688 = AIR 2012 SC 1979;** *Subedar Tewari v. State of U.P. & Ors.*, **AIR 1989 SC 733;** *Suresh Chandra Bahri v. State of Bihar,* **1994 (1) Suppl. SCR 483 = AIR 1994 SC 2420; and** *Dr. Sunil Clifford Daniel v. State of Punjab,* **(2012) 11 SCC 205– referred to.**

Explanation of the accused:

1.5. Under s. 313 Cr.P.C., accused must furnish some explanation of the incriminating circumstances, which should be noted by the court to ascertain that the chain of circumstances is complete. A false explanation may be counted as providing a missing link for completing the chain of circumstances. [para 22-23] [904-G; 905-D]

Musheer Khan @ Badshah Khan & Anr. v. State of Madhya Pradesh, **2010 (2) SCR 119 = AIR 2010 SC 762;** *State of Maharashtra v. Suresh,* **1999 (5) Suppl. SCR 215 = (2000) 1 SCC 471– referred to.**

1.6. Caretaker of the Girls Hostel (PW.8) is an independent witness. She had "last seen together" the appellant and the deceased. There is no reason to doubt the veracity of her statement. The appellant had left alone from the hostel and has not furnished any explanation as to what could have happened to the deceased while she

was with him, if he was not responsible for her death. Further, no explanation was furnished by him as regards why he had stayed at the Guest House, by providing a fictitious name and false address, nor was any explanation provided by him with respect to the circumstances under which the mobile phone belonging to the deceased had come to be in his possession. [para 37] [913-F-H; 914-A]

Last seen together theory:

1.7. In cases where the accused was last seen with the deceased victim (last seen-together theory) just before the incident, it becomes the duty of the accused, as the burden shifts upon him, to show the circumstances under which the death of the victim occurred. [para 24-25] [905-E; 906-B]

Nika Ram v. State of Himachal Pradesh, **1973 (1) SCR 428 = AIR 1972 SC 2077; and** *Ganeshlal v. State of Maharashtra* **1992 (2) SCR 502 = (1992) 3 SCC 106;** *Trimukh Maroti Kirkan v. State of Maharashtra,* **2006 (7) Suppl. SCR 156 = (2006) 10 SCC 681;** *Prithipal Singh & Ors. v. State of Punjab & Anr.,* **2012 (14) SCR 862 = (2012) 1 SCC 10 – referred to.**

Police official as a witness:

1.8. There is no prohibition that a policeman cannot be a witness, or that his deposition cannot be relied upon. However, as far as possible, corroboration of his evidence on material particulars should be sought. [para 26] [906-F; 907-B]

Pradeep Narayan Madgaonkar & Ors. v. State of Maharashtra, **AIR 1995 SC 1930;** *Paras Ram v. State of Haryana,* **1992 (2) Suppl. SCR 55 =AIR 1993 SC 1212;** *Balbir Singh v. State*, **1996 (7) Suppl. SCR 50 = (1996) 11 SCC 139;** *Kalpnath Rai v. State (Through CBI*), **AIR 1998 SC**

201; *M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence,* **2003 (3) Suppl. SCR 958 = AIR 2003 SC 4311; and** *Ravinderan v. Superintendent of Customs,* **AIR 2007 SC 2040 - referred to.**

Motive:

1.9. In a case of circumstantial evidence, motive may be a very relevant factor. From the undelivered letter that had been written by the appellant to the Superintendent of Police and others, and the suicide note written in the diary recovered from the Guest House, it is evident that the feelings of the appellant towards deceased and her family members were such that they could have given rise to a motive for him to commit the offence. [para 21 and 38] [904-C; 914-B-C, F]

1.10. No interference with the judgments of the courts below is called for by this Court. [para 42] [916-G]

Case Law Reference:

1985 (1) SCR 88	**referred to**	**Para 7**
2010 (11) SCR 1064	**referred to**	**Para 7**
AIR 1954 SC 31	**referred to**	**Para 8**
1958 SCR 161	**referred to**	**Para 9**
1964 SCR 133	**referred to**	**Para 10**
1977 (1) SCR 665	**referred to**	**Para 10**
1964 (7) SCR 397	**referred to**	**Para 11**
AIR 1971 SC 2156	**referred to**	**Para 12**
1997(1) Suppl. SCR 648	**referred to**	**Para 13**
1991 (1) SCR 712	**referred to**	**Para 14**

2003 (5) Suppl. SCR 119	**referred to**	**Para 15**
1957 SCR 981	**referred to**	**Para 16**
JT 2013(1) SC 222	**referred to**	**Para 16**
AIR 1985 SC 48	**referred to**	**Para 18**
2008 (14) SCR 405	**referred to**	**Para 18**
(2010) 8 SCC 191	**referred to**	**Para 18**
1996 (4) Suppl. SCR 631	**referred to**	**Para 20**
2010 (10) SCR 262	**referred to**	**Para 20**
2011 (1) SCR 48	**referred to**	**Para 20**
2012 (6) SCR 688	**referred to**	**Para 20**
AIR 1989 SC 733	**referred to**	**Para 21**
1994 (1) Suppl. SCR 483	**referred to**	**Para 21**
(2012) 11 SCC 205	**referred to**	**Para 21**
2010 (2) SCR 119	**referred to**	**Para 22**
1999 (5) Suppl. SCR 215	**referred to**	**Para 23**
1973 (1) SCR 428	**referred to**	**Para 24**
1992 (2) SCR 502	**referred to**	**Para 24**
2006 (7) Suppl. SCR 156	**referred to**	**Para 25**
2012 (14) SCR 862	**referred to**	**Para 25**
AIR 1995 SC 1930	**referred to**	**Para 26**
1992 (2) Suppl. SCR 55	**referred to**	**Para 26**
1996 (7) Suppl. SCR 50	**referred to**	**Para 26**
AIR 1998 SC 201	**referred to**	**Para 26**

AIR 2007 SC 2040	**referred to**	**Para 26**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 896 of 2011.

