C.N. PARAMSIVAN & ANR.
v.
SUNRISE PLAZA TR. PARTNER & ORS.
(Civil Appeal No.154 of 2013)

JANUARY 9, 2013

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

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 – s.29 – Income Tax Act, 1961 – Second Schedule; r.57 – Auction conducted by Recovery Officer under the RDDB Act held illegal and void by High Court on ground of non-compliance with r.57 in the Second Schedule of the Income Tax Act – Whether s.29 of the RDDB Act apply the Income Tax Rules in the Second Schedule of the Income Tax Act to recovery proceedings under RDDB Act with full force – Expression 'as far as possible' in s.29 – If vests the Recovery Officer with discretion to apply the said Rules depending upon the fact situation of each case – Held: s.29 of the RDDB Act makes it clear that the rules under Income Tax Act are applicable only "as far as possible" and with the modification as if the said provisions and the rules referred to the amount of debt due under the RDDB Act instead of the Income Tax Act – Expressions "as far as possible" and "with necessary modifications" appearing in s.29 have been used to take care of situations where certain provisions under the Income Tax Rules may have no application on account of the scheme under the RDDB Act being different from that of the Income Tax Act or the Rules framed thereunder – It cannot be said that the use of the words "as far as possible" in s.29 is meant to give discretion to the Recovery Officer under the RDDB Act to apply the said Rules or not to apply the same in specific fact situations – While the phrase "as far as possible", may be indicative of a certain inbuilt flexibility, the scope of that flexibility extends only to what is "not at all

practicable" – Phrase "as far as possible" used in s.29 of the RDDB Act can at best mean that the Income Tax Rules may not apply where it is not at all possible to apply them having regard to the scheme and the context of the legislation – r.57 is mandatory in character – Equivalent pari materia provision in Order XXI, rr.84, 85 and 86 of CPC – No reason to hold that rr. 57 and 58 are anything but mandatory in nature – Breach of the requirements under those Rules will render the auction non-est in the eyes of law – Code of Civil Procedure, 1908 – Order XXI, rr.84, 85 & 86.

Interpretation of Statutes – Legislation by incorporation – Effect – Held: The effect of legislation by incorporation of the provisions of an earlier Act into a subsequent Act is that the provisions so incorporated are treated to have been incorporated in the subsequent legislation for the first time – Once the incorporation is made, the provisions incorporated become an integral part of the statute in which it is transposed – Thereafter there is no need to refer to the statute from which the incorporation is made and any subsequent amendment made in it has no effect on the incorporating statute.

Words and Phrases – "possible" and "practicable" – Meaning of – Held: The two words are more or less interchangeable.

The partners of a firm had obtained bank loan based on equitable mortgage of their properties. The partners defaulted in repaying the loan. The respondent-bank filed application before the Debt Recovery Tribunal whereafter an ex-parte decree was passed in favour of the bank. The property mortgaged with the bank was brought to sale in a public auction in which the appellants emerged as the successful bidders. The auction sale was challenged. The debt recovery appellate tribunal held that the appellants-auction purchasers were not bona fide purchasers and set aside the sale and asked the partners to deposit the entire loan amount.

Aggrieved, the appellants filed Writ Petition before the High Court. The High Court instead of going into the question whether the appellants were bona fide auction purchasers, examined the validity of the auction itself and came to the conclusion that the auction conducted by the Recovery Officer under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDB Act) was illegal and void because of non-compliance with the provisions of Rule 57 in the Second Schedule of the Income Tax Act, 1961 which in view of Section 29 of the RDDB Act were applicable to recovery of debt dues under the latter mentioned Act.

The appellant contended before this Court that the Income Tax Rules set out in the Second Schedule of the Income Tax Act were applicable only "*as far as possible and with necessary modification",* as evident from a plain reading of Section 29 of the RDDB Act; that the use of the expressions "*as far as possible"* and *"with necessary modifications*", gave sufficient play at the joints to the Recovery Officer to apply the said rules in the manner considered most appropriate by him, having regard to the facts and circumstances of a given case; and that the High Court had fallen in an error in ignoring the expressions appearing in Section 29 of the RDDB Act and proceeding with the matter as if Rule 57 of the said rules was mandatory and applicable with full force.

