RISHIPAL

v.

STATE OF UTTARAKHAND

(Criminal Appeal No. 928 of 2009)

JANUARY 8, 2013

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

Penal Code, 1860 – ss.302, 171, 201, 365 and 420 – Prosecution – Case based on circumstantial evidence – Corpus delicti not recovered – Conviction by trial court u/ss. 302, 171, 201, 364 and 420 IPC – High Court acquitted the accused u/s.302 while upholding the conviction u/ss. 171, 201 and 420 and further altering the conviction u/s.364 to that u/s.365 – Appeal to Supreme Court by accused challenging conviction order – Notice to State as well as to the accused to show cause as to why the order acquitting him u/s.302 not be set aside – Plea of accused to withdraw his appeal rejected – Held: Conviction u/ss. 171, 201, 420 and 365 upheld – Acquittal of the accused u/s.302 is correct since charge of murder not proved beyond reasonable doubt as it was not proved that the deceased met a homicidal death – Circumstances of the case also did not form a complete chain as to leave no option except to hold that accused alone was guilty of the offences – Evidence – Circumstantial Evidence.

Criminal Trial – Absence of corpus delicti – Effect of – Held: Absence of corpus delicti, by itself is, not fatal to a charge of murder, if prosecution successfully proves that the victim met a homicidal death.

Appellant-accused was convicted by the trial court u/ss.302, 171, 201, 364 and 420 IPC. In appeal, High Court acquitted him u/s. 302 IPC and upheld the conviction u/ss.171, 201 and 420 IPC. It further altered conviction u/s.

364 to that u/s. 365 IPC. The accused filed appeal to this Court challenging his conviction. This Court issued notice to the State as well as to the appellant-accused to show cause as to why his acquittal u/s.302 IPC might not be set aside. The appellant-accused prayed for withdrawal of SLP filed by him. However, the prayer was declined by the Court.

Dismissing the appeal, the Court

HELD: 1. In the present appeal, no attempt was made by the appellant to question the correctness of the findings recorded by the trial court in so far as the commission of offences punishable u/ss. 171, 201, 365 IPC were concerned. The appellant had also sought withdrawal of the SLP which implied that he did not question the correctness of the sentence recorded by the High Court in so far as other offences were concerned. That prayer was rejected which effectively kept the SLP alive, but no serious attempt was made to pursue the challenge against the order passed by the High Court in so far as the conviction recorded by the said court under other offences was concerned. Thus, the Court is not called upon to examine the correctness of the conviction of the appellant for other offences. Even otherwise the findings recorded by the trial court and affirmed by the High Court are supported by evidence in so far as commission of other offences are concerned. There is no miscarriage of justice in the appreciation of the evidence or recording of those finding to call for interference of this Court. [Para 8] [925-C-G]

2.1. The instant case is entirely based on circumstantial evidence. No direct evidence has been adduced to prove that the deceased, whose *corpus delicti* has not been recovered, was done to death, nor any evidence adduced to show where and when the same was disposed of by the appellant assuming that he had

committed the crime alleged against him. [Para 9] [925-H; 926-A]

2.2. In the absence of *corpus delicti,* what the court looks for is clinching evidence that proves that the victim has been done to death. If the prosecution is successful in providing cogent and satisfactory proof of the victim having met a homicidal death, absence of *corpus delicti* will not by itself be fatal to a charge of murder. Failure of the prosecution to assemble such evidence will, however, result in failure of the most essential requirement in a case involving a charge of murder. In the present case, there is no evidence either direct or circumstantial about the deceased having met a homicidal death. The charge of murder levelled against the appellant, therefore, rests on a rather tenuous ground of the two having been last seen together. [Para 13] [929-A-C]

Rama Nand and Ors. v. State of Himachal Pradesh **(1981) 1 SCC 511: 1981 (2) SCR 444;** *Ram Chandra and Ram Bharosey v. State of Uttar Pradesh* **AIR 1957 SC 381;** *State of Karnataka v. M.V. Mahesh* **(2003) 3 SCC 353: 2003 (2) SCR 553;** *Lakshmi and Ors. v. State of Uttar Pradesh* **(2002) 7 SCC 198: 2002 (1) Suppl. SCR 733 – referred to.**

2.3. It is not the case of the prosecution that there existed any enmity between the deceased and the appellant nor is there any evidence to prove any such enmity. All that was suggested by the prosecution was that the appellant got rid of the deceased by killing him because he intended to take away the car which the complainant had given to him. If the motive behind the alleged murder was to somehow take away the car, it was not necessary for the appellant to kill the deceased for the car could be taken away even without physically harming the deceased. It was not as though the deceased was driving the car and was in control thereof so that without removing him from the scene it was

difficult for the appellant to succeed in his design. The prosecution case on the contrary is that the appellant had induced the complainant to part with the car and a sum of Rs.15,000/-. The appellant has been rightly convicted for that fraudulent act. The motive for the alleged murder is as weak as it sounds illogical. While motive does not have a major role to play in cases based on eye-witness account of the incident, it assumes importance in cases that rest entirely on circumstantial evidence. [Para 15] [929-D-H; 930-A-B]

Sukhram v. State of Maharashtra **(2007) 7 SCC 502: 2007 (9) SCR 44;** *Sunil Clifford Daniel (Dr.) v. State of Punjab* **(2012) 8 SCALE 670;** *Pannayar v. State of Tamil Nadu by Inspector of Police* **(2009) 9 SCC 152: 2009 (13) SCR 367 – referred to.**

2.4. The High Court was correct in arriving at the conclusion that the charge of murder could not be held to be proved on the basis of the evidence on record. It is true that the tell-tale circumstances proved on the basis of the evidence on record give rise to a suspicion against the appellant but suspicion howsoever strong, is not enough to justify conviction of the accused, for murder. The trial Court proceeded more on the basis that the appellant 'may have' murdered the deceased. In doing so the trial court over-looked the fact that there was a long distance between 'may have', and 'must have' which distance must be traversed by the prosecution by producing cogent and reliable evidence. No such evidence is forthcoming in the instant case. The circumstances sought to be proved against the accused should not only be established beyond a reasonable doubt but also that such circumstances form so complete a chain as leaves no option for the Court, except to hold that the accused is guilty of the offences with which he is charged. The disappearance of deceased in the present case is not explainable as sought to be

contended only on the hypothesis that the appellant killed him near some canal in a manner that is not known or that the appellant disposed of his body in a fashion about which the prosecution has no evidence except a wild guess that the body may have been dumped into a canal from which it was never recovered. [Para 15] [931-D-G, H; 932-A-C]

Mohibur Rahman and Anr. v. State of Assam **(2002) 6 SCC 715;** *Arjun Marik and Ors. v. State of Bihar* **1994 Supp (2) SCC 372: 1994 (2) SCR 265;** *Godabarish Mishra v. Kuntala Mishra and Another* **(1996) 11 SCC 264: 1996 (7) Suppl. SCR 688;** *Bharat v. State of M.P* **(2003) 3 SCC 106: 2003 (1) SCR 748;** *State of Goa v. Sanjay Thakran and Anr.* **(2007) 3 SCC 755: 2007 (3) SCR 507;** *Bodh Raj alias Bodha and Ors. v. State of Jammu and Kashmir* **(2002) 8 SCC 45: 2002 (2) Suppl. SCR 67;** *Jaswant Gir v. State of Punjab* **(2005) 12 SCC 438 – relied on.**

2.5. Even if the most charitable liberal view is taken in favour of the prosecution, all that is got, is a suspicion against the appellant and no more. The High Court was in that view justified in setting aside the order passed by the trial court and acquitting the appellant of the offence of murder u/s. 302 IPC. The order passed by the High Court is affirmed giving to the appellant the benefit of doubt. [Para 20] [934-C-E]

Case Law Reference:

1981 (2) SCR 444	**referred to**	**Para 9**
AIR 1957 SC 381	**referred to**	**Para 10**
2003 (2) SCR 553	**referred to**	**Para 11**
2002 (1) Suppl. SCR 733	**referred to**	**Para 12**
2007 (9) SCR 44	**referred to**	**Para 14**
(2012) 8 SCALE 670	**referred to**	**Para 14**
2009 (13) SCR 367	**referred to**	**Para 14**
(2002) 6 SCC 715	**relied on**	**Para 16**
1994 (2) SCR 265	**relied on**	**Para 16**
1996 (7) Suppl. SCR 688	**relied on**	**Para 16**
2003 (1) SCR 748	**relied on**	**Para 16**
2007 (3) SCR 507	**relied on**	**Para 17**
2002 (2) Suppl. SCR 67	**relied on**	**Para 17**
(2005) 12 SCC 438	**relied on**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 928 of 2009.

From the Judgment & Order dated 27.08.2008 of the High Court of Uttarakhand at Nainital in Criminal Appeal No. 298 of 2001.

Neeraj Kumar Jain, Kamal Singh Pundir, Pratham Kant, Anil Kumar Sharma, Rameshwar Prasad Goyal for the Appellant.

Abhishek Atrey, Aishverya Shandilya for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal arises out of a judgment and order dated 27th August, 2008 passed by the High Court of Uttarakhand at Nainital whereby Criminal Appeal No.298 of 2001 filed by the appellant has been partly allowed. The High Court has while setting aside the conviction and sentence awarded to the appellant under Section 302 IPC upheld his conviction for offences punishable under Sections 171, 201 and 420 IPC and the sentence awarded by the trial Court for these offences. The High Court has further convicted the appellant for an offence punishable under Section 365 IPC and sentenced

him to undergo rigorous imprisonment for a period of seven years on that count.

2. The facts giving rise to the arrest and eventual conviction of the appellant have been set out by the High Court at length. We need not, therefore, recapitulate the same over again except to the extent it is absolutely necessary to do so for the disposal of this appeal. Suffice it to say that the appellant according to the prosecution dishonestly induced the complainant Dr. Mohd. Alam (P.W.2) at Dehradun to deliver his car bearing registration No.URM 2348 and a sum of Rs. 15,000/- and at about 1.30 p.m. on the same day abducted Abdul Mabood, brother of the complainant with the intention to commit his murder. The prosecution case further is that sometime between 1.7.1987 and 2.7.1987, Abdul Mabood was murdered near a canal on Kairana Panipat Road in District Panipat and with a view to cause disappearance of any signs of the crime committed by him threw the dead body of Abdul Mabood in the Canal. A report for the alleged commission of offences under Sections 406, 419, 420 and 365 IPC was lodged by Dr. Mohd. Alam on 6.7.1987 at Police Station Dalanwala based on which Crime No.185/1987 was registered and the investigation undertaken by Muzaffar Ali - Sub-Inspector, examined as PW17 at the trial. In the course of investigation the said witness took the appellant into custody, recovered the car bearing Registration No.U.R.M.2348 from Panipat and effected seizure of some letters allegedly written by him. Further investigation of the case was then handed over to Mr. J.P. Sharma (P.W.18) who completed the same and submitted a charge sheet against the appellant for offences punishable under Sections 364, 302, 201, 420, 170 and 171 I.P.C.

3. The appellant was in due course committed to the Court of Sessions to face trial before the III Additional Sessions Judge, Dehradun who framed charges against the appellant to which the appellant pleaded not guilty and claimed to be tried.

4. At the trial Court the prosecution examined P.W. 1

Raees Ahmad, P.W.2 Dr. Mohd. Alam, also complainant in the case; P.W.3 Hari Om, P.W.4 Jiledar Singh, P.W.5 Hizfur Rahman the brother of Abdul Mabood-deceased; P.W.6 Anees Ahmad, P.W.7 Akash Garg, P.W.8 Badloo Ram, P.W.9 Jai Bhagwan, P.W.10 Ajit Chopra, and nine other witnesses including P.W.17 Muzaffar Ali and P.W.18 J. P. Sharma who concluded the investigation and P.W.19 Ramanand Pandey, another Scientific Officer of Forensic Laboratory, Agra. The appellant examined D.W.1 Yashveer Singh, his brother and D.W.2 Constable Om Prakash, in his defence.

5. Appreciation of evidence thus assembled at the trial led the trial Court to the conclusion that the appellant had committed offences punishable under the provisions with which he stood charged and accordingly sentenced him to life imprisonment for the offence of murder besides a fine of Rs.3,000/-. For the remaining offence he was sentenced to undergo rigorous imprisonment ranging between two months to five years with the direction that all the sentences shall run concurrently.

6. Aggrieved by the judgment and order passed by the trial Court the appellant preferred an appeal to the High Court of Allahabad from where the same was transferred to the High Court of Uttarakhand at Nainital in terms of Section 35 of the U.P. Re-organisation Act, 2000. The transferee High Court allowed the appeal but only in part and to the extent that the appellant was acquitted of the charge of murder while his conviction for offences under Sections 171, 201 and 420 was maintained. The High Court also altered the conviction from Section 364 IPC to Section 365 IPC and sentenced him to undergo rigorous imprisonment for a period of seven years on that count. The present appeal assails the correctness of the said order of the High Court.

7. When this appeal came up for hearing before S.B. Sinha and Cyriac Joseph, JJ. on 24th October, 2008, this Court not only issued notice to the State in the appeal but also directed notice to the appellant to show cause why the order passed by

the High Court acquitting the appellant under Section 302 may not be set aside. At this stage the appellant made a prayer for withdrawal of the SLP filed by him against his conviction which prayer was declined by this Court by order dated 5th January, 2009 on the ground that the Court had issued a show cause notice for reversal of the appellant's acquittal under Section 302 IPC.

8. We have heard learned counsel for the parties at some length who have taken us through the evidence on record. The only question that was argued before us with some amount of seriousness on both sides was whether the High Court was justified in acquitting the appellant of the charge of murder held proved against him by the trial Court. There was no attempt made by the counsel for the appellant to question the correctness of the findings recorded by the trial Court in so far as the commission of offences punishable under other provisions of the IPC were concerned. As seen above, the appellant had sought withdrawal of the SLP which implied that he did not question the correctness of the sentence recorded by the High Court in so far as other offences were concerned. That prayer was rejected which effectively kept the SLP alive, but no serious attempt was made to pursue the challenge against the order passed by the High Court in so far as the conviction recorded by the said Court under other offences was concerned. We are not in that view of the matter called upon to examine the correctness of the conviction of the appellant for other offences. Even otherwise the findings recorded by the trial Court and affirmed by the High Court are in our opinion supported by evidence in so far as commission of other offences are concerned. There is no miscarriage of justice in the appreciation of the evidence or recording of those finding to call for our interference.

9. Coming next to the question whether the prosecution has brought home the charge of murder levelled against the appellant, we must at the outset point out that the case is entirely

based on circumstantial evidence. No direct evidence has been adduced to prove that Abdul Mabood, whose *corpus delicti* has not been recovered, was done to death, nor any evidence adduced to show where and when the same was disposed of by the appellant assuming that he had committed the crime alleged against him. The legal position regarding production of *corpus delicti* is well settled by a long line of decisions of this Court. We may briefly refer to some of those cases. In *Rama Nand and Ors. v. State of Himachal Pradesh* (1981) 1 SCC 511, this Court summed up the legal position on the subject as:

> ".....In other words, we would take it that the corpus delicti, i.e., the dead-body of the victim was not found in this case. But even on that assumption, the question remains whether the other circumstances established on record were sufficient to lead to the conclusion that within all human probability, she had been murdered by Rama Nand appellant? It is true that one of the essential ingredients of the offence of culpable homicide required to be proved by the prosecution is that the accused caused the death" of the person alleged to have been killed.
>
> *28. This means that before seeking to prove that the accused is the perpetrator of the murder, it must be established that homicidal death has been caused. Ordinarily, the recovery of the dead-body of the victim or a vital part of it, bearing marks of violence, is sufficient proof of homicidal death of the victim. There was a time when under the old English Law, the finding of the body of the deceased was held to be essential before a person was convicted of committing his culpable homicide. "I would never convict", said Sir Mathew Hale, "a person of murder or manslaughter unless the fact were proved to be done, or at least the body was found dead". This was merely a rule of caution, and not of law. But in those times when execution was the only punishment for murder, the*

need for adhering to this cautionary rule was greater. Discovery of the dead-body of the victim bearing physical evidence of violence, has never been considered as the only mode of proving the corpus delicti in murder. Indeed, very many cases are of such a nature where the discovery of the dead-body is impossible. A blind adherence to this old "body" doctrine would open the door wide open for many a heinous murderer to escape with impunity simply because they were cunning and clever enough to destroy the body of their victim. In the context of our law, Sir Hale's enunciation has to be interpreted no more than emphasising that where the dead-body of the victim in a murder case is not found, other cogent and satisfactory proof of the homicidal death of the victim must be adduced by the prosecution. Such proof may be by the direct ocular account of an eye-witness, or by circumstantial evidence, or by both. But where the fact of corpus delicti, i.e. 'homicidal death' is sought to be established by circumstantial evidence alone, the circumstances must be of a clinching and definitive character unerringly leading to the inference that the victim concerned has met a homicidal death. Even so, this principle of caution cannot be pushed too far as requiring absolute proof. Perfect proof is seldom to be had in this imperfect world, and absolute certainty is a myth. That is why under Section 3, Evidence Act, a fact is said to be "proved", if the Court considering the matters before it, considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The corpus delicti or the fact of homicidal death, therefore, can be proved by telling and inculpating circumstances which definitely lead to the conclusion that within all human probability, the victim has been murdered by the accused concerned…."

(emphasis supplied)

10. To the same effect is the decision in *Ram Chandra & Ram Bharosey v. State of Uttar Pradesh* AIR 1957 SC 381, where this Court said:

> *"It is true that in law a conviction for an offence does not necessarily depend upon the corpus delicti being found. There may be reliable evidence, direct or circumstantial, of the commission of the murder though the corpus delicti are not traceable."*

11. Reference may also be made to *State of Karnataka v. M.V. Mahesh* (2003) 3 SCC 353 where this Court observed:

> "It is no doubt true that even in the absence of the corpus delicti it is possible to establish in an appropriate case commission of murder on appropriate material being made available to the court. In this case no such material is made available to the court."

12. In *Lakshmi and Ors. v. State of Uttar Pradesh* (2002) 7 SCC 198 the legal position was reiterated thus :

> *"16. Undoubtedly, the identification of the body, cause of death and recovery of weapon with which the injury may have been inflicted on the deceased are some of the important factors to be established by the prosecution in an ordinary given case to bring home the charge of offence under Section 302 I.P.C. This, however, is not an inflexible rule. It cannot be held as a general and broad proposition of law that where these aspects are not established, it would be fatal to the case of the prosecution and in all cases and eventualities, it ought to result in the acquittal of those who may be charged with the offence of murder. It would depend on the facts and circumstances of each case. A charge of murder may stand established against an accused even in absence of identification of the body and cause the death."*

13. In the absence of *corpus delicti* what the court looks for is clinching evidence that proves that the victim has been done to death. If the prosecution is successful in providing cogent and satisfactory proof of the victim having met a homicidal death, absence of *corpus delicti* will not by itself be fatal to a charge of murder. Failure of the prosecution to assemble such evidence will, however, result in failure of the most essential requirement in a case involving a charge of murder. That is precisely the position in the case at hand. There is no evidence either direct or circumstantial about Abdul Mabood having met a homicidal death. The charge of murder levelled against the appellant, therefore, rests on a rather tenuous ground of the two having been last seen together to which aspect we shall presently advert when we examine whether the two being last seen together is proved as a circumstance and can support a charge of murder.

14. The second aspect to which we must straightaway refer is the absence of any motive for the appellant to commit the alleged murder of Abdul Mabood. It is not the case of the prosecution that there existed any enmity between Abdul Mabood and the appellant nor is there any evidence to prove any such enmity. All that was suggested by learned counsel appearing for the State was that the appellant got rid of Abdul Mabood by killing him because he intended to take away the car which the complainant-Dr. Mohd. Alam had given to him. That argument has not impressed us. If the motive behind the alleged murder was to somehow take away the car, it was not necessary for the appellant to kill the deceased for the car could be taken away even without physically harming Abdul Mabood. It was not as though Abdul Mabood was driving the car and was in control thereof so that without removing him from the scene it was difficult for the appellant to succeed in his design. The prosecution case on the contrary is that the appellant had induced the complainant to part with the car and a sum of Rs.15,000/-. The appellant has been rightly convicted for that fraudulent act which conviction we have affirmed. Such being

the position, the car was already in the possession and control of the appellant and all that he was required to do was to drop Abdul Mabood at any place en route to take away the car which he had ample opportunity to do during all the time the two were together while visiting different places. Suffice it to say that the motive for the alleged murder is as weak as it sounds illogical to us. It is fairly well-settled that while motive does not have a major role to play in cases based on eye-witness account of the incident, it assumes importance in cases that rest entirely on circumstantial evidence. [See *Sukhram v. State of Maharashtra* (2007) 7 SCC 502, *Sunil Clifford Daniel (Dr.) v. State of Punjab* (2012) 8 SCALE 670, *Pannayar v. State of Tamil Nadu by Inspector of Police* (2009) 9 SCC 152]. Absence of strong motive in the present case, therefore, is something that cannot be lightly brushed aside.

15. Coming then to the circumstances which according to the prosecution prove the charge of murder against the appellant, all that we have is that the appellant and Abdul Mabood, the deceased, had left in a car bearing registration No.URM 2348 from No.1, Circular Road, Police Station Dalanwala, Dehradun and that on 2nd July, 1986 the appellant had gone to the house of one Akash Garg P.W.7 accompanied by a boy whom the witness identified as the deceased-Abdul Mabood. The deposition of PW8 Badlu Ram, posted as a Peon at Naval Cinema, Panipat, is also to the same effect. According to the said witness the appellant had gone to the cinema accompanied by a boy between 20-22 years of age whom he recognised as the alleged deceased-Abdul Mabood on the basis of a photograph shown to him at the trial. The only other evidence which has any relevance to the circumstances that led to the disappearance of Abdul Mabood is the deposition of Tejveer Singh P.W.11, resident of Budha Kheri, Panipat, a businessman by occupation, who claims to have seen the appellant with Abdul Mabood when the two visited his farm. The boy was identified by the witness by reference to a photograph shown to him as the alleged deceased-Abdul

Mabood. According to the witness the appellant had gone away with his companion boy and when he returned at night he was all alone. He also appeared troubled and his clothes were stained with dust and sand. The appellant asked for a towel to take a bath and explained that his car had broken down and while trying to put it in order his clothes got soiled. When the witness asked him about the boy accompanying the appellant the latter is alleged to have explained that he had stayed back with his friend. The deposition of PW10 Ajit Chopra who is also a resident of Panipat proved that the appellant had visited his residence in the first week of July, 1987 and had left his car at Naval Talkies which was then brought to his factory by their driver Jai Bhagwan examined as PW9. The trial Court on the basis of the above evidence held that the deceased-Abdul Mabood had been taken by the appellant to Panipat and disposed of by him on the basis that the two were last seen together. The trial Court had, however, found no motive or evidence for the alleged murder of the deceased-Abdul Mabood. The High Court took a contrary view and found that the charge of murder could not be held to be proved on the basis of the evidence on record. The High Court was, in our opinion, correct in arriving at that conclusion. It is true that the tell-tale circumstances proved on the basis of the evidence on record give rise to a suspicion against the appellant but suspicion howsoever strong is not enough to justify conviction of the appellant for murder. The trial Court has, in our opinion, proceeded more on the basis that the appellant may have murdered the deceased-Abdul Mabood. In doing so the trial Court over looked the fact that there is a long distance between 'may have' and 'must have' which distance must be traversed by the prosecution by producing cogent and reliable evidence. No such evidence is unfortunately forthcoming in the instant case. The legal position on the subject is well settled and does not require any reiteration. The decisions of this Court have on numerous occasions laid down the requirements that must be satisfied in cases resting on circumstantial evidence. The essence of the said requirement is that not only should the

circumstances sought to be proved against the accused be established beyond a reasonable doubt but also that such circumstances form so complete a chain as leaves no option for the Court except to hold that the accused is guilty of the offences with which he is charged. The disappearance of deceased-Abdul Mabood in the present case is not explainable as sought to be argued before us by the prosecution only on the hypothesis that the appellant killed him near some canal in a manner that is not known or that the appellant disposed of his body in a fashion about which the prosecution has no evidence except a wild guess that the body may have been dumped into a canal from which it was never recovered.

16. In *Mohibur Rahman and Anr. v. State of Assam* (2002) 6 SCC 715, this Court held that the circumstance of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. There may however be cases where, on account of close proximity of place and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. Similarly in *Arjun Marik and Ors. V. State of Bihar* 1994 Supp (2) SCC 372, this Court reiterated that the solitary circumstance of the accused and victim being last seen will not complete the chain of circumstances for the Court to record a finding that it is consistent only with the hypothesis of the guilt of the accused. No conviction on that basis alone can, therefore, be founded. So also in *Godabarish Mishra v. Kuntala Mishra and Another* (1996) 11 SCC 264, this Court declared that the theory of last seen together is not of universal application and may not always be sufficient to sustain a conviction unless supported by other links in the chain of circumstances. In *Bharat v. State of M.P* (2003) 3 SCC 106; two circumstances on the basis whereof the appellant had been

convicted were (i) the appellant having been last seen with the deceased and (ii) Recovery of ornaments made at his instance. This Court held :

> *".....Mere non-explanation cannot lead to the proof of guilt against the appellant. The prosecution has to prove its case against the appellant beyond reasonable doubt. The chain of circumstances, in our opinion, is not complete so as to sustain the conviction of the appellant....."*

17. We may also refer to *State of Goa v. Sanjay Thakran and Anr.* (2007) 3 SCC 755 where this Court held that in the absence of any other corroborative piece of evidence to complete the chain of circumstances it is not possible to fasten the guilt on the accused on the solitary circumstance of the two being seen together. Reference may also be made to *Bodh Raj alias Bodha and Ors. v. State of Jammu and Kashmir* (2002) 8 SCC 45 where this Court held :

> "*The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases...."*

18. Finally in *Jaswant Gir v. State of Punjab* (2005) 12 SCC 438, this Court held that it is not possible to convict Appellant solely on basis of 'last seen' evidence in the absence

of any other links in the chain of circumstantial evidence, the Court gave benefit of doubt to accused persons.

19. Abdul Mabood-deceased was a young, physically stout boy aged 20-22 years. In the absence of any suggestion as to how and where he was done to death it is difficult to infer anything incriminating against the appellant except a strong suspicion when he returned at night to the farm of Tajveer Singh with soiled clothes. The explanation given by the appellant for his clothes getting soiled can also not said to be so absurd that one could straightway reject and count the same as an incriminating circumstance so conclusive in nature that the Court could presume that they were explainable only on the hypothesis that the appellant had committed the crime alleged against him.

20. Suffice it to say that even if we take the most charitable liberal view in favour of the prosecution, all that we get is a suspicion against the appellant and no more. The High Court was in that view justified in setting aside the order passed by the trial Court and acquitting the appellant of the offence of murder under Section 302 IPC. The order passed by the High Court deserves to be affirmed giving to the appellant the benefit of doubt. We accordingly dismiss the appeal filed by the appellant and discharge the notice of show-cause issued to him.

K.K.T. Appeal dismissed.

UDAI SHANKAR AWASTHI
v.
STATE OF U.P. & ANR.
(Criminal Appeal No. 61 of 2013)

JANUARY 9, 2013

[DR. B.S. CHAUHAN AND JAGDISH SINGH KHEHAR,JJ.]

Code of Criminal Procedure, 1973:

s.482 – Termination of contract between a proprietary firm and a company – Initiation of arbitration proceedings – The allegation of the firm against the officials of the company that they removed certain property, kept in the premises of the company – The arbitrator rejected the allegation – Three complaints by the proprietors of the firm dismissed – One complaint entertained by the Magistrate – Petition by the officials of the Company for quashing the criminal proceedings – Dismissed by High Court – On appeal, held The criminal proceedings were abuse of the process of the Court – Complaint case was not maintainable.

ss.468, 469, 472 and 473 – Termination of contract between proprietary firm and company – Complaint by the proprietor of the firm against officials of the company after a period of 15 years – Held: Limitation for taking cognizance is 3 years – In the fact situation of the case, the offence alleged is not a continuing offence, even though the effect caused by it may be continuous – Limitation.

s.202 (as amended by Amendment Act, 2005) – It is mandatory for the Court to postpone the issue of process, if the accused falls outside the territorial jurisdiction of the Court – In the instant case, the Magistrate was wrong in issuing summons as the accused were outside his territorial jurisdiction.

Criminal Jurisprudence – Law does not prohibit second complaint even on the same facts, if the earlier complaint was decided on the basis of insufficient material, or the order was passed without understanding the nature of complaint, or complete facts could not be placed, or where certain material facts came to knowledge of the complainants after disposal of the first complaint – Where earlier complaint is decided on merits after full consideration of the case, second complaint is not maintainable.

Limitation – Law of Limitation – Prescribed under Cr.P.C. – Observance of – Held: Law of limitation prescribed under Cr.P.C. must be observed, but in exceptional circumstances – The principle of condonation of delay is based on general rule of criminal justice system that 'a crime never dies'– Criminal court may condone delay in the interest of justice recording reasons for the same – Code of Criminal Procedure, 1973 – ss.468, 469, 472 and 473 – Delay – Condonation of.

Delay – Question of delay in launching criminal proceedings – May not by itself be a ground for dismissing the complaint at the threshold.

Criminal Law – 'Continuing offence' and 'Instantaneous offence' – Difference between.

Maxim – 'nullum tempus out locus occurrit regi' – Applicability.

The works contract, awarded by IFFCO to the firm, of which respondent No.2 was the proprietor, was terminated. The matter was referred to arbitrator. The arbitrator rejected the claim of respondent No.2 whereby he had alleged that the items kept in the godown of their firm, which was located within the premises of IFFCO, were removed by the officials of IFFCO. However, the arbitrator accepted some other claims. The application

challenging the award of the arbitrator is still pending. Brother of respondent No. 2 had filed 2 complaints against the officers of IFFCO and the appellants u/ss. 323, 504, 506, 406 and 120-B IPC and u/ss.147, 148, 323, 504, 506, 201 and 379 IPC respectively. Both the complaints were dismissed. Respondent No.2 had also filed a complaint against the appellants u/ss. 323, 504, 506, 406 and 120-B IPC, wherein the police report stated that the allegations made in the complaint were false. Respondent No.2 filed another complaint u/ss.403 and 406 IPC, of which congnizance was taken and bailable warrants were issued against the appellants. Appellants filed application u/s.482 Cr.P.C. for quashing the criminal proceedings against them. The application was dismissed by High Court.

Allowing the appeals, the Court

HELD: 1. In the instant appeals, criminal proceedings must be labeled as an abuse of the process of the court, particularly in view of the fact that, with respect to enact the same subject matter, various complaint cases had already been filed by respondent No.2 and his brother, which were all dismissed on merits, after the examination of witnesses. In such a fact-situation, Complaint Case was not maintainable. Thus, the Magistrate concerned committed a grave error by entertaining the said case, and wrongly took cognizance and issued summons to the appellants. [Para 33] [960-B-D]

Rabindra Nath Bose and Ors. v. Union of India and Ors. **AIR 1970 SC 470: 1970 (2) SCR 697 – followed.**

State of Orissa v. Sri Pyarimohan Samantaray and Ors. **AIR 1976 SC 2617;** *State of Orissa etc. v. Shri Arun Kumar Patnaik and Anr. etc. etc.* **AIR 1976 SC 1639: 1976 (0) Suppl. SCR 59;** *Swatantar Singh v. State of Haryana and Ors.* **AIR 1997 SC 2105: 1997 (2) SCR 639;** *Sri Krishna*

Coconut Co. etc. v. East Godavari Coconut and Tobacco Market Committee **AIR 1967 SC 973: 1967 SCR 974;** *Karnataka Power Corporation Ltd. and Anr. v. K. Thangappan and Anr*. **AIR 2006 SC 1581: 2006 (3) SCR 783;** *Eastern Coalfields Ltd. v. Dugal Kumar* **AIR 2008 SC 3000: 2008 (11) SCR 369;** *Kishan Singh (dead) thr. Lrs. v. Gurpal Singh and Ors.* **AIR 2010 SC 3624: 2010 (10) SCR 16 – relied on.**

2. The law does not prohibit filing or entertaining of the second complaint even on the same facts provided the earlier complaint has been decided on the basis of insufficient material or the order has been passed without understanding the nature of the complaint or the complete facts could not be placed before the court or where the complainant came to know certain facts after disposal of the first complaint which could have tilted the balance in his favour. [Para 17] [953-D-F]

Shiv Shankar Singh v. State of Bihar and Anr. **(2012) 1 SCC 130: 2011 (13) SCR 247;** *Pramatha Nath Talukdar v. Saroj Ranjan Sarkar* **AIR 1962 SC 876: 1962 Suppl. SCR 297;** *Jatinder Singh and Ors. v. Ranjit Kaur* **AIR 2001 SC 784: 2001 (1) SCR 707;** *Mahesh Chand v. B. Janardhan Reddy and Anr.* **AIR 2003 SC 702: 2002 (4) Suppl. SCR 566;** *Poonam Chand Jain and Anr. v. Fazru* **AIR 2005 SC 38: 2004 (5) Suppl. SCR 525 – relied on.**

3.1. Approaching the court at a belated stage for a rightful cause, or even for the violation of the fundamental rights, has always been considered as a good ground for its rejection at the threshold. In case a representation is made by the person aggrieved and the same is rejected by the competent statutory authority, and such an order is communicated to the person aggrieved, making repeated representations will not enable the party to explain the delay. [Para 28] [958-B-D]

3.2. Section 468 Cr.P.C. places an embargo upon

court from taking cognizance of an offence after the expiry of the limitation period provided therein. Section 469 prescribes when the period of limitation begins. Section 473 enables the court to condone delay, provided that the court is satisfied with the explanation furnished by the prosecution/complainant, and where, in the interests of justice, extension of the period of limitation is called for. The principle of condonation of delay is based on the general rule of the criminal justice system which states that a crime never dies, as has been explained by way of the legal maxim, *nullum tempus aut locus occurrit regi* (lapse of time is no bar to the Crown for the purpose of it initiating proceeding against offenders). A criminal offence is considered as a wrong against the State and also the society as a whole, even though the same has been committed against an individual. [Para 6] [948-D-G]

3.3. The question of delay in launching a criminal prosecution may be a circumstance to be taken into consideration while arriving at a final decision, however, the same may not itself be a ground for dismissing the complaint at the threshold. Moreover, the issue of limitation must be examined in the light of the gravity of the charge in question. [Paras 7] [948-G-H; 949-A]

Japani Sahoo v. Chandra Sekhar Mohanty **AIR 2007 SC 2762: 2007 (8) SCR 582;** *Sajjan Kumar v. Central Bureau of Investigation* **(2010) 9 SCC 368: 2010 (11) SCR 669;** *Noida Entrepreneurs Association v. Noida and Ors*. **AIR 2011 SC 2112 : 2011 (8) SCR 25;** *State of Maharashtra v. Sharad Chandra Vinayak Dongre and Ors.* **AIR 1995 SC 231: 1994 (4) Suppl. SCR 378;** *State of H.P. v. Tara Dutt and Anr.* **AIR 2000 SC 297:1999 (4) Suppl. SCR 514 – relied on.**

3.4. Section 472 Cr.P.C. provides that in case of a continuing offence, a fresh period of limitation begins to

run at every moment of the time period during which the offence continues. [Para 10] [949-E-F]

3.5. In the case of a continuing offence, the ingredients of the offence continue, i.e., endure even after the period of consummation, whereas in an instantaneous offence, the offence takes place once and for all i.e. when the same actually takes place. In such cases, there is no continuing offence, even though the damage resulting from the injury may itself continue. [Para 16] [953-A-B]

Balakrishna Savalram Pujari Waghmare and Ors. v. Shree Dnyaneshwar Maharaj Sansthan and Ors. **AIR 1959 SC 798: 1959 Suppl. SCR 476;** *Gokak Patel Volkart Ltd. v. Dundayya Gurushiddaiah Hiremath and Ors.* **(1991) 2 SCC 141: 1991 (1) SCR 396;** *State of Bihar v. Deokaran Nenshi and Anr.* **AIR 1973 SC 908: 1973 (3) SCR 1004;** *Bhagirath Kanoria and Ors. v. State of M.P.* **AIR 1984 SC 1688: 1985 (1) SCR 626;** *Amrit Lal Chum v. Devoprasad Dutta Roy* **AIR 1988 SC 733:1988 (2) SCR 783;** *M/s. Raymond Limited and Anr. Etc. Etc. v. Madhya Pradesh Electricity Board and Ors. Etc. Etc.* **AIR 2001 SC 238: 2000 (4) Suppl. SCR 668;** *Sankar Dastidar v. Smt. Banjula Dastidar and Anr.* **AIR 2007 SC 514: 2006 (10) Suppl. SCR 101 – relied on.**

3.6. The limitation period within which cognizance must be taken, as per the provisions of Section 468 Cr.P.C. is three years. In the case of an instantaneous offence, as per the provisions of Section 469 of the Cr.P.C., the period of limitation commences on the date of offence. In the instant case, admittedly, the claim of the said firm was rejected by way of a speaking order dated 15.10.2001, in pursuance of the order of the High Court dated 25.5.2001, and the said order was communicated vide letter dated 29.10.2001. Respondent No. 2 correctly understood the nature of the offence and, therefore, subsequently approached the High Court for the

purpose of seeking recovery of outstanding dues, wherein the High Court directed him to pursue the remedy available under the arbitration agreement between the parties. In such a fact situation, the offence involved herein can not possibly be termed as a continuing offence. [Para 27] [957-D-G]

Arun Vyas and Ors. v. Anita Vyas **AIR 1999 SC 2071: 1999 (3) SCR 719 ;** *Ramesh and Ors. v. State of Tamil Nadu* **AIR 2005 SC 1989: 2005 (2) SCR 493 – relied on.**

4. The Magistrate, in the instant case, issued summons without meeting the mandatory requirement of Section 202 Cr.P.C., though the appellants were outside his territorial jurisdiction. The provisions of Section 202 Cr.P.C. were amended vide Amendment Act of 2005, making it mandatory to postpone the issue of process where the accused resides in an area beyond the territorial jurisdiction of the Magistrate concerned. The same was found necessary in order to protect innocent persons from being harassed by unscrupulous persons and making it obligatory upon the Magistrate to enquire into the case himself, or to direct investigation to be made by a police officer, or by such other person as he thinks fit for the purpose of finding out whether or not, there was sufficient ground for proceeding against the accused before issuing summons in such cases. [Para 26] [956-H; 957-A-C]

Shivjee Singh v. Nagendra Tiwary and Ors. **AIR 2010 SC 2261: 2010 (7) SCR 667;** *National Bank of Oman v. Barakara Abdul Aziz and Anr.* **JT 2012 (12) SC 432 – relied on.**

Case Law Reference:

2007 (8) SCR 582	**relied on**	**Para 7**
2010 (11) SCR 669	**relied on**	**Para 7**
2011 (8) SCR 25	**relied on**	**Para 7**
1994 (4) Suppl. SCR 378	**relied on**	**Para 8**
1999 (4) Suppl. SCR 514	**relied on**	**Para 8**
1959 Suppl. SCR 476	**relied on**	**Para 11**
1991 (1) SCR 396	**relied on**	**Para 12**
1973 (3) SCR 1004	**relied on**	**Para 13**
1985 (1) SCR 626	**relied on**	**Para 13**
1988 (2) SCR 783	**relied on**	**Para 13**
2000 (4) Suppl. SCR 668	**relied on**	**Para 14**
2006 (10) Suppl. SCR 101	**relied on**	**Para 15**
2011 (13) SCR 247	**relied on**	**Para 17**
1962 Suppl. SCR 297	**relied on**	**Para 17**
2001 (1) SCR 707	**relied on**	**Para 17**
2002 (4) Suppl. SCR 566	**relied on**	**Para 17**
2004 (5) Suppl. SCR 525	**relied on**	**Para 17**
2010 (7) SCR 667	**relied on**	**Para 26**
JT 2012 (12) SC 432	**relied on**	**Para 26**
1999 (3) SCR 719	**relied on**	**Para 27**
2005 (2) SCR 493	**relied on**	**Para 27**
1970 (2) SCR 697	**followed**	**Para 29**
AIR 1976 SC 2617	**relied on**	**Para 30**
1976 (0) Suppl. SCR 59	**relied on**	**Para 30**
1997 (2) SCR 639	**relied on**	**Para 30**

2006 (3) SCR 783	**relied on**	**Para 31**
2008 (11) SCR 369	**relied on**	**Para 31**
2010 (10) SCR 16	**relied on**	**Paras 32, 33**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 61 of 2013.

From the Judgment & Order dated 13.03.2012 of the High Court of Judicature at Allahabad in Criminal Misc. Application No. 41827 of 2011.

WITH

Crl. A.No. 62 of 2013

Mukul Rohatgi, Nagendra Rai, Abhay Kumar, Upendra Pratap Singh, Vineet Kr. Singh, Neetu Jain for the Appellant

Gaurav Bhatia, AAG, Devvrat, Shalini Kumar, Anuvrat Sharma, Gautam Talukdar for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Both these appeals have been preferred against the impugned judgment and order dated 13.3.2012, passed by the High Court of Judicature at Allahabad in Criminal Misc. Application No. 41827 of 2011, by which the High Court has rejected the petition filed under Section 482 of Code of Criminal Procedure,1973 (hereinafter referred to as the 'Cr.P.C.') for quashing the proceedings in Complaint Case No.628 of 2011 (*Sudha Kant Pandey v. K.L. Singh & Anr.*) under Sections 403 and 406 of Indian Penal Code, 1860 (hereinafter referred to as the 'IPC').

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

A. M/s. Manish Engineering Enterprises of which respondent No.2, Sudha Kant Pandey, claims to be the

proprietor, was given a work order by M/s. Indian Farmers Fertilizer Cooperative Ltd. (hereinafter referred to as "IFFCO"), Phulpur unit, on 1.2.1996 for the purpose of conducting repairs in their plant worth an estimated value of Rs.13,88,750/-. The said work order was subsequently cancelled by IFFCO on 7.2.1996.

B. Aggrieved, M/s. Manish Engineering Enterprises made a representation dated 21.3.2001, to IFFCO requesting it to make payments for the work allegedly done by it. As there was no response from the management of IFFCO, the said concern filed Writ Petition No. 19922 of 2001 before the High Court of Allahabad, seeking a direction by it to IFFCO for the payment of an amount of Rs.22,81,530.22 for alleged work done by it.

C. The High Court disposed of the said Writ Petition vide order dated 25.5.2001, directing IFFCO to dispose of the representation dated 21.3.2001, submitted by the said concern within a period of 6 weeks. In pursuance of the order of the High Court dated 25.5.2001, the said representation dated 21.3.2001, was considered by the Managing Director of IFFCO and was rejected by way of a speaking order dated 15.10.2001, and the same was communicated to the said concern vide letter dated 29.10.2001.

D. M/s. Manish Engineering Enterprises filed Writ Petition No. 7231 of 2002 before the High Court of Allahabad for the recovery of the said amount, which stood disposed of vide order dated 20.2.2002, with a direction to pursue the remedy available under the arbitration clause contained in the agreement executed in pursuance of the aforementioned work order.

E. M/s. Manish Engineering Enterprises filed Arbitration Application No. 24 of 2002 before the High Court of Allahabad under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as 'the Act 1996') on 24.5.2002, praying for the appointment of an arbitrator, in view of the fact that the

application made by the said concern for the purpose of appointing an arbitrator, had been rejected by IFFCO as being time barred. The High Court therefore, vide judgment and order dated 17.10.2003, appointed an arbitrator. However, the said arbitrator expressed his inability to work. Thus, vide order dated 13.2.2004, another arbitrator was appointed.

F. M/s. Manish Engineering Enterprises filed a Claim Petition on various counts, including one for an amount of Rs.9,27,182/- towards the alleged removal of items from their godown within the IFFCO premises.

The learned arbitrator so appointed, framed a large number of issues and rejected in particular, the claim of alleged removal of items from the godown of M/s. Manish Enterprises, located within the IFFCO premises (being issue No.13), though he accepted some other claims vide award dated 11.3.2007.

IFFCO filed an application under Section 34 of the Act, 1996 for the purpose of setting aside the award dated 11.3.2007, before the District Court, Allahabad and the matter is *sub-judice*.

G. Mr. Sabha Kant Pandey, the brother of respondent no.2/complainant, filed Complaint Case No. 4948 of 2009 against the officers of IFFCO on 23.11.2009 under Sections 323, 504, 506, 406 and 120-B IPC before the court of Special Chief Judicial Magistrate, Allahabad. Therein, some witnesses including the said complainant were examined.

H. Sabha Kant Pandey, the brother of respondent no.2 filed another Complaint Case No. 26528 of 2009, against the appellants and others under Sections 147, 148, 323, 504, 506, 201 and 379 IPC. In the said complainant, the brother of respondent no.2 was examined alongwith others as a witness.

I. Complaint case no. 4948 of 2009 was rejected by way of a speaking order passed by the Special Chief Judicial

Magistrate, vide order dated 20.3.2010 under Section 203 Cr.P.C.

J. Respondent no.2 filed Criminal Complaint No. 1090 of 2010 against the appellants and others on 2.4.2010, under Sections 323, 504, 506, 406 and 120-B IPC before the Special Chief Judicial Magistrate, Allahabad. After investigating the matter, the police submitted a report on 18.4.2010 stating that, allegations made in complaint case no. 1090 of 2010 were false.

K. The Additional Chief Judicial Magistrate, vide order dated 18.8.2011 dismissed complaint case no. 26528 of 2009 filed by the brother of respondent no.2.

L. Respondent no.2 filed another complaint case no. 628 of 2011 on 31.5.2011 under Sections 403 and 406 IPC, in which, after taking cognizance, summons were issued to the present appellants under Sections 403 and 406 IPC on 16.7.2011, and vide order dated 22.9.2011, bailable warrants were issued against the appellants by the Addl. CJM, Allahabad. Subsequently, vide order dated 21.11.2011, non-bailable warrants were also issued against one of the appellants by the Addl. CJM, Allahabad.

In view of the fact that K.L. Singh, appellant in the connected appeal, could not be served properly as the correct address was not given, on being requested, the Addl. CJM withdrew the non-bailable warrants on 17.12.2011.

M. Aggrieved, the appellants filed Criminal Misc. Application No. 41827 of 2011 under Section 482 Cr.P.C. before the High Court for quashing the said criminal proceedings, which has been dismissed vide impugned judgment and order.

Hence, these appeals.

3. Shri Mukul Rohtagi and Shri Nagendra Rai, learned

senior counsel appearing for the appellants, have submitted that as the complaint cases filed by the brother of the respondent no.2 in regard to the same subject matter were dismissed by the magistrate concerned, the question of entertaining a fresh complaint could not arise. A fresh complaint cannot be entertained during the pendency of the complaint case filed by respondent No. 2, with respect to which, the police filed a final report, stating the same to be a false complaint. It was further submitted, that there was suppression of material facts, as in Complaint Case No. 628 of 2011, dismissal of the earlier complaint was not disclosed. Furthermore, as the matter is purely civil in nature, and in view of the fact that arbitration proceedings with respect to the very same subject matter are presently *sub-judice,* and the claim of respondent no.2 on this count has already been rejected by the arbitrator, entertaining/ continuing criminal proceedings in the said matter is clearly an abuse of the process of the court. Moreover, the alleged claim is related to the period of 1996. A complaint made after a lapse of 15 years is barred by the provisions of Section 468 Cr.P.C., and the High Court has erred in holding the same to be a continuing offence. As, in pursuance of the High Court's order dated 25.5.2001, the representation of respondent no.2 dated 21.3.2001 was decided by the Managing Director, IFFCO vide order dated 15.10.2001, the limitation period began from the date of the said order, or at the most from 29.10.2001, that is, the date on which, the order of rejection was communicated.

The initiation of criminal proceedings is nothing but an attempt by the frustrated litigant to give vent to his frustration, by invoking the jurisdiction of the criminal court and thus, the proceedings are liable to be quashed.

4. Per contra, Shri Devrrat, learned counsel appearing for respondent no.2, has submitted that the High Court has rightly held that the same was in fact, a case of continuing offence. Therefore, the question of limitation does not arise. The law does not prohibit the initiation of criminal proceedings where

there has been breach of trust and further, in such a case, in spite of the fact that arbitration proceedings are pending, a criminal complaint is maintainable, and the court concerned has rightly entertained the same. There is no prohibition in law as regards maintaining a second application, even though the earlier application has been dismissed. Thus, the appeals are liable to be dismissed.

5. We have considered the rival submissions made by learned counsel for the parties as well as by Shri Gaurav Bhatia and Shri Annurat, learned counsel appearing for the State of U.P. and perused the record.

In light of the facts of these cases, it is desirable to deal first, with the legal issues involved herein.

LIMITATION IN CRIMINAL CASES- Section 468 Cr.P.C.:

6. Section 468 Cr.P.C. places an embargo upon court from taking cognizance of an offence after the expiry of the limitation period provided therein. Section 469 prescribes when the period of limitation begins. Section 473 enables the court to condone delay, provided that the court is satisfied with the explanation furnished by the prosecution/complainant, and where, in the interests of justice, extension of the period of limitation is called for. The principle of condonation of delay is based on the general rule of the criminal justice system which states that a crime never dies, as has been explained by way of the legal maxim, *nullum tempus aut locus occurrit regi* (lapse of time is no bar to the Crown for the purpose of it initiating proceeding against offenders). A criminal offence is considered as a wrong against the State and also the society as a whole, even though the same has been committed against an individual.

7. The question of delay in launching a criminal prosecution may be a circumstance to be taken into consideration while arriving at a final decision, however, the same may not itself

be a ground for dismissing the complaint at the threshold. Moreover, the issue of limitation must be examined in light of the gravity of the charge in question. (Vide: *Japani Sahoo v. Chandra Sekhar Mohanty,* AIR 2007 SC 2762; *Sajjan Kumar v. Central Bureau of Investigation,* (2010) 9 SCC 368; and *Noida Entrepreneurs Association v. Noida & Ors.,* AIR 2011 SC 2112).

8. The court, while condoning delay has to record the reasons for its satisfaction, and the same must be manifest in the order of the court itself. The court is further required to state in its conclusion, while condoning such delay, that such condonation is required in the interest of justice. (Vide: *State of Maharashtra v. Sharad Chandra Vinayak Dongre & Ors.,* AIR 1995 SC 231; and *State of H.P. v. Tara Dutt & Anr.,* AIR 2000 SC 297).

9. To sum up, the law of limitation prescribed under the Cr.P.C., must be observed, but in certain exceptional circumstances, taking into consideration the gravity of the charge, the Court may condone delay, recording reasons for the same, in the event that it is found necessary to condone such delay in the interest of justice.

CONTINUING OFFENCE:

10. Section 472 Cr.P.C. provides that in case of a continuing offence, a fresh period of limitation begins to run at every moment of the time period during which the offence continues. The expression, 'continuing offence' has not been defined in the Cr.P.C. because it is one of those expressions which does not have a fixed connotation, and therefore, the formula of universal application cannot be formulated in this respect.

11. In *Balakrishna Savalram Pujari Waghmare & Ors. v. Shree Dnyaneshwar Maharaj Sansthan & Ors.,* AIR 1959 SC 798, this Court dealt with the aforementioned issue, and

observed that a continuing offence is an act which creates a continuing source of injury, and renders the doer of the act responsible and liable for the continuation of the said injury. *In case a wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the said act may continue.* If the wrongful act is of such character that the injury caused by it itself continues, then the said act constitutes a continuing wrong. The distinction between the two wrongs therefore depends, upon the effect of the injury.

In the said case, the court dealt with a case of a wrongful act of forcible ouster, and held that the resulting injury caused, was complete at the date of the ouster itself, and therefore there was no scope for the application of Section 23 of the Limitation Act in relation to the said case.

12. In *Gokak Patel Volkart Ltd. v. Dundayya Gurushiddaiah Hiremath & Ors.,* (1991) 2 SCC 141, this Court dealt with the issue and held as under:

> *"According to the Blacks' Law Dictionary, Fifth Edition, 'Continuing' means 'enduring; not terminated by a single act or fact; subsisting for a definite period or intended to cover or apply to successive similar obligations or occurrences.' Continuing offence means 'type of crime which is committed over a span of time.' As to period of statute of limitation in a continuing offence, the last act of the offence controls for commencement of the period. 'A continuing offence, such that only the last act thereof within the period of the statute of limitations need be alleged in the indictment or information, is one which may consist of separate acts or a course of conduct but which arises from that singleness of thought, purpose or action which may be deemed a single impulse.' So also a 'Continuous Crime' means "one consisting of a continuous series of acts, which endures after the period of consummation, as, the offence of carrying concealed weapons. In the case of instantaneous crimes, the statute*

of limitation begins to run with the consummation, while in the case of continuous crimes it only begins with the cessation of the criminal conduct or act."

13. While deciding the case in *Gokak Patel Volkart Ltd.* (Supra), this Court placed reliance upon its earlier judgment in *State of Bihar v. Deokaran Nenshi & Anr.,* AIR 1973 SC 908, wherein the court while dealing with the case of continuance of an offence has held as under:

"A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and recurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all."

(See also: *Bhagirath Kanoria & Ors. v. State of M.P.,* AIR 1984 SC 1688; and *Amrit Lal Chum v. Devoprasad Dutta Roy,* AIR 1988 SC 733).

14. In *M/s. Raymond Limited & Anr., Etc. Etc. v. Madhya Pradesh Electricity Board & Ors., Etc. Etc.,* AIR 2001 SC 238, this Court held as under:

"It cannot legitimately be contended that the word "continuously" has one definite meaning only to convey

uninterrupted ness in time sequence or essence and on the other hand the very word would also mean 'recurring at repeated intervals so as to be of repeated occurrence'. That apart, used as an adjective it draws colour from the context too."