From the Judgment & Order dated 05.02.2009 of the High Court of Punjab at Haryana at Chandigarh in Crl. Appeal No. 862-DB of 2006.

Dr. Sushil Balwada, Pankaj Bhagat for the Appellant.

Ramesh Kumar, Manish K. Bishnoi for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been filed against the judgment and order dated 5.2.2009 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 862-DB of 2006, by which it has affirmed the judgment and order of the Sessions Court, by way of which and whereunder the appellant has been convicted for the offences punishable under Sections 302 and 404 of the Indian Penal Code, 1860 (hereinafter referred to as 'the IPC'), and sentenced to undergo life imprisonment and to pay a fine of Rs.5,000/-, and in default of payment of fine, to undergo further rigorous imprisonment for one year under Section 302 IPC; and was also sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.500/-, and in default of payment of fine, to undergo further rigorous imprisonment for three months under Section 404 IPC. However, both the substantive sentences have been ordered to run concurrently.

2. Facts and circumstances as per the prosecution in brief, are as under:

A. Appellant got married to Sonia (since deceased), aged 30 years, in March 2003. It was an inter-caste marriage, and thus, was not approved of by Sonia's family members. They had both studied Pharmacy together. After passing the Pharmacy

Course, Sonia (deceased) was appointed as a Lecturer in the B.S.A. Pharmacy College, Faridabad, and she was also working as a Warden in the Girls' hostel of the said Pharmacy College, situated in Kothi No. 783, Sector 21-A, Faridabad. The married life of the couple was not happy and they thus filed a Divorce Petition on the basis of mutual consent under Section 13-B of the Hindu Marriage Act, 1955 before the Family Court, Rohtak. The first motion was complete and the second motion had been fixed for 3.9.2004.

B. On 2.9.2004, Sonia (deceased) sent a telephonic message to her mother, Smt. Dhanpati Devi (PW.3), stating that in the previous evening, the appellant Rohtash had come to meet her in the hostel at 8.00 P.M. and had told her that he would appear in the Family Court at Rohtak on 3.9.2004, to make his statement for getting the divorce.

C. In view of the above, on 2.9.2004 at about 5.00 P.M., Sube Singh (PW.1), father of Sonia (deceased), came alongwith his nephew Wazir Singh to meet Sonia in her hostel at Faridabad. However, when they reached there, Ghanshyam (Security Guard), Arjun (Cook) and Bimla (Caretaker) of the hostel came and met them. Bimla (PW.8) (Caretaker) told them that on the same day at about 1.00 P.M., the appellant had come to the hostel to meet Sonia. Both of them had engaged in conversation for about one hour, while sitting in the verandah of the hostel and also had tea together. After the appellant had left the hostel, Bimla (PW.8) had gone to bathroom to wash clothes. Later on, when she had gone in search of Sonia (deceased), she had found her lying dead among the plants, in the gallery of the hostel. She had died of strangulation.

D. Sube Singh (PW.1), had gone to the police station and lodged a complaint giving all the details, also stating that the appellant might have committed the said offence, as she had scratch marks on her neck, as well as on her breasts.

E. In view of the complaint made by Sube Singh (PW.1),

an FIR was registered (Ex.P-12). Necessary investigation was conducted, statements of witnesses were recorded, and the postmortem examination on the dead body of Sonia (deceased) was also performed. The appellant was arrested only on 8.9.2004. The articles collected from the place of occurrence and samples taken from the appellant, particularly, specimens of his hair etc., were sent to the Forensic Science Laboratory, Madhuban, for the preparation of an FSL report. After completion of the investigation, a chargesheet was filed against the appellant in court.

F. After committal proceedings, charges were framed against the appellant under Sections 302 and 404 IPC. The prosecution examined 21 witnesses in support of its case, including the parents and relatives of the deceased, as well as Dr. Virender Yadav (PW.4), Ms. Anita Dahiya, the then Chief Judicial Magistrate, Faridabad (PW.17), Dr. O.P. Sethi, (PW.21), and SI Vinod Kumar (PW.20), the investigating officer. Some of the cited witnesses were given up, and a large number of documents etc., were filed.

G. The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973, (hereinafter referred to as 'the Cr.P.C.'), and all the incriminating material/circumstances were put to him one by one. He denied each allegation levelled against him by repeatedly stating, "It is incorrect." The appellant did not himself, adduce any evidence in defence.

The learned Sessions Court, after appreciating all the evidence and the submissions made by the public prosecutor and the defence counsel, convicted and sentenced the appellant as has been referred to hereinabove.

H. Aggrieved, the appellant preferred an Appeal before the High Court, which has been dismissed vide impugned judgment and order dated 5.2.2009.

Hence, this appeal.