The question which therefore arose for consideration in the instant appeal was whether Section 29 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 do not apply the Income Tax Rules in the Second Schedule of the Income Tax Act to the recovery proceedings under RDDB Act with full force and the expression 'as far as possible' appearing in Section 29 vests the Recovery Officer with discretion to apply the said Rules depending upon the fact situation of each case.

Dismissing the appeal, the Court

HELD: 1. A plain reading of Section 29 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 leaves no manner of doubt that the rules under Income Tax Act were applicable only "*as far as possible"* and with the modification as if the said provisions and the rules referred to the amount of debt due under the RDDB Act instead of the Income Tax Act. [Para 16] [16-A-B]

Janak Raj v. Gurdial Singh **(1967) 2 SCR 77;** *Janatha Textiles and Ors. v. Tax Recovery Officer and Anr.* **(2008) 12 SCC 582: 2008 (8) SCR 1148,** *Padanathil Ruqmini Amma Vs. P.K. Abdulla* **(1996) 7 SCC 668: 1996 (1) SCR 651 and** *Chinnammal and Ors. v. P. Arumugham and Anr.* **(1990) 1 SCC 513: 1990 (1) SCR 78 – cited.**

2.1. Legislation by incorporation is a device to which legislatures often take resort for the sake of convenience. The effect of legislation by incorporation of the provisions of an earlier Act into a subsequent Act is that the provisions so incorporated are treated to have been incorporated in the subsequent legislation for the first time. Once the incorporation is made, the provisions incorporated become an integral part of the statute in which it is transposed and thereafter there is no need to refer to the statute from which the incorporation is made and any subsequent amendment made in it has no effect on the incorporating statute. [Paras 17-19] [16-C; 17-B-C & F-G]

2.2. Section 29 of the RDDB Act incorporates the provisions of the Rules found in the Second Schedule to the Income Tax Act for purposes of realisation of the dues by the Recovery Officer under the RDDB Act. The expressions "as far as possible" and "with necessary modifications" appearing in Section 29 have been used

to take care of situations where certain provisions under the Income Tax Rules may have no application on account of the scheme under the RDDB Act being different from that of the Income Tax Act or the Rules framed thereunder. The provisions of the Rules, it is manifest, from a careful reading of Section 29 are attracted only in so far as the same deal with recovery of debts under the Act with the modification that the 'amount of debt' referred to in the Rules is deemed to be one under the RDDB Act. That modification was intended to make the position explicit and to avoid any confusion in the application of the Income Tax Rules to the recovery of debts under the RDDB Act, which confusion could arise from a literal application of the Rules to recoveries under the said Act. Proviso to Section 29 further makes it clear that any reference "to the assessee" under the provisions of the Income Tax Act and the Rules shall be construed as a reference to the defendant under the RDDB Act. The Income Tax Rules make provisions that do not strictly deal with recovery of debts under the Act. Such of the rules cannot possibly apply to recovery of debts under the RDDB Act. For instance Rules 86 and 87 under the Income Tax Act do not have any application to the provisions of the RDDB Act, while Rules 57 and 58 of the said Rules in the Second Schedule deal with the process of recovery of the amount due and present no difficulty in enforcing them for recoveries under the RDDB Act. The use of the words "as far as possible" in Section 29 of RDDB Act simply indicate that the provisions of the Income Tax Rules are applicable except such of them as do not have any role to play in the matter of recovery of debts recoverable under the RDDB Act. The argument that the use of the words "as far as possible" in Section 29 is meant to give discretion to the Recovery Officer to apply the said Rules or not to apply the same in specific fact situations is accordingly rejected. [Para 21] [18-E-H; 19-A-E]