15. In *Sankar Dastidar v. Smt. Banjula Dastidar & Anr.,* AIR 2007 SC 514, this Court observed as under:

"A suit for damages, in our opinion, stands on a different footing vis—vis a continuous wrong in respect of enjoyment of one's right in a property. When a right of way is claimed whether public or private over a certain land over which the tort-teaser has no right of possession, the breaches would be continuing one. It is, however, indisputable that unless the wrong is a continuing one, period of limitation does not stop running. Once the period begins to run, it does not stop except where the provisions of Section 22 of the Limitation Act would apply."

The Court further held:

"Articles 68, 69 and 91 of the Limitation Act govern suits in respect of movable property. For specific movable property lost or acquired by theft, or dishonest misappropriation or conversion; knowledge as regards possession of the party shall be the starting point of limitation in terms of Article 68. For any other specific movable property, the time from which the period begins to run would be when the property is wrongfully taken, in terms of Article 69. Article 91 provides for a period of limitation in respect of a suit for compensation for wrongfully taking or injuring or wrongfully detaining any other specific movable property. The time from which the period begins to run would be when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful."

16. Thus, in view of the above, the law on the issue can be summarised to the effect that, in the case of a continuing offence, the ingredients of the offence continue, i.e., endure even after the period of consummation, whereas in an instantaneous offence, the offence takes place once and for all i.e. when the same actually takes place. In such cases, there is no continuing offence, even though the damage resulting from the injury may itself continue.

SECOND COMPLAINT ON SAME FACTS-MAINTAINABILITY:

17. While considering the issue at hand in *Shiv Shankar Singh v. State of Bihar & Anr.,* (2012) 1 SCC 130, this Court, after considering its earlier judgments in *Pramatha Nath Talukdar v. Saroj Ranjan Sarkar* AIR 1962 SC 876; *Jatinder Singh & Ors. v. Ranjit Kaur* AIR 2001 SC 784; *Mahesh Chand v. B. Janardhan Reddy & Anr.,* AIR 2003 SC 702; *Poonam Chand Jain & Anr. v. Fazru* AIR 2005 SC 38 held:

> *"It is evident that the law does not prohibit filing or entertaining of the second complaint even on the same facts provided the earlier complaint has been decided on the basis of insufficient material or the order has been passed without understanding the nature of the complaint or the complete facts could not be placed before the court or where the complainant came to know certain facts after disposal of the first complaint which could have tilted the balance in his favour. However, second complaint would not be maintainable wherein the earlier complaint has been disposed of on full consideration of the case of the complainant on merit."*

18. The present appeals require to be decided on the basis of the settled legal propositions referred to hereinabove.

Complaint Case No.4948 of 2009 was filed by Sabha Kant Pandey, brother of respondent no.2, wherein, he claimed to be

a partner in the firm M/s Manish Engineering Enterprises, against one of the appellants and other officers of IFFCO, under Sections 323, 504, 506, 406 and 120B IPC at Police Statition Phulpur, District Allahabad, alleging that the said Firm had been given a separate godown/office within the IFFCO compound, wherein their articles worth Rs.30-40 lacs, as well as their documents were kept. The complainant was not permitted to remove them and additionally, even the payment for the work done by the firm was not made, on certain technical grounds. The officers of IFFCO, including Mr. U.S. Awasthi - the appellant, misbehaved with the complainant and kept the said articles worth Rs.30-40 lacs, as also the important documents, in addition to the entry gate pass required to enter the plant by the complainant and his brother Sudhakant (respondent no.2 herein), therefore making it impossible for them to access their godown.

19. The complaint was dealt with appropriately by the competent court, wherein the present complainant was also examined as a prosecution witness. The Court took note of the fact of pendency of the Arbitration Proceedings with respect to the payment of dues, and came to the conclusion that **the complaint had been filed to put pressure on IFFCO to obtain payments. The said complaint was dismissed on merits**.

20. Complaint Case No.26528 of 2009 was then filed by Sabhakant Pandey, brother of respondent no.2, against one of the appellants and also other officers of IFFCO under Sections 147, 148, 323, 504, 506, 201 and 379 IPC in Police Statition Phulpur, Allahabad, making similar allegations, and giving full particulars of the outstanding dues. That complaint was heard and disposed of by the competent court, taking note of the fact that there had been a cross-complaint by the officers of IFFCO, wherein allegations were made to the effect that on 19.12.2008, Arbitration Proceedings in Case No.1 of 2007 took place at the residence of the Arbitrator, a retired Judge of the Allahabad

High Court, wherein Sabha Kant Pandey and Sudha Kant Pandey misbehaved with the Arbitrator, and he was hence forced to adjourn the hearing of the case. Subsequently, they stood in front of his house and shouted slogans, abusing the officers of IFFCO and even tried to beat them up. The court dismissed the said complaint after recording the following findings:

> "In the opinion of the court, the complaint filed by Sabhakant Pandey is imaginary, a bald story with an intention to put illegal pressure and by suppressing material facts in the complaint."

21. Complaint Case No.1090 of 2010 was filed by the present complainant, respondent no.2 against the appellant Udai Shankar Awasthi and other officers of IFFCO under Sections 323, 504, 506, 406 and 120B IPC, making similar allegations as were mentioned in the first complaint, to the effect that articles worth Rs.15-20 lacs in each godown were lying in the premises of IFFCO, and that the complainant was not permitted to remove the same. In the said case, after investigation, the police filed the final report stating that all the allegations made in the complaint were false. The concluding part of the report reads as under:

> "For last 6 months no body has turned up to get his statement recorded in spite of notice. The application had been filed on false facts and complaint was bogus, forceless and baseless and was liable to be dismissed."

22. So far as the present complaint is concerned, the same has been filed under Sections 415, 406 and 403 IPC, wherein the allegation that their Bill had been cleared on 10.7.1996, but the requisite payment, to the tune of Rs.22,81,530/- was not made to the complainant. Their claim for payment was wrongly rejected. Certain articles and documents belonging to the complainant were lying within the premises of IFFCO and the same were not returned to the complainant despite requests

for the same. In this case, after taking cognizance, summons were issued on 16.7.2011, under Sections 403 and 406 IPC, though the case under Section 415 IPC stood rejected.

23. It is evident that in the said complaint, no reference was made by the complainant as regards the Arbitration Proceedings. There was also no disclosure of facts to show that earlier complaints in respect of the same subject matter, had been dismissed on merits by the same court.

24. A copy of the Award made by the Arbitrator was placed on record, wherein issue no.13 which dealt with the present controversy, i.e. some material and documents were placed in the premises of IFFCO and the return of the same was refused. The claim as regards the same, has been rejected. There has been no mention of such claim and its rejection by the said concern, in either of the writ petitions filed before the High Court earlier or even for that matter, in the application filed by the said concern before IFFCO, for the purpose of making appointment of an arbitrator, or in the application filed under Section 11 of the Act, 1996 before the High Court.

25. In the counter affidavit filed by respondent no.2, it has been submitted that the contract was terminated by IFFCO fraudulently, to usurp the entire amount towards the work done by it and that IFFCO took illegal possession of all the goods and articles belonging to the firm lying within its premises, and as the amount had not been paid, the officers were guilty of criminal breach of trust and were therefore, liable to be punished. However, the fact that earlier complaints had been filed by the brother of respondent no.2 Sabha Kant Pandey has been admitted. It has further been admitted that Arbitration Proceedings are still pending, but it has also simultaneously been urged that criminal prosecution has nothing to do with the Arbitral award.

26. The Magistrate had issued summons without meeting the mandatory requirement of Section 202 Cr.P.C., though the

appellants were outside his territorial jurisdiction. The provisions of Section 202 Cr.P.C. were amended vide Amendment Act 2005, making it **mandatory to postpone the issue of process** where the accused resides in an area beyond the territorial jurisdiction of the Magistrate concerned. The same was found necessary in order to protect innocent persons from being harassed by unscrupulous persons and making it obligatory upon the Magistrate to enquire into the case himself, or to direct investigation to be made by a police officer, or by such other person as he thinks fit for the purpose of finding out whether or not, there was sufficient ground for proceeding against the accused before issuing summons in such cases.. (See also: *Shivjee Singh v. Nagendra Tiwary & Ors.,* AIR 2010 SC 2261; and *National Bank of Oman v. Barakara Abdul Aziz & Anr.,* JT 2012 (12) SC 432).

27. Section 403 IPC provides for a maximum punishment of 2 years, or fine or both; and Section 406 IPC provides for a maximum punishment of 3 years, or fine or both. The limitation period within which cognizance must be taken, as per the provisions of Section 468 of Cr.P.C. is three years. In the case of an instantaneous offence, as per the provisions of Section 469 of the Cr.P.C., the period of limitation commences on the date of offence. In the instant case, admittedly, the claim of the said firm was rejected by way of a speaking order dated 15.10.2001, in pursuance of the order of the High Court dated 25.5.2001, and the said order was communicated vide letter dated 29.10.2001. Respondent No. 2 correctly understood the nature of the offence and, therefore, subsequently approached the High Court for the purpose of seeking recovery of outstanding dues, wherein the High Court directed him to pursue the remedy available under the arbitration agreement between the parties. In such a fact situation, it is beyond our imagination as to how the offence involved herein can possibly be termed as a continuing offence. In fact, the damage caused by virtue of non-payment of their dues, if any, is legally sustainable, may continue, but the offence is most certainly not

a continuing offence, as the same has not recurred subsequent to order dated 15.10.2001, even though the effect caused by it may be continuous in nature.

In *Arun Vyas & Ors. v. Anita Vyas,* AIR 1999 SC 2071, this Court held that in a case of cruelty, the starting point of limitation would be the last act of cruelty. (See also: *Ramesh & Ors. v. State of Tamil Nadu,* AIR 2005 SC 1989).

28. Approaching the court at a belated stage for a rightful cause, or even for the violation of the fundamental rights, has always been considered as a good ground for its rejection at the threshold. The ground taken by the learned counsel for respondent No. 2 that the cause of action arose on 20.10.2009 and 5.11.2009, as the appellants refused to return money and other materials, articles and record, does not have substance worth consideration. In case a representation is made by the person aggrieved and the same is rejected by the competent statutory authority, and such an order is communicated to the person aggrieved, making repeated representations will not enable the party to explain the delay.

29. In *Rabindra Nath Bose & Ors. v. Union of India & Ors.,* AIR 1970 SC 470, in spite of the fact that the Government rejected a representation and communicated such rejection to the applicant therein, his subsequent representations were entertained by the Government. A Constitution Bench of this Court held as under:

> *"He says that the representations were being received by the government all the time. But there is a limit to the time which can be considered reasonable for making representations.* ***If the Government has turned down one representation, the making of another representation on similar lines would not enable the petitioners to explain the delay****."* (Emphasis added)

30. In *State of Orissa v. Sri Pyarimohan Samantaray &*

Ors., AIR 1976 SC 2617; *State of Orissa etc. v. Shri Arun Kumar Patnaik & Anr. etc., etc.,* AIR 1976 SC 1639; and *Swatantar Singh v. State of Haryana & Ors.,* AIR 1997 SC 2105, a similar view has been reiterated.

31. The view taken by this Court in *Rabindra Math Bose* (Supra) has been approved and followed in *Sri Krishna Coconut Co. etc. v. East Godavari Coconut and Tobacco Market Committee,* AIR 1967 SC 973, *Karnataka Power Corporation Ltd. & Anr. v. K. Thangappan & Anr.,* AIR 2006 SC 1581; and *Eastern Coalfields Ltd. v. Dugal Kumar,* AIR 2008 SC 3000.

32. In *Kishan Singh (dead) thr. Lrs. v. Gurpal Singh & Ors.* AIR 2010 SC 3624, this court while dealing with a case of inordinate delay in launching a criminal prosecution, has held as under:

> *"In cases where there is a delay in lodging a FIR, the Court has to look for a plausible explanation for such delay. In absence of such an explanation, the delay may be fatal. The reason for quashing such proceedings may not be merely that the allegations were an afterthought or had given a coloured version of events. In such cases the court should carefully examine the facts before it for the reason that a frustrated litigant who failed to succeed before the Civil Court may initiate criminal proceedings just to harass the other side with mala fide intentions or the ulterior motive of wreaking vengeance on the other party. Chagrined and frustrated litigants should not be permitted to give vent to their frustrations by cheaply invoking the jurisdiction of the criminal court. The court proceedings ought not to be permitted to degenerate into a weapon of harassment and persecution. In such a case, where an FIR is lodged clearly with a view to spite the other party because of a private and personal grudge and to enmesh the other party in long and arduous criminal proceedings, the court may take a view that it amounts to an abuse of the process of law in the facts and circumstances of the case. (Vide : Chandrapal Singh & Ors. v. Maharaj Singh & Anr., AIR 1982 SC 1238; State of Haryana & Ors. v. Ch. Bhajan Lal & Ors., AIR 1992 SC 604; G. Sagar Suri & Anr. v. State of U.P.& Ors., AIR 2000 SC 754; and Gorige Pentaiah v. State of A.P. & Ors., (2008) 12 SCC 531)."*

33. The instant appeals are squarely covered by the observations made in *Kishan Singh* (Supra) and thus, the proceedings must be labeled as nothing more than an abuse of the process of the court, particularly in view of the fact that, with respect to enact the same subject matter, various complaint cases had already been filed by respondent No.2 and his brother, which were all dismissed on merits, after the examination of witnesses. In such a fact-situation, Complaint Case No. 628 of 2011, filed on 31.5.2001 was not maintainable. Thus, the Magistrate concerned committed a grave error by entertaining the said case, and wrongly took cognizance and issued summons to the appellants.

34. In view of above, the appeals are allowed. The impugned judgment dated 13.3.2012 is set aside and the proceedings in Complaint Case No. 628 of 2011 pending before the Additional C.J.M., Allahabad, are hereby quashed.

K.K.T. Appeals allowed.

ARUN BHANDARI
v.
STATE OF U.P. AND OTHERS
(Criminal Appeal No. 78 of 2013)

JANUARY 10, 2013

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

Constitution of India, 1950 – Art. 226 – Commercial transaction – Subsequently, purchaser filed criminal case against the sellers u/ss.406 and 420 IPC – Police report that the case was of civil nature and no criminal offence made out – In protest petition by the complainant, CJM took cognizance of the case – Writ petition against order of CJM – High Court quashed the criminal case in respect of one of the accused – Held: A case which may apparently look to be of civil nature may also contain ingredients of criminal offences – The facts of the instant case show that it was not purely civil in nature – Neither the FIR nor the protest petition was mala fide, frivolous or vexatious, hence interference of High Court in exercise of its jurisdiction u/Art.226 was not justified – Prima facie case is made out against the accused that they had the intention to cheat – Penal Code, 1860 – ss.406 and 420.

Respondent No.2 and her husband respondent No.3, claimed to be the owners of the property in question and offered to sell the same to the appellant. They jointly received a sum of Rs.1,05,00,00/- from the appellant towards part payment of the sale consideration. The agreement was executed on the basis of a registered agreement executed in favour of respondent No.3 by the original allottee to sell the property in question. The appellant came to know that respondent No.2, in whose favour the original allottee had executed a power of attorney, had already transferred the property in question

to some other person. The appellant demanded refund of the advance amount. As the same was not refunded, he lodged an FIR. The police gave its report that the case was of civil nature and no criminal offence was made out. On the protest petition of the appellant, the Chief Judicial Magistrate (CJM) held that even if the suit could be filed, the facts of the case revealed criminal culpability and hence he took cognizance u/ss.420 and 406 IPC. The Criminal Revision, against the order was dismissed approving the order of CJM. Respondent filed writ petition. High Court dismissed the writ petition so far as respondent No.3 (husband) was concerned holding hat there was *prima facie* case for offences u/ss.406 and 420 IPC. The petition was allowed so far as respondent No.2 (wife) was concerned holding that there was no privity of contract between respondent No.2 and the complainant. Hence the present appeal by the complainant.

Allowing the appeal, the Court

HELD: 1. The High Court, while exercising power under Article 226 of the Constitution or Section 482 of the CrPC, has to adopt a very cautious approach. The powers possessed by the High Court u/s. 482 Cr.P.C. are very wide and the very plentitude of the power requires great caution in its exercise. The court must be careful to see that its decision in exercise of this power is based on sound principles and such inherent powers should not be exercised to stifle a legitimate prosecution. It is not proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint could not be proceeded with. The meticulous

analysis of the case is not necessary and the complaint has to be read as a whole and if it appears that on consideration of the allegations in the light of the statement made on oath of the complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is *mala fide*, frivolous or vexatious, in that event there would be no justification for interference by the High Court. One of the paramount duties of the superior court is to see that person who is absolutely innocent is not subjected to prosecution and humiliation on the basis of a false and wholly untenable complaint. [Paras 27] [983-C-G; 984-A]

Central Bureau of Investigation v. Ravi Shankar Srivastava, IAS and Anr. **(2006) 7 SCC 188: 2006 (4) Suppl. SCR 450;** *R. Kalyani* v. *Janak C. Mehta and Ors.* **(2009) 1 SCC 516: 2008 (14) SCR 1249;** *Gian Singh v. State of Punjab and Anr.* **(2012) 10 SCC 303: 2012 (8) SCR 753 – relied on.**

Janata Dal v. H.S. Chowdhary **(1992) 4 SCC 305: 1992 (1) Suppl. SCR 226;** *Raghubir Saran (Dr.) v. State of Bihar* **AIR 1964 SC 1: 1964 SCR 336;** *Hamida v. Rashid* **(2008) 1 SCC 474: 2007 (5) SCR 937;** *State of Orissa v. Saroj Kumar Sahoo* **(2005) 13 SCC 540: 2005 (5) Suppl. SCR 548 – referred to.**

2. In the present case, neither the FIR nor the protest petition was *mala fide*, frivolous or vexatious. It is also not a case where there is no substance in the complaint. The manner in which the investigation was conducted by the officer who eventually filed the final report and the transfer of the investigation earlier to another officer who had almost completed the investigation and the entire case diary which has been adverted to in detail in the protest petition *prima facie* makes out a case against the husband and the wife regarding collusion and the intention to cheat from the very beginning, inducing him to hand over a huge sum of money to both of them. Their

conduct of not stating so many aspects, namely, the Power of Attorney executed by the original owner, the will and also the sale effected by the wife in the name of 'M' on 28.7.2008 cannot be brushed aside at this stage. [Para 31] [985-E-H; 986-A]

3. Some times a case may apparently look to be of civil nature or may involve a commercial transaction but such civil disputes or commercial disputes in certain circumstances may also contain ingredients of criminal offences and such disputes have to be entertained notwithstanding they are also civil disputes. The present case falls in the category which cannot be stated at this stage to be purely civil in nature on the basis of the admitted documents or the allegations made in the FIR or what has come out in the investigation or for that matter what has been stated in the protest petition. *Prima facie* there is allegation that there was a guilty intention to induce the complainant to part with money. It is not a case where a promise initially made could not be lived up to subsequently. It is not a case where it could be said that even if the allegations in entirety are accepted, no case is made out. [Paras 24 and 27] [981-A-B; 983-A-C]

Mohammed Ibrahim and Ors. v. State of Bihar and Anr. **(2009) 8 SCC 751;** *Rajesh Bajaj v. State NCT of Delhi* **(1999) 3 SCC 259: 1999 (1) SCR 1012 – relied on.**

All Cargo Movers (I) Pvt. Ltd. v. Dhanesh Badarmal Jain and Anr. **AIR 2008 SC 247: 2007 (11) SCR 271 – referred to.**

4. Therefore, the High Court, while exercising the extraordinary jurisdiction, had not proceeded on the sound principles of law for quashment of order taking cognizance. The High Court has been guided by the non-existence of privity of contract and without appreciating the factual scenario has observed that the wife was

merely present. When the wife had the Power of Attorney in her favour and was aware of execution of the will, had accepted the money along with her husband from the complainant, it is extremely difficult to say that an innocent person is dragged to face a vexatious litigation or humiliation. The entire conduct of the respondent Nos. 2 and 3 would show that a *prima facie* case is made out and allegations are there on record in this regard that they had the intention to cheat from the stage of negotiation. [Para 31] [986-A-D]

Hridya Rajan Pd. Verma and Ors. v. State of Bihar and Anr. **AIR 2000 SC 2341: 2000 (2) SCR 859;** *Murari Lal Gupta v. Gopi Singh* **(2006) 2 SCC (Crl.) 430;** *B. Suresh Yadav v. Sharifa Bee and Anr*. **(2007) 13 SCC 107: 2007 (11) SCR 238 – distinguished.**

State of Haryana v. Bhajan Lal **1992 Supp (1) SCC 335: 1990 (3) Suppl. SCR 259;** *Rupen Deol Bajaj (Mrs.) v. Kanwar Pal Singh Gill* **AIR 1996 SC 309: 1995 (4) Suppl. SCR 237;** *State of Kerala v. O.C. Kuttan* **AIR 1999 SC 1044: 1999 (1) SCR 696;** *State of Kerala v. A. Pareed Pillai and Anr.* **AIR 1973 SC 326;** *G.V. Rao v. L.H.V. Prasad and Ors.* **(2000) 3 SCC 693: 2000 (2) SCR 123;** *Jaswantrai Manilal Akhaney v. State of Bombay* **AIR 1956 SC 575:1956 SCR 483;** *Mahadeo Prasad v. State of W.B.* **AIR 1954 SC 724;** *S.N. Palanitkar and Ors. v. State of Bihar and Anr.* **AIR 2001 SC 2960: 2001 (4) Suppl. SCR 397 – referred to.**

Case Law Reference:

2000 (2) SCR 859	**distinguished**	**Para 11**
(2006) 2 SCC (Cri) 430	**distinguished**	**Para 11**
2007 (11) SCR 238	**distinguished**	**Para 11**
1990 (3) Suppl. SCR 259	**referred to**	**Para 14**
1995 (4) Suppl. SCR 237	**referred to**	**Para 14**

1999 (1) SCR 1012	**referred to**	**Para 14**
1999 (1) SCR 696	**referred to**	**Para 14**
AIR 1973 SC 326	**referred to**	**Para 19**
2000 (2) SCR 123	**referred to**	**Para 20**
1956 SCR 483	**referred to**	**Para 20**
AIR 1954 SC 724	**referred to**	**Para 20**
2001 (4) Suppl. SCR 397	**referred to**	**Para 21**
(2009) 8 SCC 751	**relied on**	**Para 24**
2007 (11) SCR 271	**referred to**	**Para 25**
1999 (1) SCR 1012	**relied on**	**Para 26**
2006 (4) Suppl. SCR 450	**relied on**	**Para 27**
1992 (1) Suppl. SCR 226	**referred to**	**Para 27**
1964 SCR 336	**referred to**	**Para 27**
2008 (14) SCR 1249	**relied on**	**Para 28**
2007 (5) SCR 937	**referred to**	**Para 28**
2005 (5) Suppl. SCR 548	**referred to**	**Para 28**
2012 (8) SCR 753	**relied on**	**Para 30**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 78 of 2013.

From the Judgment & Order dated 29.01.2011 of the High Court of Judicature at Allahabad in Cirminal Misc. Writ Petition No. 69 of 2011.

Amit Khemka, Ambhoj Kumar Sinha, Sanorita D. Bharali for the Appellant.

Chetan Sharma, Manjit Singh Ahluwalia, Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. Calling in question the legal pregnability of the order dated 29.1.2011 passed by the High Court of Judicature at Allahabad in Criminal Misc. Writ Petition No. 69 of 2011 whereby the learned single Judge in exercise of jurisdiction under Articles 226 and 227 of the Constitution has quashed the order dated 5.6.2010 passed by the learned Chief Judicial Magistrate, Gautam Budh Nagar, taking cognizance under Sections 406 and 420 of the Indian Penal Code (for short "the IPC") against the respondent No. 2 in exercise of power under Section 190(1)(b) of the Code of Criminal Procedure (for short "the CrPC") and the order dated 4.12.2010 passed by the learned Sessions Judge, Gautam Budh Nagar affirming the said order, on the foundation that the allegations made neither in the FIR nor in the protest petition constitute offences under the aforesaid sections, the present appeal by special leave has been preferred.

3. The factual score as depicted are that the appellant is a Non-Resident Indian (NRI) living in Germany and while looking for a property in Greater Noida, he came in contact with respondent No. 2 and her husband, Raghuvinder Singh, who claimed to be the owner of the property in question and offered to sell the same. On 24.3.2008, as alleged, both the husband and wife agreed to sell the residential plot bearing No. 131, Block – (Cassia-Fastula Estate), Sector CHI-4, Greater Noida, U.P. for a consideration of Rs.2,43,97,880/- and an agreement to that effect was executed by the respondent No. 3, both the husband and wife jointly received a sum of Rs.1,05,00,000/- from the appellant towards part payment of the sale consideration. It was further agreed that the respondent Nos. 2 and 3 would obtain permission from Greater Noida Authority

to transfer the property in his favour and execute the deed of transfer within 45 days from the grant of such permission.

4. As the factual antecedents would further reveal, the said agreement was executed on the basis of a registered agreement executed in favour of the respondent No. 3 by the original allottee, Smt. Vandana Bhardwaj to sell the said plot. After expiry of a month or so, the appellant enquired from the respondent No. 3 about the progress of delivery of possession from the original allottee, but he received conflicting and contradictory replies which created doubt in his mind and impelled him to rush to Noida and find out the real facts from the Greater Noida Authority. On due enquiry, he came to know that there was a registered agreement in favour of the 3rd respondent by Smt. Vandana Bhardwaj; that a power of attorney had been executed by the original allottee in favour of the respondent No. 2, the wife of respondent No. 3; that the original allottee, to avoid any kind of litigation, had also executed a will in favour of the respondent No. 3; and that the respondent No. 2 by virtue of the power of attorney, executed in her favour by the original allottee, had transferred the said property in favour of one Monika Goel who had got her name mutated in the record of Greater Noida Authority. Coming to know about the aforesaid factual score, he demanded refund of the money from the respondents, but a total indifferent attitude was exhibited, which compelled him to lodge an FIR at the Police Station, Kasna, which gave rise to the Criminal Case No. 563 of 2009.

5. The Investigating Officer, after completing the investigation, submitted the final report stating that the case was of a civil nature and no criminal offence had been made out. The appellant filed a protest petition before the learned Magistrate stating, inter alia, that the accused persons had colluded with the Investigating Officer and the Station House Officer as a result of which the Investigation Officer, on 22.10.2009, had concluded the investigation observing that the dispute was of the civil nature and intended to submit the final

report before the court. The appellant coming to know about the same submitted an application before the concerned Area Officer, who, taking note of the same, handed over the investigation to another S.S.I. of Police on 24.11.2009. The said Investigating Officer recorded statements of the concerned Sub-Registrar, the Chief Executive Officer of Greater Noida Authority, from whose statements it was evident that the accused persons were never the owners of the property in question and the original allottee had not appeared in the Greater Noida Authority and not transferred any documents. He also recorded the statement of original allottee who had stated that the property was allotted in her name in 2005 and on a proposal being made by Raghuvinder Singh, a friend of her husband, to sell the property she executed an agreement to sell in his favour and a General Power of Attorney in the name of his wife, Savita Singh, at his instance but possession was not handed over to them. He also examined one Sharad Kumar Sharma, who was a witness to the agreement to sell and the Power of Attorney executed by the original allottee, and said Sharma had stated that the General Power of Attorney was executed to implement the agreement to sell executed in favour of Raghuvinder Singh. The Investigating Officer obtained an affidavit from the complainant which was kept in the case diary, and on 25.2.2010 it was recorded in the case diary that a criminal offence had been made out against the accused persons. The case diary also evinced that there was an effort for settlement between the informant and the accused persons and the accused persons were ready to return the amount of Rs.1,05,00,000/- to the appellant. On 10.3.2010, he made an entry to file the charge-sheet against the respondents under Sections 420, 406, 567, 468 and 479 of the IPC. At this stage, the accused persons again colluded with the previous Investigating Officer and the Station House Officer and got the investigation transferred to the previous Investigating Officer. Coming to know about the said development, the appellant submitted a petition before the Senior Superintendent of Police, Gautam Budh Nagar on 6.5.2010, but before any steps could

be taken by the higher authority, the said Investigating Officer submitted a final report stating that no offence under the IPC had been made out. In the protest petition it was urged that the whole case diary should be perused and appropriate orders may be passed.

6. On the basis of the aforesaid protest petition the Chief Judicial Magistrate, on 5.6.2010, perused the final report submitted by the Investigating Officer, the entire case diary, the protest petition and the statements recorded under Section 161 of the CrPC by the previous Investigating Officer and came to hold that even if a suit could be filed, the fact situation prima facie revealed criminal culpability and, accordingly, took cognizance under Sections 420 and 406 of the IPC against the respondents and issued summons requiring them to appear before the court on 9.7.2010.

7. Being dissatisfied with the said order, the respondents preferred Criminal Revision No. 108 of 2010 before the learned Sessions Judge contending, inter alia, that the FIR had been lodged with an ulterior motive to pressurize the respondents to return the earnest money and the complainant had, in fact, committed breach of the terms of the agreement; that the allegations made in the FIR could only be ascertained on the basis of evidence and documents by a civil court of competent jurisdiction regard being had to the nature of the dispute; that the learned Magistrate had taken cognizance without any material in the case diary; and that the exercise of power under Section 190(1)(b) of the CrPC was totally unwarranted in the case at hand. The revisional court scanned the material brought on record, perused the case diary in entirety, took note of the conduct of the Investigating Officer who had submitted the final report stating that the allegations did not constitute any criminal offence despite the material brought on record during the course of investigation by the Investigating Officer, who was appointed at the instance of the Area Officer, scrutinized the substance of material collected to the effect that Raghuvinder

Singh had no right, title and interest in the property and a General Power of Attorney was executed in favour of his wife to sell, transfer and convey all rights, title and interest in the plot in question on behalf of the original allottee and that the husband and wife had concealed the material factum of execution of Power of Attorney from the complainant and opined that both the accused persons had fraudulent and dishonest intention since the beginning of the negotiation with the complainant and, therefore, the allegations prima facie constituted a criminal offence and it could not be said that it was a pure and simple dispute of civil nature. Being of this view he gave the stamp of approval to the order passed by the learned Magistrate.

8. The unsuccess in revision compelled the respondents to approach the High Court in a writ petition and the Writ Court came to hold that on the basis of the allegations made in the FIR and the evidence collected during investigation it could not be said that the instant case is simpliciter a breach of contract not attracting any criminal liability as far as the husband was concerned and there was a prima facie case triable for offences under Section 406 and 420 of the IPC. However, while dealing with the allegations made against the wife, the High Court observed that there being no entrustment of any property by the complainant to her and further there being no privity of contract between them, she was under no legal obligation to disclose to the complainant that she held a registered Power of Attorney from the original allottee to sell and alienate the property in question and such non-disclosure of facts could not be said to have constituted offence either under Section 406 or Section 420 of the IPC. Being of this view the High Court partly allowed the writ petition and quashed the order taking cognizance and summoning of the wife, the respondent No. 2 herein.

9. We have heard Mr. Amit Khemka, learned counsel for the appellant, and Mr. Chetan Sharma, learned senior counsel appearing for the respondent Nos. 2 and 3.

10. It is submitted by Mr. Khemka learned counsel for the

appellant that the High Court could not have scrutinized the material brought on record as if it was sitting in appeal against the judgment of conviction and also committed error in ignoring certain material facts which make the order sensitively susceptible. It is his further submission that the learned Sessions Judge had considered the entire gamut of facts and appositely opined that the order taking cognizance could not be flawed but the High Court by taking note of the fact that there was no privity of contract and the non-disclosure was not material has completely erred in its conclusion and, hence, the order deserves to be lancinated.

11. Mr. Chetan Sharma, learned senior counsel, resisting the aforesaid contentions, canvassed that mere presence of the respondent No. 2 at the time of signing of the agreement to sell does not amount to an offence under Section 420 of the IPC as she did not sign the document nor did she endorse the same as a witness. It is urged by him that no criminal liability can be fastened on her, for the *sine qua non* for attracting criminality is to show dishonest intention right from the very inception which is non-existent in the case at hand. It is submitted by him that if the criminal action is allowed to continue against her that would put a premium on a commercial strategy adopted by the appellant in roping a lady only to have more bargaining power in the matter to arrive at a settlement despite the breach of contract by him. The learned senior counsel would further contend that the appellant has taken contradictory stands inasmuch as in one way he had demanded the forfeited amount and the other way lodged an FIR to set the criminal law in motion which is impermissible. To bolster the said contentions reliance has been placed on the judgments rendered in *Hridya Rajan Pd. Verma & Others v. State of Bihar and Another*[1], *Murari Lal Gupta v. Gopi Singh*[2] and *B. Suresh Yadav v. Sharifa Bee and Another*[3].

1. AIR 2000 SC 2341.
2. (2006) 12 SCC (Cri) 430.
3. (2007) 13 SCC 107.

12. At the very outset, it is necessary to state that on a perusal of the FIR, the protest petition and the order passed by the learned Magistrate, it is demonstrable that at various stages of the investigation different views were expressed by the Investigating Officers and the learned Magistrate has scrutinized the same and taking note of the allegations had exercised the power to reject the final report and take cognizance. The court taking cognizance and the revisional court have expressed the view that both the respondents had nurtured dishonest intentions from the very beginning of making the negotiation with the complainant and treated non-disclosure of execution of Power of Attorney in favour of the respondent No. 2 herein by the original owner as a material omission as a consequence of which damage had been caused to the complainant. The learned counsel for the appellant would submit that the High Court has misguided itself by observing that there was no entrustment of any property to the wife and further there was no privity of contract and non-disclosure on her part do not constitute an offence. The learned senior counsel for the respondent has highlighted the factum of absence of privity of contract. Regard being had to the allegations brought on record, the question that emerges for consideration is whether the High Court is justified in exercising its extraordinary jurisdiction to quash the order taking cognizance against the respondent No. 2 herein.

13. At this juncture, we may note that Raghuvinder Singh, respondent No. 3, had filed SLP (Crl) No. 3894 of 2011 which has been dismissed on 13.5.2011.

14. As advised at present we are inclined to discuss the decisions which have been commended to us by the learned senior counsel for the respondent. In *Hridya Rajan Pd. Verma* (supra) a complaint was filed that the accused persons therein had deliberately and intentionally diverted and induced the respondent society and the complainant by suppressing certain facts and giving false and concocted information and

assurances to the complainant so as to make him believe that the deal was a fair one and free from troubles. The further allegation was that the accused person did so with the intention to acquire wrongful gain for themselves and to cause wrongful loss to the Society and the complainant and they had induced the complainant to enter into negotiation and get advance consideration money to them. The two-Judge Bench referred to the judgment in *State of Haryana v. Bhajan Lal*[4] wherein this Court has enumerated certain categories of cases by way of illustration wherein the extraordinary power under Article 226 or the inherent powers under Section 482 of the CrPC could be exercised either to prevent abuse of the process of the court or otherwise to secure the ends of justice. The Bench also referred to the decisions in *Rupen Deol Bajaj (Mrs.) v. Kanwar Pal Singh Gill*[5]*, Rajesh Bajaj v. State NCT of Delhi*[6] and *State of Kerala v. O.C. Kuttan*[7] wherein the principle laid down in *Bhajan Lal* (supra) was reiterated. The Court posed the question whether the case of the appellants therein came under any of the categories enumerated in *Bhajan Lal* (supra) and whether the allegations made in the FIR or the complaint if accepted in entirety did make out a case against the accused-appellants therein. For the aforesaid purpose advertence was made to offences alleged against the appellants, the ingredients of the offences and the averments made in the complaint. The Court took the view that main offence alleged to have been committed by the appellants is cheating punishable under Section 420 of the IPC. Scanning the definition of 'cheating' the Court opined that there are two separate classes of acts which the persons deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set-forth in the section is the doing or omitting to

4. 1992 Supp (1) SCC 335.
5. AIR 1996 SC 309.
6. (1999) 3 SCC 259.
7. AIR 1999 SC 1044.

do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest. Thereafter, the Bench proceeded to state as follows:-

> "**16.** In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore, it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

15. After laying down the principle the Bench referred to the complaint and opined that reading the averments in the complaint in entirety and accepting the allegations to be true, the ingredients of intentional deception on the part of the accused right at the beginning of the negotiations for the transaction had neither been expressly stated nor indirectly suggested in the complaint. All that the respondent No. 2 had alleged against the appellants was that they did not disclose to him that one of their brothers had filed a partition suit which was pending. The requirement that the information was not disclosed by the appellants intentionally in order to make the respondent No. 2 part with property was not alleged expressly

or even impliedly in the complaint. Therefore, the core postulate of dishonest intention in order to deceive the complainant-respondent No. 2 was not made out even accepting all the averments in the complaint on their face value and, accordingly, ruled that in such a situation continuing the criminal proceeding against the accused would be an abuse of process of the Court.

16. From the aforesaid decision it is quite clear that this Court recorded a finding that there was no averment in the complaint that intention to deceive on the part of the accused was absent right from the beginning of the negotiation of the transaction as the said allegation had neither been expressly made nor indirectly suggested in the complaint. This Court took note of the fact that only non-disclosure was that one of their brothers had filed a partition suit which was pending and the allegation that such a disclosure was not made intentionally to deceive the complainant was absent. It is worthy to note that this Court referred to certain averments in the complaint petition and scrutinized the allegations and recorded the aforesaid finding. The present case, as we perceive, stands on a different factual matrix altogether. The learned Sessions Judge has returned a finding that there was intention to deceive from the very beginning, namely, at the time of negotiation but the High Court has dislodged the same on the foundation that the respondent No. 2 was merely present and there was no privity of contract between the complainant and her. We will advert to the said factual analysis at a later stage after discussing the other authorities which have been placed reliance upon by the learned senior counsel for the respondents.

17. In *Murari Lal Gupta* (supra) a two-Judge Bench quashed the criminal complaint instituted under Sections 406 and 420 of the IPC on the following analysis: -

> "The complaint does not make any averment so as to infer any fraudulent or dishonest inducement having been made by the petitioner pursuant to which the respondent parted

with the money. It is not the case of the respondent that the petitioner does not have the property or that the petitioner was not competent to enter into an agreement to sell or could not have transferred title in the property to the respondent. Merely because an agreement to sell was entered into which agreement the petitioner failed to honour, it cannot be said that the petitioner has cheated the respondent. No case for prosecution under Section 420 or Section 406 IPC is made out even prima facie. The complaint filed by the respondent and that too at Madhepura against the petitioner, who is a resident of Delhi, seems to be an attempt to pressurize the petitioner for coming to terms with the respondent."

In our considered opinion the factual position in the aforesaid case is demonstrably different and, hence, we have no hesitation in stating that the said decision is not applicable to the case at hand.

18. In *B. Suresh Yadav* (supra) the complainant, who was defendant in the suit, had filed a written statement from which it was manifest that she at all material times was aware of the purported demolition of the rooms standing on the suit property. It was contended in the written statement that the suit properties were different from the subject-matter of the deed of sale. After filing the written statement the respondent had filed the complaint under Section 420 of the IPC. The Court took note of the fact that there existed a dispute as to whether the property whereupon the said two rooms were allegedly situated was the same property forming the subject-matter of the deed of sale or not and a civil suit had already been filed pertaining to the said dispute. The Court also took note of the fact that at the time of execution of the sale deed the accused had not made any false or misleading representation and there was no omission on his part to do anything which he could have done. Under these circumstances, the Court opined that the dispute between the parties was basically a civil dispute. It is apt to note here

that the Court also opined that when a stand had been taken in a complaint petition which is contrary to or inconsistent with the stand taken by him in a civil suit, the same assumes significance and had there been an allegation that the accused got the said two rooms demolished and concealed the said fact at the time of execution of the deed of sale, the matter would have been different. Being of this view, this Court quashed the criminal proceeding as that did amount to abuse of the process of the court. On an x-ray of the factual score, it can safely be stated that the said pronouncement renders no assistance to the lis in question.

19. Before we proceed to scan and analyse the material brought on record in the case at hand, it is seemly to refer to certain authorities wherein the ingredients of cheating have been highlighted. In *State of Kerala v. A. Pareed Pillai and Another*[8], a two-Judge Bench ruled that to hold a person guilty of the offence of cheating, it has to be shown that his intention was dishonest at the time of making the promise and such a dishonest intention cannot be inferred from a mere fact that he could not subsequently fulfil the promise.

20. In *G.V. Rao v. L.H.V. Prasad and Others*[9], this Court has held thus: -

"7. As mentioned above, Section 415 has two parts. While in the first part, the person must "dishonestly" or "fraudulently" induce the complainant to deliver any property; in the second part, the person should intentionally induce the complainant to do or omit to do a thing. That is to say, in the first part, inducement must be dishonest or fraudulent. In the second part, the inducement should be intentional. As observed by this Court in *Jaswantrai Manilal Akhaney v. State of Bombay*[10] a guilty intention

8. AIR 1973 SC 326.
9. (2000) 3 SCC 693.
10. (2000) 3 SCC 693.

is an essential ingredient of the offence of cheating. In order, therefore, to secure conviction of a person for the offence of cheating, "*mens rea*" on the part of that person, must be established. It was also observed in *Mahadeo Prasad v. State of W.B.*[11] that in order to constitute the offence of cheating, the intention to deceive should be in existence at the time when the inducement was offered."

21. In *S.N. Palanitkar and Others v. State of Bihar and Another*[12], it has been laid down that in order to constitute an offence of cheating, the intention to deceive should be in existence at the time when the inducement was made. It is necessary to show that a person had fraudulent or dishonest intention at the time of making the promise, to say that he committed an act of cheating. A mere failure to keep up promise subsequently cannot be presumed as an act leading to cheating.

22. In the said case while dealing with the ingredients of criminal breach of trust and cheating, the Bench observed thus:-

"9. The ingredients in order to constitute a criminal breach of trust are: (*i*) entrusting a person with property or with any dominion over property (*ii*) that person entrusted (*a*) dishonestly misappropriating or converting that property to his own use; or (*b*) dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation (*i*) of any direction of law prescribing the mode in which such trust is to be discharged, (*ii*) of any legal contract made, touching the discharge of such trust.

10. The ingredients of an offence of cheating are: (*i*) there should be fraudulent or dishonest inducement of a person by deceiving him, (*ii*)(*a*) the person so deceived should be induced to deliver any property to any person, or to consent

11. AIR 1956 SC 575.

12. AIR 2001 SC 2960.

that any person shall retain any property; or (*b*) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and (*iii*) in cases covered by (*ii*)(*b*), the act of omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property."

23. Coming to the facts of the present case, it is luminicent from the FIR that the allegations against the respondent No. 2 do not only pertain to her presence but also about her total silence and connivance with her husband and transfer of property using Power of Attorney in favour of Monika Goel. It is also graphically clear that the complainant had made allegations that Raghuvinder Singh and his wife, Savita Singh, had met him at the site, showed the registered agreement and the cash and cheque were given to them at that time. It is also mentioned in the FIR that on 28.7.2008, Savita Singh had received the possession of the said plot and on the same day it was transferred in the name of Monika Goel. It is also reflectible that on 28.2.2007, Raghuvinder Singh and Savita Singh had got prepared and registered two documents in the office of the Sub-Registrar consisting one agreement to sell in favour of Raghuvinder Singh and another General Power of Attorney in favour of the wife. The allegation of collusion by the husband and wife has clearly been stated. During the investigation, as has been stated earlier, many a fact emerged but the same were ignored and a final report was submitted. In the protest petition the complainant had asseverated everything in detail about what emerged during the course of investigation. The learned Chief Judicial Magistrate after perusal of the case diary and the FIR has expressed the view that a case under Sections 406 and 420 of the IPC had been made out against both the accused persons. The learned Sessions Judge, after referring to the ingredients and the role ascribed, concurred with the same. The High Court declined to accept the said analysis on the ground that it was mere

presence and further there was no privity of contract between the complainant and the respondent No. 2.

24. At this stage, we may usefully note that some times a case may apparently look to be of civil nature or may involve a commercial transaction but such civil disputes or commercial disputes in certain circumstances may also contain ingredients of criminal offences and such disputes have to be entertained notwithstanding they are also civil disputes. In this context, we may reproduce a passage from *Mohammed Ibrahim and Others v. State of Bihar and Another*[13]*:* -

> "**8.** This Court has time and again drawn attention to the growing tendency of the complainants attempting to give the cloak of a criminal offence to matters which are essentially and purely civil in nature, obviously either to apply pressure on the accused, or out of enmity towards the accused, or to subject the accused to harassment. Criminal courts should ensure that proceedings before it are not used for settling scores or to pressurize parties to settle civil disputes. But at the same time, it should be noted that several disputes of a civil nature may also contain the ingredients of criminal offences and if so, will have to be tried as criminal offences, even if they also amount to civil disputes. (See *G. Sagar Suri v. State of U.P.*[14] and *Indian Oil Corpn. v. NEPC India Ltd.*[15])"

25. In this context we may usefully refer to a paragraph from *All Cargo Movers (I) Pvt. Ltd. V. Dhanesh Badarmal Jain & Anr.*[16]

> "…..Where a civil suit is pending and the complaint petition has been filed one year after filing of the civil suit, we may for the purpose of finding out as to whether the said

13. (2009) 8 SCC 751.
14. (2000) 6 SCC 636.
15. (2006) 6 SCC 736.
16. AIR 2008 SC 274.

> allegations are prima facie cannot notice the correspondence exchanged by the parties and other admitted documents. It is one thing to say that the Court at this juncture would not consider the defence of the accused but it is another thing to say that for exercising the inherent jurisdiction of this Court, it is impermissible also to look to the admitted documents. Criminal proceedings should not be encouraged, when it is found to be mala fide or otherwise an abuse of the process of the court. Superior Courts while exercising this power should also strive to serve the ends of justice."

26. In *Rajesh Bajaj v. State NCT of Delhi and Others,*[17] while dealing with a case where the High Court had quashed an F.I.R., this Court opined that the facts narrated in the complaint petition may reveal a commercial transaction or a money transaction, but that is hardly a reason for holding that the offence of cheating would elude from such a transaction. Proceeding further, the Bench observed thus: -

> **"11.** The crux of the postulate is the intention of the person who induces the victim of his representation and not the nature of the transaction which would become decisive in discerning whether there was commission of offence or not. The complainant has stated in the body of the complaint that he was induced to believe that the respondent would honour payment on receipt of invoices, and that the complainant realised later that the intentions of the respondent were not clear. He also mentioned that the respondent after receiving the goods had sold them to others and still he did not pay the money. Such averments would prima facie make out a case for investigation by the authorities."

27. We have referred to the aforesaid decisions in the field to highlight about the role of the Court while dealing with such

17. AIR 1999 SC 1216.

issues. In our considered opinion the present case falls in the category which cannot be stated at this stage to be purely civil in nature on the basis of the admitted documents or the allegations made in the FIR or what has come out in the investigation or for that matter what has been stated in the protest petition. We are disposed to think that prima facie there is allegation that there was a guilty intention to induce the complainant to part with money. We may hasten to clarify that it is not a case where a promise initially made could not lived up to subsequently. It is not a case where it could be said that even if the allegations in entirety are accepted, no case is made out. Needless to emphasise, the High Court, while exercising power under Article 226 of the Constitution or Section 482 of the CrPC, has to adopt a very cautious approach. In *Central Bureau of Investigation v. Ravi Shankar Srivastava, IAS and Another,*[18] the Court, after referring to *Janata Dal v. H.S. Chowdhary*[19] and Raghubir Saran (Dr.) *v.* State of Bihar[20], has observed that the powers possessed by the High Court under Section 482 of the IPC are very wide and the very plentitude of the power requires great caution in its exercise. The court must be careful to see that its decision in exercise of this power is based on sound principles and such inherent powers should not be exercised to stifle a legitimate prosecution. This Court has further stated that it is not proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises arrive at a conclusion that the proceedings are to be quashed. It has been further pronounced that it would be erroneous to assess the material before it and conclude that the complaint could not be proceeded with. The Bench has opined that the meticulous analysis of the case is not necessary and the complaint has to be read as a whole and if it appears that on consideration of the allegations in the light of the statement made on oath of the

18. (2006) 7 SCC 188.

19. (1992) 4 SCC 305.

20. AIR 1964 SC 1.

complainant that the ingredients of the offence or offences are disclosed and there is no material to show that the complaint is mala fide, frivolous or vexatious, in that event there would be no justification for interference by the High Court.

28. In *R. Kalyani v. Janak C. Mehta and Others*[21], after referring to the decisions in *Hamida v. Rashid*[22] and *State of Orissa v. Saroj Kumar Sahoo,*[23] this Court eventually culled out the following propositions: -

"**15.** Propositions of law which emerge from the said decisions are:

a. The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a first information report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.

b. For the said purpose the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

c. Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the Court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.

d. If the allegation discloses a civil dispute, the same by itself may not be a ground to hold that the criminal proceedings should not be allowed to continue."

29. It is worth noting that it was observed therein that one of the paramount duties of the superior court is to see that person who is absolutely innocent is not subjected to

21. (2009) 1 SCC 516.

22. (2008) 1 SCC 474.

23. (2005) 13 SCC 540.

prosecution and humiliation on the basis of a false and wholly untenable complaint.

30. Recently in *Gian Singh v. State of Punjab and Another*[24] a three-Judge Bench has observed that: -

> "**55.** In the very nature of its constitution, it is the judicial obligation of the High Court to undo a wrong in course of administration of justice or to prevent continuation of unnecessary judicial process. This is founded on the legal maxim *quando lex aliquid alicui concedit, conceditur et id sine qua res ipsa esse non potest*. The full import of which is whenever anything is authorised, and especially if, as a matter of duty, required to be done by law, it is found impossible to do that thing unless something else not authorised in express terms be also done, may also be done, then that something else will be supplied by necessary intendment. Ex debito justitiae is inbuilt in such exercise; the whole idea is to do real, complete and substantial justice for which it exists. The power possessed by the High Court under Section 482 of the Code is of wide amplitude but requires exercise with great caution and circumspection."

31. Applying the aforesaid parameters we have no hesitation in coming to hold that neither the FIR nor the protest petition was mala fide, frivolous or vexatious. It is also not a case where there is no substance in the complaint. The manner in which the investigation was conducted by the officer who eventually filed the final report and the transfer of the investigation earlier to another officer who had almost completed the investigation and the entire case diary which has been adverted to in detail in the protest petition prima facie makes out a case against the husband and the wife regarding collusion and the intention to cheat from the very beginning, inducing him to hand over a huge sum of money to both of them. Their conduct of not stating so many aspects, namely, the Power of Attorney executed by the original owner, the will and also the

24. (2012) 10 SCC 303.

sale effected by the wife in the name of Monika Singh on 28.7.2008 cannot be brushed aside at this stage. Therefore, we are disposed to think that the High Court, while exercising the extraordinary jurisdiction, had not proceeded on the sound principles of law for quashment of order taking cognizance. The High Court and has been guided by the non-existence of privity of contract and without appreciating the factual scenario has observed that the wife was merely present. Be it noted, if the wife had nothing to do with any of the transactions with the original owner and was not aware of the things, possibly the view of the High Court could have gained acceptation, but when the wife had the Power of Attorney in her favour and was aware of execution of the will, had accepted the money along with her husband from the complainant, it is extremely difficulty to say that an innocent person is dragged to face a vexatious litigation or humiliation. The entire conduct of the respondent Nos. 2 and 3 would show that a prima facie case is made out and allegations are there on record in this regard that they had the intention to cheat from the stage of negotiation. That being the position, the decision in *Hridya Rajan Pd. Verma & Others* (supra) which is commended to us by Mr. Sharma, learned senior counsel, to which we have adverted to earlier, does not really assist the respondents and we say so after making the factual analysis in detail.

32. In view of our aforesaid analysis we allow the appeal, set aside the order passed by the High Court and direct the Magistrate to proceed in accordance with law. However, we may clarify that we may not be understood to have expressed any opinion on the merits of the case one way or the other and our observations must be construed as limited to the order taking cognizance and nothing more than that. The learned Magistrate shall decide the case on its own merit without being influenced by any of our observations as the same have been made only for the purpose of holding that the order of cognizance is prima facie valid and did not warrant interference by the High Court.

K.K.T. Appeal allowed.

MR. JUSTICE CHANDRASHEKARAIAH (RETD.)

v.

JANEKERE C. KRISHNA & ORS. ETC.

(Civil Appeal Nos.197-199 of 2013)

JANUARY 11, 2013

[K.S. RADHAKRISHNAN AND MADAN B. LOKUR, JJ.]

Karnataka Lokayukta Act, 1984 – s.3(2)(a) and (b) – Appointment of Lokayukta / Upa Lokayukta under the Act by the Governor of Karnataka – Nature and procedure to be followed – Requirement of 'consultation' in the context of appointment process – Meaning of – Held: The Governor of the State can appoint Lokayukta or Upa Lokayukta only on the advice tendered by the Chief Minister – The Chief Minister is mandatorily required to consult the Chief Justice of the High Court and four other consultees – The consultation must be meaningful and effective – However, the advice tendered by the Chief Minister will have primacy and not that of the consultees including the Chief Justice of the High Court – On facts, the Chief Minister erred in not consulting the Chief Justice of the High Court in the matter of appointment of appellant as Upa Lokayukta – Appointment of appellant was in violation of s.3(2)(b) of the Act since the Chief Justice of the High Court was not consulted nor was the name deliberated upon before advising or appointing him as Upa Lokayukta – Consequently appellant has no authority to continue or hold the post of Upa Lokayukta.

Karnataka Lokayukta Act, 1984 – s.3(2)(a) and (b) – State of Karnataka – Duties and functions of the Lokayukta / Upa Lokayukta – Nature of – Discussed.

The office of the Karnataka Upa Lokayukta fell vacant. The Chief Minister of the Karnataka State initiated steps for filling up that vacancy and following that

advised the Governor to appoint Justice Chandrashekaraiah as Upa Lokayukta. The Governor, accepting the advice of the Chief Minister, passed order dated 20.01.2012 appointing Justice Chandrashekaraiah as the Upa Lokayukta.