3. Dr. Sushil Balwada, learned counsel appearing on behalf of the appellant has submitted, that there was no eye-witness to the occurrence and that the prosecution had failed to prove and meet the parameters laid down by this Court for conviction in a case of circumstantial evidence. Even if there had been some discord in their marriage, they had agreed to separate mutually and the second motion of the Divorce Petition filed by mutual consent, had been fixed for next day i.e. 3.9.2004. Thus, there had been no occasion for the appellant to commit the offence. The material witnesses to the incident, particularly Ghanshyam and Arjun, who had been working as the Guard and Cook respectively in the Girls' hostel, and Mahender (Attendant) of the Taneja Guest House, where the appellant is alleged to have stayed under a fake name, have not been examined. The prosecution was under an obligation to examine each of them. The evidence of Jagatpal (PW.2), a hostile witness, could not have been considered at all. In light of the facts of this case, the theory of "last seen" together cannot be applied. Furthermore, the prosecution has created an entirely improbable story to the effect that after killing Sonia, the appellant had taken away her mobile phone, and had in the evening on the same day, telephoned his mother-in-law Dhanpati (PW.3), as well as several other relatives of Sonia, making an extra- judicial confession stating that he had killed Sonia, and that he would now himself commit suicide. The recovery of mobile phone from Itarsi (M.P.) cannot be relied upon, as this place is far away from Faridabad. There are material inconsistencies in the statements of the witnesses. The chain of circumstances is not complete. The prosecution must prove its case beyond reasonable doubt, and cannot take advantage of the weaknesses in the case of the defence. Thus, the appeal deserves to be allowed.

4. Per contra, Shri Ramesh Kumar, learned counsel appearing on behalf of the State, has opposed the appeal contending that the appellant had last been seen with Sonia (deceased), by several persons including Bimla (PW.8), in the

hostel. The appellant had thereafter left the hostel alone, just before Sonia had been found dead. The appellant, after committing the offence, had run away and stayed at the Taneja Guest House, Faridabad, under a fictitious name and by providing a fake address. He had also made an attempt to commit suicide in the said Guest House, and on being asked about the same by the attendant, he had run away from there. The appellant had left his diary and wrist watch, as well as a letter in the name of the Superintendent of Police, the Deputy Commissioner of Faridabad, the Chief Justice of the Punjab & Haryana High Court, and the Chairman of the Human Rights Commission, complaining about the family members of Sonia. The diary had also contained a suicide note. The conduct of the appellant clearly indicates that he has committed the offence. The concurrent findings of fact recorded by the courts below do not warrant any interference and therefore, the appeal is liable to be dismissed.

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

Before we enter into the merits of the case and its factual matrix, it is desirable to deal with the legal issues involved herein.

Case of Circumstantial evidence:

6. The present case is of circumstantial evidence, as there exists no eye-witness to the occurrence. The primary issue herein involves determination of the requirements for deciding a case of circumstantial evidence.

7. This Court, in *R. Shaji v. State of Kerala,* AIR 2013 SC 651 has held, "the prosecution must establish its case beyond reasonable doubt, and cannot derive any strength from the weaknesses in the defence put up by the accused. However, a false defence may be brought to notice, only to lend assurance to the Court as regards the various links in the chain

of circumstantial evidence, which are in themselves complete. The circumstances on the basis of which the conclusion of guilt is to be drawn, must be fully established. The same must be of a conclusive nature, and must exclude all possible hypothesis, except the one to be proved. Facts so established must be consistent with the hypothesis of the guilt of the accused, and the chain of evidence must be complete, so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused, and must further show, that in all probability, the said offence must have been committed by the accused."

(See also: *Sharad Birdhichand Sarda v. State of Maharashtra,* AIR 1984 SC 1622; and *Paramjeet Singh @ Pamma v. State of Uttarakhand,* AIR 2011 SC 200).

Thus, the Court while convicting a person on the basis of the circumstantial evidence, must apply the aforesaid principles.

Whether prosecution must examine all the witnesses:

8. A common issue that may arise in such cases where some of the witnesses have not been examined, though the same may be material witnesses is, whether the prosecution is bound to examine all the listed/cited witnesses.

This Court, in *Abdul Gani & Ors. v. State of Madhya Pradesh,* AIR 1954 SC 31, has examined the aforesaid issue and held, that as a general rule, all witnesses must be called upon to testify in the course of the hearing of the prosecution, but that there is no obligation compelling the public prosecutor to call upon all the witnesses available who can depose regarding the facts that the prosecution desires to prove. Ultimately, it is a matter left to the discretion of the public prosecutor, and though a court ought to and no doubt would, take into consideration the absence of witnesses whose testimony would reasonably be expected, it must adjudge the evidence as a whole and arrive at its conclusion accordingly,

taking into consideration the persuasiveness of the testimony given in the light of such criticism, as may be levelled at the absence of possible material witnesses.

9. In *Sardul Singh v. State of Bombay,* AIR 1957 SC 747, a similar view has been reiterated, observing that a court cannot, normally compel the prosecution to examine a witness which the prosecution does not choose to examine, and that the duty of a fair prosecutor extends only to the extent of examination of such witnesses, who are necessary for the purpose of disclosing the story of the prosecution with all its essentials.