Ram Kirpal Bhagat and Ors. v. State of Bihar **(1969) 3 SCC 471: 1970 (3) SCR 233;** *Mahindra and Mahindra Ltd. v. Union of India and Anr.* **(1979) 2 SCC 529: 1979 (2) SCR 1038** *Onkarlal Nandlal v. Rajasthan and Anr.* **(1985) 4 SCC 404: 1985 (2) Suppl. SCR 1075;** *Mary Roy and Ors. v. State of Kerala and Ors.* **(1986) 2 SCC 209: 1986 (1) SCR 371;** *Nagpur Improvement Trust v. Vasantrao and Ors. and Jaswantibai and Ors.* **(2002) 7 SCC 657: 2002 (2) Suppl. SCR 636 and** *M/s Surana Steels Pvt. Ltd. v. The Deputy Commissioner of Income Tax and Ors.* **(1999) 4 SCC 306: 1999 (2) SCR 589 – relied on.**

Principles of Statutory Interpretation **by G.P. Singh – referred to.**

3.1. While the phrase "*as far as possible*", **may be indicative of a certain inbuilt flexibility, the scope of that flexibility extends only to what is** "*not at all practicable*"**. In order to show that Rules 57 and 58 of the Second Schedule of the Income Tax Act may be departed from under the RDDB Act, it would have to be proved that the application of these Rules is "*not at all practicable*" in the context of RDDB Act. [Para 23] [20-D-E]**

3.2. The interchangeable use of the words "*possible*" and "*practicable*" was previously established by a three-judge Bench of this Court in *N.K. Chauhan* **where this Court observed that in simple Anglo-Saxon Practicable, feasible, possible, performable, are more or less interchangeable. The phrase** "*as far as possible*" **used in Section 29 of the RDDB Act can at best mean that the Income Tax Rules may not apply where it is not at all possible to apply them having regard to the scheme and the context of the legislation. [Paras 24, 26] [20-E-F; 21-A]**

Osmania University v. V.S. Muthurangam and Ors. **(1997) 10 SCC 741: 1997 (1) Suppl. SCR 499;** *N.K. Chauhan and Ors. v. State of Gujarat and Ors.* **(1977) 1 SCC 308: 1977 (1) SCR 1037 – relied on.**

Webster and Black's Law Dictionary **– referred to.**

4. There is nothing in the provisions of Section 29 of RDDB Act or the scheme of the rules under the Income Tax Act to suggest that a discretion wider than what is explained above was meant to be conferred upon the Recovery Officer under Section 29 of the RDDB Act or Rule 57 of the Income Tax Rules. It is clear from a plain reading of Rule 57 that the provision is mandatory in character. The use of the word "shall" is both textually and contextually indicative of the making of the deposit of the amount being a mandatory requirement. The provisions of Rules 57 and 58 of the Income Tax Rules, have their equivalent in Order XXI Rules 84, 85 & 86 of the C.P.C. which are *pari materia* **in language, sweep and effect and have been held to be mandatory by this Court in earlier cases. In the light of the above there is no reason to hold that Rules 57 and 58 of the Income Tax Rules are anything but mandatory in nature, so that a breach of the requirements under those Rules will render the auction** ***non-est*** **in the eyes of law. [Paras 27, 28 & 32] [27-B-C & F-G; 23-G-H]**

Manilal Mohanlal Shah and Ors. v. Sardar Sayed Ahmed Sayed Mahmed and Anr. **AIR 1954 SC 349: 1955 SCR 108;** *Sardara Singh (Dead) by Lrs. and Anr. v. Sardara Singh (Dead) and Ors.* **(1990) 4 SCC 90;** *Balram, son of Bhasa Ram v. Ilam Singh and Ors.* **(1996) 5 SCC 705: 1996 (5) Suppl. SCR 104;** *Rao Mahmood Ahmed Khan v. Sh. Ranbir Singh and Ors.* **(1995) 4 SCC 275;** *Gangabai Gopaldas Mohata v. Fulchand and Ors.* **(1997) 10 SCC 387: 1996 (10) Suppl. SCR 457;** *Himadri Coke & Petro Ltd. v. Soneko Developers (P) Ltd. And Ors.* **(2005) 12 SCC 364 and** *Shilpa Shares and Securities and Ors. v. The National Co-operative Bank Ltd. and Ors.* **(2007) 12 SCC 165: 2007 (5) SCR 1128 – relied on.**