The Chief Justice of the Karnataka High Court addressed a letter dated 04.02.2012 to the Chief Minister stating that he was not consulted in the matter of appointment of Justice Chandrashekaraiah as Upa Lokayukta and that the appointment was not in conformity with the constitutional provisions and requested for recalling the appointment. Subsequently, two writ petitions were filed in public interest for quashing the appointment of Justice Chandrashekaraiah as Upa Lokayukta. A *writ of quo warranto* was also preferred against the functioning of Justice Chandrashekaraiah as Upa Lokayukta.

The High Court held that since there was no consultation with the Chief Justice of the Karnataka High Court specifically on the appointment of Justice Chandrashekaraiah as an Upa-lokayukta, his appointment, therefore, was void *ab initio*. The High Court held that under the Karnataka Lokayukta Act, 1984, the opinion expressed by the Chief Justice of the High Court of Karnataka has primacy while tendering advice by the Chief Minister of the State to the Governor and that since, the order passed by the Governor of Karnataka, appointing Justice Chandrashekaraiah as Upa Lokayukta, was without consulting the Chief Justice of the High Court, the same was illegal.

In the instant appeals preferred by Justice Chandrashekaraiah and the State of Karnataka, the question which arose for consideration was whether the view of the Chief Justice of the High Court of Karnataka has got primacy while making appointment to the post

of Lokayukta or Upa Lokayukta by the Governor of Karnataka in exercise of powers conferred on him under Section 3(2)(a) and (b) of the Karnataka Lokayukta Act, 1984.

Disposing of the appeals, the Court

Per Radhakrishnan, J.

HELD: 1.1. The functions to be discharged by Lokayukta or Upa Lokayukta are investigative in nature and the report of Lokayukta or Upa Lokayukta under sub-sections (1) and (3) of Section 12 of the Act and the Special Report submitted under sub-section (5) of Section 12 of the Act are only recommendatory. No civil consequence as such follows from the action of Lokayukta and Upa Lokayukta, though they can initiate prosecution before a competent court. Sections 9, 10 and 11 of the Act clearly indicate that Lokayukta and Upa Lokayukta are discharging quasi-judicial functions while conducting the investigation under the Act. Sub-section (2) of Section 11 of the Act also states that for the purpose any such investigation, including the preliminary inquiry Lokayukta and Upa Lokayukta shall have all the powers of a Civil Court while trying a suit under the Code of Civil Procedure, 1908, in the matter of summoning and enforcing the attendance of any person and examining him on oath. Further they have also the power for requiring the discovery and production of any document, receiving evidence on affidavits, requisitioning any public record or copy thereof from any court or office, issuing commissions for examination of witnesses of documents etc. Further, sub-section (3) of Section 11 stipulates that any proceedings before the Lokayukta and Upa Lokayukta shall be deemed to be a judicial proceeding within the meaning of Section 193 of the Indian Penal Code. Therefore, Lokayukta and Upa Lokayukta, while

investigating the matters are discharging quasi-judicial functions, though the nature of functions is investigative. [Paras 25, 33] [1024-A-B; 1027-B-F]

1.2. The Governor, as per Section 3(2)(a) of the Karnataka Lokayukta Act, 1984, is empowered to appoint Lokayukta on the advice tendered by the Chief Minister, in consultation with the Chief Justice of the High Court of Karnataka, the Chairman, Karnataka Legislative Council, the Speaker, Karnataka Legislative Assembly, the Leader of the Opposition in the Karnataka Legislative Council and the Leader of the Opposition in the Karnataka Legislative Assembly. It is, therefore, clear that all the above five dignitaries have to be consulted before tendering advice by the Chief Minister to the Governor of the State. Section 3(2)(b) of the Act stipulates that, so far as the Upa Lokayukta is concerned, he shall be a person who has held the office of a Judge of the High Court and shall be appointed on the advice tendered by the Chief Minister. The Chief Minister has to consult the five dignitaries, the Chief Justice of the High Court of Karnataka, the Chairman, Karnataka Legislative Council, the Speaker, Karnataka Legislative Assembly, the Leader of the Opposition in the Legislative Council and the Leader of Opposition in the Karnataka Legislative Assembly. Therefore, for the purpose of appointment of Lokayukta or Upa Lokayukta all the five consultees are common. The appointment has to be made by the Governor on the advice tendered by the Chief Minister in consultation with those five dignitaries. [Paras 36, 37] [1029-F-H; 1030-A-D]

1.3. The language employed in Section 3(2)(a) and (b) of the Karnataka Lokayukta Act, 1984 is clear and unambiguous and one has to apply the golden rule of interpretation i.e. the literal interpretation. When the language is plain and unambiguous and admits of only

one meaning no question of construction of a statute arises, for the Act speaks for itself. Section 3(2)(a) and (b) when read literally and contextually admit of no doubt that the Governor of the State can appoint Lokayukta or Upa Lokayukta only on the advice tendered by the Chief Minister and that the Chief Justice of the High Court is only one of the consultees and his views have no primacy. The Governor, as per the statute, can appoint only on the advice tendered by the Chief Minister and not on the opinion expressed by the Chief Justice or any of the consultees. [Paras 60, 61 and 62] [1045-F-G; 1046-A-B, F-G]

1.4. The Chief Minister is legally obliged to consult the Chief Justice of the High Court and other four consultees, which is a mandatory requirement. The consultation must be meaningful and effective and mere eliciting the views or calling for recommendations would not suffice. Consultees can suggest various names from the source stipulated in the statute and those names have to be discussed either in a meeting to be convened by the Chief Minister of the State for that purpose or by way of circulation. The Chief Minister, if proposes to suggest or advise any name from the source ear-marked in the statute that must also be made available to the consultees so that they can also express their views on the name or names suggested by the Chief Minister. After due deliberations and making meaningful consultation, the Chief Minister of the State is free to advise a name which has come up for consideration among the consultees to the Governor of the State. The advice tendered by the Chief Minister will have primacy and not that of the consultees including the Chief Justice of the High Court. [Para 63] [1047-A-E]

1.5. It cannot be said that since the source (from which a candidate has to be advised for the post of Lokayukta / Upa Lokayukta) consists of persons who

have held the office of the Judge of the Supreme Court or the High Court, the Chief Justice of the High Court would be in a better position to compare the merits and demerits of those candidates. Apart from a person's competence, integrity and character as a Judge, various other information have also to be gathered since the persons who fall in that source are retired judges. Government has its own machinery and system to gather various information about retired Judges. The Chief Minister cannot advise a name from that source without making a meaningful and effective consultation after disclosing the relevant materials. This is a sufficient safeguard against arbitrary selection and advice. Further the duties and functions of the Lokayukta or Upa Lokayukta are investigative in nature and their orders as such cannot be executed. In such situation, the legislature, in its wisdom, felt that no primacy need be attached to views of the consultees including the Chief Justice but on the advice of the Chief Minister. [Para 64] [1047-G-H; 1048-A-C]

1.6. Nothing spells out from the language used in Section 3(2)(a) and (b) to hold that primacy be attached to the opinion expressed by the Chief Justice of the High Court of Karnataka. The various directions given by the High Court holding that the views of the Chief Justice has got primacy, is beyond the scope of the Act and the High Court has indulged in a legislative exercise which is impermissible in law. Therefore, all the directions issued by the High Court, are set aside since they are beyond the scope of the Act. [Para 65] [1048-D-F]

1.7. The Chief Minister has however committed an error in not consulting the Chief Justice of the High Court in the matter of appointment of Justice Chandrashekaraiah as Upa Lokayukta. Records indicate that there was no meaningful and effective consultation or discussion of the names suggested among the

consultees before advising the Governor for appointment to the post of Upa Lokayukta. The appointment of Justice Chandrashekaraiah as Upa Lokayukta, therefore, is in violation of Section 3(2)(b) of the Act since the Chief Justice of the High Court was not consulted nor was the name deliberated upon before advising or appointing him as Upa Lokayukta, consequently, the appointment of Justice Chandrasekharaiah as Upa Lokayukta cannot stand in the eye of law and he has no authority to continue or hold the post of Upa Lokayukta of the State. [Para 66] [1048-F-H; 1049-A-B]

1.8. The Chief Minister of the State is directed to take appropriate steps for appointment of Upa Lokayukta in the State of Karnataka, in accordance with law. Since nothing adverse has been found against Justice Chandrasekharaiah, his name can still be considered for appointment to the post of Upa Lokayukta along with other names, if any, suggested by the other five consultees under the Act. However, it is made clear that there is no primacy in the views expressed by any of the consultees and after due deliberations of the names suggested by the consultees including the name, if any suggested by the Chief Minister, the Chief Minister can advise any name from the names discussed to the Governor of the State for appointment of Upa Lokayukta under the Act. [Para 67] [1049-B-E]

Justice K.P. Mohapatra v. Sri Ram Chandra Nayak and Ors. **2002 (8) SCC 1: 2002 (3) Suppl. SCR 166;** *Nagendra Nath Bora and Another v. Commissioner of Hills Division and Appeals, Assam and Others* **AIR 1958 SC 398: 1958 SCR 1240;** *Indian National Congress (I) v. Institute of social Welfare and Others* **(2002) 5 SCC 685: 2002 (3) SCR 1040;** *Automotive Tyre Manufactures Association v. Designated Authority and Others* **(2011) 2 SCC 258: 2011 (1) SCR 198;** *State of Gujarat v. Hon'ble Mr. Justice R.A. Mehta (Retd.)*

2013 (1) SCALE 7; *Chandra Mohan v. State of U.P.* **1967 (1) SCR 77;** *Chandramouleshwar Prasad v. Patna High Court* **(1969) 3 SCC 56: 1970 (2) SCR 666;** *Samsher Singh v. State of Punjab and Another* **(1974) 2 SCC 831: 1975 (1) SCR 814;** *Union of India v. Sankalchand Himatlal Sheth and Another* **(1977) 4 SCC 193: 1978 (1) SCR 423;** *Supreme Court Advocates-on-Record Association and Others v. Union of India* **(1993) 4 SCC 441: 1993 (2) Suppl. SCR 659;** *Union of India and Others v. Kali Dass Batish and Another* **(2006) 1 SCC 779: 2006 (1) SCR 261;** *Ashish Handa, Advocate v. Hon'ble the Chief Justice of High Court of Punjab and Haryana and Others* **(1996) 3 SCC 145: 1996 (3) SCR 474;** *Ashok Tanwar and Another v. State of H.P. and Others* **(2005) 2 SCC 104: 2004 (6) Suppl. SCR 1065;** *N. Kannadasan v. Ajoy Khose and Others* **(2009) 7 SCC 1: 2009 (7) SCR 668 and** *Kanailal Sur v. Paramnidhi Sadhu Khan* **AIR 1957 SC 907: 1958 SCR 360 – referred to.**

Empror v. Benoarilal Sarma **AIR 1945 PC 48– referred to.**

Per Lokur, J. [Concurring]

HELD: 1.1. The broad spectrum of functions, powers, duties and responsibilities of the Upa-lokayukta, as statutorily prescribed, clearly bring out that not only does he perform quasi-judicial functions, as contrasted with purely administrative or executive functions, but that the Upa-lokayukta is more than an investigator or an enquiry officer. At the same time, notwithstanding his status, he is not placed on the pedestal of a judicial authority rendering a binding decision. He is placed somewhere in between an investigator and a judicial authority, having the elements of both. For want of a better expression, the office of an Upa-lokayukta can only be described as a *sui generis* quasi-judicial authority. [Para 27] [1057-E-H]

1.2. In the appointment of the Upa-lokayukta, the

Chief Minister must consult not only the Chief Justice but several other constitutional authorities also and given the fact that the Upa-Lokayukta is not a purely judicial authority, it hardly matters who initiates the process of appointment of the Upa-Lokayukta. Ordinarily, it must be the Chief Minister since he has to tender advice to the Governor and, in a sense, the appointment is his primary responsibility. But this does not preclude any of the other constitutional authorities who are required to be consulted from bringing it to the notice of the Chief Minister that the post of the Upa-Lokayukta needs to be filled up and that the appointment process ought to commence – nothing more than that. None of them ought to suggest a name since constitutional courtesy would demand that only the Chief Minister should initiate the appointment process. There is no reason to hold that merely because the Upa-Lokayukta is a *sui generis* quasi-judicial authority, only the Chief Justice must initiate the process of appointment. The selection of the Upa-lokayukta is a consultative process involving several constitutional authorities and in the context of the Act, no constitutional authority is subordinate to the other. It cannot be said that the recommendation for appointing the Upa-lokayukta under the Act must emanate only from the Chief Justice and only the name recommended by him should be considered. [Paras 45, 47] [1064-G-H; 1065-A-D; 1066-A-B]

1.3. There is a clear distinction between 'consultation' in the appointment of a judge of a superior court and 'consultation' in the appointment to a statutory judicial position. For the former, the Chief Justice must consult the collegiums of Judges, while it is not necessary for the latter. An Upa-lokayukta is not a judicial authority, let alone a constitutional authority like a judge of a High Court. Therefore, mandatory consultation in the appointment process as postulated by Section 3(2)(b) of

the Act is with the Chief Justice in his individual capacity and not consultation in a collegial capacity. [Paras 56, 58] [1070-A-B, E-F]

1.4. There are absolutely no 'consultation' guidelines laid down in the Act. It is not necessary to circumscribe the manner of consultation. The Chief Minister may consult the other constitutional authorities collectively or in groups or even individually – this hardly matters as long as there is meaningful and effective consultation. Similarly, it is not necessary to restrict the mode of consultation. It may be in a meeting or through correspondence. Today, with available technology, consultation may even be through a video link. The form of consultation or the venue of consultation is not important - what is important is the substance of the consultation. The matter has to be looked at pragmatically and not semantically. It is important that no constitutional authority is kept in the dark about the name of any candidate under consideration and each constitutional authority mentioned in Section 3(2)(b) of the Act must know the recommendation made by one another for appointment as an Upa-Lokayukta. In addition, they must have before them full and identical facts. As long as these basic requirements are met, 'consultation' could be said to have taken place. [Paras 59, 60] [1070-G; 1071-A-E]

1.5. In the instant case, there was no 'consultation' between the various constitutional authorities before the Chief Minister recommended the name of Justice Chandrashekharaiah. In response to the letter of the Chief Minister, the Chief Justice recommended the name of Justice Rangavittalachar; the Speaker of the Legislative Assembly recommended Justice Chandrashekharaiah; the Chairman of the Legislative Council recommended Justice Chandrashekharaiah; the Leader of the Opposition in the Legislative Assembly recommended Justice Mohammed Anwar and Justice Ramanna; the

Leader of the Opposition in the Legislative Council recommended Justice Mohammed Anwar and Justice Ramanna. Therefore, as many as four retired judges were recommended for appointment as Upa-lokayukta. It is not clear whether the names of all these judges were disclosed to all the constitutional authorities. The name of Justice Chandrashekharaiah was certainly not disclosed to the Chief Justice, as is evident from his letter dated 4th February 2012 wherein he stated four times that he was not consulted on the appointment of Justice Chandrashekharaiah. The contents of this letter are not denied by the State and are quite obviously admitted. Significantly, the Chief Minister did not reply to this letter. Clearly, the Chief Justice was kept in the dark about the name of a candidate and there was no full and complete disclosure of facts. *Ergo*, the Chief Minister did not recommend the name of Justice Chandrashekharaiah in consultation with the Chief Justice. This was contrary to the mandatory requirement of Section 3(2)(b) of the Act and so, it must be held that the appointment of Justice Chandrashekharaiah was void *ab initio.* [Paras 61, 62] [1071-F-H; 1072-A-B; 1073-A-B]

1.6. 'Consultation' for the purposes of Section 3(2)(b) of the Act does not and cannot postulate concurrence or consent. There is always a possibility of an absence of agreement on any one single person being recommended for appointment as an Upa-lokayukta, as has actually happened in the present case. In such a situation, it is ultimately the decision of the Chief Minister what advice to tender to the Governor, since he alone has to take the final call. [Para 67] [1074-G-H; 1075-A]

1.7. There is no reason why the Chief Minister cannot advice the Governor to appoint a person not recommended by any of the constitutional authorities, as long as he consults them – the 'consultation' being in the manner postulated above. The Chief Minister can

recommend a completely different person, other than any of those recommended by any of the constitutional authorities as long as he does not keep them in the dark about the name of the candidate and there is a full and complete disclosure of all relevant facts. On the facts of this case, there was no consultation between the Chief Minister and the Chief Justice on the appointment of Justice Chandrashekharaiah as an Upa-lokayukta. His appointment was, therefore, void *ab initio*. [Para 68, 69] [1075-A-C, F-G]

1.8. As far as Section 3(2)(b) of the Act is concerned, the primary 'responsibility' for the appointment of the Upa-Lokayukta rests with the Chief Minister who has to advice the Governor. Since the Chief Justice is only one of the constitutional authorities required to be consulted by the Chief Minister before advice is tendered to the Governor, it cannot be said that only his view would prevail over the views of other constitutional authorities. If that were so, then (to rephrase the High Court) consultation with the other constitutional authorities including the Chairman of the Karnataka Legislative Council, the Speaker of the Karnataka Legislative Council and the Leader of the Opposition in the Karnataka Legislative Council and in the Karnataka Legislative Assembly would be reduced to a farce. It must be appreciated that these constitutional authorities also have an equal say in the executive governance of the State and there is nothing to suggest that their opinion should be subordinated to the opinion of the Chief Justice or that the Chief Justice can veto their views. On the other hand, since it is ultimately the Chief Minister who has to advice the Governor, it is he alone who has to take the final call and shoulder the responsibility of correctly advising the Governor in the matter of appointing the most suitable person as an Upa-lokayukta. [Para 78] [1079-B-G]

1.9. The mechanics of the working of a statute has

to be decoded from the contents of the statute and the words used therein; otherwise there is a possibility of committing a serious error. A statute must be considered and understood on its own terms. In so construing the Act, there is no reason to accord primacy to the views of the Chief Justice in the appointment of an Upa-lokayukta under the Karnataka Lokayukta Act, 1984. [Para 79] [1079-G-H; 1080-B-C]

1.10. The doctrine of 'prospective overruling' has no application herein since there is no overwhelming reason to save the appointment of the Upa-lokayukta from attack. There was no consultation with the Chief Justice specifically on the appointment of Justice Chandrashekharaiah as an Upa-Lokayukta. In absence of any consultation with the Chief Justice, the appointment of Justice Chandrashekharaiah as Upa-lokayukta is void *ab initio*. [Paras 4, 81, 83] [1050-A-B; 1080-F; 1081-A-B]

N. Gundappa v. State of Karnataka **1989 (3) KarLJ 425;** *State of Karnataka v. N. Gundappa* **ILR 1990 Kar 4188;** *Prof. S.N. Hegde v. The Lokayukta* ILR **2004 Kar 3892;** *The Bharat Bank Ltd., Delhi v. Employees of the Bharat Bank Ltd., Delhi* **[1950] SCR 459;** *Durga Shankar Mehta v. Thakur Raghuraj Singh and Others* **[1955] 1 SCR 267;** *Associated Cement Companies v. P.N. Sharma* **1965 (2) SCR 366;** *Sarwan Singh Lamba v. Union of India* **(1995) 4 SCC 546: 1995 (1) Suppl. SCR 427;** *S.P. Sampath Kumar v. Union of India* **(1987) 1 SCC 124: 1987 (1) SCR 435;** *Ashish Handa v. Hon'ble the Chief Justice of High Court of Punjab & Haryana and Others* **(1996) 3 SCC 145: 1996 (3) SCR 474;** *Ashok Tanwar and Another v. State of Himachal Pradesh and Others* **(2005) 2 SCC 104: 2004 (6) Suppl. SCR 1065;** *State of Haryana v. National Consumer Awareness Group* **(2005) 5 SCC 284: 2005 (3) SCR 1158;** *N. Kannadasan v. Ajoy Khose and Others* **(2009) 7 SCC 1: 2009 (7) SCR 668;** *Supreme Court Advocates on Record Association v. Union of India* **AIR 1994 SC 268: 1993 (2) Suppl. SCR 659;** *Aruna Roy v.*

Union of India **(2002) 7 SCC 368: 2002 (2) Suppl. SCR 266;** *S.P. Gupta v. Union of India* **1981 Supp SCC 87: 1982 SCR 365;** *Union of India v. Sankalchand Himmatlal Seth* **(1977) 4 SCC 193: 1978 (1) SCR 423;** *Indian Administrative Service (S.C.S.) Association U.P. and Others v. Union of India and Others* **1993 Supp. (1) SCC 730: 1992 (2) Suppl. SCR 389;** *M.M. Gupta v. State of Jammu & Kashmir* **(1982) 3 SCC 412: 1983 (1) SCR 593;** *Justice K.P. Mohapatra v. Sri Ram Chandra Nayak* **(2002) 8 SCC 1: 2000 (4) Suppl. SCR 22 and** *Maharashtra State Financial Corporation v. Jaycee Drugs and Pharmaceuticals* **(1991) 2 SCC 637: 1991 (1) SCR 480 – referred to.**

Case Law Reference:

Per K.S. Radhakrishnan, J.:

2002 (3) Suppl. SCR 166	**referred to**	**Paras 13, 57, 59**
1958 SCR 1240	**referred to**	**Para 30**
2002 (3) SCR 1040	**referred to**	**Para 30**
2011 (1) SCR 198	**referred to**	**Para 32**
2013 (1) SCALE 7	**referred to**	**Para 48**
1967 (1) SCR 77	**referred to**	**Para 50**
1970 (2) SCR 666	**referred to**	**Para 50**
1975 (1) SCR 814	**referred to**	**Para 51**
1978 (1) SCR 423	**referred to**	**Para 51**
1993 (2) Suppl. SCR 659	**referred to**	**Para 52, 54, 55**
2006 (1) SCR 261	**referred to**	**Para 53**
1996 (3) SCR 474	**referred to**	**Para 54**

2004 (6) Suppl. SCR 1065	**referred to**	**Para 55**
2009 (7) SCR 668	**referred to**	**Para 55**
AIR 1945 PC 48	**referred to**	**Para 61**
1958 SCR 360	**referred to**	**Para 61**

Per Madan B. Lokur, J.:

1989 (3) KarLJ 425	**referred to**	**Para 9**
ILR 1990 Kar 4188	**referred to**	**Para 10**
ILR 2004 Kar 3892	**referred to**	**Para 10**
[1950] SCR 459	**referred to**	**Para 28**
[1955] 1 SCR 267	**referred to**	**Para 30**
1965 (2) SCR 366	**referred to**	**Para 31**
1995 (1) Suppl. SCR 427	**referred to**	**Para 37, 38**
1987 (1) SCR 435	**referred to**	**Para 37**
1996 (3) SCR 474	**referred to**	**Para 38, 39**
2004 (6) Suppl. SCR 1065	**referred to**	**Para 39**
2005 (3) SCR 1158	**referred to**	**Para 39**
2009 (7) SCR 668	**referred to**	**Para 40**
1993 (2) Suppl. SCR 659	**referred to**	**Para 51**
2002 (2) Suppl. SCR 266	**referred to**	**Para 53**
1982 SCR 365	**referred to**	**Para 55**
1978 (1) SCR 423	**referred to**	**Para 55**
1992 (2) Suppl. SCR 389	**referred to**	**Para 63**
1983 (1) SCR 593	**referred to**	**Para 68**
2000 (4) Suppl. SCR 22	**referred to**	**Para 74**

1991 (1) SCR 480	**referred to**	**Para 76**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 197-199 of 2013.

From the Judgment & Order dated 03.04.2012 of the High Court of Karnataka at Bangalore in Writ Petition Nos. 4852-53 of 2012 and Writ Petition No. 4962 of 2012.

WITH

C.A. No. 200-202 of 2013

K.V. Viswanathan, P.V. Shetty, V.N. Ragupathy, Gautam Bharadwaj, Mahesh Agarwal, Akhil Anand, E.C. Agrawala, Rishi Agrawala, Ankur Saigal, Abhinav Agrawal for the Appellant.

K.N. Bhat, Shailesh Madiyal, Anantha Narayana M.G., Navkesh Batra, Sandeep Narain Shalu Lal, S. Narain & Co. for the Respondents.

The Judgments of the Court were delivered by

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

2. The sentinel issue that has come up for consideration in these appeals is whether the views expressed by the Chief Justice of the High Court of Karnataka has got primacy while making appointment to the post of Lokayukta or Upa Lokayukta by the Governor of Karnataka in exercise of powers conferred on him under Section 3(2)(a) and (b) of the Karnataka Lokayukta Act, 1984 (for short 'the Act').

3. The Division Bench of the Karnataka High Court took the view that under the Act the opinion expressed by the Chief Justice of the High Court of Karnataka has primacy while tendering advice by the Chief Minister of the State to the Governor. The Court held since, the order passed by the Governor of Karnataka, appointing Justice Chandrashekaraiah

as Upa Lokayukta on 21.1.2012, was without consulting the Chief Justice of the High Court, the same was illegal. The High Court also issued various directions including the direction to the State and the Principal Secretary to the Governor to take steps for filling up the post of Upa Lokayukta in accordance with the directions contained in the judgment. Aggrieved by the Judgment of the High Court, these appeals have been preferred by Justice Chandrashekaraiah and the State of Karnataka.

Facts

4. The notification dated 21.1.2012 issued in the name of the Governor was challenged by two practicing lawyers in public interest contending that the institution of Lokayukta was set up in the State for improving the standard of public administration by looking into complaints against administrative actions including cases of corruption, favouritism and official indiscipline in administrative machinery and if the Chief Minister's opinion has primacy, then it would not be possible for the institution to work independently and impartially so as to achieve the object and purpose of the Act.

5. The office of the Karnataka Upa Lokayukta fell vacant on the resignation of Justice R. Gururajan and the Chief Minister initiated steps for filling up that vacancy. Following that, the Chief Minister on 18.10.2011 addressed separate letters to the Chief Justice of the High Court of Karnataka, Chairman of the Karnataka Legislative Council, Speaker of the Karnataka Legislative Assembly, Leader of the Opposition in the Legislative Council and Leader of the Opposition in the Legislative Assembly requesting them to suggest a panel of eligible persons for appointment as Upa Lokayukta on or before 24.10.2011.

6. The Chief Justice suggested the name of Mr. H. Rangavittalachar (Retd.), the Leader of the Opposition in the Karnataka Legislative Council and the Leader of the Opposition in the Karnataka Legislative Assembly suggested

the names of Mr. Justice K. Ramanna (Retd.) and Mr. Justice Mohammed Anwar (Retd.). The Chairman of the Karnataka Legislative Council and the Speaker of the Karnataka Legislative Assembly suggested the name of Justice Chandrashekaraiah (Retd.). The Chief Minister then advised the Governor to appoint Justice Chandrashekaraiah as Upa Lokayukta. The Governor, accepting the advice of the Chief Minister, passed the order dated 20.1.2012 appointing Justice Chandrashekaraiah as the Upa Lokayukta.

7. The Chief Justice on 21.01.2012 received an invitation for attending the oath taking ceremony of Justice Chandrashekaraiah as Upa Lokayukta in the morning which, according to the Chief Justice, was received only in the evening. The Chief Justice then addressed a letter dated 04.02.2012 to the Chief Minister stating that he was not consulted in the matter of appointment of Justice Chandrashekaraiah as Upa Lokayukta and expressed the opinion that the appointment was not in conformity with the constitutional provisions and requested for recalling the appointment.

8. The stand taken by the Chief Justice was widely published in various newspapers; following that, as already indicated, two writ petitions were filed in public interest for quashing the appointment of Justice Chandrashekaraiah as Upa Lokayukta. A *writ of quo warranto* was also preferred against the functioning of Justice Chandrashekaraiah as Upa Lokayukta.

Arguments

9. Shri K.V. Viswanathan, learned senior counsel appearing for the State of Karnataka took us extensively to the objects and reasons and to the various provisions of the Act and submitted that the nature and functions of the office of Lokayukta or Upa Lokayukta are to carry out investigation and enquiries and the institution of Lokayukta, as such, does not

form part of the judicial organ of the State. Learned senior counsel also submitted that the functions and duties of the institution of Lokayukta, as such, cannot be compared with the functions and duties of the Judiciary, Central Administrative Tribunals, State Administrative Tribunals or Consumer Disputes Redressal Forums etc.

10. Learned senior counsel, referring to the various provisions such as Sections 3, 7, 9 etc. of the Act, submitted that Lokayukta or Upa Lokayukta are appointed for the purpose of conducting investigations and enquiries and they are not discharging any judicial functions as such and their reports are only recommendatory in nature. Consequently, the Act never envisaged vesting any primacy on the views of the Chief Justice of the High Court in the matter of appointment of Lokayukta or Upa Lokayukta. In support of his contentions, reference was made to the various judgments of this Court, which we will discuss in the latter part of this judgment. Shri Viswanathan, however, has fairly submitted that, as per the Scheme of the Act, especially under Section 3(2)(a) and (b), before making appointment to the post of Lokayukta and Upa Lokayukta, it is obligatory on the part of the Chief Minister to consult the Chief Justice of the State High Court, even though the views of the Chief Justice has no primacy. Learned senior counsel submitted that the Governor has to act on the advice of the Chief Minister for filling up the post of Lokayukta and Upa Lokayukta.

11. Shri P.V. Shetty, learned senior counsel appearing for Justice Chandrashekaraiah (retd.) submitted that the primacy in terms of Section 3 of the Act lies with the Chief Minister and not with the Chief Justice. In support of his contention, reference was made to the various judgments of this Court, which we will discuss in the latter part of the judgment. Learned senior counsel submitted that the judgment delivered by the High Court holding that the views of the Chief Justice has primacy relates to cases pertaining to appointment of the Judges of the

Supreme Court and High Courts, appointment of the President of State Consumer Forum, Central Administrative Tribunal and so on and the ratio laid down in those judgments is inapplicable while interpreting Section 3(2)(a) and (b) of the Act. Learned senior counsel also submitted that the reasoning of the High Court that there should be specific consultations with regard to the names suggested by the Governor with the Chief Justice, is unsustainable in law. Shri P.V. Shetty also submitted that the expression 'consultation' cannot be understood to be consent of the constitutional authorities as contemplated in the section.

12. Learned senior counsel submitted that the Chief Minister advised the name of Justice Chandrashekaraiah, suggested by some of the Consultees to the Governor who appointed him as Upa Lokayukta. Learned senior counsel submitted that assuming that the Chief Justice had not been consulted, the views of the Chief Minister had primacy and the Governor rightly accepted the advice of the Chief Minister and appointed Justice Chandrashekaraiah as Upa Lokayukta. Learned senior counsel submitted that in any view the failure to consult the Chief Justice would not vitiate the decision making process, since no primacy could be attached to the views of the Chief Justice. Learned senior counsel, therefore, submitted that the High Court has committed a grave error in quashing the notification appointing Justice Chandrashekaraiah as Upa Lokayukta. Learned senior counsel submitted that the various directions given by the High Court in its judgment is in the realm of rule making which is impermissible in law.

13. Shri K.N. Bhat, learned senior counsel appearing for the respondents endorsed the various directions given by the High Court which according to him are of paramount importance considering the nature and functions to be discharged by Lokayukta or Upa Lokayukta in the State of Karnataka. Learned senior counsel pointed out that the institution of Lokayukta has been set up for improving the standards of public administration so as to examine the

complaints made against administrative actions, including the cases of corruption, favouritism and official indiscipline in administrative machinery. Shri Bhat compared the various provisions of the Act with the similar legislations in other States and submitted that, so far as the Karnataka Act is concerned, there is a multi-member team of consultees and also there is no indication in the Act as to whose opinion should prevail over others. Considerable reliance was placed on the judgment of this Court in *Justice K.P. Mohapatra v. Sri Ram Chandra Nayak and Ors.* (2002) 8 SCC 1, wherein this Court has taken the view that the opinion of the Chief Justice has got primacy which is binding on the State. Learned senior counsel submitted that the conduct and functions to be discharged by Lokayukta or Upa Lokayukta are apparent, utmost importance has to be given in seeing that unpolluted administration of the State is maintained and maladministration is exposed. Learned senior counsel submitted that the functions of the Karnataka Lokayukta are identical to that of Lokpal of Orissa and that the principle laid down in that judgment would also apply while interpreting Sections 3(2)(a) and (b) of the Act.

14. Learned senior counsel submitted that the primacy has to be given to the views expressed by the Chief Justice, not because the persons appointed are discharging judicial or quasi-judicial functions but the source from which the persons are advised for appointment consists of former judges of the Supreme Court and Chief Justices of High Courts and judges of the High Courts in the matter of appointment of Upa Lokayukta. Learned senior counsel submitted that the Chief Justice of the High Court, therefore, would be in a better position to know about suitability of the persons to be appointed to the posts since they were either former judges of the Supreme Court or Chief Justices of the High Courts or judges of the High Courts.

15. Let us examine the various contentions raised at the bar after delving into the historical setting of the Act.

Historical Setting

16. The President of India vide notification No. 40/3/65-AR(P) dated 05.01.1966 appointed the Administrative Reforms Commission for addressing "Problems of Redress of Citizens' Grievances" *inter alia* with the object for ensuring the highest standards of efficiency and integrity in the public services, for making public administration a fit instrument for carrying out the social and economic policies of the Government and achieving social and economic goals of development as also one responsive to people. The Commission was asked to examine the various issues including the Problems of Redress of Citizens' Grievances. One of the terms of reference specifically assigned to the Commission required it to deal with the Problems of Redress of Citizens' Grievances, namely:

(1) the adequacy of existing arrangements for redress of grievances; and

(2) the need for introduction of any new machinery for special institution for redress of grievances.

The Commission after elaborate discussion submitted its report on 14.10.1966 to the Prime Minister vide letter dated 20.10.1966.

17. The Commission suggested that there should be one authority dealing with complaints against the administrative acts of Ministers or Secretaries to Government at the Centre and in the States and another authority in each State and at the Centre for dealing with complaints against administrative acts of other officials and all these authorities should be independent of the executive, the legislative and the judiciary.

The Committee, in its report, has stated as follows:

"21. We have carefully considered the political aspect mentioned above and while we recognize that

there is some force in it, we feel that the Prime Minister's hands would be strengthened rather than weakened by the institution. In the first place, the recommendations of such an authority will save him from the unpleasant duty of investigation against his own colleagues. Secondly, it will be possible for him to deal with the matter without the glare of publicity which often vitiates the atmosphere and affects the judgment of the general public. Thirdly, it would enable him to avoid internal pressures which often help to shield the delinquent. What we have said about the Prime Minister applies *mutatis mutandis* to Chief Minister.

Cases of corruption:

23. Public opinion has been agitated for a long time over the prevalence of corruption in the administration and it is likely that cases coming up before the independent authorities mentioned above might involve allegations or actual evidence of corrupt motive and favourtism. We think that this institution should deal with such cases as well, but where the cases are such as might involve criminal charge or misconduct cognizable by a Court, the case should be brought to the notice of the Prime Minister or the Chief Minister, as the case may be. The latter would then set the machinery of law in motion after following appropriate procedures and observing necessary formalities. The present system of Vigilance Commissions wherever operative will then become redundant and would have to be abolished on the setting up of the institution.

Designation of the authorities of the institution:

24. We suggest that the authority dealing with complaints against Ministers and Secretaries to Government may be designated "Lokpal" and the other authorities at the Centre and in the States empowered to deal with complaints against other officials may be designated "Lokayukta". A word may be said about our

decision to include Secretaries actions along with those of Ministers in the jurisdiction of the Lokpal. We have taken this decision because we feel that at the level at which Ministers and Secretaries function, it might often be difficult to decide where the role of one functionary ends and that of the other begins. The line of demarcation between the responsibilities and influence of the Minister and Secretary is thin; in any case much depends on their personal equation and personality and it is most likely that in many a case the determination of responsibilities of both of them would be involved.

25. The following would be the main features of the institutions of Lokpal and Lokayukta:-

(a) They should be demonstrably independent and impartial.

(b) Their investigations and proceedings should be conducted in private and should be informal in character.

(c) Their appointment should, as far as possible, be non-political.

(d) Their status should compare with the highest judicial functionaries in the country.

(e) They should deal with matters in the discretionary field involving acts of injustice, corruption or favourtism.

(f) Their proceedings should not be subject to judicial interference and they should have the maximum latitude and powers in obtaining information relevant to their duties.

(g) They should not look forward to any benefit or

pecuniary advantage from the executive Government.

Bearing in mind these essential features of the institutions, the Commission recommend that the Lokpal be appointed at the Centre and Lokayaukta at the State level.

The Lokayukta

36. So far as the Lokayukta is concerned, we envisage that he would be concerned with problems similar to those which would face the Lokpal in respect of Ministers and Secretaries though, in respect of action taken at subordinate levels of official hierarchy, he would in many cases have to refer complainants to competent higher levels. We, therefore, consider that his powers, functions and procedures may be prescribed *mutatis mutandis* with those which we have laid down for the Lokpal. His status, position, emoluments, etc. should, however, be analogous to those of a Chief Justice of a High Court and he should be entitled to have free access to the Secretary to the Government concerned or to the Head of the Department with whom he will mostly have to deal to secure justice for a deserving citizen. Where he is dissatisfied with the action taken by the department concerned, he should be in a position to seek a quick corrective action from the Minister or the Secretary concerned, failing which he should be able to draw the personal attention of the Prime Minister or the Chief Minster as the case may be. It does not seem necessary for us to spell out here in more detail the functions and powers of the Lokayukta and the procedures to be followed by him.

Constitutional amendment-whether necessary?

37. We have carefully considered whether the institution of Lokpal will require any Constitutional

amendment and whether it is possible for the office of the Lokpal to be set up by Central Legislation so as to cover both the Central and State functionaries concerned. We agree that for the Lokpal to be fully effective and for him to acquire power, without conflict with other functionaries under the Constitution, it would be necessary to give a constitutional status to his office, his powers, functions, etc. We feel, however, that it is not necessary for Government to wait for this to materialize before setting up the office. The Lokpal, we are confident, would be able to function in a large number of cases without the definition of his position under the Constitution. The Constitutional amendment and any consequential modification of the relevant statute can follow. In the meantime, Government can ensure that the Lokpal or Lokayukta is appointed and takes preparatory action to set up his office, to lay down his procedures, etc., and commence his work to such extent as he can without the constitutional provisions. We are confident that the necessary support will be forthcoming from the Parliament.

Conclusion.

38**.** We should like to emphasise the fact that we attach the highest importance to the implementation, at an early date, of the recommendations contained in this our Interim Report. That we are not alone in recognizing the urgency of such a measure is clear from the British example we have quoted above. We have no doubt that the working of the institution of Lokpal or Lokayukta that we have suggested for India will be watched with keen expectation and interest by other countries. We hope that this aspect would also be fully borne in mind by Government in considering the urgency and importance of our recommendation. Though its timing is very close to the next Election, we need hardly to assure the Government that this has had nothing to do with the necessity of making this

interim report. We have felt the need of such a recommendation on merits alone and are convinced that we are making it not a day too soon."

18. Based on the above report, the following Bill was presented before the Karnataka Legislature which reads as follows:-

"The Administrative Reforms Commission had recommended the setting up of the institution of Lokayukta for the purpose of appointment of Lokayukta at the state's level, to improve the standards of public administration, by looking into complaints against the administrative actions, including cases of corruption, favouritism and official indiscipline in administrative machinery.

One of the election promises in the election manifesto of the Janata Party was the setting up of the Institution of the Lokayukta.

The bill provides for the appointment of a Lokayukta and one or more Upalokayuktas to investigate and report on allegations or grievances relating to the conduct of public servants.

The public servants who are covered by the Act include :-

(1) Chief Minister;

(2) all other Ministers and Members of the State Legislature;

(3) all officers of the State Government;

(4) Chairman, Vice Chairman of local authorities, Statutory Bodies or Corporations established by or under any law of the State Legislature, including Co-operative Societies;

(5) Persons in the service of Local Authorities, Corporations owned or controlled by the State Government, a company in which not less than fifty-one per cent of the shares are held by the State Government, Societies registered under the Societies Registration Act, Co-operative Societies and Universities established by or under any law of the Legislature.

Where, after investigation into the complaint, the Lokayukta considers that the allegation against a public servant is *prima facie* true and makes a declaration that the post held by him, and the declaration is accepted by the Competent Authority, the public servant concerned, if he is a Chief Minister or any other Minister or Member of State Legislature shall resign his office and if he is any other non-official shall be deemed to have vacated his office, and, if an official, shall be deemed to have been kept under suspension, with effect from the date of the acceptance of the declaration.

If, after investigation, the Lokayukta is satisfied that the public servant has committed any criminal offence, he may initiate prosecution without reference to any other authority. Any prior sanction required under any law for such prosecution shall be deemed to have been granted.

The Vigilance Commission is abolished. But all inquiries and investigations and other disciplinary proceedings pending before the Vigilance Commission will be transferred to the Lokayukta."

The Bill became an Act with some modifications as the Karnataka Lokayukta Act, 1984.

Relevant Provisions

19. The matters which have to be investigated are

provided in Section 7 of the Act which is extracted hereunder for easy reference:

"7. Matters which may be investigated by the Lokayukta and an Upalokayukta.– (1) Subject to the provisions of this Act, the Lokayukta may investigate any action which is taken by or with the general or specific approval of.-

(i) the Chief Minister;

(ii) a Minister or a Secretary;

(iii) a member of the State Legislature; or

(iv) any other public servant being a public servant of a class notified by the State Government in consultation with the Lokayukta in this behalf;

in any case where a complaint involving a grievance or an allegation is made in respect of such action.

(2) Subject to the provisions of the Act, an Upa-lokayukta may investigate any action which is taken by or with the general or specific approval of, any public servant not being the Chief Minister, Minister, Member of the Legislature, Secretary or other public servant referred to in sub-section (1), in any case where a complaint involving a grievance or an allegation is made in respect of such action or such action can be or could have been, in the opinion of the Upa-lokayukta, the subject of a grievance or an allegation.

(2-A) Notwithstanding anything contained in sub-sections (1) and (2), the Lokayukta or an Upa-lokayukta may investigate any action taken by or with the general or specific approval of a public servant, if it is referred to him by the State Government.

(3) Where two or more Upa-lokayuktas are appointed under this Act, the Lokayukta may, by general or special order, assign to each of them matters which may be investigated by them under this Act:

Provided that no investigation made by an Upa-lokayukta under this Act, and no action taken or things done by him in respect of such investigation shall be open to question on the ground only that such investigation relates to a matter which is not assigned to him by such order.

(4) Notwithstanding anything contained in sub-sections (1) to (3), when an Upa-lokayukta is unable to discharge his functions owing to absence, illness or any other cause, his function may be discharged by the other Upa-lokayukta, if any, and if there is no other Upa-lokayukta by the Lokayukta."

20. Few matters are not subjected to the investigation of Lokayukta or Upa Lokayukta which is provided in Section 8 of the Act, which is also extracted hereunder for easy reference:

"**8. Matters not subject to investigation**.- (1) Except as hereinafter provided, the Lokayukta or an Upa-lokayukta shall not conduct any investigation under this Act in the case of a complaint involving a grievance in respect of any action, -

(a) if such action relates to any matter specified in the Second Schedule; or

(b) if the complainant has or had, any remedy by way of appeal, revision, review or other proceedings before any Tribunal, Court Officer or other authority and has not availed of the same.

(2) The Lokayukta or an Upa-lokayukta shall not investigate, -

(a) any action in respect of which a formal and public eiquiry has been ordered with the prior concurrence of the Lokayukta or an Upalokayukta, as the case may be;

(b) any action in respect of a matter which has been referred for inquiry, under the Commission of Inquiry Act, 1952 with the prior concurrence of the Lokayukta or an Upalokayukta, as the case may be;

(c) any complaint involving a grievance made after the expiry of a period of six months from the date on which the action complained against becomes known to the complainant; or

(d) any complaint involving an allegation made after the expiry of five years from the date on which the action complained against is alleged to have taken place:

Provided that he may entertain a complaint referred to in clauses (c) and (d) if the complainant satisfies that he had sufficient cause for not making the complaint within the period specified in those clauses.

(3) In the case of any complaint involving a grievance, nothing in this Act shall be construed as empowering the Lokayukta or an Upa-lokayukta to question any administrative action involving the exercise of discretion except where he is satisfied that the elements involved in the exercise of the discretion are absent to such an extent that the discretion can *prima facie* be regarded as having been improperly exercised."

21. Section 9 of the Act pertains to provisions relating to 'complaints' and 'investigations' which is extracted hereunder:

"**9. Provisions relating to complaints and investigations**.- (1) Subject to the provisions of this Act, any person may make a complaint under this Act to the Lokayukta or an Upa-lokayukta.

(2) Every complaint shall be made in the form of a statement supported by an affidavit and in such forms and in such manner as may be prescribed.

(3) Where the Lokayukta or an Upa-lokayukta proposes, after making such preliminary inquiry as he deemed fit, to conduct any investigation under this Act, he.-

(a) shall forward a copy of the complaint to the public servant and the Competent Authority concerned;

(b) shall afford to such public servant an opportunity to offer his comments on such complaint;

(c) may make such order as to the safe custody of documents relevant to the investigation, as he deems fit.

(4) Save as aforesaid, the procedure for conducting any such investigation shall be such, and may be held either in public or in camera, as the Lokayukta or the Upa-lokayukta, as the case may be, considers appropriate in the circumstances of the case.

(5) The Lokayukta or the Upa-lokayukta may, in his discretion, refuse to investigate or cease to investigate any complaint involving a grievance or an allegation, if in his opinion.-

(a) the complaint is frivolous or vexatious or is not made in good faith;

(b) there are no sufficient grounds for investigating or, as the case may be, for continuing the investigation;

or

(c) other remedies are available to the complainant and in the circumstances of the case it would be more proper for the complainant to avail such remedies.

(6) In any case where the Lokayukta or an Upa-lokayukta decides not to entertain a complaint or to discontinue any investigation in respect of a complaint he shall record his reasons therefor and communicate the same to the complainant and the public servant concerned.

(7) The conduct of an investigation under this Act against a Public servant in respect of any action shall not affect such action, or any power or duty of any other public servant to take further action with respect to any matter subject to the investigation."

22. Section 10 empowers Lokayukta or Upa Lokayukta to exercise certain powers in relation to search and seizure. It says that the provisions of the Code of Criminal Procedure, relating to search and seizure, would apply only for the limited purpose of investigation carried out by the incumbent, in consequence of information in his possession, while investigating into any grievance, allegation against any administrative action.

23. Section 11 deals with the producing, recording, etc. of evidence for the purpose of investigation under the Act. Sub-sections (1) and (2) of Section 11 read as follows:

"**11. Evidence.-** (1) Subject to the provisions of this section, for the purpose of any investigation (including the preliminary inquiry if any, before such investigation) under this Act, the Lokayukta or an Upa-lokahukta may require any public servant or any other person who, in his opinion, is able to furnish information or produce documents relevant to the investigation to furnish any such information

or produce any such document.

(2) For the purpose of any investigation (including the preliminary inquiry) the Lokayukta or Upa-lokayukta shall have all the powers of a Civil Court while trying a suit under that the Code of Civil Procedure Code, 1908, in respect of the following matters only:-

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copy thereof from any Court or office;

(e) issuing commissions for the examination of witnesses or documents;

(f) such other matters as may be prescribed."

Sub-section (3) of Section 11 provides for applicability of Section 193 of the Indian Penal Code (Punishment for false evidence), for proceedings before the Lokayukta or Upa Lokayukta, while exercising its powers conferred under sub-section (2) of Section 11, and only for that limited extent is considered a judicial proceeding.

24. Section 12 deals with the reports of Lokayukta which essentially deals with the following aspects:

(i) The Lokayukta or Upa Lokayukta can sent a report with certain recommendations and findings as envisaged in sub section (1) and (3) of Section 12.

(ii) Under sub section (2) of Section 12, the competent authority is required to intimate or cause to intimate

the Lokayukta or the Upa Lokayukta on the action taken on the report as provided under sub section (1) of Section 12, within 1 month.

(iii) Failure to intimate the action taken on the report submitted under section (1) has not been dealt with specifically, however if in the opinion of Lokayukta / Upa Lokayukta satisfactory action is not taken by the competent authority under Section 12(2), he is at liberty to send a 'Special report' to the governor as provided for under sub section (5) of Section 12.

(iv) Findings and recommendations to be given by the Lokayukta or Upa-lokayukta under sub section 3 of Section 12, include those as contemplated under Section 13 of the Act.

(v) Sub-section (4) of Section 12 requires the competent authority to examine the report forwarded under sub-section (3), within three months and intimate the Lokayukta or the Upa Lokayukta on the action taken or proposed to be taken on the basis of the report.

(vi) Failure to intimate the action taken on the report submitted under section (3) has not been dealt with specifically, however if in the opinion of Lokayukta / Upa Lokayukta, satisfactory action taken is not taken by the competent authority under Section 12(4), he is at liberty to send a 'Special report' to the governor as provided for under sub section (5) of Section 12.

(vii) If any Special Report as contemplated under sub-section (5) is received and the annual report of the Lokayukta under sub section (6), would have to be laid before each house of the State legislature along with an explanatory note of the Governor.

(viii) It is important to note that the act neither binds the Governor nor the State Legislature to accept the recommendations or findings of the incumbent, thereby ensuring no civil consequences follow from the direct action of the Lokayukta or Upa Lokayukta.

Section 13 prescribes when a public servant would have to vacate office, which reads as follows:

"**13. Public servant to vacate office if directed by Lokayukta etc.** (1) Where after investigation into a complaint the Lokayukta or an Upalokayukta is satisfied that the complaint involving an allegation against the public servant is substantiated and that the public servant concerned should not continue to hold the post held by him, the Lokayukta or the Upalokayukta shall make a declaration to that effect in his report under sub-section (3) of section 12. Where the competent authority is the Governor, State Government or the Chief Minister, it may either accept or reject the declaration. In other cases, the competent authority shall send a copy of such report to the State Government, which may either accept or reject the declaration. If it is not rejected within a period of three months from the date of receipt of the report, or the copy of the report, as the case may be, it shall be deemed to have been accepted on the expiry of the said period of three months.

(2) If the declaration so made is accepted or is deemed to have been accepted, the fact of such acceptance or the deemed acceptance shall immediately be intimated by Registered post by the Governor, the State Government or the Chief Minister if any of them is the competent authority and the State Government in other cases then, notwithstanding anything contained in any law, order, notification, rule or contract of appointment, the public servant concerned shall, with effect from the date of

intimation of such acceptance or of the deemed acceptance of the declaration,

(i) if the Chief Minister or a Minister resign his office of the Chief Minister, or Minister, as the case may be.

(ii) If a public servant falling under items (e) and (f), but not falling under items (d) and (g) of clause (12) of section 2, be deemed to have vacated his office: and

(iii) If a public servant falling under items (d) and (g) of clause (12) of section 2, be deemed to have been placed under suspension by an order of the appointing authority.

Provided that if the public servant is a member of an All India Service as defined in section 2 of the All India Services Act, 1951 (Central Act 61 to 1951) the State Government shall take action to keep him under suspension in accordance with the rules or regulations applicable to his service."

Section 14 deals with the initiation of prosecution which reads as follows:

"**14. Initiation of prosecution.-** If after investigation into any complaint the Lokayukta or an Upa-lokayukta is satisfied that the public servant has committed any criminal offence and should be prosecuted in a court of law for such offence, then, he may pass an order to that effect and initiate prosecution of the public servant concerned and if prior sanction of any authority is required for such prosecution, then, notwithstanding anything contained in any law, such sanction shall be deemed to have been granted by the appropriate authority on the date of such order."

Investigative in nature

25. The provisions discussed above clearly indicate that the functions to be discharged by Lokayukta or Upa Lokayukta are investigative in nature and the report of Lokayukta or Upa Lokayukta under sub-sections (1) and (3) of Section 12 and the Special Report submitted under sub-section (5) of Section 12 are only recommendatory. No civil consequence as such follows from the action of Lokayukta and Upa Lokayukta, though they can initiate prosecution before a competent court. I have extensively referred to the object and purpose of the Act and explained the various provisions of the Act only to indicate the nature and functions to be discharged by Lokayukta or Upa Lokayukta under the Act.

26. The Act has, therefore, clearly delineated which are the matters to be investigated by the Lokayukta and Upa Lokayukta. They have no authority to investigate on a complaint involving a grievance in respect of any action specified in the Second Schedule of the Act, which are as follows:

(a) Action taken for the purpose of powers investigating crimes relating to the security of the State.

(b) Action taken in the exercise of powers in relation to determining whether a matter shall go to a Court or not.

(c) Action taken in matters which arise out of the terms of a contract governing purely commercial relations of the administration with customers or suppliers, except where the complaint alleges harassment or gross delay in meeting contractual obligations.

(d) Action taken in respect of appointments, removals, pay, discipline, superannuation or other matters relating to conditions of service of public servants but not including action relating to claims for

pension, gratuity, provident fund or to any claims which arise on retirement, removal or termination of service.

(e) Grant of honours and awards.

27. Further if the complainant has or had any remedy by way of appeal, revision, review or other proceedings before any tribunal, court officer or other authority and has not availed of the same, the Lokayukta and Upa Lokayukta shall not conduct any investigation under the Act, in other words, they have to act within the four corners of the Act.

28. The Act has also been enacted to make provision for making enquiries by the Lokayukta and Upa Lokayukta into the administrative action relatable to matters specified in List II or List III of the Seventh Schedule to the Constitution, taken by or on behalf of the Government of Karnataka or certain public authorities in the State of Karnataka, including any omission or commission in connection with or arising out of such action etc.