10. In *Masalti v. State of U.P.,* AIR 1965 SC 202, this Court held that it would be unsound to lay down as a general rule, that every witness must be examined, even though, the evidence provided by such witness may not be very material, or even if it is a known fact that the said witness has either been won over or terrorised. "In such cases, *it is always open to the defence to examine such witnesses as their own witnesses,* and the court itself may also call upon such a witness in the interests of justice under Section 540 Cr.P.C.".

(See also: *Bir Singh & Ors. v. State of U.P.,* (1977) 4 SCC 420)

11. In *Darya Singh & Ors. v. State of Punjab,* AIR 1965 SC 328, this Court reiterated a similar view and held that if the eye-witness(s) is deliberately kept back, the Court may draw inference against the prosecution and may, in a proper case, regard the failure of the prosecutor to examine the said witnesses as constituting a serious infirmity in the proof of the prosecution case.

12. In *Raghubir Singh v. State of U.P.,* AIR 1971 SC 2156, this Court held as under:

"...Material witnesses considered necessary by the prosecution for unfolding the prosecution story alone

need be produced without unnecessary and redundant multiplication of witnesses. The appellant's counsel has not shown how the prosecution story is rendered less trustworthy as a result of the non-production of the witnesses mentioned by him. No material and important witness was deliberately kept back by the prosecution. Incidentally we may point out that the ***accused too have not considered it proper to produce those persons as witnesses for controverting the prosecution version****....."*

(Emphasis added)

13. In *Harpal Singh v. Devinder Singh & Anr.,* AIR 1997 SC 2914, this Court reiterated a similar view and further observed:

"....The illustration (g) in Section 114 of the Evidence Act is only a permissible inference and not a necessary inference. Unless there are other circumstances also to facilitate the drawing of an adverse inference, it should not be a mechanical process to draw the adverse inference merely on the strength of non-examination of a witness even if it is a material witness....."

14. In *Mohanlal Shamji Soni v. Union of India & Anr.,* AIR 1991 SC 1346, this Court held:

"10. It is cardinal rule in the law of evidence that the best available evidence should be brought before the Court to prove a fact or the points in issue. But it is left either for the prosecution or for the defence to establish its respective case by adducing the best available evidence and the Court is not empowered under the provisions of the Code to compel either the prosecution or the defence to examine any particular witness or witnesses on their sides. Nonetheless if either of the parties withholds any evidence which could be produced and which, if

produced, be unfavourable to the party withholding such evidence, the Court can draw a presumption under illustration (g) to Section 114 of the Evidence Act.... In order to enable the Court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any Court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

15. In *Banti @ Guddu v. State of M.P.,* AIR 2004 SC 261, this Court held:

"In trials before a Court of Session the prosecution "shall be conducted by a Public Prosecutor". Section 226 of the Code of Criminal Procedure, 1973 enjoins on him to open up his case by describing the charge brought against the accused. He has to state what evidence he proposes to adduce for proving the guilt of the accused. ....If that version is not in support of the prosecution case it would be unreasonable to insist on the Public Prosecutor to examine those persons as witnesses for prosecution.

When the case reaches the stage envisages in Section 231 of the Code the Sessions Judge is obliged "to take all such evidence as may be produced in support of the prosecution". It is clear form the said section that the Public Prosecutor is expected to produce evidence "in support of the prosecution" and not in derogation of the

prosecution case. At the said stage the Public Prosecutor would be in a position to take a decision as to which among the presence cited are to be examined. If there are too many witnesses on the same point the Public Prosecutor is at liberty to choose two or some among them alone so that the time of the Court can be saved from repetitious depositions on the same factual aspects. ……This will help not only the prosecution in relieving itself of the strain of adducing repetitive evidence on the same point but also help the Court considerably in lessening the workload. Time has come to make every effort possible to lessen the workload, particularly those courts crammed with cases, but without impairing the cause of justice. ……It is open to the defence to cite him and examine him as a defence witness……."

16. The said issue was also considered by this Court in *R. Shaji* (supra), and the Court, after placing reliance upon its judgments in *Vadivelu Thevar v. State of Madras;* AIR 1957 SC 614; and *Kishan Chand v. State of Haryana,* JT 2013 (1) SC 222), held as under: .

"22. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses, but the quality of their evidence which is important, as there is no requirement in the law of evidence stating that a particular number of witnesses must be examined in order to prove/disprove a fact. It is a time-honoured principle, that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy, or otherwise. The legal system has laid emphasis on the value provided by each witness, as opposed to the multiplicity or plurality of witnesses. It is thus, the quality and not quantity, which determines the adequacy of evidence, as has been provided by Section 134 of the Evidence Act. Where the law requires the examination of at least one

attesting witness, it has been held that the number of witnesses produced over and above this, does not carry any weight."

17. Thus, the prosecution is not bound to examine all the cited witnesses, and it can drop witnesses to avoid multiplicity or plurality of witnesses. The accused can also examine the cited, but not examined witnesses, if he so desires, in his defence. It is the discretion of the prosecutor to tender the witnesses to prove the case of the prosecution and "the court will not interfere with the exercise of that discretion unless, perhaps, it can be shown that the prosecution has been influenced by some oblique motive." In an extra-ordinary situation, if the court comes to the conclusion that a material witness has been withheld, it can draw an adverse inference against the prosecution, as has been provided under Section 114 of the Evidence Act. Undoubtedly, the public prosecutor must not take the liberty to "pick and choose" his witnesses, as he must be fair to the court, and therefore, to the truth. In a given case, the Court can always examine a witness as a court witness, if it is so warranted in the interests of justice. In fact, the evidence of the witnesses, must be tested on the touchstone of reliability, credibility and trustworthiness. If the court finds the same to be untruthful, there is no legal bar for it to discard the same.