Case Law Reference:

(1967) 2 SCR 77	**cited**	**Para 11**
2008 (8) SCR 1148	**cited**	**Para 11**
1996 (1) SCR 651	**cited**	**Para 11**
1990 (1) SCR 78	**cited**	**Para 11, 12**
1970 (3) SCR 233	**relied on**	**Para 18**
1979 (2) SCR 1038	**relied on**	**Para 19**
1985 (2) Suppl. SCR 1075	**relied on**	**Para 20**
1986 (1) SCR 371	**relied on**	**Para 20**
2002 (2) Suppl. SCR 636	**relied on**	**Para 20**
1999 (2) SCR 589	**relied on**	**Para 20**
1997 (1) Suppl. SCR 499	**relied on**	**Para 22**
1977 (1) SCR 1037	**relied on**	**Para 24**
1955 SCR 108	**relied on**	**Para 28**
(1990) 4 SCC 90	**relied on**	**Para 29**
1996 (5) Suppl. SCR 104	**relied on**	**Para 30**
(1995) 4 SCC 275	**relied on**	**Para 31**
1996 (10) Suppl. SCR 457	**relied on**	**Para 31**
(2005) 12 SCC 364	**relied on**	**Para 31**
2007 (5) SCR 1128	**relied on**	**Para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 154 of 2013.

From the Judgment & Order dated 31.03.2010 of the High Court of Judicature at Madras in Writ Petition No. 14594 of 2007.

L.N. Rao, Santash Krishanan, Krishna Dev, Senthil Jagadeesan, Sony Bhatt for the Appellants.

Rakesh Dwivedi, Rajiv Dutta, S. Ramesh, K.K. Mohan, Sanskriti Pathak, Kumar Dushyant Singh, Ashish Mohan, Arijeet Singh, Dharmendra Kumar Sinha, Himanshu Munshi, Manoj Kumar Karna, Rajesh Kumar for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. This appeal by special leave arises out of an order passed by the High Court of Judicature at Madras whereby writ petition No.14594 of 2007 filed by the appellants has been dismissed and orders passed by the Debt Recovery Appellate Tribunal in M.A. No.90 of 2006 upheld, no matter on a ground other than the one on which that found favour with the Appellate Tribunal.

3. Facts leading to the filing of the writ petition have been set out at considerable length in the orders passed by the Appellate Tribunal and that passed by the High Court. We do not, therefore, consider it necessary to recapitulate the entire history over again except to the extent the same is necessary for the disposal of the present appeal. The long drawn legal battle that has raged over the past two decades or so has its genesis in a loan which respondent Indian Bank advanced to M/s. Sunrise Plaza, a partnership concern comprising respondent-S. Kalyanasundaram and his wife - Mrs. Vasantha Kalyanasundaram. The loan was advanced on the basis of an equitable mortgage of the properties owned by the partners of the firm by deposit of title deeds relevant thereto. The borrower having defaulted in the repayment of the loan amount, the respondent-bank filed O.A. No.238 of 1998 re-numbered as O.A. No.1098 of 2001 before the Debt Recovery Tribunal at Chennai. Failure of the respondents to appear and contest the

claim made against them culminated in the passing of an ex-parte decree in favour of the bank on 20th September, 1999. An application for setting aside of the said decree was then made by the borrower defendants which was dismissed by the Tribunal for default. An application for recall of the said order too failed and was dismissed by the Tribunal.

4. Proceedings for execution of the Recovery Certificate issued in favour of the bank were in the meantime initiated and the property mortgaged with the bank brought to sale in a public auction on 7th March, 2003 in which the appellants emerged as the successful bidders. The respondents then filed I.A. No.146 of 2003 for setting aside of the auction sale, while I.A. No.150 of 2003 filed by them prayed for an order of refusal of confirmation of the sale. The Debt Recovery Tribunal passed a conditional order in the said application deferring the confirmation of sale subject to the judgment-debtor depositing a sum of Rs.10,00,000/- with the decree holder bank on or before 25th April, 2003. I.A. No.146 of 2003 for setting aside the sale was, however, dismissed by the Tribunal on 15th April, 2003, as not maintainable. A prayer made by the respondents - judgment-debtors for extension of time to make the deposit of the amount directed by the Tribunal having been rejected, the recovery officer proceeded further and issued a sale certificate in favour of the appellants on 28th May, 2003. The judgment-debtors -respondent Nos.1 to 3 then filed an appeal challenging the orders passed by the Debt Recovery Tribunal in which the Appellate Tribunal directed them to pay the requisite court fee.