29. Lokayukta or Upa Lokayukta under the Act are established to investigate and report on allegations or grievances relating to the conduct of public servants which includes the Chief Minister; all other Minister and members of the State Legislature; all officers of the State Government; Chairman, Vice Chairman of Local Authorities, Corporations, owned or controlled by the State Government, a company in which not less than fifty one per cent of the shares are held by the State Government, Societies registered under the Societies Registration Act, Co-operative Societies and Universities established by or under any law of the Legislature.

30. Lokayukta and Upa Lokayukta while exercising powers under the Act, of course, is acting as a quasi judicial authority but it functions are investigative in nature. The Constitution Bench of this Court in *Nagendra Nath Bora and Another v.*

Commissioner of Hills Division and Appeals, Assam and Others AIR 1958 SC 398 held whether or not an administrative body or authority functions as purely administrative one or in a quasi-judicial capacity, must be determined in each case, on an examination of the relevant statute and rules framed thereunder. This Court in *Indian National Congress (I) v. Institute of social Welfare and Others* (2002) 5 SCC 685, while dealing with the powers of the Election Commission of India under the Representation of the People Act, 1951 held that while exercising power under Section 29-A, the Commission acts quasi-judicially and passes quasi judicial orders.

31. The Court held that what distinguishes an administrative act from a quasi-judicial act is, in the case of quasi-judicial functions, under the relevant law, the statutory authority is required to act judicially. In other words, where law requires that an authority before arriving at a decision must make an enquiry, such a requirement of law makes the authority a quasi-judicial authority. Noticing the above legal principles this Court held in view of the requirement of law that the Commission is to give decision only after making an enquiry, wherein an opportunity of hearing is to be given to the representative of the political party, the Election Commission is is required to act judicially.

32. Recently, in *Automotive Tyre Manufactures Association v. Designated Authority and Others* (2011) 2 SCC 258, this Court examined the question whether the Designated Authority appointed by the Central Government under Rule 3 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on dumped Articles and for Determination of Injury) Rules, 1995 (1995 Rules) for conducting investigation, for the purpose of levy of anti dumping duty in terms of Section 9-A of the Customs Act, 1962, is functioning as an administrative or quasi judicial authority. The Court after examining the scheme of the Tariff Act read with 1995 Rules and the nature of functions to be discharged by the Designated Authority took the view that the authority exercising quasi-judicial

functions is bound to act judicially. Court noticed that the Designated Authority determines the rights and obligations of the "interested parties" by applying objective standards based on the material/information/evidence presented by the exporters, foreign producers and other "interested parties" by applying the procedure and principles laid down in the 1995 Rules.

33. Provisions of Sections 9, 10 and 11 clearly indicate that Lokayukta and Upa Lokayukta are discharging quasi-judicial functions while conducting the investigation under the Act. Sub-section (2) of Section 11 of the Act also states that for the purpose any such investigation, including the preliminary inquiry Lokayukta and Upa Lokayukta shall have all the powers of a Civil Court while trying a suit under the Code of Civil Procedure, 1908, in the matter of summoning and enforcing the attendance of any person and examining him on oath. Further they have also the power for requiring the discovery and production of any document, receiving evidence on affidavits, requisitioning any public record or copy thereof from any court or office, issuing commissions for examination of witnesses of documents etc. Further, sub-section (3) of Section 11 stipulates that any proceedings before the Lokayukta and Upa Lokayukta shall be deemed to be a judicial proceeding within the meaning of Section 193 of the Indian Penal Code. Therefore, Lokayukta and Upa Lokayukta, while investigating the matters are discharging quasi-judicial functions, though the nature of functions is investigative.

Consequence of the report

34. The Governor of the State, acting in his discretion, if accepts the report of the Lokayukta against the Chief Minister, then he has to resign from the post. So also, if the Chief Minister accepts such a report against a Minister, then he has to resign from the post. Lokayukta or Upa Lokayukta, however, has no jurisdiction or power to direct the Governor or the Chief Minister to implement its report or direct resignation from the Office they

hold, which depends upon the question whether the Governor or the Chief Minister, as the case may be, accepts the report or not. But when the Lokayukta or Upa Lokayukta, if after the investigation, is satisfied that the public servant has committed any criminal offence, prosecution can be initiated, for which prior sanction of any authority required under any law for such prosecution, shall also be deemed to have been granted.

Nature of Appointment

35. We are, in this case, as already indicated, called upon to decide the nature and the procedure to be followed in the matter of appointment of Lokayukta or Upa Lokayukta under the Act for which I have elaborately discussed the intention of the legislature, objects and purpose of the Act and the nature and functions to be discharged by Lokayukta or Upa Lokayukta, its investigative nature, the consequence of its report etc. Section 3 of the Act deals with the appointment of Lokayukta and Upa Lokayukta, which reads as follows:

3. Appointment of Lokayukta and Upa-lokayukta-

(1) For the purpose of conducting investigations and enquiries in accordance with the provisions of this Act, the Governor shall appoint a person to be known as the Lokayukta and one or more persons to be known as the Upa-lokayukta or Upa-lokayuktas.

(2)(a) A person to be appointed as the Lokayukta shall be a person who has held the office of a Judge of the Supreme Court or that of the Chief Justice of a High Court and shall be appointed on the advice tendered by the Chief Minister in consultation with the Chief Justice of the High Court of Karnataka, the Chairman, Karnataka Legislative Council, the Speaker, Karnataka Legislative Assembly, the Leader of the Opposition in the Karnataka Legislative Council and the Leader of the Opposition in the Karnataka Legislative Assembly.

(b) A person to be appointed as an Upa-lokayukta shall be a person who has held the office of the Judge of a High Court and shall be appointed on the advice tendered by the Chief Minister in consultation with the Chief Justice of the High Court of Karnataka, the Chairman, Karnataka Legislative Council, the Speaker, Karnataka Legislative Assembly, the Leader of the opposition in the Karnataka Legislative Council and the Leader of the opposition in the Karnataka Legislative Assembly.

(3) A person appointed as the Lokayukta or an Upa-lokayukta shall, before entering upon his office, make and subscribe before the Governor, or some person appointed in that behalf of him, an oath or affirmation in the form set out for the purpose in the First Schedule."

36. The purpose of appointment of Lokayukta or Upa Lokayukta is clearly spelt out in Section 3(1) of the Act which indicates that it is for the purpose of conducting investigation and enquiries in accordance with the provisions of the Act. The procedure to conduct investigation has been elaborately dealt with in the Act. The scope of enquiry is however limited, compared to the investigation that is only to the ascertainment of the truth or falsehood of the allegations. The power has been entrusted by the Act on the Governor to appoint a person to be known as Lokayukta and one or more persons to be known as Upa Lokayukta and Upa Lokayuktas. The person to be appointed as Lokayukta shall be a person who has held the office of a Judge of the Supreme Court of India or that of the Chief Justice of the High Court. The Governor, as per Section 3(2)(a), is empowered to appoint Lokayukta on the advice tendered by the Chief Minister, in consultation with the Chief Justice of the High Court of Karnataka, the Chairman, Karnataka Legislative Council, the Speaker, Karnataka Legislative Assembly, the Leader of the Opposition in the Karnataka Legislative Council and the Leader of the Opposition in the Karnataka Legislative Assembly. It is, therefore, clear that all the above five dignitaries have to be consulted before tendering advice by the Chief Minister to the Governor of the State.

37. Section 3(2)(b) of the Act stipulates that, so far as the Upa Lokayukta is concerned, he shall be a person who has held the office of a Judge of the High Court and shall be appointed on the advice tendered by the Chief Minister. The Chief Minister has to consult the five dignitaries, the Chief Justice of the High Court of Karnataka, the Chairman, Karnataka Legislative Council, the Speaker, Karnataka Legislative Assembly, the Leader of the Opposition in the Legislative Council and the Leader of Opposition in the Karnataka Legislative Assembly. Therefore, for the purpose of appointment of Lokayukta or Upa Lokayukta all the five consultees are common. The appointment has to be made by the Governor on the advice tendered by the Chief Minister in consultation with those five dignitaries.

Legislations in few other States.-

38. Legislatures in various States have laid down different methods of appointment and eligibility criterias for filling up the post of Lokayukta and Upa-Lokayuktas, a comparison of which would help us to understand the intention of the legislature and the method of appointment envisaged.

39. ANDHRA PRADESH LOKAYUKTA ACT, 1983

Section 3 – Appointment of Lokayukta and Upa-Lokayukta: (1) For the purpose of conducting investigation in accordance with the provisions of this Act, the Governor shall, by warrant under his hand and seal, appoint a person to be known as the Lokayukta and one or more persons to be known as the Upa-Lokayukta or Upa-Lokayuktas:

Provided that,-

(a) the person to be appointed as the Lokayukta

shall be a Judge or a retired Chief Justice of a High Court;

(b) the Lokayukta shall be appointed after consultation with the Chief Justice of the High Court concerned;

(c) the Upa-Lokayukta shall be appointed from among the District Judges of Grade I, out of a panel of five names forwarded by the Chief Justice of the High Court of Andhra Pradesh.

(2) In the Andhra Pradesh Lokayukta and Upa –Lokayukta Act, 1983 (hereinafter referred to as the principal Act) for sub-section (2) of Section 3, the following shall be substituted, namely:-

(i) Every person appointed to be the Lokayukta shall, before entering upon his office, make and subscribe, before the Governor an oath or affirmation according to the form set out for the purpose in the First Schedule.

(ii) Every person appointed to be the Upa-Lokayukta shall, before entering upon his office, make and subscribe before the Governor or some person appointed in that behalf by him, an oath or affirmation according to the form setout for the purpose in the First Schedule.

(3) The Upa-Lokayukta shall function under the administrative control of the Lokayukta and in particular, for the purpose of convenient disposal of investigations under this Act, the Lokayukta may issue such general or special directions, as he may consider necessary, to the Upa-Lokayukta:

Provided that nothing in this sub-section shall be construed to authorize the Lokayukta to question any

decision, finding, or recommendation of the Upa-Lokayukta.

40. ASSAM LOKAYUKTA AND UPA-LOKAYUKTAS ACT, 1985

Section 3 – Appointment of Lokayukta and Upa-Lokayuktas.- 1. For the purpose of conducting investigations in accordance with the provisions of the Act, the Governor shall, by warrant under his hand and seal, appoint a person to be known as Lokayukta and one or more persons to be known as Upa-Lokayukta or Upa-Lokayuktas:

Provided that:-

(a) The Lokayukta shall be appointed after consultation with the Chief Justice of the Gauhati High Court, the Speaker and the leader of the opposition in the Assam Legislative Assembly and if there be no such leader a person elected in this behalf by the members of the opposition in that house in such manner as the speaker may direct;

(b) The Upa-Lokayukta or Upa-Lokayuktas shall be appointed after consultation with the Lokayukta

Provided further that where the Speaker of the Legislative Assembly is satisfied that circumstances exists on account of which it is not practicable to consult the leader of the opposition in accordance with Cl(a) of the preceding proviso he may intimate the Governor the name of any other member or the opposition in the Legislative Assembly who may be consulted under that clause instead of the leader of the opposition.

(2) Every person appointed as the Lokayukta or Upa-Lokayukta shall before entering upon his office, make and subscribe before the Governor or some person appointed

in that behalf by him, an oath or affirmation in the form set out for the purpose in the First Schedule.

(3) The Upa-Lokayuktas shall be subject to the administrative control of the Lokayukta and, in particular, for the purpose of convenient disposal of investigations under this Act, the Lokayukta may issue such general or special direction, as he may consider necessary to the Upa-Lokayukta

Provided that nothing in this sub-section shall be construed to authorize the Lokayukta to question any finding, conclusion or recommendation of an Upa Lokayukta.

41. <u>THE BIHAR LOKAYUKTA ACT, 1973:</u>

3. Appointment of Lokayukta.- (1) For the purpose of conduction investigations in accordance with the provisions of this Act the Governor shall by warrant under his hand and shall appoint a person to be known as the Lokayukta of Bihar;

Provided that the Lokayukta shall be appointed after consultation with the Chief Justice of the Patna High Court and the Opposition in the State Legislative Assembly or if there be no such leader a person elected in this behalf by the Opposition in the State Legislative Assembly in such manner as the Speaker may direct.

(2) The person appointed as the Lokayukta shall, before entering upon his office, make and subscribe, before the Governor, or some person appointed in that behalf by the Governor, an oath or affirmation in the form set out for the purposes in the First Schedule.

42. <u>CHHATTISGARH LOK AAYOG ADHYADESH, 2002</u>

3. Constitution of Lok Aayog:- (1) There shall be a Lok Aayog for the purpose of conducting inquiries in accordance with the provisions of this Ordinance.

(2) The Lok Aayog shall consist of two members, one to be known as the Pramukh Lokayukt, and the other as the Lokayukt.

(3) The Pramukh Lokayukt shall be a person who has been a Judge of a High Court or has held a judicial officer higher than that of a Judge of a High Court.

(4) The Lokayukta shall be a person with experience in administrative and quasi-judicial matters, and shall have functioned at the level of a Secretary to the Government of India or the Chief Secretary to any State Government in India.

Provided that the Pramukh Lokayukta shall have administrative control over the affairs of the Lok Aayog.

(5) Governor shall, by warrant under his hand and seal, appoint the Pramukh Lokayukta and the Lokayukta, on the advice of the Chief Minister who shall consult the Chief Justice of the High Court of Chattisgarh and the Speaker of the Chattisgarh Legislative Assembly.

(6) Every person appointed as a Pramukh Lokayukt or a L Lokayukt shall, before entering upon his office, take and subscribe before the Governor, or some person appointed in that behalf by him, an oath of affirmation in the form set out for the purpose in the First Schedule.

(7) The Pramukh Lokayukt or the Lokayukt shall not hold any other office of trust or profit or be connected with any political party or carry on any business or practice any profession or hold any post in any society, including any cooperative society, trust, or any local authority, or membership of the Legislative Assembly of any State or

of the Parliament.

43. DELHI LOKAYUKTA AND UPLOKAYUKTA ACT, 1995:

Section 3 – Appointment of Lokayukta and Uplokayukta.- (1) For the purpose of conducting investigations and inquiries in accordance with the provisions of this Act, the Lieutenant Governor shall, with the prior approval of the President, appoint a person to be known as the Lokayukta and one or more persons to be known as Upalokayukta;

Provided that-

(a) the Lokayukta shall be appointed after consultation with the Chief Justice of the High Court of Delhi and the Leader of the Opposition in the Legislative Assembly and if there be no such leader, a person selected in this behalf by the Members of the Opposition in that House in such manner as the Speaker may direct;

(b) the Upalokayukta shall be appointed in consultation with the Lokayukta.

(2) A person shall not be qualified for appointment as-

(a) the Lokayukta, unless he is or has been Chief Justice of any High Court in India, or a Judge of a High Court for seven years;

(b) an Upalokayukta, unless he is or has been a Secretary to the Government or a District Judge in Delhi for seven years or has held the post of a Joint Secretary to the Government of India.

3. Every person appointed as Lokayukta or Upalokayukta shall, before entering upon his office, make

and subscribe before the Lieutenant Governor or some person appointed in that behalf by him, an oath or affirmation in the form set out for the purpose in the First Schedule.

4. The Upalokayukta shall be subject to the administrative control of the Lokayukta and in particular, for the purpose of convenient disposal of investigations under this Act, the Lokayukta may issue such general or special directions as he may consider necessary to the Upalokayukta and may withdraw to himself or may, subject to the provisions of Section 7, make over any case from himself to an Upalokayukta or from one Upalokayukta to another Upalokayukta for disposal

Provided that nothing in this sub-section shall be construed to authorize the Lokayukta to question any finding, conclusion, recommendation of an Upalokayukta.

44. GUJARAT LOKAYUKTA ACT, 1986

Section 3 – Appointment of Lokayukta- 1) For the purpose of conducting investigations in accordance with the provisions of this Act, the Governor shall by warrant under his hand and seal appoint a person to be known as the Lokayukta;

Provided that the Lokayukta shall be appointed after consultation with the Chief Justice of the High Court and except where such appointment is to be made at a time when the Legislative Assembly of the State of Gujarat has been dissolved or a Proclamation under Article 356 of the Constitution is in operation in the State of Gujarat, after consultation also with the Leader of the Opposition in the Legislative Assembly or if there be no such Leader a person elected in this behalf by the members of Opposition in that house in the manner as the Speaker may direct.

(2) A person shall not be qualified for appointment as a Lokayukta unless he is or has been a Judge of the High Court.

(3) Every person appointed as the Lokayukta shall, before entering upon his office, make and subscribe before the Governor or some person appointed in that behalf by him an oath or affirmation in the form set out for the purpose in the First Schedule.

45. THE JHARKHAND LOKAYUKTA ACT, 2001

3. Appointment of Lokayukta- (1) For the purpose of conduction investigations in accordance with the provisions of this Act, the Governor shall by warrant under his hand and seal appoint a person to be known as the Lokayukta of Jharkhand;

Provided that the Lokayukta shall be appointed after consultation with the Chief Justice of the Jharkhand High Court, Ranchi and the Leader of the Opposition in the State Legislative Assembly or if there be no such leader a person elected in this behalf by the Members of the Opposition in the State Legislative Assembly in such manner as the Speaker may direct.

(2) The person appointed as the Lokayukta shall, before entering upon his office, make and subscribe, before the Governor, or some person appointed in that behalf by the Governor, an oath or affirmation in the form set out for the purposes in the First Schedule.

46. HARYANA LOKAYUKTA ACT, 2002:

Section 3 – Appointment of Lokayukta- (1) For the purpose of conducting investigations in accordance with the provisions of this Act, the Governor, shall, by warrant, under his hand and seal, appoint a person to be known as the Lokayukta:

Provided that the Lokayukta shall be appointed on the advice of the Chief Minister who shall consult the Speaker of Haryana Legislative Assembly, Leader of Opposition and the Chief Justice of India in case of appointment of a person who is or has been a Judge of the Supreme Court or Chief Justice of the High Court, and Chief Justice of the Punjab and Haryana High Court in case of appointment of a person who is or has been a Judge of a High Court.

Provided further that the result of consultation shall have persuasive value but not binding on the Chief Minister.

(2) A notification by the State Government about the consultation having been held as envisaged in sub-section (1) shall be conclusive proof thereof.

(3) Every person appointed as the Lokayukta shall, before entering upon his office, make and subscribe, before the Governor, or some person appointed in that behalf by him, an oath of affirmation in the form set out for the purpose in the Schedule.

47. KERALA LOK AYUKTA ACT, 1999

Section 3 – Appointment of Lok Ayukta and Upa-Lok Ayuktas- 1) For the purpose of conducting investigations and inquiries in accordance with the provisions of this Act, the Governor shall appoint a person to be known as Lok Ayukta and two other persons to be known as Upa-Lok Ayuktas.

(2) A person to be appointed as Lok Ayukta shall be a person who has held the office of a Judge of the Supreme Court or that of the Chief Justice of a High Court and shall be appointed on the advice tendered by the Chief

Minister, in consultation with the Speaker of the Legislative Assembly of the State and the Leader of Opposition in the Legislative Assembly of the State.

(3) A person to be appointed as an Upa-Lok Ayukta shall be a person who holds or has held the office of a Judge of a High Court and shall be appointed on the advice tendered by the Chief Minister in consultation with the Speaker of the Legislative Assembly of the state and the leader of Opposition in the Legislative Assembly of the state.

Provided that the Chief Justice of the High Court concerned shall be consulted, if a sitting judge is appointed as an Upa-Lok Ayukta.

(4) A person appointed as Lok Ayukta or Upa-Lok Ayukta shall, before entering upon his office, make and subscribe, before the Governor or a person appointed by him in that behalf, an oath or affirmation in the form set out for the purpose in the First Schedule."

48. A brief survey of the above statutory provisions would show that State Legislatures of various States have adopted different eligibility criteria, method of selection, consultative procedures etc. in the matter of appointment of Lokayukta, Upa-Lokayukta in their respective States. For instance, in Andhra Pradesh Lokayukta Act the Chief Minister as such has no role and the only consultee for the post of Lokayukta is the Chief Justice. Upa Lokayukta is appointed not from the category of Judges of the High Court, sitting or former, but from a panel of five names of District Judges of Grade I forwarded by the Chief Justice. Further in the States of Assam, Delhi, Gujarat, etc., the Chief Ministers have no role as such. However, in the States of Chattisgarh, Haryana etc., the Governor appoints on the advice of the Chief Minister. In the State of Chhattisgarh the Act says, the Pramukh Lokayukta shall be a person who has been a judge of a High Court or has held a judicial office higher

than that of a High Court Judge. Lokayukta shall be a person who has functioned at the level of a Secretary, both Government of India or the Chief Secretary to any State Government. The Chief Justice of the High Court is a consultee, in the Lokayukta Act of Assam, Bihar, Delhi, Gujarat, Jharkhand and so on. However, in the Kerala Lokayukta Act, the Chief Justice is not a consultee at all. In few States, Upa-lokayuktas are appointed from a panel of District Judges, not from the High Court Judges sitting or former. Legislatures of the various States, in their wisdom, have, therefore, adopted different sources, eligibility criteria, methods of appointment etc. in the matter of appointment of Lokayukta and Upa-Lokayuktas. Recently, this Court had an occasion to consider the scope of Section 3(1) of the Gujarat Lokayukta Act, 1986 in *State of Gujarat v. Hon'ble Mr. Justice R.A. Mehta (Retd.)* reported in 2013 (1) SCALE 7. Interpreting that provision this Court held that the views of the Chief Justice have primacy in the matter of appointment of Lokayukta in the State of Gujarat. Every Statute has, therefore, to be construed in the context of the scheme of the Statute as a whole, consideration of context, it is trite, is to give meaning to the legislative intention according to the terms in which it has been expressed.

49. Constitution of India and its articles, judicial pronouncements interpreting various articles of the Constitution confer primacy to the views of Chief Justice of India or to the Chief Justice of a High Court in the matter of appointment to certain posts the incumbents of which have to discharge judicial or quasi judicial functions.

APPOINTMENT TO THE POSTS OF DISTRICT JUDGE/ HIGH COURT JUDGES:

50. The views of the High Court has primacy in the matter of appointment of District Judges. *Chandra Mohan v. State of U.P.* 1967 (1) SCR 77 was a case relating to the appointment of District Judges wherein this Court had occasion to consider the scope of Articles 233-236 of the Constitution. Interpreting

the word "consultation" in Article 233, this Court has taken the view that the exercise of power of appointment by the Governor is conditioned by his consultation with the High Court, meaning thereby the Governor can only appoint a person to the post of District Judge in consultation with the High Court. The purpose and object of consultation is that the High Court is expected to know better in regard to the suitability or otherwise of a person, belonging either to the judicial service or to the Bar, to be appointed as a district Judge. The duties enjoined on the Governor are, therefore, to make the appointment in consultation with the body which is the appropriate authority to give advice to him. In *Chandramouleshwar Prasad v. Patna High Court* (1969) 3 SCC 56, Justice Mitter J. while interpreting the Article 233 held "that the High Court is the body which is intimately familiar with the efficiency and quality of officers who are fit to be promoted as District Judges. It was held that consultation with the High Court under Article 233 is not an empty formality. Further, it was also stated that consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other others and discuss and examine the relative merits of their views".

51. In *Samsher Singh v. State of Punjab and Another* (1974) 2 SCC 831, Justice Krishna Iyer, in his concurring judgment, highlighted the independence of Judiciary and held "it is a cardinal principle of the Constitution and has been relied on to justify the deviation, is guarded by the relevant article making consultation with the Chief Justice of India obligatory". In *Union of India v. Sankalchand Himatlal Sheth and Another* (1977) 4 SCC 193 this Court high-lighted the rationale behind consulting the Chief Justice of India on matters pertaining to judiciary, in the light of Article 222 of the Constitution of India. This Court held that "Article 222(1) requires the President to consult the Chief Justice of India on the premises that in a matter which concerns the judiciary vitally, no decision ought to be taken by the executive without obtaining the views of the

Chief Justice of India who, by training and experience, is in the best position to consider the situation fairly, competently and objectively".

52. In *Supreme Court Advocates-on-Record Association and Others v. Union of India* (1993) 4 SCC 441 while interpreting the Article 217 of the Constitution, i.e. in the matter of appointment of Judges to the Higher Judiciary, it was held that the opinion of the Chief Justice of India has got primacy in the process of consultation. Primacy of the opinion of the Chief Justice of India is, in effect, the primacy of the opinion of the Chief Justice of India formed collectively, that is, after taking into account the views of his senior colleagues who are required to be consulted by him for the formation of the opinion. The Court has also proceeded on the premises that the President is constitutionally obliged to consult the Chief Justice of India in the case of appointment of Judges of the Supreme Court of India, as per the proviso to Article 124(2) and in the case of appointment of the Judges of the High Court the President is obliged to consult the Chief Justice of India and the Governor of the State in addition to the Chief Justice of the High Court concerned. In the matter of appointment of Judges of the Supreme Court as well as that the High Courts, the opinion of the collegium of the Supreme Court of India has primacy. Judgments referred to above are primarily concerned with the appointment of District Judges in the subordinate judiciary, High Court Judges and the Supreme Court. Primacy to the executive is negatived, in view of the nature of functions to be discharged by them and to make the judiciary independent of the executive.

APPOINTMENT TO THE CENTRAL AND STATE ADMINISTRATIVE TRIBUNALS

53. Central Administrative Tribunal as a Tribunal constituted under Article 323-A of the Constitution and is expected to have the same jurisdiction as that of the High Court. Such Tribunal exercises vast judicial powers and the members must be

ensured absolute judicial independence, free from any executive or political interference. It is for this reason, sub-section (7) to Section 6 of the Administrative Tribunals Act, 1985 requires that the appointment of a member of the Tribunal cannot be made "except after consultation with the Chief Justice of India". Considering the nature of functions to be discharged by the Tribunal which is judicial, the views of the Chief Justice of India has primacy. In *Union of India and Others v. Kali Dass Batish and Another* (2006) 1 SCC 779 this Court has interpreted the expression "after consultation with the Chief Justice of India" as appearing in Section 6(7) of the Administrative Tribunal Act, 1985 and held that the judicial powers are being exercised by the Tribunal and hence the views of the Chief Justice of India be given primacy in the matter of appointment in the Central Administrative Tribunal. Similar is the situation with regard to the State Administrative Tribunals as well, where the views of the Chief Justice of the High Court has primacy, since the Tribunal is exercising judicial powers and performing judicial functions.

APPOINTMENT TO THE NATIONAL AND STATE CONSUMER REDRESSAL COMMISIONS:

54. This Court in *Ashish Handa, Advocate v. Hon'ble the Chief Justice of High Court of Punjab and Haryana and Others* (1996) 3 SCC 145, held in the matter of appointment of President of the State Commissions and the National Commissions under the Consumer Protection Act, 1986, the consultation with the Chief Justice of the High Court and Chief Justice of India is in the same manner, as indicated by the Supreme Court in *Supreme Court Advocates-on-Record Association* case (supra) for appointment of High Court and Supreme Court Judges. This Court noticed that the functions discharged by the Commission are primarily the adjudication of consumer disputes and, therefore, a person from the judicial branch is considered to be suitable for the office of the President. The Court noticed the requirement of consultation

with the Chief Justice under the proviso to Section 16(1)(a) and Section 20(1)(a) of the Consumer Protection Act, is similar to that in Article 217. Consequently, it was held that principle enunciated in the majority opinion in the *Supreme Court Advocates-on-Record Association* case (supra) must apply even for initiating the proposal for appointment.

55. This Court, however, in *Ashok Tanwar and Another v. State of H.P. and Others* (2005) 2 SCC 104, relying on *Supreme Court Advocates-on-Record Association* case (supra) disagreed with *Ashish Handa* only to the limited extent that for the purpose of the Consumer Protection Act, 1986 'consultation' would not be with the collegium, but would rest only with the Chief Justice. In *N. Kannadasan v. Ajoy Khose and Others* (2009) 7 SCC 1, this Court held that primacy must be with the opinion of the Chief Justice *inter alia* because the appointment is to a judicial post and in view of the peremptory language employed in the proviso to Section 16(1)(a) of the Consumer Protection Act, 1986. This Court held that the word "consultation" may mean differently in different situations depending on the nature and purpose of the Statute.

56. Judgments discussed above would indicate that the consultation is held to be mandatory if the incumbent to be appointed to the post is either a sitting or a retired judge who has to discharge judicial functions and the orders rendered by them are capable of execution. Consultation, it may be noted, is never meant to be a formality, but meaningful and effective and primacy of opinion is always vested with the High Court or the Chief Justice of the State High Court or the collegium of the Supreme Court or the Chief Justice of India, as the case may be, when a person has to hold a judicial office and discharge functions akin to judicial functions.

57. The High Court, in the instant case has, placed considerable reliance on the Judgment of this Court in *K.P. Mohapatra* (supra) and took the view that consultation with the Chief Justice is mandatory and his opinion will have primacy.

Above Judgment has been rendered in the context of the appointment of Orissa Lokpal under Section 3 of the Orissa Lokpal and Lokayuktas Act. The proviso to Section 3(1) of the Act says that the Lokpal shall be appointed on the advice of the Chief Justice of the High Court of Orissa and the Leader of the Opposition, if there is any. Consultation with the Chief Justice assumes importance in view of the proviso. The Leader of the Opposition need be consulted, if there is one. In the absence of the Leader of the Opposition, only the Chief Justice remains as the sole consultee. In that context and in view of the specific statutory provision, it has been held that the consultation with the Chief Justice assumes importance and his views has primacy.

58. In that case, the Chief Justice approved the candidature of Justice K.P. Mahapatra, but the Leader of the Opposition later recommended another person, but the State Government appointed the former but the High Court interfered with that appointment. Reversing the judgment of the High Court, this Court held that the opinion rendered by the Leader of the Opposition is not binding on the State Government.

59. I am of the view that the judgment of this Court in *K. P. Mahapatra* (supra) is inapplicable while construing the provisions of the Karnataka Lokayukta Act, 1984, since the language employed in that Act and Section 3 of the Orissa Lokpal and Lokayukta Act, 1985 are not *pari materia.*

60. We have, therefore, to interpret the provisions of Section 3(2)(a) and (b) as it stands in the Karnataka Lokayukta Act, where the language employed, in my view, is clear and unambiguous and we have to apply the golden rule of interpretation i.e. the literal interpretation which clearly expresses the intention of the legislature which I have already indicated, supports the objects and reasons, the preamble, as well as various other related provisions of the Act.

61. Tindal, C.J., as early as 1844, has said that "If the

words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves do alone in such case best declare the intent of the lawgiver". In other words, when the language is plain and unambiguous and admits of only one meaning no question of construction of a statute arises, for the Act speaks for itself. Viscount Simonds, L.C. in *Empror v. Benoarilal Sarma* AIR 1945 PC 48 has said "in construing enacted words we are not concerned with the policy involved or with the results, injurious or otherwise, which may follow from giving effect to the language used". Blackstone, in Commentaries on the Laws of England, Vol.1 page 59 has said "the most fair and rational method for interpreting a statute is by exploring the intention of the Legislature through the most natural and probable signs which are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reasons of the law. In *Kanailal Sur v. Paramnidhi Sadhu Khan* AIR 1957 SC 907, Justice Gajendragadkar stated that, "if the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act". It is unnecessary to multiply that principle with decided cases, as the first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself.

62. Section 3(2)(a) and (b) when read literally and contextually admits of not doubt that the Governor of the State can appoint Lokayukta or Upa Lokayukta only on the advice tendered by the Chief Minister and that the Chief Justice of the High Court is only one of the consultees and his views have no primacy. The Governor, as per the statute, can appoint only on the advice tendered by the Chief Minister and not on the opinion expressed by the Chief Justice or any of the consultees.

Consultation

63. The Chief Minister is legally obliged to consult the Chief Justice of the High Court and other four consultees, which is a mandatory requirement. The consultation must be meaningful and effective and mere eliciting the views or calling for recommendations would not suffice. Consultees can suggest various names from the source stipulated in the statute and those names have to be discussed either in a meeting to be convened by the Chief Minister of the State for that purpose or by way of circulation. The Chief Minister, if proposes to suggest or advise any name from the source ear-marked in the statute that must also be made available to the consultees so that they can also express their views on the name or names suggested by the Chief Minister. Consultees can express their honest and free opinion about the names suggested by the other consultees including the Chief Justice or the Chief Minister. After due deliberations and making meaningful consultation, the Chief Minister of the State is free to advise a name which has come up for consideration among the consultees to the Governor of the State. The advice tendered by the Chief Minister will have primacy and not that of the consultees including the Chief Justice of the High Court.

64. I may point out that the source from which a candidate has to be advised consists of former judges of the Supreme Court or Chief Justices of the State High Courts for the post of Lokayukta and former judges of the High Courts for the post of Upa Lokayukta. Persons, who fall in that source, have earlier held constitutional posts and are presumed to be persons of high integrity, honesty and ability and choosing a candidate from that source itself is sometimes difficult. The Governor cannot appoint a person who does not fall in that source and satisfies the other eligibility criteria. Contention was raised that since the source consists of persons who have held the office of the Judge of the Supreme Court or the Chief Justice of the High Court, the Chief Justice of the High Court would be in a better

position to compare the merits and demerits of those candidates. I find it difficult to accept that contention. Apart from a person's competence, integrity and character as a judge, various other information have also to be gathered since the persons who fall in that source are retired judges. Government has its own machinery and system to gather various information about retired judges. The Chief Minister, it may be noted, cannot advise a name from that source without making a meaningful and effective consultation after disclosing the relevant materials. This, in my view, is a sufficient safeguard against arbitrary selection and advice. Further, as already noticed, the duties and functions of the Lokayukta or Upa Lokayukta are investigative in nature and their orders as such cannot be executed. In such situation, the legislature, in its wisdom, felt that no primacy need be attached to views of the consultees including the Chief Justice but on the advice of the Chief Minister.

65. In my view that this is the scheme of Section 3(2)(a) and (b) of the Act and however, much we strain, nothing spells out from the language used in Section 3(2)(a) and (b) to hold that primacy be attached to the opinion expressed by the Chief Justice of the High Court of Karnataka. I am, therefore, of the view that the various directions given by the High Court holding that the views of the Chief Justice has got primacy, is beyond the scope of the Act and the High Court has indulged in a legislative exercise which is impermissible in law. I, therefore, set aside all the directions issued by the High Court, since they are beyond the scope of the Act.

66. The Chief Minister, in my view, has however committed an error in not consulting the Chief Justice of the High Court in the matter of appointment of Justice Chandrashekaraiah as Upa Lokayukta. Records indicate that there was no meaningful and effective consultation or discussion of the names suggested among the consultees before advising the Governor for appointment to the post of Upa Lokayukta. The appointment of Justice Chandrashekaraiah as Upa Lokayukta, therefore, is

in violation of Section 3(2)(b) of the Act since the Chief Justice of the High Court was not consulted nor was the name deliberated upon before advising or appointing him as Upa Lokayukta, consequently, the appointment of Justice Chandrasekharaiah as Upa Lokayukta cannot stand in the eye of law and he has no authority to continue or hold the post of Upa Lokayukta of the State.

67. Judgment of the High Court is accordingly set aside, with a direction to the Chief Minister of the State to take appropriate steps for appointment of Upa Lokayukta in the State of Karnataka, in accordance with law. Since nothing adverse has been found against Justice Chandrasekharaiah, his name can still be considered for appointment to the post of Upa Lokayukta along with other names, if any, suggested by the other five consultees under the Act. I, however, make it clear that there is no primacy in the views expressed by any of the consultees and after due deliberations of the names suggested by the consultees including the name, if any suggested by the Chief Minister, the Chief Minister can advise any name from the names discussed to the Governor of the State for appointment of Upa Lokayukta under the Act. Appeals are allowed as above, with no order as to costs.

MADAN B. LOKUR, J. 1. Leave granted.

2. Brother Radhakrishnan has elaborately dealt with the issues raised – and I agree with his conclusions. Nevertheless, I think it necessary to express my views on the various issues raised.

The issues raised:

3. My learned Brother has stated the material facts of the case and it is not necessary to repeat them.

4. The principal question for consideration is whether the appointment of Justice Chandrashekaraiah as an Upa-

lokayukta was in accordance with the provisions of Section 3(2)(b) of the Karnataka Lokayukta Act, 1984 which requires consultation, *inter alia*, with the Chief Justice of the Karnataka High Court. In my opinion, the Karnataka High Court was right in holding that there was no consultation with the Chief Justice specifically on the appointment of Justice Chandrashekaraiah as an Upa-lokayukta. His appointment, therefore, is void *ab initio*.

5. Several related questions require consideration, including whether the Upa-lokayukta is a quasi-judicial authority or is only (without meaning any disrespect) an investigator; who should initiate the process of appointment of an Upa-lokayukta; what is meant by 'consultation' in the context of Section 3(2)(b) of the Karnataka Lokayukta Act, 1984 (for short the Act); whether consultation is at all mandatory under Section 3(2)(b) of the Act; how is the process of consultation required to be carried out; whether the view of the Chief Justice of the Karnataka High Court regarding the suitability of a person for appointment as Upa-lokayukta has primacy over the views of others involved in the consultation and finally, whether the Karnataka High Court was right in directing a particular procedure to be followed for the appointment of an Upa-lokayukta.

6. The interpretation of Section 3 of the Karnataka Lokayukta Act, 1984 arises for consideration. This Section reads as follows:

"**Section 3: Appointment of Lokayukta and Upa-lokayukta**

(1) For the purpose of conducting investigations and enquiries in accordance with the provisions of this Act, the Governor shall appoint a person to be known as the Lokayukta and one or more persons to be known as the Upa-lokayukta or Upa-lokayuktas.

(2) (a) A person to be appointed as the Lokayukta shall be a person who has held the office of a Judge of the Supreme Court or that of the Chief Justice of a High Court and shall be appointed on the advice tendered by the Chief Minister in consultation with the Chief Justice of the High Court of Karnataka, the Chairman, Karnataka Legislative Council, the Speaker, Karnataka Legislative Assembly, the Leader of the Opposition in the Karnataka Legislative Council and the Leader of the Opposition in the Karnataka Legislative Assembly.

(b) A person to be appointed as an Upa-lokayukta shall be a person who has held the office of a judge of a High Court and shall be appointed on the advice tendered by the Chief Minister in consultation with the Chief Justice of the High Court of Karnataka, the Chairman, Karnataka Legislative Council, the Speaker, Karnataka Legislative Assembly, the Leader of the Opposition in the Karnataka Legislative Council and the Leader of the Opposition in the Karnataka Legislative Assembly.

(3) A person appointed as the Lokayukta or an Upa-lokayukta shall, before entering upon his office, make and subscribe, before the Governor, or some person appointed in that behalf by him, an oath or affirmation in the form set out for the purpose in the First Schedule."

Whether the Upa-lokayukta a quasi-judicial authority:

7. Without intending to belittle the office of the Upa-lokayukta, it was submitted by learned counsel for the State of Karnataka (hereafter "the State") that the Upa-lokayukta is essentially required to investigate complaints and inquire into grievances brought before him. In this process, he may be exercising some quasi-judicial functions, but that does not make

him a quasi-judicial authority. The significance of this submission lies in the further submission that if the Upa-lokayukta is not a quasi-judicial authority then the opinion of the Chief Justice of the Karnataka High Court would not have primacy in the appointment and consultation process, otherwise it would have primacy.

(i) View of the High Court:

8. After discussing the provisions of the Act and the case law on the subject, the High Court was of the opinion that the Upa-Lokayukta performs functions that are in the nature of judicial, quasi-judicial and investigative. The High Court expressed the view that if the functions of an Upa-Lokayukta were purely investigative, the legislature would not have insisted on a person who has held the office of a judge of a High Court as the qualification for appointment and consultation with the Chief Justice as mandatory.

9. In coming to this conclusion, the High Court drew attention to *N. Gundappa v. State of Karnataka,* 1989 (3) KarLJ 425 wherein it was held that "the Upa-lokayukta ….while conducting investigation into a complaint and making a report on the basis of such investigation, exercises quasi judicial power. It determines the complaint made against a public servant involving a 'grievance' or an 'allegation' and the report becomes the basis for taking action against the public servant by the Competent Authority." The Division Bench of the Karnataka High Court upheld this conclusion by a very cryptic order in *State of Karnataka v. N. Gundappa,* ILR 1990 Kar 4188.

10. The High Court also drew attention to *Prof. S.N. Hegde v. The Lokayukta,* ILR 2004 Kar 3892 wherein the scope of Sections 9,11 and 12 of the Act were considered and it was held that proceedings under Section 9 of the Act are judicial proceedings, or in any event, they are quasi-judicial proceedings. It was said:

"Therefore, the investigation to be conducted under Section 9 would be in the nature of a judicial proceeding and it would be in the nature of a suit and oral evidence is recorded on oath and documentary evidence is also entertained. Therefore, it is clear that the investigation under Section 9 of the Act would be in the nature of judicial proceedings or at any rate it is a quasi-judicial proceedings where the principles of natural justice had to be followed and if any evidence is recorded the public servant has the right to cross-examine those witnesses."

(ii) Functions, powers, duties and responsibilities of the Upa-lokayukta

11. The appointment of an Upa-lokayukta is dealt with in Section 3 of the Act. This Section requires that the Upa-lokayukta must be with a person who has held the office of a judge of a High Court. The Upa-lokayukta is, therefore, expected to be impartial and having some (if not considerable) judicial experience and abilities. The reason for this, quite obviously, is that he would possibly be required to deal with complaints and grievances against public servants in the State.

12. Given the importance of the office of the Upa-lokayukta, he is appointed by the Governor of the State on the advice of the Chief Minister, in consultation with the Chief Justice of the High Court, the Chairman of the Karnataka Legislative Council, the Speaker of the Karnataka Legislative Assembly, the Leader of the Opposition in the Karnataka Legislative Council and the Leader of the Opposition in the Karnataka Legislative Assembly. In other words, the appointment of the Upa-lokayukta is the concern of constitutional authorities of the State.

13. The oath of office taken by the Upa-lokayukta in terms of Section 3(3) of the Act is similar to the oath of office taken by a judge of a High Court under Schedule III to the Constitution. The only substantial difference between the two is that, in addition, a judge of the High Court takes an oath to uphold the

sovereignty and integrity of India and uphold the Constitution of India and the laws.

14. The term of office and other conditions of service of an Upa-lokayukta are dealt with in Section 5 of the Act. This Section, read with Section 6 of the Act (which deals with the removal of an Upa-lokayukta), provides security of tenure to the Upa-lokayukta. He has a fixed term of five years and cannot be removed "except by an order of the Governor passed after an address by each House of the State Legislature supported by a majority of the total membership of the House and by a majority of not less than two-thirds of the members of that House present and voting". The removal of an Upa-lokayukta can only be on the ground of proved misbehavior or incapacity and the procedure for investigation and proof of misbehavior or incapacity is as provided in the Judges (Inquiry) Act, 1968 which applies *mutatis mutandis* to an Upa-lokayukta.

15. On ceasing to hold office, an Upa-lokayukta is ineligible for further employment to any office of profit under the State or any other authority, corporation, company, society or university referred to in the Act. The salary of an Upa-lokayukta is equal to that of a judge of the High Court and the conditions of service cannot be varied to his disadvantage after his appointment. All the administrative expenses of the Upa-lokayukta are charged on the Consolidated Fund of the State.

16. In a sense, therefore, the Upa-lokayukta is a high dignitary in the State of Karnataka.

17. Section 7 of the Act provides for matters that may be investigated by the Upa-lokayukta while Section 8 of the Act provides for matters that may not be investigated by the Upa-lokayukta. For the purposes of this judgment, it is not necessary to refer to Section 8 of the Act. In terms of Section 7(2) of the Act, the Upa-lokayukta is entitled to investigate (upon a complaint involving a grievance or an allegation) any action taken by or with the general or special approval of a public

servant other than one mentioned in Section 7(1) of the Act. Only the Lokayukta can investigate action taken by or with the general or special approval of a public servant mentioned in Section 7(1) of the Act. The power vested in an Upa-lokayukta is, therefore, quite wide though hierarchically circumscribed.

18. Section 9 of the Act relates to complaints and investigations thereon by an Upa-lokayukta. A complaint may be made to him in the form of a statement supported by an affidavit. If the Upa-lokayukta, after making a preliminary enquiry proposes to conduct an investigation in respect of the complaint, he shall follow the procedure provided in Section 9(3) of the Act which broadly conforms to the principles of natural justice by giving an opportunity to the public servant against whom the complaint is being investigated to offer comments on the complaint.

19. For the purposes of any enquiry or other proceedings to be conducted by him, an Upa-lokayukta is empowered by Section 10 of the Act to issue a warrant for search and seizure against any person or property. The warrant can be executed by a police officer not below the rank of Inspector of Police authorized by the Upa-lokayukta to carry out the search and seizure. The provisions of Section 10 of the Act also make it clear that the provisions of the Code of Criminal Procedure, 1973 relating to search and seizure shall apply.

20. By virtue of Section 11 of the Act, an Upa-lokayukta has all the powers of a Civil Court for the purpose of carrying out an investigation. These powers include summoning and enforcing the attendance of any person and examining him on oath; requiring the discovery and production of any document; receiving evidence on affidavits and other related powers. Proceedings before the Upa-lokayukta are deemed to be judicial proceedings within the meaning of Section 193 of the Indian Penal Code. In this context, Section 17-A of the Act is important and this Section enables the Upa-lokayukta to

exercise the same powers of contempt of itself as a High Court and for this purpose, the provisions of the Contempt of Courts Act, 1971 shall have effect *mutatis mutandis*.

21. The Upa-lokayukta is protected by virtue of Section 15 of the Act in respect of any suit, prosecution or other legal proceedings in respect of anything that is done in good faith while acting or purporting to act in the discharge of his official duties under the Act.

22. The Upa-lokayukta is statutorily obliged under Section 12(1) of the Act to submit a report in writing if, after investigation of any grievance, he is satisfied that the complainant has suffered some injustice or undue hardship. In his report to the Competent Authority, as defined in Section 2(4) of the Act, the Upa-lokayukta shall recommend that the injustice or hardship be remedied or redressed in a particular manner and within a specified time frame. Sub-section (2) of Section 12 of the Act requires the Competent Authority to submit an 'action taken report' to the Upa-lokayukta within one month on the report given by him. Sub-section (3) and sub-section (4) of Section 12 of the Act are similar to sub-section (1) and (2) thereof except that they deal with an 'action taken report' in respect of an investigation resulting in the substantiation of an allegation. In such a case, the Competent Authority is obliged to furnish an 'action taken report' within three months of receipt of the report of the Upa-lokayukta. Sub-section (5) and sub-section (7) of Section 12 of the Act provide that in the event the Upa-lokayukta is not satisfied with the action taken report, he may make a special report upon the case to the Governor of the State who shall cause a copy thereof to be laid before each House of the State Legislature together with an explanatory memorandum.

23. In short, Section 12 of the Act confers a decision-making obligation on the Upa-lokayukta in respect of grievances and complaints received by him.

24. Section 13 of the Act requires a public servant to vacate his office if so directed by the Upa-lokayukta if a declaration is made to that effect in a report under Section 12(3) of the Act. Even though the declaration may not be accepted, it does not whittle down the authority of the Upa-lokayukta.

25. Section 14 of the Act enables the Upa-lokayukta to prosecute a public servant and if such an action is taken, sanction to prosecute the public servant shall be deemed to have been granted by the appropriate authority.

26. The conditions of service of the staff of the Upa-lokayukta are referred to in Section 15 of the Act. They may be prescribed in consultation with the Lokayukta in such a manner that the staff may act without fear in the discharge of their functions. Section 15 of the Act also enables the Upa-lokayukta to utilize the services of any officer or investigating agency of the State or even of the Central Government, though with the prior concurrence of the Central Government or the State Government. Section 15(4) of the Act makes it clear that the officers and other employees of the Upa-lokayukta are under the administrative and disciplinary control of the Lokayukta.

27. The broad spectrum of functions, powers, duties and responsibilities of the Upa-lokayukta, as statutorily prescribed, clearly bring out that not only does he perform quasi-judicial functions, as contrasted with purely administrative or executive functions, but that the Upa-lokayukta is more than an investigator or an enquiry officer. At the same time, notwithstanding his status, he is not placed on the pedestal of a judicial authority rendering a binding decision. He is placed somewhere in between an investigator and a judicial authority, having the elements of both. For want of a better expression, the office of an Upa-lokayukta can only be described as a *sui generis* quasi-judicial authority.

(iii) Decisions on the subject:

28. Learned counsel for the State referred to *The Bharat Bank Ltd., Delhi v. Employees of the Bharat Bank Ltd., Delhi,* [1950] SCR 459 to highlight the difference between a court and a tribunal. It is not necessary to go into this issue because the question is not whether the Upa-lokayukta is a court or a tribunal – the question is whether he is a quasi-judicial authority or an administrative authority. To this extent, the decision of the Constitution Bench does not add to an understanding of the issue under consideration.

29. However, the decision does indicate that an Upa-lokayukta is certainly not a court. He does not adjudicate a *lis* nor does he render a "judicial decision" derived from the judicial powers of the State. An Upa-lokayukta is also not a tribunal, although he may have the procedural trappings (as it were) of a tribunal. The final decision rendered by the Upa-lokayukta, called a report, may not bear the stamp of a judicial decision, as would that of a court or, to a lesser extent, a tribunal, but in formulating the report, he is required to consider the point of view of the person complained against and ensure that the investigation reaches its logical conclusion, one way or the other, without any interference and without any fear. Notwithstanding this, the report of the Upa-lokayukta does not determine the rights of the complainant or the person complained against. Consequently, the Upa-lokayukta is neither a court nor a tribunal. Therefore, in my opinion, the Upa-lokayukta can best be described as a *sui generis* quasi-judicial authority.

30. Reference by learned counsel for the State to *Durga Shankar Mehta v. Thakur Raghuraj Singh and Others,* [1955] 1 SCR 267 also does not take us much further in determining whether an Upa-lokayukta is a quasi-judicial authority or not. That case concerned, *inter alia*, the competency of an appeal on special leave under Article 136 of the Constitution from a decision of the Election Tribunal. In that case, it was clearly laid

down that courts and tribunals are "constituted by the State and are invested with judicial as distinguished from purely administrative or executive functions".

31. However, the issue is more specifically dealt with in *Associated Cement Companies v. P.N. Sharma,* 1965 (2) SCR 366. In that case, Kania, C.J. held:

> "It seems to me that the true position is that when the law under which the authority is making a decision, itself requires a judicial approach, the decision will be quasi-judicial. Prescribed forms of procedure are not necessary to make an inquiry judicial, provided in coming to the decision the well-recognised principles of approach are required to be followed."

32. Similarly, Das, J held, after reviewing a large number of cases where there were two disputing parties and an authority to adjudicate their dispute and where there were no two disputing parties but there was an authority to sit in judgment. I am presently concerned with the second line of cases. The learned Judge held:

> "What are the principles to be deduced from the two lines of cases I have referred to? The principles, as I apprehend them, are: (i) that if a statute empowers an authority, not being a Court in the ordinary sense, to decide disputes arising out of a claim made by one party under the statute which claim is opposed by another party and to determine the respective rights of the contesting parties who are opposed to each other, there is a lis and prima facie and in the absence of anything in the statute to the contrary it is the duty of the authority to act judicially and the decision of the authority is a quasi-judicial act; and (ii) that if a statutory authority has power to do any act which will prejudicially affect the subject, then, although there are not two parties apart from the authority and the contest is between the authority proposing to do the act and the subject opposing it, the final determination of the authority will yet be a quasi-judicial act provided the authority is required by the statute to act judicially."

33. As mentioned above, an Upa-lokayukta does function as an adjudicating authority but the Act places him short of a judicial authority. He is much more "judicial" than an investigator or an inquisitorial authority largely exercising administrative or executive functions and powers. Under the circumstances, taking an overall view of the provisions of the Act and the law laid down, my conclusion is that the Upa-lokayukta is a quasi-judicial authority or in any event an authority exercising functions, powers, duties and responsibilities conferred by the Act as a *sui generis* quasi-judicial authority.

34. However, this is really of not much consequence in view of my conclusion on the issue of primacy of the opinion of the Chief Justice.

Initiating the process of appointment of an Upa-lokayukta:

35. Having held that the Upa-lokayukta is a *sui generis* quasi-judicial authority, the question for consideration is who should initiate the process for the appointment of an Upa-lokayukta. The significance of this is that it is tied up with the primacy of the views of the Chief Justice of the High Court. That in turn is tied up with not only maintaining the independence of the office but also of the Upa-lokayukta not being dependent on the Executive for the appointment.

(i) View of the High Court:

36. The High Court was of the opinion that to maintain the independence of the office of the Lokayukta and the Upa-lokayukta under the Act, the recommendation for appointment to these offices must emanate only from the Chief Justice and only the name recommended by him should be considered. The High Court opined:

"[T]he name of the Lokayukta and Upa-Lokayukta to be appointed has to necessarily emanate from a person who is not within their jurisdiction. The only person who is outside the ambit of Lokayukta is the Chief Justice and all other Constitutional authorities mentioned in the provision come within his jurisdiction. They will not have the right to suggest the name. Only the Chief Justice would have the right to suggest the name which, of course the other Constitutional authorities can consider. Though all of them are constitutional authorities, all of them cannot be placed on the same pedestal. The Chief Justice is the head of the Judiciary in the State, and he cannot be compared with others. That is why the legislature has consciously enacted the provision in such a manner that the first person to be consulted is the Chief Justice. The intention of the legislature is clear. The name has to emanate from the Chief Justice alone. Therefore, the law laid down by the Constitution Bench of the Apex Court squarely applies to the appointment of Lokayukta and Upa-Lokayukta. Therefore, we have no hesitation in holding that under Section 3 of the Act, it is only the Chief Justice who shall suggest the name of the Judge for being appointed as Lokayukta or Upa-Lokayukta. Other constitutional functionaries have no such right to suggest the name. It is only "one" name and not panel of names as there is no indication to that effect in the provision."