Discrepancies in the depositions:

18. It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters which do not affect the core of the case of the prosecution, must not prompt the court to reject the evidence in its entirety. Therefore, unless irrelevant details which do not in any way corrode the credibility of a witness should be ignored. The court has to examine whether evidence read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies,

drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken, as to render it unworthy of belief. Thus, the court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter, and shake the basic version of the prosecution witness. Thus, the court must read the evidence of a witness as a whole, and consider the case in light of the entirety of the circumstances, ignoring the minor discrepancies with respect to trivial matters, which do not affect the core of the case of the prosecution. The said discrepancies as mentioned above, should not be taken into consideration, as they cannot form grounds for rejecting the evidence on record as a whole. (See: *State of U.P. v. M.K. Anthony,* AIR 1985 SC 48; *State rep. by Inspector of Police v. Saravanan & Anr.,* AIR 2009 SC 152; and *Vijay @ Chinee v. State of M.P.,* (2010) 8 SCC 191).

Evidence of a hostile witness:

19. It is a settled legal proposition that evidence of a prosecution witness cannot be rejected in toto, merely because the prosecution chose to treat him as hostile and cross examined him. The evidence of such witnesses cannot be treated as effaced, or washed off the record altogether. The same can be accepted to the extent that their version is found to be dependable, upon a careful scrutiny thereof.

20. In *State of U.P. v. Ramesh Prasad Misra & Anr.,* AIR 1996 SC 2766, this Court held, that evidence of a hostile witness would not be rejected in entirety, if the same has been given in favour of either the prosecution, or the accused, but is required to be subjected to careful scrutiny, and thereafter, that portion of the evidence which is consistent with the either case of the prosecution, or that of the defence, may be relied upon. (See also: *C. Muniappan & Ors. v. State of Tamil Nadu,* AIR 2010 SC 3718; *Himanshu @ Chintu v. State (NCT of Delhi),*

(2011) 2 SCC 36; and *Ramesh Harijan v. State of U.P.,* AIR 2012 SC 1979).

Therefore, the law permits the court to take into consideration the deposition of a hostile witness, to the extent that the same is in consonance with the case of the prosecution, and is found to be reliable in careful judicial scrutiny.

Motive:

21. The evidence regarding the existence of a motive which operates in the mind of the accused is very often very limited, and may not be within the reach of others. The motive driving the accused to commit an offence may be known only to him and to no other. In a case of circumstantial evidence, motive may be a very relevant factor. However, it is the perpetrator of the crime alone who is aware of the circumstances that prompted him to adopt a certain course of action, leading to the commission of the crime. Therefore, if the evidence on record suggests adequately, the existence of the necessary motive required to commit a crime, it may be conceived that the accused has in fact, committed the same. (Vide: *Subedar Tewari v. State of U.P. & Ors.,* AIR 1989 SC 733; *Suresh Chandra Bahri v. State of Bihar,* AIR 1994 SC 2420; and *Dr. Sunil Clifford Daniel v. State of Punjab,* (2012) 11 SCC 205).

Explanation of the accused:

22. It is obligatory on the part of the accused while being examined under Section 313 Cr.P.C., to furnish some explanation with respect to the incriminating circumstances associated with him, and the court must take note of such explanation even in a case of circumstantial evidence, to decide whether or not, the chain of circumstances is complete. [Vide: *Musheer Khan @ Badshah Khan & Anr. v. State of Madhya Pradesh,* AIR 2010 SC 762; and *Dr. Sunil Clifford Daniel* (supra)]**.**

23. This Court, in *State of Maharashtra v. Suresh,* (2000) 1 SCC 471, held as under:

> *"When the attention of the accused is drawn to such circumstances that inculpate him in relation to the commission of the crime, and he fails to offer an appropriate explanation or gives a false answer with respect to the same, the said act may be counted as providing a missing link for completing the chain of circumstances."*

Undoubtedly, the prosecution has to prove its case beyond reasonable doubt. However, in certain circumstances, the accused has to furnish some explanation to the incriminating circumstances, which has come in evidence, put to him. A false explanation may be counted as providing a missing link for completing a chain of circumstances.

Last seen together theory:

24. In cases where the accused was last seen with the deceased victim (last seen-together theory) just before the incident, it becomes the duty of the accused to explain the circumstances under which the death of the victim occurred. (Vide: *Nika Ram v. State of Himachal Pradesh,* AIR 1972 SC 2077; and *Ganeshlal v. State of Maharashtra,* (1992) 3 SCC 106).

25. In *Trimukh Maroti Kirkan v. State of Maharashtra,* (2006) 10 SCC 681, this Court held as under:

> *"Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."*

(See also: *Prithipal Singh & Ors. v. State of Punjab & Anr.,* (2012) 1 SCC 10)

Thus, the doctrine of "last seen together" shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him.

Police official as a witness:

26. The term witness, means a person who is capable of providing information by way of deposing as regards relevant facts, via an oral statement, or a statement in writing, made or given in Court, or otherwise.

In *Pradeep Narayan Madgaonkar & Ors. v. State of Maharashtra,* AIR 1995 SC 1930, this Court examined the issue of the requirement of the examination of an independent witness, and whether the evidence of a police witness requires corroboration. The Court herein held, that the same must be subject to strict scrutiny. However, the evidence of police officials cannot be discarded merely on the ground that they belonged to the police force, and are either interested in the investigating or the prosecuting agency. However, as far as possible the corroboration of their evidence on material particulars, should be sought.

(See also: *Paras Ram v. State of Haryana,* AIR 1993 SC 1212; *Balbir Singh v. State,* (1996) 11 SCC 139; *Kalpnath Rai v. State (Through CBI),* AIR 1998 SC 201*; M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence,* AIR 2003 SC 4311; and *Ravinderan v. Superintendent of Customs,* AIR 2007 SC 2040).

Thus, a witness is normally considered to be independent, unless he springs from sources which are likely to be tainted and this usually means that the said witness has cause, to bear such enmity against the accused, so as to implicate him falsely. In view of the above, there can be no prohibition to the effect that a policeman cannot be a witness, or that his deposition cannot be relied upon.

27. The instant case requires to be considered in light of the aforesaid settled legal propositions.

Sube Singh (PW.1), father of Sonia, deceased, had sufficient reason to go to go to Faridabad to meet his daughter, in view of the fact that the second motion of divorce between the appellant and the deceased was fixed for next day, and Sonia, deceased had telephoned her mother regarding the arrival of the appellant one day before, stating that she had doubts about the promise made by the appellant to the extent that he would make a statement before the Family Court at Rohtak, to facilitate their divorce by mutual consent. It is but natural for any parent, even if they dis-approve of the inter-caste marriage of their children, to want to be with them at the time of such proceedings, that would affect the life of their child. Sube Singh (PW.1) has further deposed, that the police had recovered clothes, rope, handkerchief, hairpin and blood stained earth etc. from the place of occurrence, and had kept these articles in separate parcels.

28. Dhanpati (PW.3), mother of the deceased, has corroborated the deposition of Sube Singh (PW.1), and has further deposed, that she had received a phone call from the accused which had been made from the mobile phone number that had belonged to Sonia deceased. On being asked, about the same by her, he had told her that he had murdered Sonia in her hostel by strangulating her, and that thereafter, he had run away from the place of occurrence. He had also stated that he would commit suicide.

29. Bimla (PW.8), the caretaker of the hostel, has deposed that while she was working as a caretaker in the Girls' hostel, on 1.9.2004 at about 8-9 p.m., Sonia (deceased) had come to the hostel and immediately had gone to make a phone call. After about 10 minutes, her husband, i.e., the appellant accused had reached there. They had engaged in some conversation. The next day, Sonia had come back from college at about 1.00 p.m., and shortly after, the appellant had also arrived there. Ghanshyam, the watchman had been told by the appellant that he was husband of the warden and wanted to meet her. Ghanshyam had not initially permitted him to enter the hostel, but had allowed his entry after taking permission from Sonia. The appellant and Sonia had then sat together in the verandah of the hostel, and had spoken for about 30-40 minutes. Both of them had then left the hostel, and had returned only after about one hour. After their arrival, the witness had served them tea. Thereafter, she had gone to bathroom to wash clothes, and when she returned after about 20-25 minutes, she had enquired from Ghanshyam regarding the whereabouts of Sonia and her husband. She had then been told that Sonia was in her room, whereas the appellant had already left the hostel alone. While going Sonia's room, she had found her lying dead in the garden, near the plants in the hostel. Seeing her dead, the witness was frightened.

30. Mukesh Chand (PW.9), has proved the pendency of the case for divorce by mutual consent before the Family Court, Rohtak and the fact that the date of the second motion had been fixed for 3.9.2004.

31. Narender Singh (PW.12), is the brother-in-law of Sonia (deceased). He has deposed that he had received a phone call at about 5.30 p.m. on 2.9.2004, from the mobile phone number belonging to Sonia. The said phone call had been made by the appellant, and he had informed the witness that he had killed Sonia, and had further told him he had also had an illicit relationship with the wife of the witness. The witness has

deposed, that on hearing this, he had lost his temper and had used abusive language in relation to the appellant, after which he had disconnected the call.

Virender Singh (PW.19), a relative of Sonia's, had also received a similar phone call from the appellant from the mobile phone number belonging to of Sonia.

32. Ms. Anita Dahiya (PW.17), the then Chief Judicial Magistrate, Faridabad, has deposed that the investigating officer had wanted to have an identification parade, but that the appellant had not agreed to the same.

33. Jagatpal (PW.2), an attendant at the Taneja Rest House, NIT, Faridabad, has deposed in his examination-in-chief that a person had stayed in the said guest house, after disclosing his identity as Amit, and by providing his address as 535, Model Town, Simla. He had even made the requisite entries in the register in his own handwriting. As regards the rest of the situation, he has stated that since his duty was then over, his colleague Mahender, had come on duty at 9.00 a.m. on 2.9.2004, and that therefore, he had no further information to offer. At this stage, he was declared hostile as it was found that he was suppressing the truth and thus, he was cross-examined. Undoubtedly, he has turned hostile. However, he has admitted that on 2.9.2004, at about 6.30 p.m., attendant Mahender had come to his place, and had told him that the occupant of room no. 114 was attempting to commit suicide, and this was when he, alongwith Mahender had gone to his room. The appellant had thereafter, run away from the guest house. They had tried to chase him but in vain. From his room, one diary, a letter and wrist watch were recovered, and the said articles were handed over to the police vide memo Ex.P5, **which bore his signature**.