(ii) Submissions and decisions on the subject:

37. Learned counsel first made a reference to *Sarwan Singh Lamba v. Union of India,* (1995) 4 SCC 546 in which the Chief Minister of the State initiated the process for the appointment of the Vice-Chairman and members of the State Administrative Tribunal. It was contended that their appointments were, *inter alia,* contrary to the procedure laid down in the decision of this Court in *S.P. Sampath Kumar v. Union of India,* (1987) 1 SCC 124. The Constitution Bench

noted that the State Government had initiated the process of appointment and that the Chief Minister of the State had mooted the name of one of the candidates selected by a Selection Committee headed by the Chief Justice of the High Court. However, since the appointees were duly qualified and eligible to hold the post to which they were appointed; there was no allegation regarding their suitability or otherwise; and the appointments having been made after consultation with the then Chief Justice of India, this Court concluded that no law was violated in the appointment process. Accordingly, the Constitution Bench declined to interfere with their appointments. The issue whether the appointment process could or could not have been initiated by the Executive was not specifically discussed.

38. *Ashish Handa v. Hon'ble the Chief Justice of High Court of Punjab & Haryana and Others,* (1996) 3 SCC 145 related to the appointment of the President of the State Consumer Disputes Redressal Commission, being a person who is or has been a judge of the High Court. This Court held that for the purposes of initiating the proposal for appointment of the President of the State Commission, the Executive is expected to approach the Chief Justice of the High Court for suggesting a candidate for appointment. In other words, the Chief Justice should initiate the appointment process. *Sarwan Singh Lamba* was distinguished by observing that "[I]n the facts of that case, substantial compliance of the requirement of approval by the Chief Justice of India was found proved and, therefore, the appointments were valid."

39. The appointment of the President of the State Commission again came up for deliberation in *Ashok Tanwar and Another v. State of Himachal Pradesh and Others,* (2005) 2 SCC 104. However, in that case, the Constitution Bench did not comment on the view expressed in *Ashish Handa* that the Chief Justice of the High Court must initiate the process for appointment of the President of the State Commission and not

the Executive of the State. The law laid down in *Ashish Handa* to this extent remained unchanged. However, *Ashish Handa* was overruled on the modality of the consultation process, which I will consider in another section of this judgment. That *Ashish Handa* was overruled on the modality of the consultation process for the appointment of the President of the State Commission under Section 16 of the Consumer Protection Act was confirmed in *State of Haryana v. National Consumer Awareness Group,* (2005) 5 SCC 284.

40. In *N. Kannadasan v. Ajoy Khose and Others,* (2009) 7 SCC 1 the appointment of the President of the State Commission under Section 16 of the Consumer Protection Act once again came up for consideration. After referring to *Ashish Handa*, *Ashok Tanwar* and *National Consumer Awareness Group* it was held in paragraph 153 of the Report that the process of selection must be initiated by the High Court. It was observed that the Chief Justice should recommend only one name and not a panel, for if the choice of selection from a panel is left to the Executive, it would erode the independence of the Judiciary.

41. One significant fact may be noticed from a reading of the cases cited above, namely, that for the appointment of the Vice Chairman or Member of the State Administrative Tribunal or the President of the State Consumer Disputes Redressal Commission, only the Chief Justice of India or the Chief Justice of the High Court is required to be consulted, and not several persons. It is this context that it was held that the Chief Justice of the High Court must initiate the process of appointment. *Sarwan Singh Lamba* is perhaps the only exception to this rule and was, therefore, confined to its own facts. A situation where more than one person is required to be consulted was not dealt with in any of the decisions referred to above. That question arises in this case.

42. A reading of the cited decisions also suggests that the Chief Justice must recommend only one name and not a panel

of names. The purpose of this is to ensure the independence of the persons appointed and to obviate any possibility of executive influence. The acceptance or non-acceptance of the candidate recommended by the Chief Justice is a different matter concerning the consultation process.

43. What are the mechanics of initiating the process of appointment? Is the Chief Justice expected to inform the State Government that a statutory judicial position is lying vacant and that someone is being recommended to fill up that position? Or does it imply that the State Government should bring it to the notice of the Chief Justice that there is a statutory judicial position lying vacant and that it needs to be filled up and to then request the Chief Justice to make a recommendation? No clear answer is available from the cited cases, but it does appear that the responsibility is of the Executive to inform the Chief Justice of the existence of a vacancy and to request him to recommend a suitable person for filling it up. However, this would not preclude the Chief Justice from initiating the appointment process, particularly in the event of the failure of the Executive to take necessary steps.

44. What would happen if the Executive, while initiating the process of appointment were to recommend the name of a person? Would it vitiate the process or would the process be only irregular? Again, no clear-cut answer is available. *Sarwan Singh Lamba* seems to suggest that the procedure would not be vitiated but would, at best, only be irregular. But, *Ashok Tanwar* seems to suggest, *sub silentio,* that the appointment procedure would be vitiated.

45. Would these principles laid down by this Court apply to initiating the process of appointment of the Upa-lokayukta under the Act? I think not. In the appointment of the Upa-lokayukta, the Chief Minister must consult not only the Chief Justice but several other constitutional authorities also and given the fact that the Upa-Lokayukta is not a purely judicial authority, it hardly matters who initiates the process of

appointment of the Upa-Lokayukta. Ordinarily, it must be the Chief Minister since he has to tender advice to the Governor and, in a sense, the appointment is his primary responsibility. But this does not preclude any of the other constitutional authorities who are required to be consulted from bringing it to the notice of the Chief Minister that the post of the Upa-Lokayukta needs to be filled up and that the appointment process ought to commence – nothing more than that. None of them ought to suggest a name since constitutional courtesy would demand that only the Chief Minister should initiate the appointment process. There is no reason to hold that merely because the Upa-Lokayukta is a *sui generis* quasi-judicial authority, only the Chief Justice must initiate the process of appointment. It must not be forgotten that the selection of the Upa-lokayukta is a consultative process involving several constitutional authorities and in the context of the Act, no constitutional authority is subordinate to the other.

46. In the present case, the process of appointment of the Upa-lokayukta commenced with a letter written by the Chief Minister to the Chief Justice of the Karnataka High Court on 18th October 2011 for suggesting "a panel of eligible persons for appointment as Karnataka Upa Lokayukta on or before 24th October, 2011 so as to fill up the post of Upa Lokayukta". I cannot fault the Chief Minister for this. He did not initiate the appointment process as understood in the decisions referred to above by recommending any candidate for appointment – he merely invited recommendations. He also did not err in law in inviting a panel of names since the consultation process involved more than one person. It was for the persons concerned to recommend a panel of names or make one recommendation or make no recommendation at all. As far as the Chief Justice was concerned, in keeping with the general view expressed by this Court in ***Kannadasan*** it was proper and appropriate for him to have recommended only one name to the Chief Minister and, as required by propriety, he correctly

did so by recommending only one person for appointment as the Upa-lokayukta.

47. I am, therefore, not in agreement with the High Court that the recommendation for appointing the Upa-lokayukta under the Act must emanate only from the Chief Justice and only the name recommended by him should be considered. To this extent, the decision of the High Court is set aside. It is made clear that this view does not apply to judicial appointments.

Consultation in the appointment of an Upa-lokayukta:

48. What does 'consultation' occurring in Section 3(2)(b) of the Act postulate? Learned counsel for the State, as well as learned counsel for Justice Chandrashekaraiah and the writ petitioner in the High Court firstly referred to the above decisions of this Court to explain the meaning of 'consultation' in the context of the appointment process and secondly in the context of the issue whether the view of the Chief Justice of the Karnataka High Court would have primacy in the process of consultation.

(i) View of the High Court:

49. The High Court gave a realistic meaning to 'consultation' generally and, in my opinion, specifically to the meaning of the word as occurring in Section 3(2)(b) of the Act. This is what the High Court had to say:

> "The word 'consult' implies a conference of two or more persons or impact of two or more minds in respect of a topic/subject. A person consults another to be elucidated on the subject matter of the consultation. Consultation is a process which requires meeting of minds between the parties involved in the process of consultation on the material facts and points involved to evolve a correct or atleast satisfactory solutions. There should be meeting of minds between the proposer and the persons to be

consulted on the subject of consultation. A consultation may be between an uninformed person and an expert or between two experts. In either case, the final decision is with the consultor, but he will not be generally ignoring the advice except for good reasons. The consultation is not complete or effective before the parties thereto making their respective points of view known to the other or others and discuss and examine the relative merits of their views. In order for two minds to be able to confer and produce a mutual impact, it is essential that each must have for its consideration fully and identical facts, which can at once constitute both the source and foundation of the final decision. Such a consultation may take place at a conference table or through correspondence. The form is not material but the substance is important. If there are more than one person to be consulted, all the persons to be consulted should know the subject with reference to which they are consulted. Each one should know the views of the other on the subject. There should be meeting of minds between the parties involved in the process of consultation on the material facts and points involved. The consultor cannot keep one consultee in dark about the views of the other consultee. When consultation is prescribed with more than one person, there cannot be bilateral consultations or parallel consultations, behind the back of others, who are to be consulted in the process. Consultation is not complete or effective before the parties thereto make their respective points of view known to the other and discuss and examine the relative merit of their views. They may discuss, but may disagree. They may confer but may not concur. However, consultation is different from consentaneity."

(ii) Consultation in the appointment process:

50. *Sarwan Singh Lamba* did not deal with the issue of consultation, but *Ashish Handa*, *Ashok Tanwar* and

Kannadasan did. That being so, reference may be made to the relevant portion of Section 16(1) of the Consumer Protection Act which relates to the President of the State Commission. This extract reads as follows:-

"16. **Composition of the State Commission.**— (1) Each State Commission shall consist of—

(a) a person who is or has been a Judge of a High Court, appointed by the State Government, who shall be its President:

Provided that no appointment under this clause shall be made except after consultation with the Chief Justice of the High Court;

(b) xxx"

51. It was observed in *Ashish Handa* that the function of the State Commission is primarily to adjudicate consumer disputes and therefore a person from the judicial branch is considered suitable for the office of the President of the State Commission under Section 16 of the Consumer Protection Act. Given this context, prior consultation with the Chief Justice of the High Court is obvious since the Chief Justice is the most appropriate person to know the suitability of the person to be appointed as the President of the State Commission. Further elaborating on this, it was held that the procedure of consultation should be the same as laid down in Article 217 of the Constitution as interpreted in *Supreme Court Advocates on Record Association v. Union of India,* AIR 1994 SC 268.

52. In *Ashok Tanwar* the Constitution Bench considered the dictum laid down in *Ashish Handa* and categorically distinguished the process of the appointment of a judge of a superior court under Article 217 of the Constitution from that of the President of the State Commission. It was observed in paragraph 16 of the Report as follows:-

> "The process of consultation envisaged under Section 16 of the Act can neither be equated to the constitutional requirement of consultation under Article 217 of the Constitution in relation to appointment of a Judge of a High Court nor can it be placed on the same pedestal. Consultation by the Chief Justice of the High Court with two senior most Judges in selecting a suitable candidate for appointment as a Judge is for the purpose of selecting the best person to the high office of a Judge of the High Court as a constitutional functionary. Consultation with the Chief Justice of the High Court in terms of Section 16 of the Act is a statutory requirement."

53. Further, while referring to *Aruna Roy v. Union of India,* (2002) 7 SCC 368 it was observed that:

> "… the words and expressions used in the Constitution, …. have no fixed meaning and must receive interpretation based on the experience of the people in the course of working of the Constitution. The same thing cannot be said in relation to interpreting the words and expressions in a statute."

54. This Court categorically rejected the view that 'consultation' postulated in Article 217 of the Constitution in relation to the appointment of a High Court judge be read in the same way as 'consultation' as contemplated under Section 16 of the Consumer Protection Act.

55. In *Kannadasan* it was noted that the collegium of judges of the Supreme Court had found N. Kannadasan unfit to continue as a judge of the High Court. In this context, it was observed that the expression "retired judge" would mean a person who has retired without blemish and not merely a person who has been a judge and, therefore, attention was drawn to the conclusion of Fazal Ali, J in *S.P. Gupta v. Union of India,* 1981 Supp SCC 87 (after referring to *Union of India v. Sankalchand Himmatlal Seth,* (1977) 4 SCC 193) that both

the "consultor" and the "consultee" must have before them full and identical facts.

56. It follows from the decisions placed before us that there is a clear distinction between 'consultation' in the appointment of a judge of a superior court and 'consultation' in the appointment to a statutory judicial position. For the former, the Chief Justice must consult the collegium of judges, while it is not necessary for the latter. In both cases, consultation is mandatory.

57. The further question that arises is whether the law laid down in these decisions would be applicable to the appointment of an Upa-Lokayukta who is not a judicial or a constitutional authority but is a *sui generis* quasi-judicial authority? In my opinion, the answer to this question must be in the affirmative.

58. At this stage, it is necessary to mention that on a plain reading of Section 3(2)(b) of the Act, there can be no doubt that consultation with all the constitutional authorities, including the Chief Justice of the Karnataka High Court, is mandatory. There was no dispute on this – the controversy was limited to the meaning of 'consultation'. I have already held that an Upa-lokayukta is not a judicial authority, let alone a constitutional authority like a judge of a High Court. Therefore, on reading of the above decisions, it is clear that the mandatory consultation in the appointment process as postulated by Section 3(2)(b) of the Act is with the Chief Justice in his individual capacity and not consultation in a collegial capacity.

(iii) The process of consultation:

59. How is this 'consultation' to take place? There are absolutely no 'consultation' guidelines laid down in the Act. But the High Court seems to endorse the view that consultation ought take place across a table or through correspondence. It was also suggested by learned counsel for the State that it

would be more appropriate that all constitutional authorities have a meeting where the suitability of the person recommended for appointment may be discussed.

60. I do not think it necessary to circumscribe the manner of consultation. The Chief Minister may consult the other constitutional authorities collectively or in groups or even individually – this hardly matters as long as there is meaningful and effective consultation. Similarly, I do not think it necessary to restrict the mode of consultation. It may be in a meeting or through correspondence. Today, with available technology, consultation may even be through a video link. The form of consultation or the venue of consultation is not important - what is important is the substance of the consultation. The matter has to be looked at pragmatically and not semantically. It is important, as held by the High Court, that no constitutional authority is kept in the dark about the name of any candidate under consideration and each constitutional authority mentioned in Section 3(2)(b) of the Act must know the recommendation made by one another for appointment as an Upa-Lokayukta. In addition, they must have before them (as Fazal Ali, J concluded in *S.P. Gupta*) full and identical facts. As long as these basic requirements are met, 'consultation' could be said to have taken place.

(iv) Consultation in this case:

61. Was there 'consultation' (as I have understood it) between the various constitutional authorities before the Chief Minister recommended the name of Justice Chandrashekharaiah? I think not. In response to the letter of the Chief Minister, the Chief Justice recommended the name of Justice Rangavittalachar; the Speaker of the Legislative Assembly recommended Justice Chandrashekharaiah; the Chairman of the Legislative Council recommended Justice Chandrashekharaiah; the Leader of the Opposition in the Legislative Assembly recommended Justice Mohammed Anwar and Justice Ramanna; the Leader of the Opposition in

the Legislative Council recommended Justice Mohammed Anwar and Justice Ramanna. Therefore, as many as four retired judges were recommended for appointment as Upa-lokayukta. It is not clear whether the names of all these judges were disclosed to all the constitutional authorities. The name of Justice Chandrashekharaiah was certainly not disclosed to the Chief Justice, as is evident from his letter dated 4th February 2012 wherein he stated four times that he was not consulted on the appointment of Justice Chandrashekharaiah. This is what he stated:

> "I was not consulted on the said name (Shri Justice Chandrashekaraiah) for the position of Karnataka Upa Lokayukta.
>
> … … …
>
> "I had not recommended the name of Shri. Justice Chandrashekaraiah for consideration for appointment as Karnataka Upa Lokayukta. Thereafter, I have not heard anything from you. I emphasise that the appointment of Shri. Justice Chandrashekaraiah has been made without consultation with the Chief Justice. Therefore, it is in violation of mandatory requirements of law.
>
> … … …
>
> "To put the matter plainly, there is no gainsaying the fact that there never ever was any consultation on the name of Shri Justice Chandrashekaraiah for appointment to the position of Upa Lokayukta between you and myself.
>
> … … …
>
> "I reiterate that in this particular case, not even the name was shared by you (the Chief Minister) with me (the Chief Justice), leave alone eliciting my views on the suitability of the person for holding the post of Upa Lokayukta."

62. The contents of this letter are not denied by the State and are quite obviously admitted. Significantly, the Chief Minister did not reply to this letter. Clearly, the Chief Justice was kept in the dark about the name of a candidate and there was no full and complete disclosure of facts. *Ergo*, the Chief Minister did not recommend the name of Justice Chandrashekharaiah in consultation with the Chief Justice. This was contrary to the mandatory requirement of Section 3(2)(b) of the Act and so, it must be held that the appointment of Justice Chandrashekharaiah was void *ab initio.*

63. In this context, reference was made to *Indian Administrative Service (S.C.S.) Association U.P. and Others v. Union of India and Others,* 1993 Supp. (1) SCC 730 to contend that since the views of the constitutional authorities are not binding on the Chief Minister, the process of consultation is not mandatory. In that case, this Court was considering Section 3(1) of the All India Service Act, 1951 which reads as follows:

> "**Regulation of recruitment and conditions of services**.- (1) The Central Govt. may, after consultation with the Governments of the States concerned (including the State of Jammu and Kashmir), (and by notification in the Official Gazette) make rules for the regulation of recruitment, and the conditions of service of persons appointed to an All India Service."

64. The fifth conclusion mentioned in *IAS Association* was relied on in support of this contention. This conclusion reads as follows:

> "When the object of the consultation is only to apprise of the proposed action and when the opinion or advice is not binding on the authorities or person and is not bound to be accepted, the prior consultation is only directory. The authority proposing to take action should make known the general scheme or outlines of the actions proposed to be taken be put to notice of the authority or the persons to be consulted; have the views or objections, take them into consideration, and thereafter, the authority or person would be entitled or has/have authority to pass appropriate orders or take decision thereon. In such circumstances it amounts to an action 'after consultation'."

65. This conclusion must not be read in isolation but along with the other conclusions arrived at in *IAS Association.* This Court referred to 'prior consultation' in the context of the "subject of consultation" as mentioned in the first conclusion. This 'prior consultation' is not always mandatory. Then there is 'consultation' as a part of "fair procedure" as mentioned in the second conclusion. This is mandatory. Finally, there is the conclusion arrived at which is 'after consultation'. In some cases the 'consultor' may be bound to accept the conclusion arrived at and in some cases he may not. That is a matter of interpretation of the statute and the purpose of the consultation process. But to say that since the 'consultor' is not bound by the conclusion arrived at, he need not go through the consultation process would be stretching the law laid down in *IAS Association* to the vanishing point.

66. This Court held in *IAS Association*, with reference to the above provision, that 'prior consultation' was not mandatory as long as the relevant rules were made 'after consultation'. The present case is not concerned with the issue of 'prior consultation'. All that is of concern in the present case is whether the Chief Minister acted in consultation with the constitutional authorities referred to Section 3(3)(b) of the Act and the answer to this is in the negative.

67. 'Consultation' for the purposes of Section 3(2)(b) of the Act does not and cannot postulate concurrence or consent. This is quite obvious given the large number of constitutional authorities involved in the consultation process. There is always a possibility of an absence of agreement on any one single person being recommended for appointment as an Upa-

lokayukta, as has actually happened in the present case. In such a situation, it is ultimately the decision of the Chief Minister what advice to tender to the Governor, since he alone has to take the final call.

68. Can the Chief Minister advice the Governor to appoint a person not recommended by any of the constitutional authorities? I see no reason why he cannot, as long as he consults them – the 'consultation' being in the manner postulated above. The Chief Minister can recommend a completely different person, other than any of those recommended by any of the constitutional authorities as long as he does not keep them in the dark about the name of the candidate and there is a full and complete disclosure of all relevant facts. In *M.M. Gupta v. State of Jammu & Kashmir,* (1982) 3 SCC 412 this Court explained 'consultation' in the matter of judicial appointments in the following words (which apply equally to the present case):

> "It is well settled that consultation or deliberation is not complete or effective before the parties thereto make their respective points of view known to the other or others and discuss and examine the relative merits of their views. If one party makes a proposal to the other who has a counter proposal in his minds which is not communicated to the proposer, the direction to give effect to the counter proposal without anything more, cannot be said to have been done after consultation."

69. On the facts of this case, I hold that there was no consultation between the Chief Minister and the Chief Justice on the appointment of Justice Chandrashekharaiah as an Upa-lokayukta. His appointment was, therefore, void *ab initio*.

(v) Primacy of the view of the Chief Justice:

70. The High Court was of the opinion that primacy is required to be given to the view of the Chief Justice of the

Karnataka High Court in the matter of the appointment of the Upa-lokayukta. In fact, it was said that since the Chief Justice is the best person to know the suitability or otherwise of a retired judge of a High Court. It was also said that, "Requesting the Chief Justice to suggest a name and on receipt of the same, ignoring the said name and tendering advice to the Governor to appoint somebody else, would make the consultation a farce."

71. In *Ashok Tanwar* the Constitution Bench did make a reference to the primacy of the Chief Justice of India in the context of the appointment of a judge of the superior court and noted that the Chief Justice is best equipped to know and assess the work of the candidate and his suitability for appointment. However, the Constitution Bench did not express any opinion on the question of primacy of the opinion of the Chief Justice in regard to the appointment of the President of the State Commission under Section 16 of the Consumer Protection Act, although I think it would naturally follow.

72. In any event, in *Kannadasan* it was held that for the appointment of the President of the State Commission, the view of the Chief Justice was final and for all intents and purposes decisive, and except for very cogent reasons, his recommendation must be accepted. It was held in paragraph 156 of the Report that:

> "For the appointment as President of the State Commission, the Chief Justice of the High Court shall have the primacy and thus the term "consultation" even for the said purpose shall mean "concurrence" only."

73. As noted above, the Chief Justice of India or the Chief Justice of the High Court is the only constitutional authority required to be consulted in the appointment of a Vice Chairman or Member of the State Administrative Tribunal or the President of the State Consumer Disputes Redressal Commission. In that context, it is quite understandable that the recommendation

of the Chief Justice must be accepted, unless there are strong and cogent reasons for not doing so. The reasons would, naturally, have to be disclosed to the Chief Justice as a part of the process of consultation. It is also quite understandable that the Chief Justice would be the best person to assess the suitability of a person for appointment to such a position. But, the situation is rather different in the appointment of an Upa-lokayukta where the constitutional authorities to be consulted include not only the Chief Justice of the Karnataka High Court but several other constitutional authorities as mentioned in Section 3(2)(b) of the Act. Can their views be subordinated to the views of the Chief Justice, and if so, why?

74. In this regard, reliance was placed on *Justice K.P. Mohapatra v. Sri Ram Chandra Nayak,* (2002) 8 SCC 1. In that case, the provisions of Section 3 of the Orissa Lokpal and Lokayuktas Act, 1999 were under consideration. That Section reads as follows:

> "**3. Appointment of Lokpal and Lokyktas.-**(1) For the purpose of conducting investigations in accordance with the provisions of this Act, the Governor shall appoint a person to be known as the Lokpal and one or more persons to be known as the Lokayukta or Lokayuktas:
>
> Provided that—
>
> (a) the Lokpal shall be appointed after consultation with the Chief Justice of the High Court of Orissa and the Leader of the Opposition, if there is any;
>
> (b) the Lokayukta or Lokayuktas shall be appointed after consultation with the Lokpal.
>
> (2) A person shall not be qualified for appointment as—
>
> (a) (sic) unless he is or has been a Judge of the Supreme Court or of a High Court;

> (b) A Lokayukta unless he is qualified to be a Judge of a High Court."

75. This Court took the view that primacy is to be accorded to the opinion of the Chief Justice in the matter of appointment of the Lokpal since his opinion would be totally independent and he would be in a position to find out who is the most or more suitable for that office. It was also held that consultation with him is a *sine qua non*, and if there is a Leader of the Opposition then he "is also required to be consulted". But if there is no Leader of the Opposition, obviously consultation with him is not possible. This Court then said, "This would indicate nature of such consultation and which is to apprise him [the Leader of the Opposition] of the proposed action but his opinion is not binding to the Government." With respect, this does not follow. If the law requires consultation then it must take place; whether the opinion expressed during the consultation process is binding or not is a different matter altogether. This Court went a bit further in *Justice Mohapatra* and held that though the Leader of the Opposition is entitled to express his views but he cannot suggest any other name for consideration.

76. I am afraid, however uncomfortable one may feel about it, Section 3 of the Orissa Lokpal and Lokayuktas Act, 1999 as I read it, simply does not prohibit the Leader of the Opposition from suggesting some other name for consideration for appointment as a Lokpal. This restriction is not warranted by the words of the statute and would, even otherwise, give that Section far too restricted a meaning. As concluded in *IAS Association* "The object of the consultation is to render consultation meaningful to serve the intended purpose." Giving 'consultation' a constricted meaning in Section 3 of the Orissa Lokpal and Lokayuktas Act, 1999 would defeat this. It was observed in *Maharashtra State Financial Corporation v. Jaycee Drugs and Pharmaceuticals,* (1991) 2 SCC 637:

> "It is a settled rule of interpretation of statutes that if the language and words used are plain and unambiguous, full

effect must be given to them as they stand and in the garb of finding out the intention of the Legislature no words should be added thereto or subtracted therefrom."

77. I would, therefore, confine the law laid down in *Justice Mohapatra* to the facts of that case only. In any event, the view expressed in *Justice Mohapatra* is not helpful in interpreting Section 3(2)(b) of the Karnataka Lokayukta Act, 1984 and I leave the matter at that.

78. As far as Section 3(2)(b) of the Act is concerned, the primary 'responsibility' for the appointment of the Upa-Lokayukta rests with the Chief Minister who has to advice the Governor. Since the Chief Justice is only one of the constitutional authorities required to be consulted by the Chief Minister before advice is tendered to the Governor, it cannot be said that only his view would prevail over the views of other constitutional authorities. If that were so, then (to rephrase the High Court) consultation with the other constitutional authorities including the Chairman of the Karnataka Legislative Council, the Speaker of the Karnataka Legislative Council and the Leader of the Opposition in the Karnataka Legislative Council and in the Karnataka Legislative Assembly would be reduced to a farce. It must be appreciated that these constitutional authorities also have an equal say in the executive governance of the State and there is nothing to suggest that their opinion should be subordinated to the opinion of the Chief Justice or that the Chief Justice can veto their views. On the other hand, since it is ultimately the Chief Minister who has to advice the Governor, it is he alone who has to take the final call and shoulder the responsibility of correctly advising the Governor in the matter of appointing the most suitable person as an Upa-lokayukta.

79. The mechanics of the working of a statute has to be decoded from the contents of the statute and the words used therein; otherwise there is a possibility of committing a serious error. If, as a general principle, it is held (as has been argued

before us) that the view of the Chief Justice must have primacy over the views of everybody else, how would one explain the omission of the Chief Justice in the consultation process in the Kerala Lokayukta Act, 1999? Similarly, if as a general principle, it is held that the view of the Chief Minister must have primacy over the views of everybody else, how would one explain the omission of the Chief Minister in the consultation process in the Orissa Lokpal and Lokayuktas Act, 1995? It is for this reason that I would hold that a statute must be considered and understood on its own terms. In so construing the Act, I see no reason to accord primacy to the views of the Chief Justice in the appointment of an Upa-lokayukta under the Karnataka Lokayukta Act, 1984. The judgment of the High Court, to this extent, is set aside.

Other contentions:

80. It was submitted that the practice followed for the appointment of the Upa-lokayukta in the present case is the same or similar to the practice followed in the past and, therefore, this Court should not interfere with the appointment already made. If at all interference is called for, the doctrine of 'prospective overruling' should be applied.

81. I am not inclined to accept either contention. Merely because a wrong has been committed several times in the past does not mean that it should be allowed to persist, otherwise it will never be corrected. The doctrine of 'prospective overruling' has no application since there is no overwhelming reason to save the appointment of the Upa-lokayukta from attack. As already held, in the absence of any consultation with the Chief Justice, the appointment of Justice Chandrashekharaiah as an Upa-lokayukta is void *ab initio*. However, this will not affect any other appointment already made since no such appointment is under challenge before us.

82. It was also contended that the High Court ought not to have laid down any procedure for the appointment of the Upa-

lokayukta. In the view that I have taken, it is not necessary to comment on the procedure proposed by the High Court.

Conclusion:

83. The appointment of Justice Chandrashekharaiah as the Upa-lokayukta is held void *ab initio*. Since some of the contentions urged by the appellants are accepted, the appeals are partly allowed to that extent only.

B.B.B. Appeals disposed of.

M/S I.C.D.S. LTD.

v.

COMMISSIONER OF INCOME TAX, MYSORE & ANR.

(Civil Appeal No. 3282 of 2008)

JANUARY 14, 2013

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

Income Tax Act, 1961 – s.32(1) – Depreciation – On the vehicle – Purchased and financed by the assessee but registered in the name of third parties to whom the assessee leased the vehicles – Claim by assessee for depreciation at normal rate as well as on higher rate – Entitlement – Held: As per s.32, the asset must be 'owned' by the assessee and 'used for the purpose of the business' – In the facts of the case, the assessee as a lessor was the owner of the vehicles, and also used them in the course of business i.e. the business of running on hire – No inference can be drawn from the registration certificate as to ownership of the legal title of the vehicle – Therefore, assessee was entitled to depreciation at normal rate as well as higher rate – Motor Vehicles Act, 1988 – ss.2(30) and 51.

Motor Vehicles Act, 1988 – s.2(30) – 'Owner' – Meaning – Applicability to general law – This provision is a deeming provision that creates a legal fiction of ownership in favour of lessee only for the purpose of the Act – It is not a statement of law on ownership in general.

Words and Phrases:

'Depreciation' – Meaning of.

'Own', 'Owner' and 'Ownership' – Meaning of.

The appellant-assessee, a non-banking finance company sought depreciation on the vehicles, which

were financed and purchased by the assessee, but registered in the name of the third parties i.e. the parties to whom it had leased out the vehicles. The assessee also claimed depreciation at a higher rate on the ground that the vehicles were used in the business of running on hire.

The question for consideration before this Court was whether the assessee was entitled to depreciation on the vehicles at normal rate as well as at higher rate.

Allowing the appeals, the Court

HELD: 1.1. In the facts of the present case, the lessor i.e. the assessee was the owner of the vehicles. As the owner, it used the assets in the course of its business, satisfying both requirements of Section 32 of the Income Tax Act, 1961 and hence, was entitled to claim depreciation in respect of the leased out vehicles. The assessee fulfills even the requirements for a claim of a higher rate of depreciation, and hence is entitled to the same. [Paras 29 and 30] [1106-D-F]

1.2. The provision on depreciation in the Act reads that the asset must be "owned, wholly or partly, by the assessee and used for the purposes of the business". Therefore, it imposes a twin requirement of 'ownership' and 'usage for business' for a successful claim under Section 32 of the Act. [Para 13] [1093-D]

1.3. Depreciation is the monetary equivalent of the wear and tear suffered by a capital asset that is set aside to facilitate its replacement when the asset becomes dysfunctional. Allowance for depreciation is to replace the value of an asset to the extent it has depreciated during the period of accounting relevant to the assessment year and as the value has, to that extent,

been lost, the corresponding allowance for depreciation takes place. [Para 10] [1092-B-D]

P.K. Badiani Vs. Commissioner of Income Tax, Bombay **(1976) 4 SCC562: 1977 (1) SCR 638 – referred to.**

Black's Law Dictionary (5th and 6th Edn.); *Principles & Practice of Valuation* **by Parks (Fifth Edn.);** *Account's Handbook* **by Paton (3rdEdn.) – referred to.**

1.4. It is not correct to say that since the lessees were actually using the vehicles, they were the ones entitled to claim depreciation, and not the assessee. Section 32 requires that the assessee must use the asset for the "purposes of business". It does not mandate usage of the asset by the assessee itself. As long as the asset is utilized for the purpose of business of the assessee, the requirement of Section 32 will stand satisfied, notwithstanding non-usage of the asset itself by the assessee. In the present case, the assessee is a leasing company which leases out trucks that it purchases. Therefore, on a combined reading of Section 2(13) and Section 2(24) of the Act, the income derived from leasing of the trucks would be business income, or income derived in the course of business, and has been so assessed. Hence, it fulfills the second requirement of Section 32 of the Act viz. that the asset must be used in the course of business. [Para 15] [1093-F-H; 1094-A-B]

Commissioner of Income Tax, Karnataka Bangalore Vs. ShaanFinance (P) Ltd., Bangalore **(1998) 3 SCC 605: 1998 (2) SCR 367 – relied on.**

1.5. The definitions of 'own', 'owner' and 'ownership' essentially make ownership a function of legal right or title against the rest of the world. However, it is "*nomen generalissimum*, and its meaning is to be gathered from

the connection in which it is used, and from the subject-matter to which it is applied." [Para 21] [1099-B]

Mysore Minerals Ltd., M.G. Road, Bangalore Vs. Commissioners of Income Tax, Karnataka, Bangalore **(1999) 7 SCC 106: 1999 (2) Suppl. SCR 182 – referred to.**

1.6. As long as the assessee has a right to retain the legal title of the vehicle against the rest of the world, it would be the owner of the vehicle in the eyes of law. A scrutiny of the sale agreement cannot be the basis of raising question against the ownership of the vehicle. The clues qua ownership lie in the lease agreement itself, which clearly point in favour of the assessee. The relevant clauses of the agreement between the assessee and the customer specifically provided that: (i) The assessee was the exclusive owner of the vehicle at all points of time; (ii) If the lessee committed a default, the assessee was empowered to re-possess the vehicle (and not merely recover money from the customer); (iii) At the conclusion of the lease period, the lessee was obliged to return the vehicle to the assessee; (iv) The assessee had the right of inspection of the vehicle at all times. [Paras 22 and 23] [1099-D-F; 1101-D-F]

1.7. The only hindrance to the claim of the assessee is Section 2(30) of the Motor Vehicles Act. The general opening words of the Section say that the owner of a motor vehicle is the one in whose name it is registered, which, in the present case, is the lessee. The subsequent specific statement on leasing agreements states that in respect of a vehicle given on lease, the lessee who is in possession shall be the owner. It cannot be said that in case of ownership of vehicles, the test of ownership is the registration and certification; and that since the certificates were in the name of the lessee, they would be the legal owners of the vehicles and the ones entitled to claim depreciation. Section 2(30) is a deeming provision

that creates a legal fiction of ownership in favour of lessee only for the purpose of the MV Act. It defines ownership for the subsequent provisions of the MV Act. It is not a statement of law on ownership in general. Section 2(30) must be read in consonance with sub-sections (4) and (5) of Section 51 of the MV Act. Thus, the MV Act mandates that during the period of lease, the vehicle be registered, in the certificate of registration, in the name of the lessee and, on conclusion of the lease period, the vehicle be registered in the name of lessor as owner. The Section leaves no choice to the lessor but to allow the vehicle to be registered in the name of the lessee. Thus, no inference can be drawn from the registration certificate as to ownership of the legal title of the vehicle. If the lessee was in fact the owner, he would have claimed depreciation on the vehicles, which was not done. It would be a strange situation to have no claim of depreciation in case of a particular depreciable asset due to a vacuum of ownership. The entire lease rent received by the assessee is assessed as business income in its hands and the entire lease rent paid by the lessee has been treated as deductible revenue expenditure in the hands of the lessee. This reaffirms the position that the assessee is in fact the owner of the vehicle, in so far as Section 32 of the Act is concerned. [Paras 24 to 26] [1102-H; 1103-C-F, G-H; 1103-A-E]

Commissioner of Income-Tax Vs. A.M. Constructions **(1999) 238 ITR775 (AP);** *Commissioner of Income- Tax Vs. Bansal Credits Ltd.* **(2003) 259 ITR 69 (Del);** *Commissioner of Income-Tax Vs. M.G.F. (India) Ltd.* **(2006) 285 ITR 142 (Del.);** *Commissioner of Income-Tax Vs. Annamalai Finance Ltd.* **2005) 275 ITR 451 (Mad) – relied on.**

Case Law Reference:

1998 (2) SCR 367	**relied on**	**Paras 6, 16**

1977 (1) SCR 638	**referred to**	**Para 10**
1999 (2) Suppl. SCR 182	**referred to**	**Para 20**
(1999) 238 ITR 775 (AP)	**relied on**	**Para 27**
(2003) 259 ITR 69 (Del)	**relied on**	**Para 27**
(2006) 285 ITR 142 (Del.)	**relied on**	**Para 27**
2005) 275 ITR 451 (Mad)	**relied on**	**Para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3282 of 2008.

From the Judgment & Order dated 9.02.2007 of the High Court of Karnataka in ITA Nos. 111 of 2000.

WITH

C.A. Nos. 3286, 3287, 3288, 3289 & 3290 of 2008

S. Ganesh, K.V. Mohan, R.K. Raghavan, K.V. Balakrishnan for the Appellant.

A.S. Chandhiok, ASG, Arijit Prasad, Reena Singh, Gurpeet S. Parwanda, Monika Tyagi, Yatinder Chaudhary, Anil Katiyar (for B.V. Balaram Das) for the Respondents.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. In all these appeals, by grant of special leave, by the Revenue, the common question of law relates to the claim of the assessee for depreciation under Section 32 of the Income Tax Act, 1961 (for short "the Act"). The assessment years involved are 1991-1992 to 1996-1997.

2. The assessee is a public limited company, classified by the Reserve Bank of India (RBI) as a non-banking finance company. It is engaged in the business of hire purchase, leasing and real estate etc. The vehicles, on which depreciation was claimed, are stated to have been purchased by the

assessee against direct payment to the manufacturers. The assessee, as a part of its business, leased out these vehicles to its customers and thereafter, had no physical affiliation with the vehicles. In fact, lessees were registered as the owners of the vehicles, in the certificate of registration issued under the Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act").

3. In its return of income for the relevant assessment years, the assessee claimed, among other heads, depreciation in relation to certain assets, (additions made to the trucks) which, as explained above, had been financed by the assessee but registered in the name of third parties. The assessee also claimed depreciation at a higher rate on the ground that the vehicles were used in the business of running on hire.

4. The Assessing Officer disallowed claims, both of depreciation and higher rate, on the ground that the assessee's use of these vehicles was only by way of leasing out to others and not as actual user of the vehicles in the business of running them on hire. It had merely financed the purchase of these assets and was neither the owner nor user of these assets. Aggrieved, the assessee preferred appeals to the Commissioner of Income Tax. In so far as the question of depreciation at normal rate was concerned, the Commissioner (Appeals) agreed with the assessee. However, assessee's claim for depreciation at higher rate did not find favour with the Commissioner.

5. Being dissatisfied, both the assessee and the Revenue carried the matter further in appeal before the Income-tax Appellate Tribunal (for short "the Tribunal"). The Tribunal agreed with the assessee on both the counts. On the question of claim for depreciation on normal rate, the following observations by the Tribunal are very significant:

"…In the present case the business of the assessee-appellant is leasing and hiring of vehicles and other

machinery. It is definitely not a hire purchase, as seen from the lease agreements, copies of some of which are on record. Further, allowing only depreciation is not the matter of dispute in the instant case. The lower authorities have already allowed the depreciation, of course in the normal rates. Therefore, ownership of the vehicles and its use is not at all disputed at any stage before the Assessing Officer and the first appellate authority.

Nothing is brought on record, whether the lessees of the vehicles have claimed the depreciation which were used by them. From this the only inference that can be drawn is that the lessees have not claimed depreciation and it is the appellant alone who has claimed the depreciation being the actual owner of the vehicles."

On the higher rate of depreciation, the Tribunal culled out the observations of the Commissioner of Income Tax (Appeals) as under:

"The CIT (Appeals) considered that the appellant has only financed to purchase the trucks. Therefore, according to him, leasing out the trucks or hiring them does not assume the character of doing business of hiring the trucks. According to the CIT (Appeals) the appellant must use the trucks for its own business of running them on hire to claim the higher rate of depreciation. But the main activity of the appellant is to lease out or give the trucks on hire to others.

*** *** ***

… In the opinion of the CIT (Appeals), the language used in the rules clearly specified that enhanced depreciation allowance is available only when the trucks are used in the business of running them on hire also. The appellant has only a leasing business and it does not run a business of hiring trucks to the public. According to the department the distinction is very clear and there is no case for the

appellant to claim the enhanced depreciation on the business of hiring the trucks."

6. Relying on the decision of this Court in *Commissioner of Income Tax, Karnataka, Bangalore Vs. Shaan Finance (P) Ltd., Bangalore,*[1] the Tribunal held that the assessee, having used the trucks for the purpose of business, was entitled to a higher rate of depreciation at 50% on the trucks leased out by it.

7. Being aggrieved, the revenue preferred an appeal to the High Court under Section 260A of the Act. The High Court framed the following substantial questions of law for its adjudication:-

"Whether the Appellant (assessee) is the owner of the vehicles which are leased out by it to its customers and

Whether the Appellant (assessee) is entitled to the higher rate of depreciation on the said vehicles, on the ground that they were hired out to the Appellant's customers."

8. Answering both the questions in favour of the revenue, the High Court held that in view of the fact that the vehicles were not registered in the name of the assessee, and that the assessee had only financed the transaction, it could not be held to be the owner of the vehicles, and thus, was not entitled to claim depreciation in respect of these vehicles. Hence, these appeals by the assessee.

9. Section 32 of the Act on depreciation, pertinent for the controversy at hand, reads as follows:

"32.(1) In respect of depreciation of—

(*i*) buildings, machinery, plant or furniture, being tangible assets;

1. (1998) 3 SCC 605.

(*ii*) know-how, patents, copyrights, trade marks, licences, franchises or any other business or commercial rights of similar nature, being intangible assets acquired on or after the 1st day of April, 1998, owned, wholly or partly, by the assessee and used for the purposes of the business or profession, the following deductions shall be allowed-

(i) in the case of assets of an undertaking engaged in generation or generation and distribution of power, such percentage on the actual cost thereof to the assessee as may be prescribed ;]

(ii) in the case of any block of assets, such percentage on the written down value thereof as may be prescribed

Provided that no deduction shall be allowed under this clause in respect of—

(a) any motor car manufactured outside India, where such motor car is acquired by the assessee after the 28th day of February, 1975 but before the 1st day of April, 2001, unless it is used—

(i) in a business of running it on hire for tourists ; or

(ii) outside India in his business or profession in another country ; and

(b) any machinery or plant if the actual cost thereof is allowed as a deduction in one or more years under an agreement entered into by the Central Government under section 42

Provided further that where an asset referred to in clause (i) or clause (ii) or clause (iia) as the case may be, is acquired by the assessee during the previous year and is put to use for the purposes of business or profession for a period of less than one hundred and eighty days in

that previous year, the deduction under this sub-section in respect of such asset shall be restricted to fifty per cent of the amount calculated at the percentage prescribed for an asset under clause (i) or clause (ii) [or clause (iia)], as the case may be."

(Emphasis supplied)

10. Depreciation is the monetary equivalent of the wear and tear suffered by a capital asset that is set aside to facilitate its replacement when the asset becomes dysfunctional. In *P.K. Badiani Vs. Commissioner of Income Tax, Bombay,*[2] this Court has observed that allowance for depreciation is to replace the value of an asset to the extent it has depreciated during the period of accounting relevant to the assessment year and as the value has, to that extent, been lost, the corresponding allowance for depreciation takes place.

11. *Black's Law Dictionary* (5th Edn.) defines 'depreciation' to mean, inter alia:

"A fall in value; reduction of worth. The deterioration or the loss or lessening in value, arising from age, use, and improvements, due to better methods. A decline in value of property caused by wear or obsolescence and is usually measured by a set formula which reflects these elements over a given period of useful life of property.... Consistent gradual process of estimating and allocating cost of capital investments over estimated useful life of asset in order to match cost against earnings..."

The 6th Edition defines it, inter alia, in the following ways:

"In accounting, spreading out the cost of a capital asset over its estimated useful life.

A decline in the value of property caused by wear or

2. (1976) 4 SCC 562.

obsolescence and is usually measured by a set formula which reflects these elements over a given period of useful life of property."

12. *Parks in Principles & Practice of Valuation* (Fifth Edn., at page 323) states: As for building, depreciation is the measurement of wearing out through consumption, or use, or effluxion of time. *Paton* has in his *Account's Handbook* (3rd Edn.) observed that depreciation is an out-of-pocket cost as any other costs. He has further observed-the depreciation charge is merely the periodic operating aspect of fixed asset costs.

13. The provision on depreciation in the Act reads that the asset must be "owned, wholly or partly, by the assessee and used for the purposes of the business". Therefore, it imposes a twin requirement of 'ownership' and 'usage for business' for a successful claim under Section 32 of the Act.

14. The Revenue attacked both legs of this portion of the section by contending: (i) that the assessee is not the owner of the vehicles in question and (ii) that the assessee did not use these trucks in the course of its business. It was argued that depreciation can be claimed by an assessee only in a case where the assessee is both, the owner and user of the asset.

15. We would like to dispose of the second contention before considering the first. Revenue argued that since the lessees were actually using the vehicles, they were the ones entitled to claim depreciation, and not the assessee. We are not persuaded to agree with the argument. The Section requires that the assessee must use the asset for the "purposes of business". It does not mandate usage of the asset by the assessee itself. As long as the asset is utilized for the purpose of business of the assessee, the requirement of Section 32 will stand satisfied, notwithstanding non-usage of the asset itself by the assessee. In the present case before us, the assessee

is a leasing company which leases out trucks that it purchases. Therefore, on a combined reading of Section 2(13) and Section 2(24) of the Act, the income derived from leasing of the trucks would be business income, or income derived in the course of business, and has been so assessed. Hence, it fulfills the aforesaid second requirement of Section 32 of the Act viz. that the asset must be used in the course of business.

16. In the case of *Shaan Finance (P) Ltd.* (supra), this Court while interpreting the words "used for the purposes of business" in case of analogous provisions of Section 32A(2) and Section 33 of the Act, dealing with Investment Allowance and Development Rebate respectively, held thus: -

"**9.** Sub-section (2) of Section 32-A, however, requires to be examined to see whether there is any provision in that sub-section which requires that the assessee should not merely use the machinery for the purposes of his business, but should himself use the machinery for the purpose of manufacture or for whatever other purpose the machinery is designed. Sub-section (2) covers all items in respect of which investment allowance can be granted. These items are, ship, aircraft or machinery or plant of certain kinds specified in that sub-section. In respect of a new ship or a new aircraft, Section 32-A(2)(*a*) expressly prescribes that the new ship or the new aircraft should be acquired by an assessee which is itself engaged in the business of operation of ships or aircraft. Under sub-section (2)(*b*), however, any such express requirement that the assessee must himself use the plant or machinery is absent. Section 32-A(2)(*b*) merely describes the new plant or machinery which is covered by Section 32-A. The plant or machinery is described with reference to its purpose. For example, sub-section (2)(*b*)(*i*) prescribes "the purposes of business of generation or distribution of electricity or any other form of power". Sub-section (2)(*b*)(*ii*) refers to small-scale industrial undertakings which may use the machinery for the business or manufacture or production of any article,

and sub-section (2)(*b*)(*iii*) refers to the business of construction, manufacture or production of any article or thing other than that specified in the Eleventh Schedule. Sub-section 2(*b*), therefore, refers to the uses to which the machinery can be put. It does not specify that the assessee himself should use the machinery for these purposes. In the present case, the person to whom the machinery is hired does use the machinery for specified purposes under Section 32-A(2)(*b*)(*iii*). That person, however, is not the owner of the machinery. The High Courts of Karnataka and Madras have held that looking to the requirements specified in Section 32-A the assessees, in the present case, fulfil all the requirements of that section, namely, (*1*) the machinery is owned by the assessees; (*2*) the machinery is used for the purpose of the assessees' business and; (*3*) the machinery is as specified in sub-section (2).

10. We are inclined to agree with this reasoning of the High Courts of Karnataka and Madras."

17. The same judgment commented on the analogous nature of Section 33 on Development Rebate and clarified that the phrase "used for the purpose of business" does not necessarily require a usage of the asset itself. It held thus:

"**11.** The provisions relating to investment allowance are akin to the provisions under Section 33 of the Income Tax Act, 1961 relating to development rebate…

*** *** ***

12. Since the provisions of Section 33 dealing with development rebate are similar to the provisions of Section 32-A, it is necessary to look at cases dealing with the grant of development rebate under Section 33. In the case of *CIT v. Castlerock Fisheries (1980) 126 ITR 382* the Kerala High Court considered the case of an assessee

which temporarily let out its cold-storage plant to a sister concern. The income derived by such letting was assessed by the Income Tax Officer in the hands of the assessee as business income of the assessee for the relevant accounting years. The assessee claimed development rebate in respect of the cold-storage plant. The High Court said that it was accepted by the department that in letting out the plant and machinery, the assessee was still doing business and the hire charges which it had received, had been assessed as business income of the assessee. Hence the assessee had complied with all the conditions for the grant of development rebate including the condition that the assessee had used the machinery for the purposes of its business. The High Court said that it must, therefore, necessarily be assumed that the conditions laid down in Section 33(1)(*a*) that the machinery or plant is wholly used for the purposes of the business carried on by the assessee, is duly satisfied and the assessee is entitled to development rebate. In appeal before this Court, a Bench of three Judges of this Court upheld the decision of the Kerala High Court in the above case in *CIT v. Castle Rock Fisheries* (1997) 10 SCC 77. This Court also held that since the department has proceeded on the explicit basis that despite the fact that the plant had been temporarily let out by the assessee to a sister concern, the plant and machinery was nevertheless being used by the assessee for its business purpose by treating the income derived by the assessee by such letting out as business income of the assessee, the development rebate must be considered as having been rightly granted. Therefore, where the business of the assessee consists of hiring out machinery and/or where the income derived by the assessee from the hiring of such machinery is business income, the assessee must be considered as having used the machinery for the purposes of its business.

13. A similar view has been taken by the Andhra Pradesh

High Court in the case of *CIT v. Vinod Bhargava*-(1988) 169 ITR 549 (AP) where Jeevan Reddy, J. (as he then was) held that where leasing of machinery is a mode of carrying on business by the assessee the assessee would be entitled to development rebate. The Court observed (p. 551):

> "[O]nce it is held that leasing out of the machinery is one mode of doing business by the assessee and the income derived from leasing out is treated as business income it would be contradictory, in terms, to say that the machinery is not used wholly for the purpose of the assessee's business."

18. Hence, the assessee meets the second requirement discussed above. The assessee did use the vehicles in the course of its leasing business. In our opinion, the fact that the trucks themselves were not used by the assessee is irrelevant for the purpose of the section.

19. We may now advert to the first requirement i.e. the issue of ownership. No depreciation allowance is granted in respect of any capital expenditure which the assessee may be obliged to incur on the property of others. Therefore, the entire case hinges on the question of ownership; if the assessee is the owner of the vehicles, then he will be entitled to the claim on depreciation, otherwise, not.

20. In *Mysore Minerals Ltd., M.G. Road, Bangalore Vs. Commissioners of Income Tax, Karnataka, Bangalore,*[3] this Court said thus:

> "…authorities shows that the very concept the depreciation suggests that the tax benefit on account of depreciation legitimately belongs to one who has invested in the capital asset is utilizing the capital asset and thereby losing gradually investment caused by wear and tear, and would

3. (1999) 7 SCC 106.

> need to replace the same by having lost its value fully over a period of time."

21. *Black's Law Dictionary* (6th Edn.) defines 'owner' as under:

> "Owner. The person in whom is vested the ownership, dominion, or title of property; proprietor. He who has dominion of a thing, real or personal, corporeal or incorporeal, which he has a right of enjoy and do with as he pleases, even to spoil or destroy it, as far as the law permits, unless he be prevented by some agreement or covenant which restrains his right.
>
> The term is, however, a nomen generalissimum, and its meaning is to be gathered from the connection in which it is used, and from the subject-matter to which it is applied. The primary meaning of the word as applied to land is one who owns the fee and who has the right to dispose of the property, but the terms also included one having a possessory right to land or the person occupying or cultivating it.
>
> The term "owner" is used to indicate a person in whom one or more interests are vested his own benefit. The person in whom the interests are vested has 'title' to the interests whether he holds them for his own benefit or the benefit of another. Thus the term "title" unlike "owner"..."

It defines the term 'ownership' as –

> "Collection of right to use and enjoy property, including right to transmit it to others.... The right of one or more persons to possess or use a thing to the exclusion of others. The right by which a thing belongs to some one in particular, to the exclusion of all other persons. The exclusive right of possession, enjoyment or disposal; involving as an essential attribute the right to control,

handle, and dispose."

The same dictionary defines the term "own" as 'To have a good legal title'.

These definitions essentially make ownership a function of legal right or title against the rest of the world. However, as seen above, it is "*nomen generalissimum*, and its meaning is to be gathered from the connection in which it is used, and from the subject-matter to which it is applied."

22. A scrutiny of the material facts at hand raises a presumption of ownership in favour of the assessee. The vehicle, along with its keys, was delivered to the assessee upon which, the lease agreement was entered into by the assessee with the customer. Moreover, the relevant clauses of the agreement between the assessee and the customer specifically provided that:

(i) The assessee was the exclusive owner of the vehicle at all points of time;

(ii) If the lessee committed a default, the assessee was empowered to re-possess the vehicle (and not merely recover money from the customer);

(iii) At the conclusion of the lease period, the lessee was obliged to return the vehicle to the assessee;

(iv) The assessee had the right of inspection of the vehicle at all times.

For the sake of ready reference, the relevant clauses of the lease agreement are extracted hereunder:-

"2. Lease Rent

The lessee shall, during the period of lease punctually pay to the lessor free of any deduction whatsoever as rent for the assets the sum of moneys specified in the Schedule 'B' hereto. All rents shall be paid at the address of the Lessor shown above or as otherwise directed by the Lessor in writing. The rent shown in Schedule 'B' shall be paid month on 1st day of each month and the first rent shall be paid on execution thereof.

4. Ownership

The assets shall at all times remain the sole and exclusive property of the lessor and the lessee shall have no right, title or interest to mortgage, hypothecate or sell the same as bailee

9. Inspection

The Lessor shall have the right at all reasonable time to enter upon any premises where the assets is believed to be kept and inspect and/or test the equipment and/or observe its use.

18. Default

If the lessee shall make default in payment of moneys or rent payable under the provisions of this agreement, the Lessee shall pay to the Lessor on the sum or sums in arrears compensation at the rate of 3% per month until payment thereof, such compensation to run from the day to day without prejudice to the lessor's rights under any terms, conditions and agreements herein expressed or implied. All costs incurred by the Lessor in obtaining payment of such arrears or in endeavoring to trace the whereabouts of the equipments or in obtaining or endeavouring to obtain possession thereof whether by action, suit or otherwise, shall be recoverable from the lessee in addition to and without prejudice to the lessors right for breach of this lease.

19. Expiration of Lease:

Upon the expiration of this Lease, the Lessee shall deliver to the Lessor the assets at such place as the Lessor may specify in good repair, condition and working order. As soon as the return of the asset the Lessor shall refund the amount of security deposit. If the lessee fails to deliver the equipment to the Lessor in accordance with any direction given by the Lessor, the Lessee shall be deemed to be the tenant of the assets at the same rental and upon the same terms herein expressed and such tenancy may be terminated by the Lessor immediately upon default by the lessee hereunder or upon 7 days notice previously given..”

23. The Revenue’s objection to the claim of the assessee is founded on the lease agreement. It argued that at the end of the lease period, the ownership of the vehicle is transferred to the lessee at a nominal value not exceeding 1% of the original cost of the vehicle, making the assessee in effect a financer. However we are not persuaded to agree with the Revenue. As long as the assessee has a right to retain the legal title of the vehicle against the rest of the world, it would be the owner of the vehicle in the eyes of law. A scrutiny of the sale agreement cannot be the basis of raising question against the ownership of the vehicle. The clues qua ownership lie in the lease agreement itself, which clearly point in favour of the assessee. We agree with the following observations of the Tribunal in this regard:

“20. It is evident from the above that after the lessee takes possession of the vehicle under a lease deed from the appellant-company it (sic.) shall be paying lease rent as prescribed in the schedule. The ownership of the vehicles would vest with the appellant-company viz., ICDS as per clause (4) of the agreement of lease. As per clause (9) of the Lease agreement, M/s. ICDS is having right of inspection at any time it wants. As per clause (18) of the Lease agreement, in case of default of lease rent, in addition to expenses, interest etc. the appellant company

is entitled to take possession of the vehicle that was leased out. Finally, as per clause (19), on the expiry of the lease tenure, the lessee should return the vehicle to the appellant company in working order.

21. It is true that a lease of goods or rental or hiring agreement is a contract under which one party for reward allows another the use of goods. A lease may be for a specified period or in perpetuity. A lease differs from a hire purchase agreement in that lessee or hirer, is not given an option to purchase the goods. A hiring agreement or lease unlike a hire purchase agreement is a contract of bailment, plain and simple with no element of sale inherent. A bailment has been defined in S.148 of the Indian Contract Act, as “the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them.

22. From the above discussion, it is clear that the transactions occurring in the business of the assessee-appellant are leases under agreement, but not hire purchase transactions. In fact, they are transactions of ‘hire’. Even viewed from the angle of the author of ‘Lease Financing and Hire Purchase’, the views of whom were discussed in pages 16 and 17 of this order, the transactions involved in the appellant business are nothing but lease transactions.

23. As far as the factual portion is concerned now we could come to a conclusion that leasing of vehicles is nothing but hiring of vehicles. These two aspects are one and the same. However, we shall discuss the case law cited by both the parties on the point.”

24. The only hindrance to the claim of the assessee, which is also the lynchpin of the case of the Revenue, is Section 2(30)

of the MV Act, which defines ownership as follows: -

> ""owner" means a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase agreement, or an agreement of lease or an agreement of a hypothecation, the person in possession of the vehicle under that agreement."

25. The general opening words of the Section say that the owner of a motor vehicle is the one in whose name it is registered, which, in the present case, is the lessee. The subsequent specific statement on leasing agreements states that in respect of a vehicle given on lease, the lessee who is in possession shall be the owner. The Revenue thus, argued that in case of ownership of vehicles, the test of ownership is the registration and certification. Since the certificates were in the name of the lessee, they would be the legal owners of the vehicles and the ones entitled to claim depreciation. Therefore, the general and specific statements on ownership construe ownership in favour of the lessee, and hence, are in favour of the Revenue.

26. We do not find merit in the Revenue's argument for more than one reason: (i) Section 2(30) is a deeming provision that creates a legal fiction of ownership in favour of lessee only for the purpose of the MV Act. It defines ownership for the subsequent provisions of the MV Act, not for the purpose of law in general. It serves more as a guide to what terms in the MV Act mean. Therefore, if the MV Act at any point uses the term owner in any Section, it means the one in whose name the vehicle is registered and in the case of a lease agreement, the lessee. That is all. It is not a statement of law on ownership in general. Perhaps, the repository of a general statement of law on ownership may be the Sale of Goods Act; (ii) Section 2(30) of the MV Act must be read in consonance with sub-sections (4) and (5) of Section 51 of the MV Act, which were referred to

by Mr. S. Ganesh, learned senior counsel for the assessee. The provisions read as follows: -

> "(4) No entry regarding the transfer of ownership of any motor vehicle which is held under the said agreement shall be made in the certificate of registration except with the written consent of the person whose name has been specified in the certificate of registration as the person with whom the registered owner has entered into the said agreement.
>
> (5) Where the person whose name has been specified in the certificate of registration as the person with whom the registered owner has entered into the said agreement, satisfies the registering authority that he has taken possession of the vehicle from the registered owner owing to the default of the registered owner under the provisions of the said agreement and that the registered owner refuses to deliver the certificate of registration or has absconded, such authority may, after giving the registered owner an opportunity to make such representation as he may wish to make (by sending to him a notice by registered post acknowledgment due at his address entered in the certificate of registration) and notwithstanding that the certificate of registration is not produced before it, cancel the certificate and issue a fresh certificate of registration in the name of the person with whom the registered owner has entered into the said agreement:
>
> Provided that a fresh certificate of registration shall not be issued in respect of a motor vehicle, unless such person pays the prescribed fee:
>
> Provided further that a fresh certificate of registration issued in respect of a motor vehicle, other than a transport vehicle, shall be valid only for the remaining period for which the certificate cancelled under this sub-section

would have been in force."

Therefore, the MV Act mandates that during the period of lease, the vehicle be registered, in the certificate of registration, in the name of the lessee and, on conclusion of the lease period, the vehicle be registered in the name of lessor as owner. The Section leaves no choice to the lessor but to allow the vehicle to be registered in the name of the lessee Thus, no inference can be drawn from the registration certificate as to ownership of the legal title of the vehicle; and (iii) if the lessee was in fact the owner, he would have claimed depreciation on the vehicles, which, as specifically recorded in the order of the Appellate Tribunal, was not done. It would be a strange situation to have no claim of depreciation in case of a particular depreciable asset due to a vacuum of ownership. As afore-noted, the entire lease rent received by the assessee is assessed as business income in its hands and the entire lease rent paid by the lessee has been treated as deductible revenue expenditure in the hands of the lessee. This reaffirms the position that the assessee is in fact the owner of the vehicle, in so far as Section 32 of the Act is concerned.

27. Finally, learned senior counsel appearing on behalf of the assessee also pointed out a large number of cases, accepted and unchallenged by the Revenue, wherein the lessor has been held as the owner of an asset in a lease agreement. [*Commissioner of Income-Tax Vs. A.M. Constructions;*[4] *Commissioner of Income- Tax Vs. Bansal Credits Ltd.;*[5] *Commissioner of Income-Tax Vs. M.G.F. (India) Ltd.;*[6] *Commissioner of Income-Tax Vs. Annamalai Finance Ltd.].*[7] In each of these cases, the leasing company was held to be the owner of the asset, and accordingly held entitled to claim depreciation and also at the higher rate applicable on the asset hired out. We are in complete agreement with these decisions on the said point.

28. There was some controversy regarding the invoices issued by the manufacturer – whether they were issued in the name of the lessee or the lessor. For the view we have taken above, we deem it unnecessary to go into the said question as it is of no consequence to our final opinion on the main issue. From a perusal of the lease agreement and other related factors, as discussed above, we are satisfied of the assessee's ownership of the trucks in question.

29. Therefore, in the facts of the present case, we hold that the lessor i.e. the assessee is the owner of the vehicles. As the owner, it used the assets in the course of its business, satisfying both requirements of Section 32 of the Act and hence, is entitled to claim depreciation in respect of additions made to the trucks, which were leased out.

30. With regard to the claim of the assessee for a higher rate of depreciation, the import of the same term "purposes of business", used in the second proviso to Section 32(1) of the Act gains significance. We are of the view that the interpretation of these words would not be any different from that which we ascribed to them earlier, under Section 32 (1) of the Act. Therefore, the assessee fulfills even the requirements for a claim of a higher rate of depreciation, and hence is entitled to the same.

31. In this regard, we endorse the following observations of the Tribunal, which clinch the issue in favour of the assessee.

"15. The CBDT vide Circular No. 652, dated 14-6-1993 has clarified that the higher rate of 40% in case of lorries etc. plying on hire shall not apply if the vehicle is used in a non- hiring business of the assessee. This circular cannot

4. (1999) 238 ITR 775 (AP).
5. (2003) 259 ITR 69 (Del).
6. (2006) 285 ITR 142 (Del).
7. (2005) 275 ITR 451 (Mad).

be read out of its context to deny higher appreciation in case of leased vehicles when the actual use is in hiring business.

(Emphasis supplied)

Perhaps, the author meant that when the actual use of the vehicle is in hire business, it is entitled for depreciation at a higher rate.

*** *** ***

39. The gist of the decision of the apex court in the case of Shaan Finance (P) Ltd. is that where the business of the assessee consists of hiring out machinery and/ or where the income derived by the assessee from the hiring of such machinery is business income, the assessee must be considered as having used the machinery for the purpose of business.

40. In the present case, the business of the assessee consists of hiring out machinery and trucks where the income derived by the assessee from hiring of such machinery is business income. Therefore, the assessee-appellant viz. ICDS should be considered as having used the trucks for the purpose of business.

41. It was further brought to our notice that the Hon'ble Karnataka High Court in its judgment in ITRC No. 789 of 1998 for the asst. year 1986- 87 in the case of the assessee- appellant itself (viz. ICDS) has already decided the issue in question in favour of the assessee, confirming the decision of the CIT (A) and the ITAT holding that the assessee company is entitled to the investment allowance and additional depreciation. In this judgment of the Karnataka High Court the decision of the Supreme Court reported in 231 ITR 308 was relied upon. Therefore we have no hesitation to hold that the appellant- company is

entitled to a higher rate of depreciation at 50% on the trucks leased out by it. We therefore, reverse the orders of the CIT (Appeals) on this issue."

32. For the foregoing reasons, in our opinion, the High Court erred in law in reversing the decision of the Tribunal. Consequently, the appeals are allowed; the impugned judgments are set aside and the substantial questions of law framed by the High Court, extracted in para 6 (supra), are answered in favour of the assessee and against the Revenue. There will, however, be no order as to costs.

K.K.T. Appeals allowed.

STATE BANK OF INDIA AND ORS.
v.
NARENDRA KUMAR PANDEY
(Civil Appeal No. 263 of 2013)

JANUARY 14, 2013

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

Service Law:

State Bank of India Officers' Service Rules – rr.68(2)(v), 68(2)(ix)(a), 68(2) (viii) and 68(2)(xix) – Departmental ex parte inquiry – Dismissal from service – Writ petition – High Court set aside dismissal order – Held: Delinquent officer rightly dismissed from service – Departmental inquiry was held as per the procedure laid down under Service Rules – In the absence of procedural irregularity, interference of High Court u/Art. 226 of Constitution not correct – Constitution of India, 1950 – Art.226.

Departmental inquiry – Degree of proof – Disciplinary authority is expected to prove the changes on preponderance of probability and not on proof beyond reasonable doubt.

Departmental proceedings were initiated against the respondent, an officer of the appellant-Bank for violating the rules of State Bank of India Officers Service Rules. The respondent-officer did not participate in the inquiry proceedings and in fact walked out of the inquiry. Therefore, the Inquiry Authority concluded the proceedings *ex-parte*. The Disciplinary Authority recommended for dismissal of the charged officer. The appointing authority decided to dismiss the charged officer from service in terms of r.67(j) r/w. r.68 of the Service Rules. The charged officer instead of availing the remedy of statutory appeal provided u/r.69 of Service

Rules, filed writ petition u/Art. 226 of the Constitution. High Court allowed the petition holding that inquiry was held in violation of r.68(2)(ix) as the Presenting Officer had failed to discharge his obligation of making available the list of all the documents and witnesses to the charged officer. Hence the present appeal by the Bank.

Allowing the appeal, the Court

HELD: 1.1 Appellant-Bank in the present case has succeeded in establishing the charges levelled against the delinquent officer and he was rightly dismissed from service which called for no interference by the High Court under Article 226 of the Constitution of India. [Para 26] [1128-F-G]

1.2. The charged officer, admittedly, did not choose to nominate his defence representative in spite of several opportunities given by the Inquiring Authority nor had he submitted any written statement to the Inquiring Authority. Neither the charged officer nor any defence representative appeared before the Inquiring Authority. The arguments that were raised before the High Court, of non-compliance of the procedure, could have been raised by the charged officer before the Inquiring Authority, but the same was not done and he had not co-operated with the inquiry proceedings. In the said circumstances, the Inquiring Authority was entitled to hold the enquiry *ex parte* as provided under Rule 68(2)(xix) of State Bank of India Officers Service Rules. [Para 17] [1124-D-F]

2. The High Court has committed an error in holding that the charge-sheet should have mentioned about the details of the documents and the names of the witnesses which the Bank proposed to examine and a list to that effect should have been appended to the charge-sheet. The charge-sheet need not contain the details of the

documents or the names of the witnesses proposed to be examined to prove the charges or a list to that effect unless there is a specific provision to that effect. Charge-sheet is not expected to be a record of evidence. Fair procedure does not mean giving of copies of the documents or list of witnesses along with the charge-sheet. Of course, statement of allegations has to accompany the charge-sheet, when required by the Service Rules. Under the circumstances of the case, the Inquiring Authority had no other alternative but to hold the inquiry *ex parte*. The Inquiring Authority and the Presenting Officer had followed procedures laid down under Rules 68(2)(v), 68(2)(ix)(a), 68(2)(viii) and 68(2)(xix) of the Service Rules. [Paras 18 and 19] [1124-G-H; 1125-A-B, H; 1126-A-B]

3.1. The High Court also committed an error in holding that since no witness was examined in support of charges, it was a case of no evidence. In an *ex parte* inquiry, if the charges are borne out from documents kept in the normal course of business, no oral evidence is necessary to prove those charges. When the charged officer does not attend the inquiry, then he cannot contend that the Inquiring Authority should not have relied upon the documents which were not made available or disclosed to him. Of course, even in an *ex parte* inquiry, some evidence is necessary to establish the charges, especially when the charged officer denies the charges, uncontroverted documentary evidence in such situation is sufficient to prove the charges. [Para 20] [1126-B-D]

3.2. The Inquiring Authority examined each and every charge levelled against the charged officer and the documents produced by the presenting officer and came to the conclusion that most of the charges were proved. In a departmental inquiry, the disciplinary authority is expected to prove the charges on preponderance of probability and not on proof beyond reasonable doubt. [Para 21] [1126-E-F]

Bank of India v. Apurba Kumar Saha **(1994) 2 SCC 615 – relied on.**

3.3. The documents produced by the Bank, which were not controverted by the charged officer, supports all the allegations and charges levelled against the charged officer. In a case, where the charged officer had failed to inspect the documents in respect of the allegations raised by the Bank and not controverted, it is always open to the Inquiring Authority to accept the same. [Para 21] [1126-F-G]

Bank of India v. Apurba Kumar Saha **(1994) 2 SCC 615 – relied on.**

3.4. Even if the Inquiring Authority set the charged officer *ex parte* that would not absolve him from deciding that the charges levelled against him were proved or not. In other words, no punishment could be imposed without an inquiry. In the present case, the Inquiring Authority had elaborately considered the charges levelled against the charged officer and also the materials produced by the bank because some evidence is necessary to establish the charges. In some cases, proof may only be documentary and in some cases oral. The requirement of proof depends on the facts and circumstances of each case. [Para 26] [1128-D-F]

4. Where a workman intentionally refuses to participate in the inquiry, cannot complain that the dismissal is against the principles of natural justice. Once the inquiry proceeds *ex parte*, it is not necessary for the Inquiring Authority to again ask the charged officer to state his defence orally or in writing. In the present case, the conduct of the charged officer cannot be appreciated who did not appear before the Inquiring Authority and

offered any explanation to the charges levelled against him but approached the High Court stating that the principles of natural justice had been violated. [Para 25] [1128-B-D]

Lakshmi Devi Sugar Mills Ltd. v. Pt. Ram Sarup **AIR 1957 SC 82: 1956 SCR 916 – relied on.**

5. The High Court under Article 226 of the Constitution of India was not justified in interfering with the order of dismissal passed by the appointing authority after a full-fledged inquiry, especially when the Service Rules provide for an alternative remedy of appeal. The High Court while exercising powers under Article 226 of the Constitution does not act as an appellate authority. In the present case, no procedural irregularity has been committed either by the Bank, Presenting Officer or the Inquiring Authority. Disciplinary proceedings were conducted strictly in accordance with the Service Rules. [Para 23] [1127-C-D, F]

State Bank of India and Ors. v. Ramesh Dinkar Punde **(2006) 7 SCC 212: 2006 (4) Suppl. SCR 511;** *State of Andhra Pradesh v. Sree Rama Rao* **AIR 1963 SC 1723: 1964 SCR 25 – relied on.**

Case Law Reference:

(1972) 4 SCC 618	**relied on**	**Para 21**
(1999) 8 SCC 90	**relied on**	**Para 21**
(1994) 2 SCC 615	**relied on**	**Para 22**
2006 (4) Suppl. SCR 511	**relied on**	**Para 23**
1964 SCR 25	**relied on**	**Para 24**
1956 SCR 916	**relied on**	**Para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 263 of 2013.

From the Judgment & Order dated 22.09.2011 of the High Court of Judicature at Allahabad, Lucknow Bench in W.P. No. 757 of 1999.

H.P. Rawal, ASG, Sanjay Kapur, Priyanka Das, Anmol Chandan for the Appellant.

Caveator-In-Person.

The Judgment of the Court was delivered by

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

2. We are, in this case, concerned with the legality of the judgment of the High Court setting aside an order dated 11.03.1999 passed by the State Bank of India dismissing the charged officer (respondent) from service in exercise of powers conferred under Article 226 of the Constitution of India.

3. The charged officer, herein, while he was functioning as the Deputy Manager of the Bank was served with a charge-sheet dated 15.02.1995 by the Joint Manager (Operations) [Disciplinary Authority] stating that while he was posted as officer JMGS-I at Government Business Branch, Kanpur, and Accountant and officiating Branch Manager at Kalpi Road (Kanpur) Branch from 21st May 1985 to 20th October 1987 and 21st October 1987 to 22nd May 1991 respectively had failed to discharge his duties with utmost integrity, honesty, devotion and diligence and acted in a manner unbecoming of a Bank Official and highly prejudicial to the Bank's interest in deliberate violation of Rules 50(3), 50(4), 50(9) and 60(2) of the State Bank of India Officers Service Rules (in short 'the Service Rules').

4. Altogether, 12 charges were framed against him. Charges are given under for easy reference:

Charge No.1

You raised a number of spurious entries by debiting

LOCL/LIT A/c at Kalpi Road Branch, Kanpur and afforded fictitious credit to the Current Account No.7/12 in the name of Shri O.S. Srivastava and Savings Bank Account No. 9095 in the name of Shri Surinder Kumar. Both the account holders were fictitious/non-existent. Although the account opening form in the case of Shri O.S. Srivastava is not traceable, it is apparent from the account opening form of Shri Surinder Kumar, that the account was allowed/authorized by you. It shows your alleged involvement in the fraud.

Charge No.2

You granted and opened under your authentication Demand Loan Accounts in the name of Fictitious/non-existent persons against pledge of fictitious NSCs with a view to avail yourself the Bank's funds unauthorisedly and in an illegal manner.

Charge No.3

You availed a conveyance loan for Rs.78,000/- for purchase of a Car. The proceeds of the loan were credited to your account on 28.05.1988 and were withdrawn by you in cash the same day but you did not purchase the vehicle within a month of availment of loan as per Bank's instructions.

Charge No. 4

(i) You got issued a number of cheque books on your savings bank and current account, although only few cheque leaves were used by you. The requisite cheque book requisition slips or your specific requests for issue of cheque books are not available. Thus, your act of getting issued several cheque books to yourself without exhausting the earlier ones, is highly irregular on your part and in contravention of the Bank's laid down instructions

(ii) You utilized a cheque leaf bearing no. 422276 for

drawing on your savings bank account no. 5603 with Kalpi Road Branch although the cheque book containing this cheque leaf was issued to some other account holder and has been recorded as "surrendered and destroyed" in the Branch books. Thus, you have taken unauthorized possession of the cheque which was incorrectly shown as destroyed in the Branch books.

(iii) A few Savings Bank Cheque books have been found to be missing from the branch as no record for issue of these cheque books to account holders is there in the Branch Books.

Charge No.5

You deliberately withheld DD Purchase documents received at the Branch by not responding these by debit to the relative accounts, with a view to providing undue benefits to the customers at the bank's cost.

Charge No.6

You misutilised the Bank's funds by negotiation of fake instruments as DD on Patna. These DDs were returned unpaid subsequently and the amounts were made good by you either in cash or through your savings bank account.

Charge No.7

You negotiated cheques drawn on local branches at Kanpur as DD to yourself in utter disregard to Bank's laid down instructions.

Charge No.8

Although no STDR/TDR existed in the name of Shri O.S. Srivastava in branch books, you made false noting in the cheque referred and returned register against the entries in

respect of two cheques drawn by him on his current account to give misleading information that Shri Srivastava had STDR/ TDR. The balance in the account of Shri O.S. Srivastava was not sufficient to pay these cheques. Due to the false and misleading information furnished by you to the then Branch Manager, these cheques were allowed on both the occasions.

Charge No.9

Your savings bank account no. 5603 shows numerous debit/credit transactions (other than salary and allowances) which you did not explain (sic) for heavy amounts.

GOVERNMENT BUSINESS BRANCH, KANPUR

Charge No.10

Your Savings Bank Account No.38 with Govt. Business Branch (Kanpur) shows frequent credit transactions (both cash and transfer) other than salary for heavy amounts which you could not explain properly.

Charge No.11

In your Savings Bank Account No. 38, while most of the withdrawals from the account were made by way of withdrawal forms, you got 4 cheque books issued and utilized approximately 15 cheques only. You did not advise, how the remaining cheque, were utilized. It is noticed that out of unutilized cheques, one cheque bearing no. 835524 was issued by you on 17.9.1987 favouring SBI SEE Co-op. Credit Society Ltd. Unnao for Rs.500/- on Kalpi Road (Kanpur) Branch, where no Savings Bank Account in your name existed in the books of that Branch. Thus, you have misutilised the facility, and issued the cheque without funds in your account.

Charge No.12

(i) You issued a Cheque no.315083 dated 4.4.86 for Rs.6030.08 favouring M/s Society Jewellers which was returned unpaid due to insufficient balance in your account no.38. On representation of the cheque on 23.4.86, it was paid after cash deposit of Rs.6,000/- by you. Thus, you issued cheque without maintaining sufficient balance in your account.

(ii) You issued cheque no. 315830 dated 23.6.87 for Rs.4,061/- favouring M/s Bhagat Ram Jai Narain without maintaining sufficient balance in your savings Bank Account No.38. The cheque could be paid when you deposited Rs.14,000/- cash on 24.6.87.

(iii) Your such actions were highly prejudicial to the Bank's interest and unbecoming of Bank Official.

5. Along with the chargesheet, statements of allegations were also annexed.

6. The charged officer was informed that it was decided to hold a departmental inquiry against him in terms of Rule 68(2)(ii) of the Service Rules read with Rule 67 in support of the above-mentioned charges. The charged officer was given 15 days time to submit his statement of defence. The charged officer submitted his reply on 29.03.1995 denying all the charges. On 24.03.1995, the charged officer sought permission from the Bank for inspection of the relevant documents, which was permitted by the Bank on 29.04.1995. The Disciplinary Authority vide letter No. Vig/96/11 dated 08.05.1996 appointed the Inquiring Authority to inquire into the charges levelled against the charged officer as per the charge sheet dated 15.02.1995. The Inquiring Authority issued a notice dated 11.05.1996 to the charged officer informing him of the holding of the preliminary hearing on 11.06.1996. From 11.06.1996 to 07.11.1997, the Inquiring Authority conducted inquiry on 17 dates and many a times the inquiry was adjourned on the request of the charged

officer. He chose to remain absent on as many as 7 dates of hearing.

7. We find from the records that the Inquiring Authority permitted the charged officer to inspect the records in the presence of investigating officer and fixed the date on 20.06.1997. Due to some inconvenience, nothing transpired on 20.06.1997 and another date was fixed i.e. 21.07.1997. Consequently, last opportunity was given to the charged officer to go through the documents and submit a list of documents and witnesses. The charged officer, it is seen, did not avail the opportunity and remained absent on 21.07.1997. On 06.11.1997, the charged officer walked out of the inquiry. The Inquiring Authority, however, continued and concluded ex parte on 07.11.1997.

8. We notice that the charged officer did not even choose to nominate his defence representative in spite of various opportunities given by the Inquiring Authority. The presenting officer had sent his written brief on 08.12.1997 but no written brief was sent by the charged officer. He was given time upto 14.01.1998. The presenting officer had informed the Inquiring Authority that a list of bank documents was forwarded to the charged officer vide his letter dated 21.05.1997 but the charged officer did not accept the same. The presenting officer was in fact present on 13.09.1997 and 14.06.1997 in the bank office but the charged officer did not report for the inspection of the bank documents on those days as well. The Inquiring Authority had written a letter dated 25.06.1997 informing the charged officer that the presenting officer had been instructed to forward a list of bank documents and witnesses by 30.06.1997 and get the bank's documents inspected by him in his presence before 12.07.1997 that was the last opportunity given to the charged officer. The same was also not availed of. In the said circumstances, the Inquiring Authority had no other alternative but to conduct the inquiry ex parte. The presenting officer then produced original documents before the Inquiring

Authority and after elaborate consideration of the charges, the statements of allegations and the supporting documents and after hearing the presenting officer, the Inquiring Authority came to the conclusion that charge nos. 1, 2, 3, 5, 7, 8, 9, 10 and 12 were proved. Charge nos.4, 6 and 11 were found to be partly proved. The Inquiring Authority vide his report dated 15.01.1998 concluded that the charged officer had failed to discharge his duties with utmost integrity, honesty, devotion and diligence and acted in a manner unbecoming of a bank official and highly prejudicial to the Bank's interest. The Disciplinary Authority later considered the relevant records of the case, including the findings of the Inquiring Authority and the submission made by the charged officer and submitted his recommendation to the appointing authority. The appointing authority, after going through the relevant records of the case, the charge-sheet, proceedings of the inquiry, written briefs of the presenting officer, the findings of the Inquiring Authority etc., decided to dismiss the charged officer from service in terms of Rule 67(j) of the Service Rules read with Rule 68 of the Service Rules. The order was passed to that effect on 11.03.1999. The charged officer was also informed that he has a right of appeal to the appellate authority as per Rule 69 of the Service Rules.

9. The charged officer without availing of the remedy of a statutory appeal approached the High Court under Article 226 of the Constitution of India. The High Court, however, took the view that the presenting officer had failed to discharge his obligation of making available the list of all the documents and witnesses to the charged officer. The Court held Rule 68(2)(ix) contemplates that the Inquiry officer must ensure supply of list of documents and witnesses to be relied on by Bank in support of its charges. The Court took the view that the presenting officer did not place anything on record to show when the list was made available to the charged officer. Further, it was also noticed that the bank had failed to examine any witnesses in respect of the charges and, therefore, the findings recorded by the Inquiring Authority could not be sustained. The Court,

therefore, allowed the writ petition and quashed the impugned order dated 11.03.1999 with liberty to hold a fresh inquiry. There was a further direction to the Bank to pay arrears of subsistence allowance treating the period of his absence as deemed suspension.

10. Shri Harin P. Rawal, learned Additional Solicitor General appearing for the Bank, submitted that the High Court has committed an error in interfering with the order of dismissal especially when the charged officer had an alternative remedy of appeal under Rule 69 of the Service Rules. Learned counsel also submitted that the list of bank documents for inspection had been enclosed by the presenting officer vide letter dated 21.05.1997 to the charged officer which the charged officer had refused to accept. Further, it was also pointed out that vide letter dated 30.05.1997, the presenting officer had enclosed the list of bank documents and requested the charged officer to inspect the same at the relevant branch which also the charged officer refused to accept. Learned counsel also pointed out that the bank had given sufficient opportunities to inspect those documents in the bank's office, the said fact was taken note of by the Inquiring Authority. Learned counsel also pointed out that where a bank employee who had refused to avail of the opportunities provided to him in a disciplinary proceeding of defending himself against the charges of misconduct cannot be permitted to complain later that he had been denied a reasonable opportunity of defending himself of the charges levelled against him. Learned counsel also pointed out that in a disciplinary proceeding, the standard of proof required is preponderance of probability and not proof beyond reasonable doubt. The High Court under Article 226 of the Constitution of India was not justified in setting aside that order especially when the charged officer could have appealed to the appellate authority under Rule 69 of the Service Rules.

11. Respondent appeared in-person and submitted that there is no illegality in the order passed by the High Court

calling for interference by this Court. The respondent pointed out that cogent reasons had been stated by the High Court in setting aside the order of dismissal which is unassailable. Further, it was pointed out that under Rule 68(2)(ix), the Inquiry Officer must ensure supply of the list of documents and witnesses relied by Bank to support the charges. There is nothing in the record of proceeding which would show that the presenting officer had produced the list of documents before the Inquiring Authority and hence no copy of the same was made available to the charged officer as well. Further, it was also pointed out that the burden is on the bank to establish the charges levelled against the charged officer which the bank had not discharged and the High Court has rightly set aside the order of dismissal.

12. The first infirmity pointed out by the High Court was that charge-sheet did not mention anything about the documents or the witnesses which/whom it proposed to rely to prove the charges, nor appended any list of documents or witnesses. The presenting officer had also, according to the High Court, failed to provide the list of documents and witnesses to the charged officer. Further, the High Court also pointed out that minutes of the proceedings would indicate that forty eight more documents were produced before the Inquiring Authority and the rest of the documents were permitted to be produced on 07.11.1997. On 07.11.1997, thirty four more documents were produced and marked as Ex. 51 to 84. The High Court also pointed out that no witness was examined by the Bank in support of charges and hence to hold the charges relating to Government Business Branch proved was in fact a finding supported with no evidence.

13. State Bank of India Officers Service Rules are framed in exercise of powers conferred under Section 43(1) of State Bank of India Act, 1955. Chapter XI of the Service Rules deals with conduct, discipline and appeal. Decision to initiate and procedure for disciplinary action is dealt with in Rule 68 of the Service Rules. Admittedly, the provision of Rule 68(3) had been

complied with and the charged officer was given time to file objections to the charges levelled against him. The charged officer filed his reply on 29.03.1995 for the charges levelled against him. Rule 68(2)(v) says that the disciplinary authority shall where it is not the Inquiring Authority, forward to the Inquiring Authority the following documents:

(a) A copy of the articles of charge and statements of imputations of misconduct;

(b) A copy of the written statement of defence, if any, submitted by the officer;

(c) A list of documents by which and list of witnesses by whom the articles of charge are proposed to be substantiated;

(d) A copy of statements of the witnesses, if any;

(e) Evidence proving the delivery of the articles of charge under clause (iii);

(f) A copy of the order appointing the "Presenting Officer" in terms of clause (vi).

14. Rule 68(2)(a) states that the Inquiring Authority shall where the officer does not admit all or any of the articles of charge furnish to such officer a list of documents by which, and a list of witnesses by whom, the articles of charge are proposed to be proved.

15. Rule 68(2)(xiii) states that on the date fixed for the inquiry, the oral and documentary evidence by which the articles of charge are proposed to be proved shall be produced by or on behalf of the Bank. The witnesses produced by the presenting officer shall be examined by the presenting officer and may be cross-examined by or on behalf of the officer. The presenting officer shall be entitled to re-examine his witnesses on any points on which they have been cross-examined, but not

on a new matter without the leave of the Inquiring Authority. The Inquiring Authority may also put such questions to the witnesses as it thinks fit.

16. Rule 68(2)(xix) states that if the officer does not submit the written statement of defence referred to in clause (iii) on or before the date specified for the purpose or does not appear in person, or through the officer's representative or otherwise fails or refuses to comply with any of the provisions of these rules which require the presence of the officer or his representative, the Inquiring Authority may hold the enquiry ex parte.

17. We may in the light of the above-mentioned statutory provisions examine the correctness of the order passed by the High Court. The charged officer, admittedly, did not choose to nominate his defence representative in spite of several opportunities given by the Inquiring Authority nor had he submitted any written statement to the Inquiring Authority. Time was given upto 14.01.1998 to do so but he had not availed of that opportunity. Neither the charged officer nor any defence representative appeared before the Inquiring Authority. The arguments that were raised before the High court of non-compliance of the procedure, could have been raised by the charged officer before the Inquiring Authority, but the same was not done and he had not co-operated with the inquiry proceedings. In the said circumstances, the Inquiring Authority was entitled to hold the enquiry ex parte as provided under Rule 68(2)(xix).

18. We are of the view that the High Court has committed an error in holding that the charge-sheet should have mentioned about the details of the documents and the names of the witnesses which the Bank proposed to examine and a list to that effect should have been appended to the charge sheet. We may point out that the charge-sheet need not contain the details of the documents or the names of the witnesses proposed to be examined to prove the charges or a list to that effect unless

there is a specific provision to that effect. Charge-sheet, in other words, is not expected to be a record of evidence. Fair procedure does not mean giving of copies of the documents or list of witnesses along with the charge-sheet. Of course, statement of allegations has to accompany the charge-sheet, when required by the Service Rules.

19. We notice the presenting officer had informed the inquiring authority that the list of bank's documents was forwarded to the charged officer vide his letter dated 21.05.1997 but the charged officer did not accept that letter. Charged officer's related letter would also indicate that he was advised not to accept the letter along with its enclosure. Presenting officer had again sent the list of bank's documents to the charged officer vide his letter dated 27.06.1997, the same was also not responded to by the charged officer. The Inquiring Authority further directed the presenting officer to make arrangements for the charged official to inspect the bank's documents. Consequently, the presenting officer vide his letter dated 30.05.1997 and 27.06.1997 made arrangements for inspection of bank's documents on 13.06.1997, 14.06.1997, 09.07.1997 and 10.07.1997 respectively. Presenting officer was also present for facilitating the inspection but the charged officer did not turn up for inspection of the bank's documents. In fact the Inquiring Authority himself had written a letter dated 25.06.1997 to the charged officer advising him that the presenting officer had again been instructed to forward the list of bank's documents and witnesses by 30.06.1997 and get the bank's documents inspected by him in his presence before 12.07.1997 which was the last opportunity given to the charged officer. One more opportunity was given by the Inquiring Authority to the charged officer to submit the list of defence documents and witnesses by 19.07.1997 but the charged officer did not give any list of defence documents and witnesses and on most of the days, the charged officer did not appear before the Inquiring Authority. On 06.11.1997, the charged officer walked out of the inquiry. Under such

circumstances, the Inquiring Authority had no other alternative but to hold the inquiry ex parte. We are of the view that the Inquiring Authority and the presenting officer had followed procedures laid down under Rules 68(2)(v), 68(2)(ix)(a), 68(2)(viii) and 68(2)(xix) of the Service Rules.

20. We are of the view that the High Court also committed an error in holding that since no witness was examined in support of charges, it was a case of no evidence. In an ex parte inquiry, in our view, if the charges are borne out from documents kept in the normal course of business, no oral evidence is necessary to prove those charges. When the charged officer does not attend the inquiry, then he cannot contend that the Inquiring Authority should not have relied upon the documents which were not made available or disclosed to him. Of course, even in an ex parte inquiry, some evidence is necessary to establish the charges, especially when the charged officer denies the charges, uncontroverted documentary evidence in such situation is sufficient to prove the charges.

21. The Inquiring Authority has examined each and every charge levelled against the charged officer and the documents produced by the presenting officer and came to the conclusion that most of the charges were proved. In a departmental inquiry, the disciplinary authority is expected to prove the charges on preponderance of probability and not on proof beyond reasonable doubt. Reference may be made to the judgments of this Court reported in *Union of India v. Sardar Bahadur*; (1972) 4 SCC 618 and *R.S. Saini v. State of Punjab and Others*; (1999) 8 SCC 90. The documents produced by the bank, which were not controverted by the charged officer, supports all the allegations and charges levelled against the charged officer. In a case, where the charged officer had failed to inspect the documents in respect of the allegations raised by the bank and not controverted it is always open to the Inquiring Authority to accept the same.

22. In *Bank of India v. Apurba Kumar Saha* ; (1994) 2

SCC 615, this court held:

> "A bank employee who had refused to avail of the opportunities provided to him in a disciplinary proceeding of defending himself against the charges of misconduct involving his integrity and honesty, cannot be permitted to complain later that he had been denied a reasonable opportunity of defending himself of the charges levelled against him and the disciplinary proceeding conducted against him by the bank employer had resulted in violation of principles of natural justice of fair hearing".

23. The High Court, in our view, under Article 226 of the Constitution of India was not justified in interfering with the order of dismissal passed by the appointing authority after a full-fledged inquiry, especially when the Service Rules provide for an alternative remedy of appeal. It is a well acceptable principle of law that the High Court while exercising powers under Article 226 of the Constitution does not act as an appellate authority. Of course, its jurisdiction is circumscribed and confined to correct an error of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of the principles of natural justice. In *State Bank of India and Others v. Ramesh Dinkar Punde* (2006) 7 SCC 212, this Court held that the High Court cannot re-appreciate the evidence acting as a court of Appeal. We have, on facts, found that no procedural irregularity has been committed either by the Bank, presenting officer or the Inquiring Authority. Disciplinary proceedings were conducted strictly in accordance with the Service Rules.

24. This court in *State of Andhra Pradesh v. Sree Rama Rao*; AIR 1963 SC 1723 held:

> "Where there is some evidence, which the authority entrusted with the duty to hold the inquiry has accepted and which evidence may reasonably support the conclusion that delinquent officer is guilty of the charge, it is not the function of the High Court in a petition for a writ under Article 226 to review the evidence and to arrive at an independent finding on the evidence especially when the charged officer had not participated in the inquiry and had not raised the grounds urged by him before the High Court by the Inquiring Authority."

25. This Court in *Lakshmi Devi Sugar Mills Ltd. v. Pt. Ram Sarup;* AIR 1957 SC 82 held where a workman intentionally refuses to participate in the inquiry, cannot complain that the dismissal is against the principles of natural justice. Once the inquiry proceed ex parte, it is not necessary for the Inquiring Authority to again ask the charged officer to state his defence orally or in writing. We cannot appreciate the conduct of the charged officer in this case, who did not appear before the Inquiring Authority and offered any explanation to the charges levelled against him but approached the High Court stating that the principles of natural justice had been violated.

26. We are also conscious of the fact that even if the Inquiring Authority set the charged officer ex parte that would not absolve him from deciding that the charges levelled against him were proved or not. In other words, no punishment could be imposed without an inquiry. We notice in this case the Inquiring Authority had elaborately considered the charges levelled against the charged officer and also the materials produced by the bank because some evidence is necessary to establish the charges. In some cases, proof may only be documentary and in some cases oral. The requirement of proof depends on the facts and circumstances of each case. Appellant - Bank in this case has succeeded in establishing the charges levelled against the delinquent officer and was rightly dismissed from service which called for no interference by the High Court under Article 226 of the Constitution of India.

27. In view of the above-mentioned reasons, we find it difficult to support the judgment of the High Court. Consequently, the appeal is allowed and the impugned judgment is set aside with no order as to costs.

K.K.T. Appeal allowed.

ROPAN SAHOO & ANOTHER
v.
ANANDA KUMAR SHARMA & OTHERS
(Civil Appeal No. 615 of 2013)

JANUARY 22, 2013

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

Orissa Excise Rules, 1965 – r.34(1) proviso – Grant of IMFL licence – By relaxing the rules – Challenged – High Court quashed the grant of licence on the ground that there was no order relaxing the rules – On appeal, plea that order granting licence was in consonance with proviso to r.34(1) – Held: It is evident from the Note-sheet in the file that every authority was aware of the restrictions on the distance from the preferred site and recommended for relaxation – Non-mentioning of rule does not tantamount to non-passing of an order – Thus the order of granting licence was in consonance with proviso to r.34(1) – Therefore, it cannot be said that there was no order relaxing the rules.

Licence in respect of IMFL 'ON' shop, was granted in favour of the appellants in C.A.No.615 of 2013. Respondent No.1 filed writ petition under Art. 226 of the Constitution, challenging the grant of the licence. High Court entertained the writ petition and quashed the grant of exclusive privilege and the licence, holding that there was no order relaxing the restrictions on the minimum distance as mentioned in clauses (d) and (e) of r.34 of Orissa Excise Rules, 1965 relating to the proposed shops in exercise of powers of the said Rule. Hence the present appeals by the affected persons as well as the State. The State referred to the Note-sheet in the file to highlight that the order had been passed in consonance with proviso to r.34(1) of the Rules.

Allowing the appeals, the Court

HELD: 1. The reasons ascribed by the High Court that there was no order whatsoever relaxing the Orissa Excise Rules, 1965 before the order of grant of exclusive privilege was passed, is not correct. On a keen scrutiny of the entire note-sheet it is evident that the Commissioner-cum-Secretary had accepted the recommendations of the Collector and the Excise Commissioner, and upon perusal of the note-sheet, the Joint Secretary had recommended for consideration and approval by the Minister of Excise and Tourism. The Minister has signed and thereafter, the file had travelled back for communication. After the Minister had signed on the file on the basis of the recommendations sent by the Commissioner-cum-Secretary which was founded on the recommendations of the Joint Secretary who had concurred with the recommendations of the Collector and the Excise Commissioner, communications were made by the Joint Secretary. The note-sheet clearly indicated application of mind to the relevant facts which pertain to the restrictions on the distance from the proposed site and the endorsement by the Minister. [Para 18] [1141-B-F]

Tafcon Projects (I) (P) Ltd. v. Union of India and Ors. **(2004) 13 SCC 788 – relied on.**

Narmada Bachao Andolan v. State of Madhya Pradesh **AIR 2011 SC3199: 2011 (12) SCR 84;** *State of U.P. and Ors. v. Pradhan Sangh Kshettra Samiti and Ors.* **AIR 1995 SC 1512: 1995 (2) SCR 1015;** *Shamsher Singh v. State of Punjab and Anr.* **AIR 1974 SC 2192: 1975 (1) SCR 814;** *Sethi Auto Service Station and Anr. v. Delhi Development Authority and Ors.* **(2009) 1 SCC 180: 2008 (14) SCR 598;** *State of West Bengal v. M. R. Mondal and Anr.* **AIR 2001 SC 3471: 2001 (2) Suppl. SCR 531 – referred to.**

2. The cumulative effect of the note-sheet goes a long way to show that every authority was aware of the distance and recommended for relaxation of clauses (d) and (e) of sub-rule (1) of Rule 34 and the concerned Minister had endorsed the same. Non-mentioning of the Rule or sub-rule does not tantamount to non-passing of an order. The dominant test has to be the application of mind to the relevant facts. The second part of the order, if properly appreciated, conveys that no reasons have been ascribed. The proviso to Rule 34(1) lays a postulate that the distance as mentioned under clauses (d) and (e) may be relaxed by the State Government in special circumstances. The recommendations made by the Collector refers to the circumstances, namely, that there is a demand for consumption of liquor within the hotel premises; that illegal liquor cases have been booked in the nearby area; and that the proposal is in the interest of the Government revenue. The said recommendations have been concurred with, by the higher authorities and, hence, there can be no trace of doubt that they constitute the special circumstances. [Para 24] [1144-H; 1145-A-D]

Case Law Reference:

(2004) 13 SCC 788	**relied on**	**Para 18**
2011 (12) SCR 84	**referred to**	**Para 20**
1995 (2) SCR 1015	**referred to**	**Para 21**
1975 (1) SCR 814	**referred to**	**Para 21**
2008 (14) SCR 598	**referred to**	**Para 22**
2001 (2) Suppl. SCR 531	**referred to**	**Para 23**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 615 of 2013.

From the Judgment & Order dated 16.09.2009 of the High Court of Orissa at Cuttack in W.P.(C) No. 3913 of 2009.

WITH

Civil Appeal No. 616 of 2013

Bhaskar P. Gupta, Shibashish Misra, Arun Patr, Abhinandan Nanda, Kirti Renu Mishra, Apurna Upmanyu, G. Ramakrishna Prasad, B. Suyodhan, Mohd. Wasay Khan, Filza Moonis for the Appearing Parties.

The Judgment of the Court was delivered by

DIPAK MISRA, J.1. Leave granted in both the special leave petitions.

2. Questioning the legal acceptability of the order dated 16.9.2009 passed by the Division Bench of the High Court Orissa at Cuttack in WP(C) No. 3913 of 2009 whereby the High Court entertained the writ petition preferred by the first respondent herein and quashed the grant of exclusive privilege and the licence granted in favour of Ropan Sahoo and Mukesh Kumar, the respondent Nos. 5 and 6 in the writ petition, the present appeals have been preferred by the grieved persons as well as by the State.

3. Shorn of unnecessary details the facts which are requisite to be stated are that Mukesh Kumar, the respondent No. 6 before the High Court, had submitted an application for grant of licence to open an IMFL "Off" shop in Ward No. 16, Bargarh Town for the year 2007-08 on 28.1.2008. As a report was submitted that the proposed site was violative of sub-rule 1(c) of Rule 34 of Orissa Excise Rules, 1965 (for short "the Rules"), the said respondent chose to withdraw the application for the aforesaid year by indicating personal reasons. In respect of the next financial year he again submitted an application for grant of licence at the same place. The Collector, Bargarh, invited objections and pursuant to the same the writ petitioner filed his objection on 18.10.2008. The Inspector of Excise submitted a report on 2.2.2009 stating about the

existence of a bathing ghat, Vishnu temple, bus stand and petrol pump within the prohibited distance, but recommended for relaxation of restrictions. The Collector, Bargarh, recommended for opening of the shop for remaining part of the year 2008-09 in relaxation of the restrictions and the Excise Commissioner also recommended to the Government on 19.2.2009 for sanction by relaxing of the restrictions. As the factual matrix would reveal, the State Government on the basis of the recommendations invoked the power of relaxation under Rule 34 of the Rules and granted licence in favour of the said respondent for the remaining period of 2008-09. Be it noted, in a similar manner relaxation was granted for opening of the IMFL/Beer ('ON' shop) at Hotel Sawadia for the period from 2.3.2009 to 31.3.2009.

4. Being grieved by the grant of said licences, the first respondent invoked the jurisdiction of the High Court under Article 226 of the Constitution principally contending that the report submitted by the Excise Inspector with regard to certain aspects, namely, location of the bathing ghat, etc. were not factually correct; that the recommendations made by the authorities were highly improper and unwarranted; and that the relaxation had been granted in an extremely arbitrary manner and, therefore, the grant of exclusive privilege and the licence deserved to be axed. The High Court perused the documents brought on record, called for the record to satisfy itself in what manner the power of relaxation was exercised, and after perusal of the record and on consideration of to various recommendations, came to hold that as far as the respondent No. 5 was concerned for sanction of a beer parlour 'ON' shop licence for the remaining period of 2008-09, no order was passed relaxing the Rules before the grant of exclusive privilege. As far as the sanction of IMFL Restaurant licence in respect of 6th respondent was concerned, the High Court expressed the similar view. We think it apt to reproduce the ultimate conclusion recorded by the High Court: -

> "13. Proviso to Rule 34 specifically prescribes that restriction on the minimum distance as mentioned in Clause (d) and (e) may be relaxed by the State Government in special circumstances. There being no order by the State Government relaxing the aforesaid two Clauses in relation to the minimum distance between the proposed shops and the place of worship i.e. the Vishnu Temple, petrol pump and bus stand, the order of the State Government approving the sanction/grant of exclusive privilege in favour of opposite parties 5 and 6 cannot be sustained in law."

5. After so stating the High Court referred to Section 41 of the Bihar and Orissa Excise Act, 1915 (for brevity "the Act") and observed as follows: -

> "Rule 34 of the Rules castes a statutory duty on the Department to pass order with reasons relaxing the restrictions. When there has been infraction of such statutory duty, the same cannot be covered under Section 41 of the Act."

6. Being of the aforesaid view, the High Court quashed the privileges and the licences granted in favour of the private respondents therein.

7. We have heard Mr. Bhaskar P. Gupta, learned senior counsel for the beneficiaries of the grant, Mrs. Kirti Renu Mishra, learned counsel for the State and Mr. G. Ramakrishna Prasad, learned counsel appearing for the respondent No. 1 in both the appeals.

8. At the very outset we may note that it is the admitted position that both the proposed sites come within the prohibited area as envisaged under Rule 34(1)(d) and (e) of the Rules. Rule 34 of the Rules stipulates that the places in respect of which licences for consumption of liquor on vendor's premises should not be granted. The said Rule reads as follows: -

"**34. Licences for shops for consumption of liquor on vendor's premises not to be granted at certain places :** (1) No new shop shall be licensed for the consumption of liquor on the vender, premises –

(a) in a marketplace, or

(b) at the entrance to market place, or

(c) in close proximity to a bathing-ghat, or

(d) within at least five hundred meters from a place of worship, recognized educational institution, established habitant especially of persons belonging to scheduled castes and labour colony, mills and factories, petrol pumps, railway stations/ yard, bus stands, agricultural farms or other places of public resort, or

(e) within at least one kilometer from industrial, irrigation and other development projects areas, or

(f) in the congested portion of a village :

Provided that the restriction on the minimum distance as mentioned under clauses (d) and (e) may be relaxed by the State Government in special circumstances.

(2) So far as practicable, an established liquor shop licensed for the consumption of liquor on the premises shall not be allowed to remain on a site which would not under sub-rule (1) be permissible for the location of a new shop.

(3) In areas inhabited by Scheduled Tribes, country spirit shops shall not be licensed to be placed immediately on the side of a main road or in any other prominent position that is likely to place temptation in their way."

9. On a perusal of the aforesaid Rule, it is crystal clear that the State Government has been conferred with the power to

relax the restriction on the minimum distance as mentioned in clauses (d) and (e) pertaining to the minimum distance. As has already been indicated hereinbefore there is no cavil that the material on record pertained to the relaxation of the restriction as prescribed under clauses (d) and (e) of sub-rule (1) of Rule 34 of the Rules. The High Court, as the impugned order would reflect, has quashed the order of approval/sanction and the consequent grant of licences on the foundation that there has been no order relaxing the restrictions on the minimum distance as mentioned in Clauses (d) and (e) relating to the proposed shops in exercise of powers of the said Rule by the State Government and, in any case, no reasons have been ascribed. Thus, the question that emanates for consideration is whether the High Court has appositely appreciated the note sheet in the file and arrived at the correct conclusion or not.

10. The High Court, as demonstrable, has reproduced the communications made by the Joint Secretary to the Government by fax vide memo No. 1159/Ex. dt. 2.3.2009 addressed to the Excise Commissioner about the Restaurant "ON" shop licence in favour of Mukesh Kumar at "RASSOI RESTAURANT" in the premises of Hotel 'Sawadia Palace', Ward No. 11, Bargarh Municipality over Plot No. 1622, Khata No. 2542/362, in the district of Bargarh for the remaining period of 2008-09 and also the memo No. 1161/Ex. dated 2.3.2009 in respect of Beer Parlour "ON" shop licence in favour of Ropan Sahoo over Plot No. 1391/2260, Khata No. 393 in Ward No. 16 of Bargarh Municipality, in the district of Bargarh for the remaining period of 2008-09. The communication that has been made in favour of Mukesh Kumar reads as follows: -

"In inviting a reference to your letter No. 1214 dt. 19.2.09 on the subject cited above, I am directed to say that Govt. after careful consideration have been pleased to grant IMFL Restaurant "ON" shop Licence in favour of Sri Mukesh Kumar at "RASSOI RESTAURANT" in the premises of Hotel "Sawadia Palace", Ward No. 11, Baragarh Municipality over Plot No. 1622, Khata No. 2542/

362, in the district of Baragarh for the remaining period of 2008-09 by relaxing rule 34 of the Orissa Excise Rules, 1965 and fixation of MGQ as per Excise Duty, Fee Structure and Guidelines for 2008-09. The Excise Administration may be held responsible if the existing nearby excise shops are affected by the new "ON" shop."