34. Dr. Virender Yadav (PW.4), had conducted the post-mortem examination on the body of Sonia, and he has deposed that there was bleeding with clotted blood present in the bilateral

nostrils, and on the right side of the mouth. Rigor mortis was present in all the four limbs with postmortem staining on dependent parts. Multiple abrasions were present on the front of the neck, with large reddish contusions-bilateral shoulders, more on the right side. Abrasions numbering four of the size 2.5 x 0.75 cms., were present on the right side, just below the clavicle and four of these in number were present on its left side.

On dissection, the muscle of the neck was contused with hemorrhage with a fracture of the thyroid cartilage, and a fracture of the tracheal rings with blood clots in the trachea. The adjoining muscles and upper chest muscles were contused extensively with blood clots, with bilateral fractures of the clavicle bone and the upper second and third ribs.

In his opinion, the cause of death was asphyxia caused as a result of smothering and throttling, which was ante-mortem in nature and was sufficient to cause death in the natural course.

He has further deposed, that she had died within two minutes of the offence, and before 24 hours of the post-mortem.

35. There is evidence on record to show that the mobile phone had been purchased by Sonia from Itarsi on 10.9.2004. The same mobile phone was recovered from the shop of Sonu at Itarsi upon the disclosure statement made by the appellant, vide recovery memo Ex.P-19.

36. In view of the aforesaid depositions, facts emerge as under:-

(i) The appellant and Sonia (deceased) had been classmates and had developed intimacy. In spite of the fact that they belonged to different castes, they had thereafter gotten married, knowing fully well that their marriage would not be approved by at least one of the two families.

(ii) Their marriage was not cordial and within an year of

such marriage, they had mutually decided to separate and had thus, filed a petition for divorce by mutual consent under Section 13-B of the Hindu Marriage Act, 1955, before the Family Court, Rohtak. The first motion was clear, and the case was fixed for second motion on 3.9.2004. Just before the said date, the appellant had met Sonia (deceased), and had assured her that he would agree to the said divorce in the second motion on 3.9.2004, before the Family Court at Rohtak.

(iii) The said information was furnished by Sonia (deceased), to her mother Smt. Dhanpati Devi (PW.3), and it was in view thereof that Sube Singh (PW.1), father of the deceased had come to Faridabad only to meet Sonia.

(iv) While reaching there, Sube Singh (PW.1) had been informed by Ghanshyam (Security Guard), Arjun (Cook) and Bimla, Caretaker (PW.8), that the appellant had come to meet Sonia, and that now she was lying dead in the garden. Bimla (PW.8) had also furnished him with all the requisite details, as regards the visit of the appellant. Sube Singh, father of the deceased, had lodged an FIR. Hence, criminal law was set into motion and the investigation began.

(v) The Police had recovered the dead body, as well as various material objects lying near it, including a rope.

(vi) The post-mortem report suggests that Sonia had died of asphyxia caused as a result of smothering and throttling, and that it had taken hardly any time to kill her.

(vii) The appellant had stayed at the Taneja Guest House, by providing a fictitious name and address, and the next day had tried to commit suicide. He had been chased by the hostel staff, but had managed to run away. While running away, he had left a diary (Ex.P-54), a wrist watch (Ex.P-56), and a letter (Ext.P-55).

(viii) On 2.9.2004, the appellant had made certain telephone calls from the mobile phone belonging to Sonia, to the mother as well as to several other relatives of the deceased, informing them about the murder of Sonia that had been committed by him, and had further stated that he would commit suicide.

(ix) A diary (Ex. P-54), a letter (Ex.P-55) and a wrist watch (Ex.P-56), belonging to the appellant were recovered from the Taneja Guest House. A suicide note had been written in the said diary by the appellant, and a letter had also been written by him to the Superintendent of Police, Faridabad, the District Collector, the Chief Justice, High Court of Punjab & Haryana, and the Human Rights Commissioner, suggesting his involvement. The recovery memo of the same (Ex.P-5), bears the signatures of Jagatpal (PW.2) and Mahender Singh, employees of the Taneja Guest House, Faridabad.

(x) The appellant had remained absconding for several days, and after his apprehension, the mobile phone belonging to Sonia was recovered from the shop of Sonu at Itarsi, Madhya Pradesh on the basis of a disclosure statement made by him. The disclosure statement made by the appellant on the basis of which the recovery was made, bears the signatures of the appellant and of a police personnel as a witness.

(xi) The call records clearly prove that the mobile phone belonging to Sonia (deceased), had been used even after her death and that the same had been in the possession of the appellant, as no body else could have used the same. Sonia had died before 2.30 p.m. on 2.9.2004. The call records of her telephone, which have been exhibited before the court, clearly disclose the outgoing calls that were made from her telephone to her mother and other relatives, as has been referred to hereinabove at 1620.55; 1625.47; 1637.17; 1707.46; and 1744.03 as Exh.P.21.

(xii) During the investigation, the appellant had refused to participate in the Test Identification Parade, as he could have been identified by Ghanshyam (Security Guard) of the hostel, Arjun (Cook) and Bimla, Caretaker (PW.8), as well as by the staff of the Taneja Guest House.

(xiii) Jagatpal (PW.2), though had turned hostile, has provided material information, and has also accepted his signatures on the recovery memo and his statements, as well as those of Mahender, the other attendant.