As far as grant of beer parlour "ON" shop in favour of Ropan Sahoo is concerned, the communication vide memo No. 1161/Ex. dated 2.3.2009 is as follows: -

"In inviting a reference to your letter No. 1380 dt. 25.02.09 on the subject cited above, I am directed to say that Govt. after careful consideration have been pleased to sanction Beer Parlour "ON" shop Licence in favour of Sri Ropna Sahoo over Plot No. 1391/2260, Khata No. 393/330 in Ward No. 16 of Bargarh Municipality, in the district of Bargarh for the remaining period of 2008-09 subject to condition that the district excise officials will be held responsible if the nearby existing excise shops are affected by opening of the new shop."

11. As no reasons were assigned, the High Court called for the file. On a perusal of the file the High Court referred to the recommendations and, eventually, opined that no order had been passed relaxing the Rule in respect of the said shops by the Commissioner-cum-Secretary to Government, Department of Excise. The thrust of the matter is whether any order has been passed relaxing the restrictions imposed by the Rules and does it contain reasons. As the first communication would reveal, it is clearly mentioned therein that the Government has relaxed the restrictions under Rule 34 and as far as the second communication is concerned, it has been stated that the Government has sanctioned grant of licence. The learned counsel for the State has referred to the note sheet to highlight that the orders had been passed in consonance with the proviso to Rule 34(1) of the Rules and on that basis the communications were issued.

12. We have bestowed our anxious consideration and carefully perused the note-sheet. On a studied scrutiny of the same it is luculent that the Excise Commissioner, Orissa, Cuttack, had recommended the proposals and in support of the same had furnished seventeen documents. The note sheet has referred to the report which states that the proposed site exist at 350 meters from Vishnu Temple, 250 meters from the petrol pump, 200 meters from the private bus stand and 50 meters from the irrigation canal. The recommendation which forms part of the note sheet reads as follows: -

"The Collector, Bargarh, in his report at P-84/C has stated that the local consumers demand for consumption of liquor within the hotel premises. Illegal liquor cases have been booked in the nearby area and hence, there is demand for the "ON" shop. The apprehension that the existing IMFL "OFF" shop will be affected after opening of the proposed "ON" shop is ruled out, because the consumers of "OFF" shop are different from "ON" shop. The customers of "ON" shop has to consume liquor inside the Hotel premises with peg system and pay service charge, whereas such a facility is not available with "OFF" shops. Besides, the bathing ghat is not nearby as objected. But only one irrigation canal is flowing at a distance of about 50 meters. Therefore, Collector has recommended for relaxation of rule 34 of Orissa Excise Rules, 1965 for sanction of the proposal in the interest of Govt. revenue and to check illegal liquor trade."

13. The objections of A.K. Sharma and that of the Secretary, Human Society, Bargarh have also been considered. Thereafter, the Joint Secretary has recommended thus: -

"In the above circumstances and in view of recommendation of the Excise Commissioner, Orissa, Cuttack, it may kindly be considered to grant IMFL Restaurant "ON" shop licence in favour of Sri Mukesh Kumar at "Rasooi Restaurant" in the premises of Hotel

"Sawadia Palace" Ward No. 11, Bargarh Municipality over Plot No. 1622, Khata No. 2542/362, in the district of Bargarh, for the remaining period of the year 2008-09 by relaxing rule 34 of Orissa Excise Rules, 1965 and MGQ fixed as per the Excise Duty, Fee Structure and Guidelines for 2008-09. The District Excise Administration may be held responsible if the existing nearby excise shops are affected by the new "ON" shop."

14. The Commissioner-cum-Secretary to Government, Excise Department, has endorsed the same in the following terms: -

"Notes from P.10/N explain. We had received a representation from Shri A.K. Sharma, Exclusive Privilege Holder of IMFL 'Off Shop' No. 4 of Bargarh (P.23-22/C) against the proposal received from Collector, Bargarh and endorsed by the Excise Commissioner, Orissa for opening of IMFL 'On Shop' at Rasoi Restaurant in the premises of Hotel Sawadia Palace, Ward No. 11 of Bargarh. The objections raised by Shri Sharma have been enquired into by the District Administration. In this regard, the letter received from Collector, Bargarh at P.34-32/C may please be glanced through. The objections of Shri Sharma are found to be devoid of merit. The report received from the Excise Commissioner, placed below, may also be perused. The Excise Commissioner had recommended to consider the sanction of IMFL 'On Shop' at Rasoi Restaurant in favour of Shri Mukesh Kumar situated in the premises of Hotel Sawadia Palace, Ward No. 11 of Bargarh. The proposal may kindly be considered and approved."

15. The same has been signed by the Minister of Excise and Tourism, Orissa. As far as the second shop is concerned, the note sheet referred to the recommendations of the Collector, which reads as follows: -

"...the Collector, Bargarh has reported that both the petrol pumps are situated in such a manner that the shops will have no effect at all on the proposed Bar and hence he has suggested for relaxation of restrictive provisions of rule-34 of Orissa Excise Rules, 1965.

The Collector, Bargarh has also reported that the proposed Beer Parlour shall cater to the needs of the consuming people of the locality besides fetching Govt. revenue and checking illicit sale of Beer, since the population of the area is increasing. Only 3 (three) IMFL "OFF' shops, one IMFL 'ON' and one Beer Parlour are functioning in the entire town area having population of more than one lakh. There is feasibility and potentiality for opening of the Beer Parlour 'ON' shop, since illegal sale of liquor has been detected in the area. The proposed shop will check illicit trade of liquor. He has also stated that the opening of new Beer Parlour will not affect the nearby IMFL shops in the Municipality."

16. The Joint Secretary after referring to the objections and the recommendations of the Excise Commissioner has passed the following order in the note sheet: -

"In the above circumstances and in view of recommendation of the Excise Commissioner, Orissa, Cuttack, it may kindly be considered to sanction Beer Parlour 'ON' shop licence in favour of Sri Ropna Sahu over plot No. 1391/2260, Khata No. 393/330 in Ward No.16 of Bargarh Municipality in the district of Bargarh for the remaining period of 2008-09 subject to condition that the district excise officials will be held responsible if the nearby existing shops are affected by opening of the new shop.

Government orders may kindly be obtained in the matter."

17. Thereafter, the Commissioner-cum-Secretary to

Government in the Department of Excise has endorsed the same and the Minister, Excise and Tourism has signed in approval thereof and thereafter the movement of the file took place. On the basis of the aforesaid orders the communications have been sent.

18. On a keen scrutiny of the entire note sheet we have no hesitation in our mind that the Commissioner-cum-Secretary had accepted the recommendations of the Collector and the Excise Commissioner, and upon perusal of the note sheet of the Joint Secretary had recommended for consideration and approval by the Minister of Excise and Tourism. The Minister, as stated earlier, has signed and thereafter, the file had travelled back for communication. We really fail to fathom the reasons ascribed by the High Court that there is no order whatsoever relaxing the Rules before the order of grant of exclusive privilege was passed. After the Minister had signed on the file on the basis of the recommendations sent by the Commissioner-cum-Secretary which was founded on the recommendations of the Joint Secretary who had concurred with the recommendations of the Collector and the Excise Commissioner, communications were made by the Joint Secretary. The note sheet clearly indicates application of mind to the relevant facts which pertain to the restrictions on the distance from the proposed site and the endorsement by the Minister. In this context, we may refer with profit to the decision in *Tafcon Projects (I) (P) Ltd. v. Union of India and Others,*[1] wherein the High Court, after taking note of the order passed by the Secretary who, in anticipation of the formal approval by the Minister concerned, had allowed the party to go ahead for appointing the appellant therein as "Event Manager". This Court referred to the earlier order passed by the Secretary granting permission and the latter order in which he had mentioned that the party may be allowed to go ahead with the proposal for making the preliminary arrangement in anticipation of the formal approval of the Minister and

1. (2004) 13 SCC 788.

expressed the view that the High Court had erred in coming to hold that the Secretary had not taken any final decision with regard to the appellant therein as the Event Manager. Thereafter, the Court adverting to the justification of the conclusion of the High Court that no final decision had been taken by the Minister expressed thus :-

> "12. It appears also from the record as noted by the High Court, that the file had been pending with the Minister for some time and despite expressions of urgency, the Minister did not sign the file since he was busy with "elections and other important matters". What the High Court has overlooked is that the relevant file was again placed before the Minister on 30.8.1999 by JS&FA with a note which stated that Tafcon had been appointed as the "Event Manager" for three years. This was signed by the Minister with the endorsement "file returned".
>
> 13. The High Court deduced from this signature of the Minister that no approval was in fact granted by him to the appointment of M/s. Tafcon either expressly or impliedly. We are unable to agree. Where the Minister has signed the various notes put up before him seeking his approval, his signature, without more, must mean that he has approved the steps taken by the Department."

19. Be it noted, in the said case, the Court referred to Rule 3 of the Transaction of Business Rules, 1961 which provided for all business to be conducted on general or special directions of the Minister-in-charge.

20. In the case at hand, Rule 7 of the Orissa Government Rules of Business made under Article 166 of the Constitution confers the power on the Minister to pass an order in respect of a matter pertaining to his portfolio. The effect of such a delegation has been dealt with by a three-Judge Bench in *Narmada Bachao Andolan v. State of Madhya Pradesh*[2] wherein it has been held that: -

2. AIR 2011 SC 3199.

"The decision of any Minister or Officer under the Rules of Business made under Articles 77(3) and 166(3) of the Constitution is the decision of the President or the Governor respectively and these Articles do not provide for `delegation'. That is to say, that decisions made and actions taken by the Minister or Officer under the Rules of Business cannot be treated as exercise of delegated power in real sense, but are deemed to be the actions of the President or Governor, as the case may be, that are taken or done by them on the aid and advice of the Council of Ministers."

21. The Bench to fructify its opinion has placed reliance on *State of U.P. & Ors. v. Pradhan Sangh Kshettra Samiti & Ors.*[3] and pronouncement by the seven-Judge Bench in *Shamsher Singh v. State of Punjab & Anr.*[4] For the sake of completeness, we may note with profit what has been stated in paragraph 27 of the aforesaid decision: -

"27. In *Dattatraya Moreshwar v. The State of Bombay & Ors.,*[5] a Constitution Bench of this Court held that an omission to make and authenticate an executive decision in the form mentioned in Article 166 does not make the decision itself illegal, on the basis that its provisions were directory and not mandatory."

22. In this regard we may quote a passage from *Sethi Auto Service Station and Another v. Delhi Development Authority and Others*[6] : -

"**14.** It is trite to state that notings in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on

3. AIR 1995 SC 1512.
4. AIR 1974 SC 2192.
5. AIR 1952 SC 181.
6. (2009) 1 SCC 180.

the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority. Needless to add that internal notings are not meant for outside exposure. Notings in the file culminate into an executable order, affecting the rights of the parties, only when it reaches the final decision-making authority in the department, gets his approval and the final order is *communicated* to the person concerned."

23. In *State of West Bengal v. M.R. Mondal and Another*[7] it has also been held that an order passed on the file and not communicated is non-existent in the eye of law.

24. In the present case it is luminous that the file had travelled to the concerned Joint Secretary of department who had communicated the order. The High Court has opined that there is no order by the State Government relaxing the restrictions enshrined in clauses (d) and (e) of Rule 34(1) of the Rules in relation to the minimum distance between the proposed shops and the Vishnu Temple, petrol pump and bus stand and at a latter part of the judgment has expressed the opinion that there has been infraction of statutory Rule, namely, Rule 34 which casts a statutory duty on the department to pass on order with reasons relaxing the restrictions. We are disposed to think that the High Court, as far as the first part of the opinion is concerned, has been guided by the factum that the Commissioner-cum-Secretary in his recommendation to the Minister of Excise and Tourism had not specifically referred to clauses (d) and (e) of Rule 34(1) of the Rules. It is pertinent to state here that it is perceptible from the note sheet that the Secretary had referred to the proposal received from the Collector, endorsement made by the Excise Commissioner, the objections raised by the objectors and also expressed the view that the said objections were devoid of merit and, accordingly, recommended for approval. The cumulative effect of the note

7. AIR 2001 SC 3471.

sheet goes a long way to show that every authority was aware of the distance and recommended for relaxation of clauses (d) and (e) of sub-rule (1) of Rule 34 and the concerned Minister had endorsed the same. Non-mentioning of the Rule or sub-rule, in our considered opinion, does not tantamount to non-passing of an order. The dominant test has to be the application of mind to the relevant facts. The second part of the order, if properly appreciated, conveys that no reasons have been ascribed. The proviso to Rule 34(1) lays a postulate that the distance as mentioned under clauses (d) and (e) may be relaxed by the State Government in special circumstances. The recommendations made by the Collector refers to the circumstances, namely, that there is a demand for consumption of liquor within the hotel premises; that illegal liquor cases have been booked in the nearby area; and that the proposal is in the interest of the Government revenue. The said recommendations, as is reflectible, have been concurred with by the higher authorities and, hence, there can be no trace of doubt that they constitute the special circumstances.

25. In view of our aforesaid analysis, the appeals are allowed and the order passed by the High Court is set aside. It is further clarified that if the Government, if so advised, can invoke the power under the proviso to Rule 34(1) of the Rules for the purpose of relaxation for grant of exclusive privilege and licence pertaining to the said shops in respect of current and subsequent financial years. In the facts and circumstances of the case, the parties shall bear their respective costs.

K.K.T. Appeals allowed.

NOOR MOHAMMED

v.

JETHANAND AND ANOTHER

(Special Leave Petition (C) No. 25848 of 2011)

JANUARY 29, 2013

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

Code of Civil Procedure, 1908 – s. 100 – Second appeal – Abuse of process of Court – Delayed delineation of controversy – Procrastination on account of frequent adjournments – Non-demonstration of due diligence to deal with the matter – Deprecated – Held: Dispensation of expeditious justice is the constitutional command – Whatever may be the nature of litigation, speedy and appropriate delineation is fundamental to judicial duty – Delayed delineation of a controversy in a court of law creates a dent in the normative dispensation of justice and in the ultimate eventuate, the Bench and the Bar gradually lose their reverence, for the sense of divinity and nobility really flows from institutional serviceability – In a democratic body polity governed by a written Constitution and where Rule of Law is paramount, judiciary is regarded as sentinel on the qui vive not only to protect the Fundamental Rights of the citizens but also to see that the democratic values as enshrined in the Constitution are respected and the faith and hope of the people in the constitutional system are not atrophied – In the instant case, the High Court should not have shown indulgence of such magnitude by adjourning the matter when the counsel for the appellant was not present – It is difficult to envision why the Court directed fresh notice to the appellant when there was nothing suggestive for passing of such an order – The counsel sought adjournment after adjournment in a nonchalant manner and the same were granted in a routine fashion – Duty of the counsel as the officer of the court

to assist the court in a properly prepared manner and not to seek unnecessary adjournments – All involved in the justice dispensation system, which includes the Judges, the lawyers, the judicial officers who work in courts, the law officers of the State, the Registry and the litigants, have to show dedicated diligence so that a controversy is put to rest – Chief Justice of the High Courts to conceive and adopt a mechanism, regard being had to the priority of cases, to avoid inordinate delays in matters which can really be dealt with in an expeditious manner – Judiciary.

The respondent-plaintiff filed suit for injunction which was dismissed by the trial court. The order was upheld in appeal. In 2001, the respondent filed second appeal, which remained pending for long, primarily due to adjournments on account of non-appearance of the counsel. The second appeal was ultimately dismissed by the High Court for non-prosecution in the year 2003. In 2006, the second appeal was restored to file while the ministerial order of restoration was recorded in 2010. Ultimately, in the year 2011, the second appeal was admitted on two substantial questions of law and the judgment and decree of both the courts below were stayed by the High Court by the impugned order.

The petitioner-defendant contended before this Court that no substantial question of law was involved and that the High Court had no reason to entertain the second appeal on the factual score.

Disposing of the Special Leave Petition, the Court

HELD: 1.1. In the facts and circumstances of the instant case, there is no requirement to interfere with the order of the High Court, but there is a compelling need to say something in regard to the disturbing manner in which the proceedings in the second appeal continued. [Para 10] [1159-C-D]

1.2. The proceedings in the second appeal before the High Court epitomizes the corrosive effect that adjournments can have on a litigation and how a lis can get entangled in the tentacles of an octopus. The philosophy of justice, the role of a lawyer and the court, the obligation of a litigant and all legislative commands, the nobility of the Bench and the Bar, the ability and efficiency of all concerned and ultimately the divinity of law are likely to make way for apathy and indifference when delay of the present nature takes place, for procrastination on the part of anyone destroys the values of life and creates a catastrophic turbulence in the sanctity of law. The virtues of adjudication cannot be allowed to be paralyzed by adjournments and non-demonstration of due diligence to deal with the matter. One cannot be oblivious to the feeling necessities of the time. It is devastating to expect infinite patience. Change of attitude is the warrant and command of the day. [Para 11] [1159-E-H; 1160-A]

1.3. The rule of law is the centripodal concern and delay in delineation and disposal of cases injects an artificial virus and becomes a vitiating element. The unfortunate characteristics of endemic delays have to be avoided at any cost. Whatever may be the nature of litigation, speedy and appropriate delineation is fundamental to judicial duty. [Paras 12, 23] [1160-C-D; 1166-C-D]

1.4. The anguish expressed in the past and the role ascribed to the Judges, lawyers and the litigants is a matter of perpetual concern and the same has to be reflected upon every moment. An attitude of indifference can neither be appreciated nor tolerated. Therefore, the serviceability of the institution gains significance. That is the command of the Majesty of Law and none should make any maladroit effort to create a concavity in the

same. Procrastination, whether at the individual or institutional level, is a systemic disorder. Its corrosive effect and impact is like a disorderly state of the physical frame of a man suffering from an incurable and fast progressive malignancy. Delay either by the functionaries of the court or the members of the Bar significantly exhibits indolence. [Para 27] [1167-C-E]

1.5. In a democratic body polity which is governed by a written Constitution and where Rule of Law is paramount, judiciary is regarded as sentinel on the *qui vive* not only to protect the Fundamental Rights of the citizens but also to see that the democratic values as enshrined in the Constitution are respected and the faith and hope of the people in the constitutional system are not atrophied. The fundamental conception of democracy can only be preserved as a colossal and priceless treasure where virtue and values of justice rule supreme and intellectual anaemia is kept at bay by constant patience, consistent perseverance, and argus-eyed vigilance. The foundation of justice, apart from other things, rests on the speedy delineation of the lis pending in courts. It would not be an exaggeration to state that it is the primary morality of justice and ethical fulcrum of the judiciary. Delayed delineation of a controversy in a court of law creates a dent in the normative dispensation of justice and in the ultimate eventuate, the Bench and the Bar gradually lose their reverence, for the sense of divinity and nobility really flows from institutional serviceability. Therefore, historically, emphasis has been laid on individual institutionalism and collective institutionalism of an adjudicator while administering justice. It can be stated without any fear of contradiction that the collective collegiality can never be regarded as an alien concept to speedy dispensation of justice. That is the hallmark of duty, and that is the real measure. [Para 1] [1154-E-F, H; 1155-A-D]

1.6. In a democratic set up, intrinsic and embedded faith in the adjudicatory system is of seminal and pivotal concern. Delay gradually declines the citizenry faith in the system. It is the faith and faith alone that keeps the system alive. Fragmentation of faith has the effect-potentiality to bring in a state of cataclysm where justice may become a casuality. A litigant expects a reasoned verdict from a temperate Judge but does not intend to and, rightly so, to guillotine much of time at the altar of reasons. Timely delivery of justice keeps the faith ingrained and establishes the sustained stability. Access to speedy justice is regarded as a human right which is deeply rooted in the foundational concept of democracy and such a right is not only the creation of law but also a natural right. This right can be fully ripened by the requisite commitment of all concerned with the system. It cannot be regarded as a facet of Utopianism because such a thought is likely to make the right a mirage losing the centrality of purpose. Therefore, whoever has a role to play in the justice dispensation system cannot be allowed to remotely conceive of a casual approach. [Para 29] [1168-C-F]

1.7. Everyone involved in the system of dispensation of justice has to inspire the confidence of the common man in the effectiveness of the judicial system. Sustenance of faith has to be treated as spinal sans sympathy or indulgence. If someone considers the task to be herculean, the same has to be performed with solemnity, for faith is the 'elan vital' of our system. [Para 31] [1169-F-G]

1.8. In the instant case, coming to the proceedings before the High Court from the date of presentation of the second appeal till the date of admission, the manner in which it has progressed is not only perplexing but also shocking. The Court should not have shown indulgence

of such magnitude by adjourning the matter when the counsel for the appellant was not present. It is difficult to envision why the Court directed fresh notice to the appellant when there was nothing suggestive for passing of such an order. The matter should have been dealt with taking a recourse to the provisions in the Code of Civil Procedure. It is also astonishing that the lawyers sought adjournments in a routine manner and the court also acceded to such prayers. When the matter stood dismissed, though an application for restoration was filed, yet it was listed after a long lapse of time. Adding to the misery, the concerned official took his own time to put the file in order. From the Registrar General's communication it is perceptible that some disciplinary action has been initiated against the erring official. But that is another matter. The fact that cannot be brushed aside is that there is enormous delay in dealing with the case. Had timely effort been made and due concern bestowed, it could have been avoided. There may be cases where delay may be unavoidable. But in the case at hand, the counsel sought adjournment after adjournment in a nonchalant manner and the same were granted in a routine fashion. It is the duty of the counsel as the officer of the court to assist the court in a properly prepared manner and not to seek unnecessary adjournments. Getting an adjournment has never been appreciated by the courts. All who are involved in the justice dispensation system, which includes the Judges, the lawyers, the judicial officers who work in courts, the law officers of the State, the Registry and the litigants, have to show dedicated diligence so that a controversy is put to rest. Shifting the blame is not the cure. Acceptance of responsibility and dealing with it like a captain in the frontier is the necessity of the time. Diligence brings satisfaction. There has to be strong resolve in the mind to carry out the responsibility with devotion. All concerned are required to abandon idleness

and arouse oneself and see to it that the syndrome of delay does not erode the concept of dispensation of expeditious justice which is the constitutional command. Sagacious acceptance of the deviation and necessitous steps taken for the redressal of the same would be a bright lamp which would gradually become a laser beam. This is the expectation of the collective, and the said expectation has to become a reality. Expectations are not to remain at the stage of hope. They have to be metamorphosed to actuality. [Para 32] [1169-G-H; 1170-A-H; 1171-A-C]

1.9. However, this Court restrains from issuing any directions, for the High Court as a constitutional Court has to carry the burden and live up to the requisite expectations of the litigants. It is also expected from the lawyers' community to see that delay is avoided. A concerted effort is bound to give results. Therefore, the Chief Justice of the Rajasthan High Court as well as the other Chief Justices are requested to conceive and adopt a mechanism, regard being had to the priority of cases, to avoid such inordinate delays in matters which can really be dealt with in an expeditious manner. [Para 33] [1171-D-E]

Kailash v. Nanhku and Others **(2005) 4 SCC 480: 2005 (3) SCR 289;** *Sushil Kumar Sen v. State of Bihar* **(1975) 1 SCC 774: 1975 (3) SCR 942;** *State of Punjab v. Shamlal Murari* **(1976) 1 SCC 719: 1976 (2) SCR 82;** *Topline Shoes Ltd.* v. *Corpn. Bank* **(2002) 6 SCC 33: 2002 (3) SCR 1167;** *Shiv Cotex v. Tirgun Auto Plast Private Limited and Others* **(2011) 9 SCC 678: 2011 (10) SCR 787;** *Ramon Services Pvt. Ltd. v. Subhash Kapoor and Others* **AIR 2001 SC 207: 2000 (4) Suppl. SCR 550;** *Mahabir Prasad Singh v. Jacks Aviation Pvt. Ltd.* **AIR 1999 SC 287: 1998 (2) Suppl. SCR 675;** *Pandurang Dattatraya Khandekar v. Bar Council of Maharashtra, Bombay and Others* **(1984) 2 SCC 556: 1984 (1) SCR 414;** *Lt. Col. S.J. Chaudhary v. State (Delhi*

Administration) **AIR 1984 SC 618: 1984 (2) SCR 438;** *O.P. Sharma and Others v. High Court of Punjab and Haryana* **(2011) 6 SCC 86: 2011 (6) SCR 301;** *R.K. Garg, Advocate v. State of Himachal Pradesh* **(1981) 3 SCC 166: 1981 (3) SCR 536;** *Hussainara Khatoon v. Home Secretary, State of Bihar* **AIR 1979 SC 1360: 1979 (3) SCR 169;** *Hussainara Khatoon (IV) and Others v. Home Secretary, State of Bihar, Patna* (**1980) 1 SCC 98: 1979 (3) SCR 532;** *Diwan Naubat Rai and Others v. State through Delhi Administration* **AIR 1989 SC 542: 1989 (1) SCC 297;** *Surinder Singh v. State of Punjab* **(2005) 7 SCC 387: 2005 (2) Suppl. SCR 1172;** *Ramdeo Chauhan Alias Raj Nath v. State of Assam* **(2001) 5 SCC 714: 2001 (3) SCR 669 and** *Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others* **(2004) 4 SCC 158: 2004 (3) SCR 1050 – referred to.**

My life in Court (Garden City, New York: Doubleday & Company Inc., **1961) by *Nizer Louis;* p.213 – referred to.**

Case Law Reference:

2005 (3) SCR 289	**referred to**	**Para 13**
1975 (3) SCR 942	**referred to**	**Para 13**
1976 (2) SCR 82	**referred to**	**Para 13**
2002 (3) SCR 1167	**referred to**	**Para 14**
2011 (10) SCR 787	**referred to**	**Para 15**
2000 (4) Suppl. SCR 550	**referred to**	**Para 16**
1998 (2) Suppl. SCR 675	**referred to**	**Para 16**
1984 (1) SCR 414	**referred to**	**Para 18**
1984 (2) SCR 438	**referred to**	**Para 19**
2011 (6) SCR 301	**referred to**	**Para 21**
1981 (3) SCR 536	**referred to**	**Para 22**

1979 (3) SCR 169	**referred to**	**Para 24**
1979 (3) SCR 532	**referred to**	**Para 24**
1989 (1) SCC 297	**referred to**	**Para 25**
2005 (2) Suppl. SCR 1172	**referred to**	**Para 26**
2001 (3) SCR 669	**referred to**	**Para 30**
2004 (3) SCR 1050	**referred to**	**Para 31**

CIVIL APPELLATE JURISDICTION : SLP No. (C) No. 25848 of 2011.

From the Judgment & Order dated 09.05.2011 of the High Court of Rajasthan at Jodhpur in S.B. Civil Second Appeal No. 207 of 2001.

H.D. Thanvi, Shashank Pareek, Sarad Kumar Singhania for the Petitioner.

Abhinav Mukerji for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. In a democratic body polity which is governed by a written Constitution and where Rule of Law is paramount, judiciary is regarded as sentinel on the *qui vive* not only to protect the Fundamental Rights of the citizens but also to see that the democratic values as enshrined in the Constitution are respected and the faith and hope of the people in the constitutional system are not atrophied. Sacrosanctity of rule of law neither recognizes a master and a slave nor does it conceive of a ruler and a subject but, in quintessentiality, encapsules and sings in glory of the values of liberty, equality and justice I n accordance with law requiring the present generation to have the responsibility to sustain them with all fairness for the posterity ostracising all affectations. To maintain the sacredness of democracy, sacrifice in continuum by every member of the collective is a categorical imperative. The fundamental conception of democracy can only be preserved

as a colossal and priceless treasure where virtue and values of justice rule supreme and intellectual anaemia is kept at bay by constant patience, consistent perseverance, and argus-eyed vigilance. The foundation of justice, apart from other things, rests on the speedy delineation of the lis pending in courts. It would not be an exaggeration to state that it is the primary morality of justice and ethical fulcrum of the judiciary. Its profundity lies in not allowing anything to cripple the same or to do any act which would freeze it or make it suffer from impotency. Delayed delineation of a controversy in a court of law creates a dent in the normative dispensation of justice and in the ultimate eventuate, the Bench and the Bar gradually lose their reverence, for the sense of divinity and nobility really flows from institutional serviceability. Therefore, historically, emphasis has been laid on individual institutionalism and collective institutionalism of an adjudicator while administering justice. It can be stated without any fear of contradiction that the collective collegiality can never be regarded as an alien concept to speedy dispensation of justice. That is the hallmark of duty, and that is the real measure.

2. Presently to the factual matrix. The respondent initiated civil action by instituting Civil Suit No. 42 of 1990 for injunction to restrain the defendant therein from selling or otherwise transferring the suit land towards the southern side of the house and further to permanently injunct him to make any construction on the land in dispute. After the written statement was filed, a counter claim was put forth by the defendant. Thereafter, issues were framed and the parties adduced evidence to substantiate their respective stands. On 12.9.1997, the learned Civil Judge (Junior Division) Nohar, District Hanumangarh, Rajasthan dismissed the suit and decreed the counter claim filed by defendant-petitioner herein. Being grieved by the aforesaid judgment and decree, the first respondent preferred Civil First Appeal No. 59 of 1997 in the Court of the concerned Additional District Judge, Nohar who, on 10.07.2001 dismissed the appeal. The dismissal of appeal compelled the respondent to

file a Civil Second Appeal No. 207/2001 in the High Court of Judicature of Rajasthan at Jodhpur.

3. Be it noted, we have not adverted to the factual controversy and findings returned thereon because advertence to the same is not necessary for our purpose.

4. The chequered history of the second appeal, a tragic one, commenced on 27.7.2011, when memorandum of the appeal was presented. The appeal was listed for admission along with the stay application on 30.07.2001. The petitioner herein had entered caveat and was present on the date of admission and on the basis of the prayer made by both the parties, the court called for the lower courts' records. Subsequently, the matter was listed on 8.11.2001, 5.12.2001 and 18.1.2002 but due to non-appearance of counsel for the parties, no order was passed. On 18.2.2002, though none was present on behalf of the appellant therein, yet the court adjourned the appeal. Similarly, adjournments were granted in the absence of counsel on 20.01.2003 and 4.2.2003. It is interesting to note that when the appeal was listed on 4.2.2003, the court directed issuance of notice to the appellant for making appropriate arrangements for his representation. It is apposite to note that the counsel for the respondent therein was present on that day. Thereafter, the matter was adjourned on many an occasion awaiting for service of notice on the appellant. After completion of service of notice, the matter was listed on 23.9.2003 and, as usual, none was present for the appellant. Similar was the situation on 7.10.2003. On 10.11.2003, when none was present for the appellant, the appeal was dismissed for non-prosecution in the presence of the counsel for the respondent.

5. After the appeal was dismissed for want of prosecution, the appellant before the High Court woke up from slumber and filed an application for restoration in 2004 which was eventually allowed vide order dated 9.1.2006. As the order sheet would

reflect, time got comatosed for more than six years and eventually, ministerial order of restoration was recorded on 11.5.2010. After the formality of restoration was over breaking the artificial arrest of time, when the file moved like a large python, the appeal was listed before the court for admission on 25.10.2010 on which day the learned counsel for the appellant commenced the argument and ultimately sought adjournment. The matter stood adjourned to 10.11.2010. Thereafter, an application under Section 100 (5) read with Order 41, Rule 2 Code of Civil Procedure was filed by the appellant and opportunity was granted to the counsel for the respondent, the plaintiff therein, to file reply to the same and the matter was directed to be listed after two weeks. As the order sheet would further uncurtain the appeal was listed again on 29.11.2010 and in the meantime, the respondent had filed an application under Order 41 Rule 27 read with Section 151 of CPC.

6. On 24.2.2011, when the matter was listed for admission, the Court directed that the matter shall be listed for admission and all the applications would be considered on that date. On 7.3.2011, it was directed by the court to list the matter after one week as adjournment was sought for. Similar prayer for adjournment was made on 16.3.2011 and the matter was again directed to be listed after two weeks as prayed for. On 27.04.2011, the learned Single Judge passed the following order:

> "None for the appellant.
>
> I have perused the record. This second appeal was filed as back as in the year 2001 and it is now more than 10 years that it is not yet either admitted for final hearing with a view to find out whether it involves any substantial question of law within the meaning of Section 100. It has undoubtedly caused serious concern to my conscience that this appeal has taken ten years to decide whether it involves any substantial question of law.

> The matter is being adjourned almost on every occasions in the last ten years to accommodate the counsel regardless of the sufficient cause and only on mere request.
>
> Even today the counsel is engaged for the appellant has not appeared. Another counsel got up and said that the counsel engaged is not well and, therefore, the case be adjourned.
>
> I could have dismissed the appeal for want of prosecution but I prefer not to do so because it does not serve anybody's purpose. With extreme reluctance and against my conscience and with a view to do substantial justice to the appellant to give right of audience, I am constrained to adjourn the case to accommodate the counsel (though I am not supposed to) and list the appeal for admission in the next week."

7. At last, on 9.5.2011, the learned counsel for both the sides appeared and the matter was admitted on two substantial questions of law and there was direction for stay of operation of the impugned judgment and decree passed by the courts below.

8. Mr. H.D. Thanvi, learned counsel for the petitioner, has contended that there was no substantial question of law involved and the High Court had no reason to entertain the second appeal only on the factual score.

9. When the matter was listed on 21.9.2012 before us, the following order was passed: -

> "Learned counsel for the petitioner submitted that Second Appeal preferred by Respondent No. 1 in 2001 was dismissed for non-prosecution on 10.11.2003, but later restored to file in January, 2006 and after almost 10 years of filing of the second appeal, the judgment and decree of

both the courts below have been stayed by the High Court by its impugned order dated 9.5.2011.

Registrar General of the Rajasthan High Court is directed to file the details of the progress of S. B. Civil Second Appeal No. 207 of 2001, from 2001 to 2011, within two weeks."

10. In pursuance of the aforesaid order, the Registrar General has sent a report to this Court on the basis of which we have referred to the proceedings before the High Court. At this juncture, we may clearly state that we had not issued notice to the contesting respondent as we are not inclined to interfere with the order. But, a pregnant one, the manner in which the proceedings in the second appeal continued, being disturbing, compels us to say something on the said score. Not that this Court is saying it for the first time but a reminder serves as a propeller for keen introspection and paves the path of needed rectification.

11. The proceedings in the second appeal before the High Court, if we allow ourselves to say so, epitomizes the corrosive effect that adjournments can have on a litigation and how a lis can get entangled in the tentacles of an octopus. The philosophy of justice, the role of a lawyer and the court, the obligation of a litigant and all legislative commands, the nobility of the Bench and the Bar, the ability and efficiency of all concerned and ultimately the divinity of law are likely to make way for apathy and indifference when delay of the present nature takes place, for procrastination on the part of anyone destroys the values of life and creates a catastrophic turbulence in the sanctity of law. The virtues of adjudication cannot be allowed to be paralyzed by adjournments and non-demonstration of due diligence to deal with the matter. One cannot be oblivious to the feeling necessities of the time. No one can afford to sit in an ivory tower. Neither a Judge nor a lawyer can ignore "the total push and pressure of the cosmos". It is devastating to expect infinite patience. Change of attitude

is the warrant and command of the day. We may recall with profit what Justice Cardozo had said:

> "It is true, I think, today in every department of law that the social value of a rule has become a test of growing power and importance".

12. It has to be kept in mind that the time of leisure has to be given a decent burial. The sooner it takes place, the better it is. It is the obligation of the present generation to march with the time and remind oneself every moment that rule of law is the centripodal concern and delay in delineation and disposal of cases injects an artificial virus and becomes a vitiating element. The unfortunate characteristics of endemic delays have to be avoided at any cost. One has to bear in mind that this is the day, this is the hour and this is the moment, when all soldiers of law fight from the path. One has to remind oneself of the great saying, "Awake, Arise, 'O' Partha".

13. As advised, at present, we are disposed to refer to certain pronouncements of this Court. A three-Judge Bench in *Kailash v. Nanhku and Others,*[1] while dealing with the issue whether Order 8 Rule 1 of Code of Civil Procedure is mandatory or directory, referred to the observations in *Sushil Kumar Sen v. State of Bihar*[2] which we may profitably reproduce: -

> "The mortality of justice at the hands of law troubles a judge's conscience and points an angry interrogation at the law reformer.
>
> The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act *ex debito*

1. (2005) 4 SCC 480.
2. (1975) 1 SCC 774.

justitiae where the tragic sequel otherwise would be wholly inequitable. … Justice is the goal of jurisprudence — processual, as much as substantive."

The Bench further referred to the pronouncement in *State of Punjab v. Shamlal Murari*[3] to emphasise the approach relating to the process of adjective law. It has been stated in the said case: -

"Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

14. We may note with profit that the Court had further opined that the procedure is directory but emphasis was laid on the concept of desirability and for the aforesaid purpose, reference was made to *Topline Shoes Ltd. v. Corpn. Bank*[4]. Analysing the purpose behind it, the three-Judge-Bench, referring to *Topline Shoes Ltd.* (supra), observed thus: -

"**36.** The Court further held that the provision is more by way of procedure to achieve the object of speedy disposal of such disputes. The strong terms in which the provision is couched are an expression of "desirability" but do not create any kind of substantive right in favour of the complainant by reason of delay so as to debar the respondent from placing his version in defence in any circumstances whatsoever."

15. In *Shiv Cotex v. Tirgun Auto Plast Private Limited and Others*[5] this Court was dealing with a judgment passed by the High Court in a second appeal wherein the High Court had not formulated any substantial question of law and further allowed

3. (1976) 1 SCC 719.
4. (2002) 6 SCC 33.
5. (2011) 9 SCC 678.

the second appeal preferred by the plaintiff solely on the ground that the stakes were high and the plaintiff should have been non-suited on the basis of no evidence. This Court took note of the fact that after issues were framed and the matter was fixed for production of the evidence of the plaintiff on three occasions, the plaintiff chose not to adduce the evidence. The question posed by the Court was to the following effect: -

"Is the court obliged to give adjournment after adjournment merely because the stakes are high in the dispute? Should the court be silent spectator and leave control of the case to a party to the case who has decided not to take the case forward?"

Thereafter, the Court proceeded to answer thus: -

"15. It is sad, but true, that the litigants seek - and the courts grant - adjournments at the drop of the hat. In the cases where the Judges are little proactive and refuse to accede to the requests of unnecessary adjournments, the litigants deploy all sorts of methods in protracting the litigation. It is not surprising that civil disputes drag on and on. The misplaced sympathy and indulgence by the appellate and revisional courts compound the malady further. The case in hand is a case of such misplaced sympathy. It is high time that courts become sensitive to delays in justice delivery system and realise that adjournments do dent the efficacy of the judicial process and if this menace is not controlled adequately, the litigant public may lose faith in the system sooner than later. The courts, particularly trial courts, must ensure that on every date of hearing, effective progress takes place in the suit.

16. No litigant has a right to abuse the procedure provided in CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system."

After so stating, the Bench observed as follows: -

"A party to the suit is not at liberty to proceed with the trial at its leisure and pleasure and has no right to determine when the evidence would be let in by it or the matter should be heard. The parties to a suit — whether the plaintiff or the defendant — must cooperate with the court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril."

16. In *Ramon Services Pvt. Ltd. v. Subhash Kapoor and Others,*[6] after referring to a passage from *Mahabir Prasad Singh v. Jacks Aviation Pvt. Ltd.,*[7] the Court cautioned thus: -

"Nonetheless we put the profession to notice that in future the advocate would also be answerable for the consequence suffered by the party if the non-appearance was solely on the ground of a strike call. It is unjust and inequitable to cause the party alone to suffer for the self imposed dereliction of his advocate. We may further add that the litigant who suffers entirely on account of his advocate's non-appearance in Court, he has also the remedy to sue the advocate for damages but that remedy would remain unaffected by the course adopted in this case. Even so, in situations like this, when the Court mulcts the party with costs for the failure of his advocate to appear, we make it clear that the same Court has power to permit the party to realize the costs from the advocate concerned. However, such direction can be passed only after affording an opportunity to the advocate. If he has any justifiable cause the Court can certainly absolve him from such a liability."

17. Be it noted, though the said passage was stated in the context of strike by the lawyers, yet it has its accent on non-appearance by a counsel in the court.

6. AIR 2001 SC 207.

7. AIR 1999 SC 287.

18. In this context, we may refer to the pronouncement in *Pandurang Dattatraya Khandekar v. Bar Council of Maharashtra, Bombay and Others,*[8] wherein the Court observed that an advocate stands in *a loco parentis* towards the litigants and it, therefore, follows that the client is entitled to receive disinterested, sincere and honest treatment especially where the client approaches the advocates for succour in times of need.

19. In *Lt. Col. S.J. Chaudhary v. State (Delhi Administration),*[9] a three-Judge Bench, while dealing with the role of an advocate in a criminal trial, has observed as follows:-

"We are unable to appreciate the difficulty said to be experienced by the petitioner. It is stated that his Advocate is finding it difficult to attend the court from day-to-day. It is the duty of every Advocate, who accepts the brief in a criminal case to attend the trial from day-to-day. We cannot over-stress the duty of the Advocate to attend to the trial from day-to-day. Having accepted the brief, he will be committing a breach of his professional duty, if he so fails to attend."

20. In *Mahabir Prasad Singh* (supra), the Bench, laying emphasis on the obligation of a lawyer in his duty towards the Court and the duty of the Court to the Bar, has ruled as under:-

"A lawyer is under obligation to do nothing that shall detract from the dignity of the Court of which he is himself a sworn officer and assistant. He should at all times pay deferential respect to the judge, and scrupulously observe the decorum of the Court room. (*Warevelle's Legal Ethics at p.182*)

Of course, it is not a unilateral affair. There is a

8. (1984) 2 SCC 556.

9. AIR 1984 SC 618.

reciprocal duty for the Court also to be courteous to the members of the Bar and to make every endeavour for maintaining and protecting the respect which members of the Bar are entitled to have from their clients as well as from the litigant public. Both the Bench and the Bar are the two inextricable wings of the judicial forum and therefore the aforesaid mutual respect is sine qua non for the efficient functioning of the solemn work carried on in Courts of law. But that does not mean that any advocate or group of them can boycott the courts or any particular Court and ask the Court to desist from discharging judicial function. At any rate, no advocate can ask the Court to avoid a case on the ground that he does not want to appear in that Court."

21. While recapitulating the duties of a lawyer towards the Court and the society, being a member of the legal profession, this Court in *O.P. Sharma and Others v. High Court of Punjab and Haryana*[10] has observed that the role and status of lawyers at the beginning of sovereign and democratic India is accounted as extremely vital in deciding that the nation's administration was to be governed by the Rule of Law. The Bench emphasized on the role of eminent lawyers in the framing of the Constitution. Emphasis was also laid on the concept that lawyers are the Officers of the Court in the administration of justice.

22. In *R.K. Garg, Advocate v. State of Himachal Pradesh*,[11] Chandrachud, C.J., speaking for the Court pertaining to the relationship between the Bench and the Bar, opined thus: -

"....the Bar and the Bench are an integral part of the same mechanism which administers justice to the people. Many members of the Bench are drawn from the Bar and their past association is a source of inspiration and pride to them. It ought to be a matter of equal pride to the Bar. It is

10. (2011) 6 SCC 86.

11. (1981) 3 SCC 166.

unquestionably true that courtesy breeds courtesy and just as charity has to begin at home, courtesy must begin with the Judge. A discourteous Judge is like an ill-tuned instrument in the setting of a court room. But members of the Bar will do well to remember that such flagrant violations of professional ethics and cultured conduct will only result in the ultimate destruction of a system without which no democracy can survive."

23. We have referred to the aforesaid judgments solely for the purpose that this Court, in different contexts, had dealt with the malady of adjournment and expressed its agony and anguish. Whatever may be the nature of litigation, speedy and appropriate delineation is fundamental to judicial duty. Commenting on the delay in the justice delivery system, although in respect of criminal trial, Krishna Iyer, J. had stated thus: -

"Our justice system, even in grave cases, suffers from slow motion syndrome which is lethal to "fair trial", whatever the ultimate decision. Speedy justice is a component of social justice since the community, as a whole, is concerned in the criminal being condignly and finally punished within a reasonable time and the innocent being absolved from the inordinate ordeal of criminal proceedings."

24. In criminal jurisprudence, speedy trial has become an indivisible component of Article 21 of the Constitution and it has been held by this Court that it is the constitutional obligation on the part of the State to provide the infrastructure for speedy trial (see *Hussainara Khatoon v. Home Secretary, State of Bihar,*[12] *Hussainara Khatoon (IV) and Others v. Home Secretary, State of Bihar, Patna*[13]***).***

25. In *Diwan Naubat Rai and Others v. State through*

12. AIR 1979 SC 1360.

13. (1980) 1 SCC 98.

Delhi Administration,[14] it has been opined that right to speedy trial encompasses all stages of trial, namely, investigation, enquiry, trial, appeal and revision.

26. In *Surinder Singh v. State of Punjab,*[15] it has been reiterated that speedy trial is implicit in the broad sweep and content of Article 21 of the Constitution of India. Thus, it has been put at the zenith and that makes the responsibility of everyone Everestine which has to be performed with Olympian calmness.

27. The anguish expressed in the past and the role ascribed to the Judges, lawyers and the litigants is a matter of perpetual concern and the same has to be reflected upon every moment. An attitude of indifference can neither be appreciated nor tolerated. Therefore, the serviceability of the institution gains significance. That is the command of the Majesty of Law and none should make any maladroit effort to create a concavity in the same. Procrastination, whether at the individual or institutional level, is a systemic disorder. Its corrosive effect and impact is like a disorderly state of the physical frame of a man suffering from an incurable and fast progressive malignancy. Delay either by the functionaries of the court or the members of the Bar significantly exhibits indolence and one can aphoristically say, borrowing a line from Southwell "Creeping snails have the weakest force". Slightly more than five decades back, talking about the responsibility of the lawyers, *Nizer Louis*[16] had put thus: -

> "I consider it a lawyer's task to bring calm and confidence to the distressed client. Almost everyone who comes to a law office is emotionally affected by a problem. It is only a matter of degree and of the client's inner resources to withstand the pressure."

14. AIR 1989 SC 542.

15. (2005) 7 SCC 387.

16. My life in Court (Garden City, New York: Doubleday & Company, Inc., 1961) p.213

28. A few lines from illustrious Frankfurter is fruitful to recapitulate:

> "I think a person who throughout his life is nothing but a practicing lawyer fulfils a very great and essential function in the life of society. Think of the responsibilities on the one hand and the satisfaction on the other, to be a lawyer in the true sense."

29. In a democratic set up, intrinsic and embedded faith in the adjudicatory system is of seminal and pivotal concern. Delay gradually declines the citizenry faith in the system. It is the faith and faith alone that keeps the system alive. It provides oxygen constantly. Fragmentation of faith has the effect-potentiality to bring in a state of cataclysm where justice may become a casuality. A litigant expects a reasoned verdict from a temperate Judge but does not intend to and, rightly so, to guillotine much of time at the altar of reasons. Timely delivery of justice keeps the faith ingrained and establishes the sustained stability. Access to speedy justice is regarded as a human right which is deeply rooted in the foundational concept of democracy and such a right is not only the creation of law but also a natural right. This right can be fully ripened by the requisite commitment of all concerned with the system. It cannot be regarded as a facet of Utopianism because such a thought is likely to make the right a mirage losing the centrality of purpose. Therefore, whoever has a role to play in the justice dispensation system cannot be allowed to remotely conceive of a casual approach.

30. In this context, it is apt to refer to a passage from *Ramdeo Chauhan Alias Raj Nath v. State of Assam*[17]: -

> "22. ... The judicial system cannot be allowed to be taken to ransom by having resort to imaginative and concocted grounds by taking advantage of loose sentences

17. (2001) 5 SCC 714.

appearing in the evidence of some of the witnesses, particularly at the stage of special leave petition. The law insists on finality of judgments and is more concerned with the strengthening of the judicial system. The courts are enjoined upon to perform their duties with the object of strengthening the confidence of the common man in the institution entrusted with the administration of justice. Any effort which weakens the system and shakens the faith of the common man in the justice dispensation system has to be discouraged."

31. In *Zahira Habibulla H. Sheikh and Another v. State of Gujarat and Others*[18], emphasizing on the duty of Court to maintain public confidence in the administration of justice, this Court has poignantly held as follows: -

"35. ...Courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice – often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a court of law in the future as in the case before it."

Thus, from the aforesaid, it is clear as day that everyone involved in the system of dispensation of justice has to inspire the confidence of the common man in the effectiveness of the judicial system. Sustenance of faith has to be treated as spinal sans sympathy or indulgence. If someone considers the task to be herculean, the same has to be performed with solemnity, for faith is the 'elan vital' of our system.

32. Coming to the proceedings before the High Court from the date of presentation of the second appeal till the date of admission, the manner in which it has progressed is not only

18. (2004) 4 SCC 158.

perplexing but also shocking. We are inclined to think that the Court should not have shown indulgence of such magnitude by adjourning the matter when the counsel for the appellant was not present. It is difficult to envision why the Court directed fresh notice to the appellant when there was nothing suggestive for passing of such an order. The matter should have been dealt with taking a recourse to the provisions in the Code of Civil Procedure. It is also astonishing that the lawyers sought adjournments in a routine manner and the court also acceded to such prayers. When the matter stood dismissed, though an application for restoration was filed, yet it was listed after a long lapse of time. Adding to the misery, the concerned official took his own time to put the file in order. From the Registrar General's communication it is perceptible that some disciplinary action has been initiated against the erring official. That is another matter and we do not intend to say anything in that regard. But the fact that cannot be brushed aside is that there is enormous delay in dealing with the case. Had timely effort been made and due concern bestowed, it could have been avoided. There may be cases where delay may be unavoidable. We do not intend to give illustrations, for facts in the said cases shall speak for themselves. In the case at hand, as we perceive, the learned counsel sought adjournment after adjournment in a nonchalant manner and the same were granted in a routine fashion. It is the duty of the counsel as the officer of the court to assist the court in a properly prepared manner and not to seek unnecessary adjournments. Getting an adjournment is neither an art nor science. It has never been appreciated by the courts. All who are involved in the justice dispensation system, which includes the Judges, the lawyers, the judicial officers who work in courts, the law officers of the State, the Registry and the litigants, have to show dedicated diligence so that a controversy is put to rest. Shifting the blame is not the cure. Acceptance of responsibility and dealing with it like a captain in the frontier is the necessity of the time. It is worthy to state that diligence brings satisfaction. There has to be strong resolve in the mind to carry out the responsibility with

devotion. A time has come when all concerned are required to abandon idleness and arouse oneself and see to it that the syndrome of delay does not erode the concept of dispensation of expeditious justice which is the constitutional command. Sagacious acceptance of the deviation and necessitous steps taken for the redressal of the same would be a bright lamp which would gradually become a laser beam. This is the expectation of the collective, and the said expectation has to become a reality. Expectations are not to remain at the stage of hope. They have to be metamorphosed to actuality. Long back, Francis Bacon, in his aphoristic style, had said, "Hope is good breakfast, but it is bad supper". We say no more on this score.

33. Though we have dwelled upon the issue, yet we restrain from issuing any directions, for the High Court as a constitutional Court has to carry the burden and live up to the requisite expectations of the litigants. It is also expected from the lawyers' community to see that delay is avoided. A concerted effort is bound to give results. Therefore, we request the learned Chief Justice of the High Court of Rajasthan as well as the other learned Chief Justices to conceive and adopt a mechanism, regard being had to the priority of cases, to avoid such inordinate delays in matters which can really be dealt with in an expeditious manner. Putting a step forward is a step towards the destination. A sensible individual inspiration and a committed collective endeavour would indubitably help in this regard. Neither less, nor more.

34. The Special Leave Petition is, accordingly, disposed of.

B.B.B. SLP disposed of.

R. SHAJI

v.

STATE OF KERALA

(Criminal Appeal No. 1774 of 2010)

FEBRUARY 4, 2013

[DR. B.S. CHAUHAN AND V. GOPALA GOWDA, JJ.]

Penal Code, 1860 – s.302 r/w s.120B – Murder – Criminal conspiracy –Dismembered parts of victim's body recovered from a lake – Case based on circumstantial evidence against accused-appellant and other accused persons – Conviction of appellant – Justification – Held: Justified – Evidence on record clearly established that appellant had adequate reason to harbour animosity towards the victim 'P', as he may well have been unable to tolerate the intimacy that 'P' had developed with appellant's wife – PW testified that appellant had threatened that in the event that he was able to lay his hands on 'P', he would chop him up into pieces – The motive thus stood proved – Victim last seen with appellant (A-1) and A-2 – Recovery of chopper at the behest of appellant – Injuries revealed by post-mortem report established that dismemberment of parts of the body was possible by using a weapon like chopper – Victim's skull recovered on basis of disclosure statement of appellant – Use of vehicle in the crime also stood proved – Appellant clearly involved in conspiracy to eliminate 'P' – Prosecution proved its case beyond reasonable doubt.

Code of Criminal Procedure, 1973 – ss.161 and 164 – Statements u/s.161 and u/s.164 – Difference – Held: Statements u/s.161 can be used only for the purpose of contradiction – Statements u/s.164, however, can be used for both corroboration and contradiction – Evidence Act, 1872 – s.157.

Code of Criminal Procedure, 1973 – s.164 – Object of – Discussed.

Criminal Law – Criminal conspiracy – Proof — Held: Offence of criminal conspiracy can be proved, either by adducing circumstantial evidence, or by way of necessary implication – However, if the circumstantial evidence is incomplete or vague, it becomes necessary for the prosecution to provide adequate proof, by adducing substantive evidence in court – In order to constitute the offence of conspiracy, it is not necessary that the person involved has knowledge of all the stages of action – Mere knowledge of the main object/purpose of conspiracy, would warrant the attraction of relevant penal provisions.

Evidence – Weapon of offence – Recovered at the behest of the accused – Blood stuck on the weapon – Failure by serologist to detect origin of the blood due to dis-integration of the serum – Effect – Held: It does not mean that the blood stuck on the weapon of offence could not have been human blood at all – Sometimes it is possible, either because the stain is insufficient in itself, or due to haematological changes and plasmatic coagulation, that a serologist may fail to detect the origin of the blood in question – However, in such a case, unless the doubt is of a reasonable dimension, which a judicially conscientious mind may entertain with some objectivity, no benefit can be claimed by the accused in this regard – Once recovery was made in pursuance of disclosure by the accused, the matching or non-matching of the blood group (s) lost its' significance.