(xiv) The appellant has given a specimen of his hair to be compared with the hair recovered from the place of occurrence, and the FSL report (Ex.P-8) that was tendered as evidence has showed, that the hair that was recovered from the place of occurrence, was found to be similar in most of its morphological and microscopical characteristics, to the sample of the hair provided by the appellant.

37. In view of the aforesaid factors, the Trial Court, as well as the High Court, have convicted the appellant and awarded the sentences as referred to hereinabove.

We have also been taken through the evidence on record, as well as through the judgments of the courts below. Bimla, Caretaker (PW.8), is definitely an independent witness. She had "last seen together" the appellant and Sonia (deceased), just before her death, and we do not see any reason to doubt the veracity of her statement. It is also on record that the appellant had left alone from the hostel. The appellant has not furnished any explanation with respect to what could have happened to Sonia (deceased) while she was with him, if he was not responsible for her death. No explanation was furnished by him as regards why he had stayed at the Taneja Guest House, by providing a fictitious name and false address and nor was any explanation provided by him with respect to the circumstances under which, the mobile phone belonging to

Sonia, had come to be in his possession. Admittedly, this is a case of a love marriage which had gone wrong. Owing to such marital discord, they had decided to separate and to get divorce by mutual consent. Therefore, it might have been frustration which had forced the appellant to commit such a heinous crime.

38. From the undelivered letter that had been written by the appellant in the name of Superintendent of Police and to others, in Ex.P-54 recovered from the Taneja Guest House, it is evident that the appellant had developed intimacy with Sonia (deceased) much earlier, and had claimed to have married her in a temple, though, the formal marriage between them had taken place in the year 2003. The said letter reveals, that Sonia (deceased) and her family members had tortured him mentally, and had extracted a huge amount of money from him over a period of the past ten years. He had even persuaded his friends, relatives and family members to give a loan to the complainant, Sube Singh, which had never been returned by him. Several threats had been made to the appellant by the family of the deceased stating that they would involve him in a false dowry demand case, eliminate him. The family members of the appellant had severed all relations with him.

In the suicide note (Ex.P-55), the same story has been depicted. Thus, the feelings of the appellant towards Sonia (deceased), and her family members were such, that they could have given rise to a motive for him to commit the said offence.

39. The non-examination of Sonu, from whose shop, the mobile phone was recovered, cannot be said to be fatal for the reason that the recovery memo bears the signature of the appellant himself. One police Head Constable has also signed the same as a witness, and it is not the case of the appellant that he had been forced to sign the said recovery memo. Similarly, we do not find any force in the submissions advanced on behalf of the appellant, stating that the non-examination of Ghanshyam and Arjun from the girls' hostel, or of Mahender from

the Taneja Guest House, requires the court to draw adverse inference, as there is no need to provide the same evidence in multiplicity. The appellant could have examined them or some of them as defence witnesse(s). However, no such attempt was made on his part.

40. A large number of discrepancies have been pointed out by the learned counsel appearing on behalf of the appellant, and some of them are reproduced as under:

A. The entry register maintained in the Girls Hostel for visitors was never produced in court.

B. The finger prints taken from the glass and tea cups recovered from the hostel, to prove that the same had been used by the appellant, did not test positive.

C. The rope allegedly used in the crime, was not recovered, nor has any positive evidence been produced to show that the appellant had gone to the hostel armed with a rock.

D. A large number of girl students had been staying in the hostel, and none of them were examined.

E. The postmortem report does not in any way prove the case of the prosecution, for the reason that the throttling, smothering and breaking of various ribs of the deceased, may not have been caused by a single person.

F. The mobile phone recovered from Itarsi (M.P.) was not deposited in the Malkhana.

G. The telephone number that had allegedly been purchased by Sonia (deceased), and later recovered, showed some variance.

H. The journey from Faridabad to Itarsi and from Itarsi to Faridabad has not been proved.

I. The Booking Register of the Taneja Guest House does not prove that the appellant had stayed in the said Guest House.

41. We have examined the aforesaid discrepancies pointed out by the learned counsel. It may be stated herein that some of the issues have been explained by the prosecution, however, no attempt was ever made by the defence to put most of these issues to SI Vinod Kumar (PW.20), the Investigating Officer in his cross-examination. It is evident from his deposition that he had, in fact, answered all the questions that were put to him in the cross-examination. However, it is pertinent to clarify that most of these questions that are being currently raised before us were not put to him. For example, he has explained that nobody from the said market had been ready to become the Panch witness for recovery of the mobile phone from Sonu's shop at Itarsi, and that even Sonu was not ready to do so. Further, no question had been put to him in the cross-examination regarding the different EMEI number of the said mobile phone. The mobile phone that was recovered, bore the EMEI No. 3534000004033852 (Ex.P-19), though the EMEI number of mobile phone that belonged to Sonia was 3534000004033853. Furthermore, no question had been put as to why the mobile phone, after the recovery, had not been deposited in the Malkhana. In light of such a fact situation, it is not permissible for us to consider such discrepancies.

So far as the inconsistencies in the depositions of the witnesses are concerned, none of them can be held to be material inconsistency.

42. The facts so established by the prosecution do not warrant further review of the judgments of the courts below by this court. The appeal lacks merit and is, accordingly, dismissed.

R.P. Appeal dismissed.