Evidence Act, 1872 – s.3 – Appreciation of evidence – In civil case and in criminal case – Held: Basis for appreciating evidence in a civil or criminal case is same — However, since in a criminal case, the life and liberty of a person is involved, by way of judicial interpretation, courts have created the requirement of a high degree of proof.

Evidence Act, 1872 – s.9 – Test identification parade – Held: Conducting a test identification parade is meaningless if the witnesses know the accused, or if they have been shown his photographs, or if he has been exposed by the media to the public – In the instant case, just after the incident took place, the main accused being a highly ranked police official, wide publicity was given to the same by the media – Moreover, the witnesses made it clear that they were acquainted with the appellant – In such fact-situation, holding/ non-holding of Test Identification Parade lost its significance.

Evidence Act, 1872 – s.134 – Evidence of witness – Appreciation of – Held: It is not the number of witnesses, but the quality of their evidence which is important – Evidence must be weighed and not counted.

The prosecution case was based on circumstantial evidence. A chopper (M.O.4) used for dismembering the victim ('P') was recovered at the instance of the appellant. A Maruti Van (M.O.5) was also similarly recovered. Charge sheet was filed against five persons, including the appellant. The trial however, could be conducted only against two persons, as all the others were absconding.

The appellant (A-1) was convicted under Section 302 read with Section 120-B of IPC, and sentenced to life imprisonment. A-2 too was sentenced to undergo imprisonment for life. Both the accused were also convicted under Section 201 read with Section 120-B IPC and also under Section 364 read with Section 120-B IPC. Aggrieved, both of them preferred Criminal Appeal which was dismissed by the High Court.

In the instant appeal, the conviction of appellant was *inter alia* challenged on grounds - that there was no motive for the appellant to cause death of 'P'; that though appellant/A-1 and A-2 were arrested, no Test Identification Parade was conducted; that the statements of witnesses

as recorded under Section 164 CrPC were not exhibited before the court for purpose of corroboration and confrontation; and that as the blood group of the blood stains found on the alleged weapon of offence i.e. the chopper could not be ascertained, the recovery of the chopper could not be relied upon.

The question that therefore arose for consideration was whether anyone apart from the appellant could have committed the murder of 'P' and that the various circumstances that stood proved, pointed only towards the guilt of the appellant.

Dismissing the appeal, the Court

HELD: 1.1. 'P' (deceased), was a victim of homicide, and the dismembered parts of the body recovered from the lake were those of 'P', as the same stood proved by the DNA report. The recovery of other articles also stood proved. Some police officers collected samples of blood stains from the floor of a van and also some hair. The said hair did in fact, belong to 'P'(deceased), and thus, the use of the said vehicle in the crime stood proved. The recovery of the chopper (M.O.4) stood proved by PW.5. [Paras 6,7, 8 and 9] [1189-D-E-G; 1190-E-F, H]

1.2. As per the deposition of PW.77, the appellant made a disclosure statement to the effect that P's body was mutilated using the chopper (M.O.4). The said chopper was recovered from the lake on the basis of such disclosure statement made by the appellant as he had exclusive knowledge as regards the place of concealment. Recovery of the said chopper at the behest of the appellant cannot be doubted. [Para 10] [1191-B-C, D]

1.3. The chopper (M.O.4) was recovered by a Scientific Assistant, who deposed that the chopper had blood stains and hair stuck on it. PW.71, a Forensic Surgeon

deposed that the dismemberment of the body of the deceased could certainly have been possible with the said chopper. So far as the recovery of the skull of 'P' (deceased) is concerned, the same was also made on the basis of the disclosure statement of the appellant. A glove and a plastic rope were also recovered at his behest, and in light of the aforementioned circumstances, it cannot be doubted that the said recoveries suffered from any illegality. [Para 11] [1191-E-F, G]

2.1. Statements under Section 161 Cr.P.C. can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction. [Para 14] [1193-D]

2.2. So far as the statement of witnesses recorded under Section 164 is concerned, the object is two fold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement, and secondly, to tide over immunity from prosecution by the witness under Section 164. [Para 15] [1193-F-G]

Jogendra Nahak & Ors. v. State of Orissa & Ors. **AIR 1999 SC 2565: 1999 (1) Suppl. SCR 39;** *Assistant Collector of Central Excise, Rajamundry v. Duncan Agro Industries Ltd. & Ors.* **AIR 2000 SC 2901: 2000 (2) Suppl. SCR 162;** *Ram Charan & Ors. v. The State of U.P.* **AIR 1968 SC 1270: 1968 SCR 354 and** *Dhanabal & Anr. v. State of Tamil Nadu* **AIR 1980 SC 628: 1980 (2) SCR 754 – relied on.**

Mamand v. Emperor **AIR 1946 PC 45;** *Bhuboni Sahu v. King* **AIR 1949 PC 257 – referred to.**

3.1. Once a recovery is made in pursuance of a disclosure statement made by the accused, the matching or non-matching of blood group (s) loses significance. [Para 17] [1194-H; 1195-A]

3.2. No advantage can be conferred upon the accused to enable him to claim any benefit, and the report of dis-integration of blood etc. cannot be termed as a missing link, on the basis of which the chain of circumstances may be presumed to be broken. [Para 18] [1195-C-D]

Prabhu Babaji Navie v. State of Bombay **AIR 1956 SC 51;** *Raghav Prapanna Tripathi v. State of U.P.* **AIR 1963 SC 74: 1963 SCR 239;** *State of Rajasthan v. Teja Ram* **AIR 1999 SC 1776: 1999 (2) SCR 29;** *Gura Singh v. State of Rajasthan* **AIR 2001 SC 330: 2000 (5) Suppl. SCR 408;** *John Pandian v. State represented by Inspector of Police, Tamil Nadu* **(2010) 14 SCC 129 and** *Dr. Sunil Clifford Daniel v. State of Punjab* **JT 2012 (8) SC 639 – relied on.**

4. In a case of circumstantial evidence, motive may be considered as a circumstance, which is a relevant factor for the purpose of assessing evidence, in the event that there is no unambiguous evidence to prove the guilt of the accused. However, the absence of motive in a case depending entirely on circumstantial evidence, is a factor that weighs in favour of the accused as it "often forms the fulcrum of the prosecution story". [Para 19] [1195-E-G]

Babu v. State of Kerala **(2010) 9 SCC 189: 2010 (9) SCR 1039;** *Kulvinder Singh & Anr. v. State of Haryana* **AIR 2011 SC 1777: 2011 (4) SCR 817 and** *Dandu Jaggaraju v. State of A.P.* **AIR 2011 SC 3387: 2011 SCR 342 – relied on.**

5. In the instant case, the evidence on record clearly established, that the appellant had adequate reason to harbour animosity towards 'P', as he may well have been unable to tolerate the intimacy that the deceased had developed with his wife. [Para 20] [1195-H; 1196-A]

6. 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. It is the quality and not quantity, which determines the adequacy of evidence, as has been provided by Section 134 of the Evidence Act. [Para 22] [1197-E-G]

Vadivelu Thevar v. State of Madras **AIR 1957 SC 614;** *Jagdish Prasad v. State of M.P.* **AIR 1994 SC 1251;** *Sunil Kumar v. State Govt. of NCT of Delhi* **AIR 2004 SC 552: 2003 (4) Suppl. SCR 767;** *Namdeo v. State of Maharashtra* **AIR 2007 SC (Supp) 100;** *Kunju @ Balachandran v. State of Tamil Nadu* **AIR 2008 SC 1381: 2008 (1) SCR 781;** *Bipin Kumar Mondal v. State of West Bengal* **AIR 2010 SC 3638: 2010 (8) SCR 1036;** *Mahesh & Anr. v. State of Madhya Pradesh* **(2011) 9 SCC 626 and** *Kishan Chand v. State of Haryana* **JT 2013(1) SC 222 – relied on.**

7. It is a settled legal proposition that the conviction of a person accused of committing an offence, is generally based solely on evidence that is either oral or documentary, but in exceptional circumstances, such conviction may also be based solely on circumstantial evidence. For this to happen, 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. [Para 23] [1198-C-D]

Sharad Birdhichand Sarda v. State of Maharashtra **AIR 1984 SC 1622: 1985 (1) SCR 88;** *Paramjeet Singh @ Pamma v. State of Uttarakhand* **AIR 2011 SC 200: 2010 (11) SCR 1064 – relied on.**

8. A criminal conspiracy is generally hatched in

secrecy, owing to which, direct evidence is difficult to obtain. The offence can therefore be proved, either by adducing circumstantial evidence, or by way of necessary implication. However, in the event that the circumstantial evidence is incomplete or vague, it becomes necessary for the prosecution to provide adequate proof regarding the meeting of minds, which is essential in order to hatch a criminal conspiracy, by adducing substantive evidence in court. Thus, an agreement between two persons to do, or to cause an illegal act, is the basic requirement of the offence of conspiracy under the penal statute. [Para 31] [1203-F-H; 1204-A-B]

Mir Nagvi Askari v. CBI **AIR 2010 SC 528: 2009 (13) SCR 124;** *Baldev Singh v. State of Punjab* **AIR 2009 SC Supp. 1629: 2009 (7) SCR 855;** *State of M.P. v. Sheetla Sahai* **AIR 2009 SC Supp. 1744:;** *R. Venkatkrishnan v. CBI* **AIR 2010 SC 1812: 2009 (12) SCR 762;** *S. Arul Raja v. State of T.N.* **(2010) 8 SCC 233;** *Monica Bedi v. State of A.P.* **(2011) 1 SCC 284: 2010 (13) SCR 522 and** *Sushil Suri v. CBI* **AIR 2011 SC 1713: 2011 (8) SCR 1 – relied on.**

9. It cannot be said that as the witnesses PW.8 and PW.11 have admitted in their cross-examination, that they have been the accused persons in certain other criminal cases, their testimony should not have been relied upon by the courts below, for the reason that the law does not prohibit taking into consideration even the evidence provided by an accomplice, who has not been put to trial. The evidence provided by a person who has not been put to trial, and who could not have been tried jointly with the accused can be considered, if the court finds his evidence reliable, and conviction can also safely be based upon it. However, such evidence is required to be considered with care and caution. [Para 32] [1204-C-F]

Laxmipat Choraria & Ors. v. State of Maharashtra **AIR 1968 SC 938: 1968 SCR 624;** *Chandran alias Manichan*

alias Maniyan & Ors. v. State of Kerala **AIR 2011 SC 1594: 2011 (8) SCR 273 and** *Prithipal Singh & Ors. v. State of Punjab & Anr.* **(2012) 1 SCC 10: 2012 (14) SCR 862 – relied on.**

10.1. The evidence from a test identification parade is admissible under Section 9 of the Evidence Act, 1872. A test identification parade cannot be claimed by an accused as a matter of right. Mere identification of an accused in a test identification parade is only a circumstance corroborative of the identification of the accused in court. Further, conducting a test identification parade is meaningless if the witnesses know the accused, or if they have been shown his photographs, or if he has been exposed by the media to the public. [Para 33] [1205-B-E]

10.2. In the instant case, the witnesses, particularly PW.8, PW.9, PW.11 and PW.12, made it clear that they were acquainted with the appellant since he was posted in the control room of their city. Moreover, just after the incident took place, the same being a sensitive case wherein the main accused was a highly ranked official of the police department, wide publicity was given to the same by the media. In light of the aforementioned fact-situation, the holding/non-holding of a Test Identification Parade loses its significance. Moreover, the defence did not put any question to PW.77, the investigating officer in relation to why such TI Parade was not held. [Para 34] [1205-F-G]

Vijay @ Chinee v. State of M.P. **(2010) 8 SCC 191: 2010 (8) SCR 1150;** *Santokh Singh v. Izhar Hussain & Anr.* **AIR 1973 SC 2190: 1974 (1) SCR 78;** *State of Himachal Pradesh v. Lekh Raj & Anr.* **AIR 1999 SC 3916: 1999 (4) Suppl. SCR 286;** *Malkhan Singh & Ors. v. State of M.P.* **AIR 2003 SC 2669: 2003 (1) Suppl. SCR 443 and** *Munna Kumar Upadhyay v. State of A.P.* **AIR 2012 SC 2470: 2012 (6) SCC 174 – relied on.**

11. The prime witness of the prosecution has no doubt been PW.12, and in relation to him, the submission advanced on behalf of the appellant that the High Court had entirely disbelieved his testimony, is factually incorrect. There is no cogent reason to disbelieve the testimony of PW12 in toto. [Para 35] [1205-H; 1206-A-B, C]

Case Law Reference:

1999 (1) Suppl. SCR 39	relied on	Para 15
2000 (2) Suppl. SCR 162	relied on	Para 15
AIR 1946 PC 45	referred to	Para 16
AIR 1949 PC 257	referred to	Para 16
1968 SCR 354	relied on	Para 16
1980 (2) SCR 754	relied on	Para 16
AIR 1956 SC 51	relied on	Para 17
1963 SCR 239	relied on	Para 17
1999 (2) SCR 29	relied on	Para 17
2000 (5) Suppl. SCR 408	relied on	Para17
(2010) 14 SCC 129	relied on	Para 17
JT 2012 (8) SC 639	relied on	Para 17
2010 (9) SCR 1039	relied on	Para 19
2011 (4) SCR 817	relied on	Para 19
2011 SCR 342	relied on	Para 19
AIR 1957 SC 614	relied on	Para 22
AIR 1994 SC 1251	relied on	Para 22
2003 (4) Suppl. SCR 767	relied on	Para 22

AIR 2007 SC (Supp) 100	relied on	Para 22
2008 (1) SCR 781	relied on	Para 22
2010 (8) SCR 1036	relied on	Para 22
(2011) 9 SCC 626	relied on	Para 22
JT 2013(1) SC 222	relied on	Para 22
1985 (1) SCR 88	relied on	Para 23
2010 (11) SCR 1064	relied on	Para 23
2009 (13) SCR 124	relied on	Para 31
2009 (7) SCR 855	relied on	Para 31
AIR 2009 SC Supp. 1744	relied on	Para 31
2009 (12) SCR 762	relied on	Para 31
(2010) 8 SCC 233	relied on	Para 31
2010 (13) SCR 522	relied on	Para 31
2011 (8) SCR 1	relied on	Para 31
1968 SCR 624	relied on	Para 32
2011 (8) SCR 273	relied on	Para 32
2012 (14) SCR 862	relied on	Para 32
2010 (8) SCR 1150	relied on	Para 33
1974 (1) SCR 78	relied on	Para 33
1999 (4) Suppl. SCR 286	relied on	Para 33
2003 (1) Suppl. SCR 443	relied on	Para 33
2012 (6) SCC 174	relied on	Para 33

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1774 of 2010.

From the Judgment & Order dated 10.12.2009 of the High Court of Kerala at Ernakulam in Crl. A.No. 86 of 2006.

Dr. S. Gopakumaran Nair, T.G. Narayanan Nair, K.N. Madhusoodhanan for the Appellant.

R. Basanth, Ramesh Babu M.R., Karthik Ashok, P.V. Dinesh 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 10.12.2009 delivered by the Kerala High Court at Ernakulam in Criminal Appeal No. 86 of 2006, by way of which it has affirmed the judgment and order of the Sessions Court, Kottayam dated 3.1.2006, passed in Sessions Case No. 145 of 2005.

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

A. As per the case of the prosecution, the appellant at the relevant time had been working as the Deputy Superintendent of Police at Malappuram, and his wife was living at Palluruthy, and was using a vehicle which was driven by Praveen (deceased). He was also related to the appellant. Praveen developed an illicit relationship with the appellant's wife, and the appellant was informed of this development by his Manager, Aji. The appellant reached Palluruthy, and made enquiries about the situation from Praveen and others, and his relatives tried to resolve the aforesaid matter. In the presence of other relatives, the matter was then amicably settled. Praveen (deceased), was asked not to come to appellant's house thereafter, and thus Praveen left and began working in a shop at Ettumanoor, as a driver.

B. During this period, on 25/26.11.2004, Vijayamma, relative of Praveen (deceased), and N. Sahadevan PW.2's father, informed Pavithran (PW.1), father of Praveen, that Praveen was in danger as Vijayamma had found out about the

illicit relationship that Praveen had developed with the appellant's wife.

C. N. Sahadevan, PW.2's father informed Pavithran (PW.1), Praveen's father who resided at Trivendrum, via the telephone of this danger to Praveen's life. Pavithran (PW.1) immediately informed his brother and requested him to help Praveen, as he may not be spared by the appellant. N. Sahadevan, PW.2's father, went and brought Praveen to his own house, whilst informing everybody, that his mother was seriously ill. The appellant asked N. Sahadevan, PW.2's father, in conversation over the telephone about Praveen, and directed him to bring Praveen back. PW.2's father then took Praveen back. When the meeting took place in the presence of various relatives, the appellant (A-1), attempted to assault Praveen, but they were separated by other persons. Praveen pleaded his innocence, and told the appellant that Aji had played this dirty game for some personal gain. However, when Aji was called to participate in the said meeting, he stood by his version of events and stated that he had seen Praveen and the appellant's wife in a compromising position. The appellant told Praveen to leave the said place and to not enter the city.

D. Praveen was brought by Jilesh M.S. (PW.2), and taken to Trivendrum for treatment. Praveen told his father after a period of 2/3 days that it was not safe for him to stay in hospital as 2/3 gundas had been roaming around in the hospital. Thus, he went back to the city and sought employment.

E. On 15.2.2005, Divakaran (PW.7), neighbour of Vinu (A-2), while coming out of a bus stop, saw Vinu (A-2) coming on a motor bike while Praveen was standing in the market. Vinu (A-2), stopped the bike and took Praveen towards Kottayam. They then went to a bar, had drinks as were served to them by Saiju (PW.9), and came out of the bar at 8.30 p.m., after which they ate at a 'thattukada' (a small petty shop), where they were served by Jose (PW.8), an employee of the 'thattukada'.

Mohammed Sherif @ Monai (PW.13), who was the owner of the 'thattukada', saw the appellant (A-1), coming in a Maruti car. In the said car, there were also some other persons. They had coffee, as was served to them by Jose (PW.8), and seen by Mohammed Sherif @ Monai (PW.13). The appellant (A-1) went back to the car and started driving. Other persons also joined him, and Vinu (A-2), along with Praveen, left on a Motor Cycle. Vinu (A-2) lifted his hand and proceeded further. The Maruti Van followed them. They all left the city at about midnight, and drove into the jungle.

F. Shanavas (PW.12), an auto-rickshaw driver carrying patients to the Medical College, Kottayam found one motor cycle parked on the side of the road. As he had slowed down seeing the vehicles on the road, he also saw two persons coming out of the van. The pillion rider of the motor cycle sat in the van and after he got into the van, the van left immediately. The motor bike also started. He noted the registration number of the van, and also that of the motor bike.

G. Mohanan (PW.10), another auto rickshaw driver saw the Maruti Van parked on the road and a person standing near it. Mohanan (PW.10), stopped his auto and asked him what had happened, however he only replied that a person had gone nearby. Thus, Mohanan (PW.10) left the place.

H. On 16.2.2005, a pair of human legs was found floating in the backwaters of the Vembanad lake (hereinafter referred to as the 'lake') at Kottayam, by a person who thereafter lodged a complaint to Subhah K. (PW.68), Sub-Inspector of the Kottayam West Police, on the basis of which, an FIR was registered.

I. On 18.2.2005, Pavithran (PW.1) lodged an FIR in the Police Station alleging that his son Praveen had gone missing, and that after he became aware of the same, he had spent the last 3/4 days searching for him, but had been still unable to trace him.

J. On 19.2.2005, a torso in a plastic bag, was seen floating on the eastern side of the lake. Upon obtaining requisite information, K.M. Antony (PW.17), Circle Inspector of Vaikom, reached the scene and Pavithran (PW.1) also identified the torso, to be that of his son. While the inquest of the torso was being conducted, a pair of hands was seen floating in the lake. K.M. Antony (PW.17) recovered the same and conducted inquest. Pavithran (PW.1) identified the hands to be those of Praveen as well.

K. After the completion of the preliminary enquiry, the appellant and Vinu (A-2), were arrested on 24.2.2005. The house of the appellant (A-1) was searched by K.M. Anto (PW.74), Circle Inspector of Police, Kottayam West and there was recovery of M.Os. 13 to 18, under Exts. P.17 and 18 Mahazars. B. Muralidharan Nair (PW.77), Dy.S.P., Kottayam, received information that a human head in a plastic cover, had been spotted on the shores of the back waters of the lake. The head was then recovered and inquest prepared. B. Muralidharan Nair (PW.77) obtained custody of the accused from court. The chopper (M.O.4), alleged to have been used in the said crime was recovered at the instance of the appellant. A Maruti Van (M.O.5) was also recovered after information was furnished by the appellant (A-1), to the effect that the said Maruti Van had also been used.

L. After having completed the investigation, a charge sheet was filed against five persons, including the appellant. The trial however, could be conducted only against two persons, i.e. the appellant (A-1) and Vinu (A-2), as all the others were absconding. Subsequent to the trial of this case, A-3 and A-4 were also apprehended, put to trial separately, and convicted under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC'). A-5 is still absconding.

M. So far as the present case is concerned, the appellant (A-1) was convicted under Section 302 read with Section 120-

B of the IPC, and was awarded a sentence of life imprisonment and a fine of Rs. one lakh, in default of which, he would undergo SI for a period of one year. Vinu (A-2) was sentenced to undergo imprisonment for life and to pay a fine of Rs.5,000/- only, in default of which, he would undergo SI for 3 months. Both the accused were also convicted under Section 201 read with Section 120-B IPC, and sentenced to imprisonment for a period of 3 years, and a fine of Rs.2,000/- each, in default of which, they would undergo SI for a period of 3 months each. They were further convicted under Section 364 read with Section 120-B IPC, and sentenced to undergo RI for a period of 7 years each, and to pay a fine of Rs.5,000/- each, in default of which, they would undergo SI for a period of one year. All the sentences were directed to run concurrently.

N. Aggrieved, both of them preferred Criminal Appeal No. 86 of 2006, which was dismissed by the High Court vide judgment and order dated 10.12.2009.

Hence, this appeal.

3. Shri S. Gopakumaran Nair, learned senior counsel appearing for the appellant, has submitted that there was no motive for the appellant to cause death of Praveen. It is a case of circumstantial evidence as there is no eye-witness to the actual incident of killing. The chain of circumstances is not complete. Haridas (PW.14), an auto-rickshaw driver had seen the appellant and others only for a fleeting moment. Though the appellant and Vinu (A-2) were arrested, no Test Identification Parade was conducted. The statements of witnesses were recorded under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.') by a Magistrate who did not even mention the date of recording such statements, such statements were not exhibited before the court for the purpose of corroboration and confrontation. Jose (PW.8), Shanavas (PW.12), and Mohamamed Sherif @ Monai (PW.13), identified Praveen (deceased), by seeing only his passport sized photograph. This is not enough as Shanavas (PW.12), had seen the appellant and others including Praveen

(deceased), only for a brief moment and thus, was unable to identify them in court after the lapse of a period of several months, during the course of the trial. Different parts of the body were found, and the identification of the dead body, merely on the basis of a mole on the leg of the body cannot be held to be proper identification by the father, as the dead body was recovered after a lapse of 3/4 days. Different parts of the body were recovered on different dates and by such time the skin would have dis-integrated entirely. Neither Vijayamma nor Radhamma were examined. Aji, who had disclosed information pertaining to the illicit relationship of Praveen with the appellant's wife, was also not examined. A DNA test was conducted on the dead body to determine whether the same was in fact, the body of Praveen (deceased). However, the FSL report disclosed that in respect of the chopper used for the purpose of dismembering the parts of the body, no blood group could be detected. The whole case of the prosecution hence, becomes unbelievable, and the conviction of the appellant is liable, to be set aside.

4. Per contra, Mr. Basant R. learned senior counsel appearing for the State has opposed the appeal, contending that the various circumstances that stood proved, pointed only towards the guilt of the appellant, and that in the light of the facts and circumstances of the case, no one apart from the appellant could have committed the murder of Praveen (deceased). The DNA test established that the different parts of the body that were recovered from the lake were in fact, those of Praveen. There was no reason for the prosecution witnesses, particularly, Jose (PW.8), Mohanan (PW.10), Shanavas (PW.12) and Mohamamed Sherif @ Monai (PW.13), to depose against the appellant and both the courts below also have found their evidence to be trustworthy. Jose (PW.8) and Mohamamed Sherif @ Monai (PW.13) knew the appellant, as well as Vinu (A-2) and Praveen (deceased). Therefore, holding a TI Parade would have been a mere formality. Though, Mohanan (PW.10) and Shanavas (PW.12), the auto rickshaw drivers, were chance

witnesses, their presence cannot be doubted as it is an ordinary circumstance that patients are taken to the hospital even in the late hours of night, and the said incident had occurred on the road that led to the hospital. There was sufficient light on the road, and the High Court recorded a finding to the effect that Shanavas (PW.12), an auto rickshaw driver, even if he had been unable to see Praveen, was still able to identify the appellant and others.

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

6. The courts below have appreciated the entire evidence on record, including the evidence of the defence. The appellant also examined Ajeesh M. Muraleedharan (DW.1), who was a Sub-Editor, Malayala Manorama and thereafter, the High Court concurred with the findings of fact recorded by the Sessions Court on various issues. There is no dispute that Praveen (deceased), was a victim of homicide, and that the dismembered parts of the body recovered from the lake were those of Praveen, as the same stood proved by the DNA report. The High Court concurring with the opinion of the Sessions Court, held as under:

> "The DNA analysis made it clear that the blood samples of the parents of Praveen matched with the DNA of Praveen, deceased and the same proved and established the identity of the dead body as the DNA had also been extracted from the portion of the limbs recovered from the lake and compared with that of DNA of parents."

7. The recovery of other articles also stood proved as the High Court yet again concurring with the finding recorded by the Sessions Court in this regard, held as under:

> "The recovery has been made by the Investigating agency on the statement voluntarily made by the appellant in respect of various materials and the High Court took note of the fact that the appellant was the seasoned police officer and unless and until some of the links were identified and located, nobody could doubt his involvement. The recovery witnesses have proved the recoveries. B. Muraleedharan Nair (PW.77), stated that the seizure was at the behest of the appellant and the vehicle infact recovered belonged to the brother-in-law of Babu (PW.6) and as the owner of the vehicle did not have enough space to park the vehicle in his house, the van was being parked in the compound of Babu (PW.6). The said PW.6 was familiar to the appellant who has deposed that the appellant had come to him on 15.2.2005 and told the said witness that the appellant's vehicle had developed some trouble and that is why he wanted to use the vehicle parked in the house of the said witness. The van was taken by the appellant as allowed by Babu (PW.6) after taking the consent of the owner and the witness further disclosed that the van was brought back by the appellant after few days. B. Muraleedharan Nair (PW.77) has stated that the vehicle was identified by the appellant himself telling that this was the van which had been used for committing the crime."

8. Undoubtedly, the van was returned on 16.2.2005 and was recovered on 24.2.2005, and hence, it might have been used in the interim period, but this does not affect the evidence on record. Some police officers collected samples of blood stains from the floor of the said vehicle and also some hair. The hair and blood stains recovered during the investigation, were compared with the hair collected by the Scientific Officer from the deceased, which established that the said hair did in fact, belong to Praveen (deceased), and thus, the use of the said vehicle in the crime stood proved. The recovery of the van was in accordance with the provisions of Section 27 of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act'), and as the same was done at the behest of the appellant, his conduct was relevant under Section 8 of the Evidence Act.

9. The recovery of the chopper (M.O.4) stood proved as the said chopper was crafted by Vijayakumar (PW.5), who deposed that appellant was familiar with him and that the

appellant had given him a leaf plate for the purpose of making a chopper, as also, a kitchen knife. He prepared both, the chopper and the knife in accordance with instructions, and handed them over to the appellant in early January, 2005. Vijayakumar (PW.5) identified the chopper.

10. As per the deposition of B. Muraleedharan Nair (PW.77), the appellant made a disclosure statement to the effect that Praveen's body was mutilated using the chopper (M.O.4). The said chopper was recovered from the southern side of the lake on the basis of such disclosure statement made by the appellant. The appellant had exclusive knowledge as regards the place of concealment, and the evidence on record makes it clear that when he was in fact, taken to such place, the appellant himself got into the water and retrieved the chopper from there. No one else knew that the weapon was hidden in such a place, and the location was not one that was frequented by the public at large. Therefore, recovery of the said chopper at the behest of the appellant cannot be doubted.

11. The chopper (M.O.4) was recovered by M.K. Ajithkumar, Scientific Assistant, who deposed that at the time of recovery, the chopper had blood stains and hair stuck on it. Dr. P. Babu (PW.71), a Forensic Surgeon deposed that the dismemberment of the body of the deceased could certainly have been possible with the said chopper. So far as the recovery of the skull of Praveen (deceased) is concerned, the same was also made on the basis of the disclosure statement of the appellant. The investigating team was taken to the relevant place by the appellant, and it was on the basis of his disclosure statement that the skull was found. This happened after digging in a few places around the land of Ananda Kini. A glove and a plastic rope were also recovered at his behest, and in light of the aforementioned circumstances, it cannot be doubted that the said recoveries suffered from any illegality.

Some minor issues with respect to the above, were raised before the Sessions Court, as well as before the High Court, and the same have rightly been explained by the courts below.

Thus, they do not require any further discussion.

12. Learned senior counsel for the appellant has urged that statements of certain witnesses were recorded under Section 164 Cr.P.C. before Magistrates, namely, Kalampasha (PW.61) and Dinesh M. Pillai (PW.62). The said statements were not put on record before the trial court, and the same were not marked. Thus, the trial stood vitiated as the accused has been denied an opportunity to contradict the aforementioned statements of the witnesses, which were made under oath before the magistrates, which though are not in the nature of substantive evidence, could well be used for the purpose of corroboration and contradiction. Denial of such opportunity is against the requisites of a fair trial.

13. Clause (iv) of Section 207 Cr.P.C. clearly provides that any statement recorded under Section 164 Cr.P.C., shall be made available to the accused alongwith all the other documents that have been filed alongwith the charge sheet. The appellant herein, has neither urged that the statements recorded under Section 164 Cr.P.C. were not a part of such documents, before the trial court, nor was any issue raised by him at the time of cross-examination of B. Muralidharan Nair (PW.77), the investigating officer. The same is a question of fact. However, it appears from the documents on record that such documents, if the same were in fact, a part of the record, were not marked. The appellant raised this issue for the first time before the High Court, and the High Court dealt with the same observing:

> *"A reading of the judgment of the court below show that both sides referred to the same in detail and the court below has also referred to the same in its judgment. It is well settled that the statement under Section 164 Cr.P.C. can be used both for corroboration and contradiction of the author of the statement and thus, did not find this ground worth acceptance. Even otherwise, it appears that statement recorded under Section 164 Cr.P.C. by the Magistrate was not in detail. No question had been put*

to the witnesses whose statements had been recorded nor an attempt had been made to extract answers from them and the witnesses were asked by the learned magistrates what they wanted to say and they had no clue as to what they had to speak. Therefore, they simply spoke what came to their mind at that point of time whether it was relevant or irrelevant. The witnesses could not be deemed to carry so much of wisdom to enable them to know what are the essential facts they need to state before the learned magistrate. The witnesses whose statements were recorded before the magistrate were simply asked "have you finished, you can go".

14. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 Cr.P.C. can be used only for the purpose of contradiction and statements under Section 164 Cr.P.C. can be used for both corroboration and contradiction. In a case where the magistrate has to perform the duty of recording a statement under Section 164 Cr.P.C., he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 Cr.P.C. Hence, the magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case.

15. So far as the statement of witnesses recorded under Section 164 is concerned, the object is two fold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement, and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in Court should be discarded, is not at all warranted. (Vide: *Jogendra Nahak & Ors. v. State of Orissa & Ors.,* AIR 1999 SC 2565; and *Assistant Collector of Central Excise, Rajamundry v.*

Duncan Agro Industries Ltd. & Ors., AIR 2000 SC 2901).

16. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 Cr.P.C., can be relied upon for the purpose of corroborating statements made by witnesses in the Committal Court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 Cr.P.C., such statements cannot be treated as substantive evidence.

During the investigation, the Police Officer may sometimes feel that it is expedient to record the statement of a witness under Section 164 Cr.P.C. This usually happens when the witnesses to a crime are clearly connected to the accused, or where the accused is very influential, owing to which the witnesses may be influenced. (Vide: *Mamand v. Emperor,* AIR 1946 PC 45; *Bhuboni Sahu v. King,* AIR 1949 PC 257; *Ram Charan & Ors. v. The State of U.P.,* AIR 1968 SC 1270; and *Dhanabal & Anr. v. State of Tamil Nadu,* AIR 1980 SC 628).

17. It has been argued by the learned counsel for the appellant, that as the blood group of the blood stains found on the chopper could not be ascertained, the recovery of the said chopper cannot be relied upon.

A failure by the serologist **to detect the origin of the blood due to dis-integration of the serum, does not mean that the blood stuck on the axe could not have been human blood at all**. Sometimes it is possible, either because the stain is insufficient in itself, or due to haematological changes and plasmatic coagulation, that a serologist may fail to detect the origin of the blood in question. However, in such a case, unless the doubt is of a reasonable dimension, which a judicially conscientious mind may entertain with some objectivity, no benefit can be claimed by the accused in this regard.

Once the recovery is made in pursuance of a disclosure statement made by the accused, the matching or non-matching

of blood group (s) loses significance. (Vide : *Prabhu Babaji Navie v. State of Bombay,* AIR 1956 SC 51; *Raghav Prapanna Tripathi v. State of U.P.,* AIR 1963 SC 74; *State of Rajasthan v. Teja Ram,* AIR 1999 SC 1776; *Gura Singh v. State of Rajasthan,* AIR 2001 SC 330; *John Pandian v. State, represented by Inspector of Police, Tamil Nadu,* (2010) 14 SCC 129; and *Dr. Sunil Clifford Daniel v. State of Punjab,* JT 2012 (8) SC 639).

18. In view of the above, the Court finds that it is not possible to accept the submission that in the absence of a report regarding the origin of the blood, the accused cannot be convicted, for it is only because of the lapse of time, that the blood could not be classified successfully. Therefore, no advantage can be conferred upon the accused to enable him to claim any benefit, and the report of dis-integration of blood etc. cannot be termed as a missing link, on the basis of which the chain of circumstances may be presumed to be broken.

19. Motive is primarily known to the accused himself and it therefore, it may not be possible for the prosecution to explain what actually prompted or excited the accused to commit a particular crime. In a case of circumstantial evidence, motive may be considered as a circumstance, which is a relevant factor for the purpose of assessing evidence, in the event that there is no unambiguous evidence to prove the guilt of the accused. Motive loses all its significance in a case of direct evidence provided by eye-witnesses, where the same is available, for the reason that in such a case, the absence or inadequacy of motive, cannot stand in the way of conviction. However, the absence of motive in a case depending entirely on circumstantial evidence, is a factor that weighs in favour of the accused as it "often forms the fulcrum of the prosecution story". (Vide: *Babu v. State of Kerala,* (2010) 9 SCC 189; *Kulvinder Singh & Anr. v. State of Haryana,* AIR 2011 SC 1777; *Dandu Jaggaraju v. State of A.P.,* AIR 2011 SC 3387).

20. The evidence on record clearly established, that the appellant had adequate reason to harbour animosity towards

Praveen, as he may well have been unable to tolerate the intimacy that the deceased had developed with his wife. In light of the fact that the appellant had absolute faith and trust in the deceased, and had hence allowed him to have free access and absolute freedom in his house, the alleged act of betrayal of trust was committed by the deceased, which the appellant no doubt found gravely humiliating and agonizing.

Jilesh M.S. (PW.2) deposed, that when the appellant became aware of the illicit relationship between Praveen and his wife, he had said that in the event that he was able to lay his hands on Praveen, he would chop him up into pieces. The said threat was followed by a tirade of abuses. Jilesh M.S. (PW.2) consulted Pavithran (PW.1), in this regard. Both of them have deposed as regards the manner in which the situation was handled by the relatives of the appellant and Praveen.

We do not find force in the submission made by Shri S. Gopakumaran Nair, learned senior counsel appearing for the appellant that the appellant had absolutely no grievance against his wife Smt. Shadi, and that even after the alleged incident, she had been accompanying her husband to all social events, as Ajith (PW.3) has deposed that the appellant had attended the engagement ceremony of Vinu (A-2) along with his wife and son, and that too, only 3 days prior to the alleged murder, thus, it would be most unnatural for him to annihilate Praveen (deceased). It is further urged that Praveen (deceased) had in fact, misbehaved with the appellant's wife, and the matter was settled upon the interference of several relatives, after which Praveen (deceased) was asked to quit his job and was also told not to enter in the city. In the event that the defence version is accepted, and it is believed that Praveen (deceased) had in fact, misbehaved with the wife of the appellant, the same could actually lead to the inference that the appellant may have had an even stronger motive to eliminate Praveen (deceased).

Further, there is no force in the submission advanced on behalf of the appellant that Shirdhi (PW.4), the son of the appellant from his first wife, did not support the case of the

prosecution. His statement is only to the effect that when the meeting took place on 26.11.2004 he did not attend the meeting and stayed upstairs. Thus, he has not deposed that the said meeting was not held. Additionally, his statement that Praveen (deceased) had tendered an apology and that upon the intervention of relatives and friends, the appellant had actually pardoned him, cannot be believed, as the said witness was not present at the meeting owing to which he could not have been an eye-witness to the aforementioned part of the incident.

21. Undoubtedly, in this case Aji, the Manager of the appellant who had revealed the existence of the alleged relationship between Praveen and the appellant's wife, has not been examined, but we are of the considered opinion that non-examination of the said witness will not adversely affect the case of the prosecution. The same is the position so far as Radhamma, the appellant's sister, Bijulal, nephew of the appellant and Vijayamma, aunt of Jilesh M.S. (PW.2) are concerned, who could also have unfolded the factum of the said meeting being held in this respect.

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. (Vide: *Vadivelu Thevar v. State of Madras;* AIR 1957 SC 614; *Jagdish Prasad v. State of M.P.* AIR 1994 SC 1251; *Sunil Kumar v. State Govt.*

of NCT of Delhi AIR 2004 SC 552; *Namdeo v. State of Maharashtra* AIR 2007 SC (Supp) 100; *Kunju @ Balachandran v. State of Tamil Nadu,* AIR 2008 SC 1381; *Bipin Kumar Mondal v. State of West Bengal* AIR 2010 SC 3638; *Mahesh & Anr. v. State of Madhya Pradesh* (2011) 9 SCC 626; *Kishan Chand v. State of Haryana* JT 2013(1) SC 222).

23. It is a settled legal proposition that the conviction of a person accused of committing an offence, is generally based solely on evidence that is either oral or documentary, but in exceptional circumstances, such conviction may also be based solely on circumstantial evidence. For this to happen, 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. (Vide: *Sharad Birdhichand Sarda v. State of Maharashtra,* AIR 1984 SC 1622; and *Paramjeet Singh @ Pamma v. State of Uttarakhand,* AIR 2011 SC 200).

24. Divakaran (PW.7), deposed that he knew Praveen (deceased) and Vinu (A-2) from childhood, and that on the fateful day Vinu (A-2) had taken Praveen on a motor cycle and had driven towards Kottayam.

Jose (PW.8) was running a 'thattukada' (petty shop) during the night. He deposed that on 15.2.2005 at 8.30 p.m., Praveen

(deceased) came with Vinu (A-2) to his shop, and that the two, after their meal, left for the theatre, on a motor cycle. At 11.45 p.m., the appellant and three others also came to his shop and had coffee. The appellant then returned to the van after which, the other three persons also got into the van. The appellant got into the driver's seat of the van. When most of the people had left after watching the movie, the witness saw Vinu (A-2) and Praveen on the said motor cycle, riding towards Thirunakkara. Vinu (A-2) came close to the van, lifted his hand and then proceeded. Thereafter, the van in which the appellant (A-1) was sitting, followed them. During the cross-examination on behalf of the appellant (A-1), the witness deposed that at the time when A-2 had lifted his hand, there was only a distance of 5 feet between the van and motorcycle. This witness further deposed that he had been shown only one photograph. He stated that A-1 had come to his shop and had remained there for 10-15 minutes. During this cross-examination on behalf of A-2, the said witness also deposed that he had told the police and magistrate that A-2 and Praveen had eaten a Bull's eye, and that he had accepted cash from them and had also returned the balance.

25. Baiju (PW.9), was working as the barman at Hotel Arcadia. He deposed that it was in fact, A-2 who had come with another person on the 15th February 2005, at about 6.30 p.m. to the Hotel and had consumed liquor. He stated that they had remained in the bar till about 8.30 p.m. and that A-2 had paid the bill. The witness had noticed the presence of the two because they were both highly intoxicated at the said time.

26. Mohanan (PW-10), an auto rickshaw driver, deposed that on 15th February 2005, he had seen an Omni Van along the eastern side of the Arpookara temple. That night, he was driving from MCH, to Kottayam town via Panambalam road. While returning, he stated that he had seen the Omni Van some 200 metres east of the temple, and on the southern side of the road at about 12.30 -1 am. The van was green in colour with KL7 registration and 5855 number. Furthermore, a man was

also seen by him standing near the door of the driver's seat. Upon asking, the said man only replied that one person had gone up. He could not see much as the van was closed but, the vehicle was most certainly a van MO.5. During cross-examination on behalf of appellant (A-1), the witness deposed that the person standing near the said van, had a North Malabari accent.

27. Shanavas (PW.12) also an auto driver by profession, identified Shaji (A-1) and Vinu (A-2). He deposed that he had first seen them on 15th February 2005 while he was proceeding in his auto from Baker Junction to MCH. He had seen an Omni Van and a motorcycle on the side of the road beyond Chemmanampadi, near the Medical College, and had seen two persons coming out of the said van. He further deposed that the two people had then caught hold of the pillion rider of the motor cycle, and had taken him to the van. Thereafter, the, van left the place and he followed the van to MCH. He identified A-1 as the person he had seen there and A-2, as the person who had been riding the motorcycle.

During his cross examination by the appellant (A-1), the witness deposed that he had in fact, seen three other persons there. However, he did not identify them.

28. Mohammad Sherif (PW.13) a businessman, deposed that he knew the appellant (A-1) and identified him as Shaji and also Vinu (A-2). At about 8.30 p.m. on 15th February 2005, A2 and Praveen came to his petty shop from the Arcadia Bar premises, on a red coloured bike. Jose (PW8), an employee of PW13 was previously acquainted with the accused (A-2) and Praveen (deceased), and hence, PW8 introduced them as his friends. He further deposed that the Omni Van arrived in front of the Arcadia Bar at 11.30 pm. A1 got out of the driver seat and proceeded to the theatre. The three other persons came out of the van and had black coffee at the witness's shop. All of them (including A-1) then returned to the van. Later, when A-2 and Praveen riding a bike, approached the Arcadia Bar, A-2 signaled to A-1 to follow him and rode in the direction of

Thirunakkara. The van followed the bike and they headed to MCH, Ettumanoor and Ernakulam.

During the cross examination on behalf of the appellant (A-1), the witness deposed that he did not tell anybody about A1 and that he did not even talk to Jose (PW.8), about the incident that occurred on 15/02/2005. He deposed that he did not know A1's friends, or the place to which A1 belonged. He only stated that he knew A1 when he was the control room, S.I.

Mohammed Sherif (PW.13) denied having told the Police that Shaji Sir of Valiadu was the person he had seen on the road. He deposed that he knew S.I.s such as Satheesan and Suseelan, and that they were also from the West Police Station. He further said that he knew of A1 only as control room S.I. He had read about the incident in the subsequent days' newspaper. He further admitted that the help of the police, as well as that of the Municipality, was needed to run the petty shop which did business from 8.00 p.m. to 1.30 a.m.

29. Reji (PW11) deposed that on 15.2.2005 at about mid-night, he had gone to Baker Junction and there he had seen the appellant (A-1), getting out of the driver's seat of a green coloured van. He thereafter, crossed M.C. Road and went into the Post Office and placed inland like material inside the post box. The appellant (A-1) returned to the van after crossing the road, got into the driver's seat and drove off towards Baker Junction. It appears that in the cross-examination, he did not support the case of the prosecution. However, his evidence is not very relevant with respect to the issues involved in this case, as at the initial stage the witness had supported the case of the prosecution to the extent that it was in fact, the appellant (A-1), who had posted the letter in the name of the deceased's father, that was purported to have been written by Praveen (deceased), stating that he was going to Bombay in search of employment. This letter seems to have been written to misdirect/mislead the deceased's family. The same became entirely insignificant, as immediately after the murder of Praveen, the dismembered parts of his body were recovered. Thereafter,

the incident became the talk of the town and the same was high-lighted by both, the print and the electronic media.

30. The evidence referred to hereinabove alongwith the material on record, reveals that Praveen (deceased) was a victim of homicide and further that there is no dispute regarding the identification of his body and its parts thereof, as has been referred to hereinabove. The recoveries of a shirt (MO.1), underwear (MO.2) and of a watch (MO.3), belonging to Praveen (deceased) were identified by Pavithran (PW.1). His body was also identified by PWs.1 to 3 and the DNA report did not leave any room for doubt with respect to the said identification. Same stood proved by super imposition.

The injuries found on the body that were revealed by the post-mortem report established that the dismemberment of the parts of the body was possible by using a weapon like the chopper (MO.4), as was explained/opined by Dr. Babu (PW.71). Praveen died in the intervening night between 15/16.2.2005. He was last seen on 15.2.2005 with Vinu (A-2) and the appellant (A-1). The motive as explained hereinabove stood proved. Vinu (A-2) and the appellant (A-1) were closely related and together they had hatched a conspiracy to eliminate Praveen (deceased). Pavithran (PW.1) has stated in his deposition that Praveen (deceased) did not bear any animosity towards any person. In fact, in his statement under Section 313 Cr.P.C., the appellant has even admitted so. Praveen (deceased) was seen by Divakaran (PW.7) talking to Vinu (A-2) at his work place. Divakaran (PW.7) was acquainted with both Vinu (A-2) and Praveen (deceased) since childhood.

The evidence of Baiju (PW.9) who was working at Hotel Arcadia at Kottayam, revealed that he was the man who had served drinks to Vinu (A-2) and Praveen (deceased). The Virca Report proved by Sujatha (PW.64), corroborated the same.

Jose (PW.8) and Mohammed Sherif (PW.13) identified the appellant (A-1) and Vinu (A-2) and stated they knew both of them very well. Baiju (PW.9) was not acquainted with either

Vinu (A-2) or Praveen (deceased) but he did in fact, have an opportunity to see them for a sufficient amount of time as he had served them food. Babu (PW.6) deposed that the appellant (A-1) was well acquainted with him. He stated that he had taken the Maruti Van (MO.5) from him on the afternoon of 15.2.2005, and had returned the same to him on the afternoon of 16.2.2005. Phone calls made by the appellant (A-1) to Babu (PW.6), were also not denied by the appellant in his cross-examination under Section 313 Cr.P.C. The aforementioned call details were duly proved. There is also material on record to show that the said van was used in the crime by the appellant (A-1) and 3 others.

Vinu (A-2) and Praveen (deceased) after watching a movie at the cinema hall and having meals etc., proceeded towards Thirunakkara on the bike, and Vinu (A-2) signaled to the person in the van by raising his hand. The appellant (A-1) and three other persons followed the bike in the van. On the way Praveen (deceased), was transferred from the bike to the van as deposed by Shanavas (PW.12) auto driver, who is a natural witness, and he also identified the appellant (A-1), Vinu (A-2), and Praveen (deceased) by way of photographs. He stated that he had seen the van standing in the middle of the road. The said witness turned hostile and did not support the prosecution case fully. Recoveries of all the material items/objects stood proved.

31. A criminal conspiracy is generally hatched in secrecy, owing to which, direct evidence is difficult to obtain. The offence can therefore be proved, either by adducing circumstantial evidence, or by way of necessary implication. However, in the event that the circumstantial evidence is incomplete or vague, it becomes necessary for the prosecution to provide adequate proof regarding the meeting of minds, which is essential in order to hatch a criminal conspiracy, by adducing substantive evidence in court. Furthermore, in order to constitute the offence of conspiracy, it is not necessary that the person involved has knowledge of all the stages of action. In fact, mere knowledge

of the main object/purpose of conspiracy, would warrant the attraction of relevant penal provisions. Thus, an agreement between two persons to do, or to cause an illegal act, is the basic requirement of the offence of conspiracy under the penal statute. (Vide: *Mir Nagvi Askari v. CBI,* AIR 2010 SC 528; *Baldev Singh v. State of Punjab,* AIR 2009 SC Supp. 1629; *State of M.P. v. Sheetla Sahai,* AIR 2009 SC Supp. 1744; *R. Venkatkrishnan v. CBI,* AIR 2010 SC 1812; *S. Arul Raja v. State of T.N.,* (2010) 8 SCC 233; *Monica Bedi v. State of A.P.,* (2011) 1 SCC 284; and *Sushil Suri v. CBI,* AIR 2011 SC 1713).

32. An argument has been advanced by Shri S. Gopokumaran Nair, learned senior counsel appearing on behalf of the appellant, that as the witnesses PW.8 and PW.11 have admitted in their cross-examination, that they have been the accused persons in certain other criminal cases, their testimony should not have been relied upon by the courts below. The argument seems to be rather attractive at the outset, but has no substance, for the reason that the law does not prohibit taking into consideration even the evidence provided by an accomplice, who has not been put to trial.

It is a settled legal proposition that the evidence provided by a person who has not been put to trial, and who could not have been tried jointly with the accused can be considered, if the court finds his evidence reliable, and conviction can also safely be based upon it. However, such evidence is required to be considered with care and caution. An accomplice who has not been put to trial is a competent witness, as he deposes in court after taking an oath, and there is no prohibition under any law to act upon his deposition without corroboration. (Vide: *Laxmipat Choraria & Ors. v. State of Maharashtra,* AIR 1968 SC 938; *Chandran alias Manichan alias Maniyan & Ors. v. State of Kerala,* AIR 2011 SC 1594; and *Prithipal Singh & Ors. v. State of Punjab & Anr.,* (2012) 1 SCC 10).

33. It has further been submitted that the prosecution failed to hold the test identification parade. Therefore, the prosecution

case itself becomes doubtful.

In *Vijay @ Chinee v. State of M.P.,* (2010) 8 SCC 191, this Court, while dealing with the effect of non holding of a test identification parade, placed very heavy reliance upon the judgments of this Court in *Santokh Singh v. Izhar Hussain & Anr.,* AIR 1973 SC 2190; *State of Himachal Pradesh v. Lekh Raj & Anr.,* AIR 1999 SC 3916; and *Malkhan Singh & Ors. v. State of M.P.,* AIR 2003 SC 2669 and held that, the evidence from a test identification parade is admissible under Section 9 of the Evidence Act, 1872. The identification parade is conducted by the police. The actual evidence regarding identification, is that which is given by the witnesses in court. A test identification parade cannot be claimed by an accused as a matter of right. Mere identification of an accused in a test identification parade is only a circumstance corroborative of the identification of the accused in court. Further, conducting a test identification parade is meaningless if the witnesses know the accused, or if they have been shown his photographs, or if he has been exposed by the media to the public. Holding a test identification parade may be helpful to the investigation to ascertain whether the investigation is being conducted in a proper manner and with proper direction. (See also: *Munna Kumar Upadhyay v. State of A.P.,* AIR 2012 SC 2470).

34. In the instant case, the witnesses, particularly Jose (PW.8), Baiju (PW.9), Reji (PW.11) and Shanavas (PW.12), made it clear that they were acquainted with the appellant since he was posted in the control room of their city. Moreover, just after the incident took place, the same being a sensitive case wherein the main accused was a highly ranked official of the police department, wide publicity was given to the same by the media. In light of the aforementioned fact-situation, the holding/ non-holding of a Test Identification Parade loses its significance. It is also pertinent to note that the defence did not put any question to B. Muralidharan Nair (PW.77), the investigating officer in relation to why such TI Parade was not held.

35. The prime witness of the prosecution has no doubt

been Shanavas (PW.12), and in relation to him, the submission advanced on behalf of the appellant that the High Court had entirely disbelieved his testimony, is factually incorrect. In fact, the High Court re-appreciated the evidence of the said witness and held as under:

> *"The act of identifying the victim from his passport size photograph seems to be unconvincing. But that does not mean that his evidence in toto has to be thrown out. The fact remains that atleast his evidence as regards the act of accused nos. 1 and 2 and others in forcing a person from the motor bike into the van has to be accepted."*

In view of the above, we do not find any cogent reason to dis-believe the testimony of Shanavas (PW.12) in toto.

36. Be that as it may, when a statement is recorded in court, and the witness speaks under oath, after he understands the sanctity of the oath taken by him either in the name of God or religion, it is then left to the court to appreciate his evidence under Section 3 of the Evidence Act. The Judge must consider whether a prudent man would appreciate such evidence, and not appreciate the same in accordance with his own perception. The basis for appreciating evidence in a civil or criminal case remains the same. However, in view of the fact that in a criminal case, the life and liberty of a person is involved, by way of judicial interpretation, courts have created the requirement of a high degree of proof.

37. In view of the above, we do not find any merit in the appeal and the same is dismissed accordingly. However, before parting with the case, we would like to mention that the courts below have appreciated the entire evidence meticulously, but it would have been desirable if all the circumstances which completed the chain, rendering the accused liable for punishment could have been put together, to facilitate better understanding of the judgment.

B.B.B. Appeal dismissed.