5. Aggrieved by the order of the Appellate Tribunal, the judgment-debtors filed Writ Petition No.28235 of 2003 in which the High Court by an order dated 14th October, 2003 set aside the ex-parte decree on payment of costs. That order when challenged by the decree holder bank in a Special Leave Petition before this Court was affirmed and the SLP dismissed in July 2004. Undeterred by the dismissal of the Special Leave

Petition, the bank filed a Review Application before the High Court for review of its order dated 14th October, 2003 setting aside the ex-parte decree. Even the appellants herein filed a review petition against the said order which applications were dismissed by the High Court with liberty to the auction purchaser-appellants herein to represent their case before the Debt Recovery Tribunal in the O.A. pending before it.

6. The appellants-auction purchasers at that stage filed I.A. No.20 of 2005 before the Debt Recovery Tribunal at Chennai seeking delivery of possession of the property purchased by them. That application was allowed by the Tribunal with a direction to the Recovery Officer to put the auction purchasers in possession of the property in question. The defendants-respondents herein challenged that order before the Appellate Tribunal at Chennai on several grounds in M.A. No.90 of 2006. The Appellate Tribunal allowed the said appeal and set aside the order passed by the Debt Recovery Tribunal with a direction to the Debt Recovery Tribunal to take up I.A. No.20 of 2005 along with O.A. No.1098 of 2001 and dispose of the same in accordance with law.

7. The appellants questioned the correctness of the above order in Writ Petition No.29356 of 2006 which was allowed by a Division Bench of the High Court by Order dated 29th November, 2006, setting aside the order passed by the Appellate Tribunal and remitting the matter back to the Debt Recovery Appellate Tribunal to decide the issue whether or not the rights of a bona fide purchaser get curtailed if the ex-parte decree on the basis whereof the auction sale was conducted is eventually set aside. The Debt Recovery Appellate Tribunal examined the matter afresh and held that the appellants-auction purchasers were not bona fide purchasers of the property as they were aware of the pending legal proceedings between the bank and the borrower. The Tribunal accordingly set aside the sale with a direction to the defendants-respondents 1 to 3 to deposit the entire amount claimed in original application.

8. Aggrieved by the orders passed by the Appellate Tribunal, the appellants filed Writ Petition No.14594 of 2007 before the High Court which writ petition has been dismissed by the High Court as already mentioned above. The High Court approached the issues from a slightly different angle; for instead of going into the question whether the appellants were bona fide auction purchasers, it examined the validity of the auction itself and came to the conclusion that the auction conducted by the Recovery Officer was illegal and void because of non-compliance with the provisions of Rule 57 in the Second Schedule of the Income Tax Act, 1961 which were in view of the provisions of Section 29 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to a 'RDDB Act' for short) applicable to recovery of debt dues under the latter mentioned Act. The present appeal assails the correctness of the above order passed by the High Court.

9. Appearing for the appellants Mr. L. Nageshwar Rao, learned senior counsel, made a threefold submission in support of his case. Firstly he contended that the remand order passed by the High Court in the earlier round was limited to the Appellate Tribunal finding out whether the rights of a bona fide purchaser stood curtailed in view of the setting aside of the ex-parte decree on which the auction had been conducted. While the Tribunal had answered that question, the High Court had failed to do so in the writ petition filed by the appellants. The High Court had digressed from the subject and added a new dimension which had not been noticed or pressed in the earlier round.

10. Secondly he contended that even if the High Court could examine a ground other than the one on which a remand had been ordered, it failed to appreciate that the provisions of the Income Tax Rules set out in the Second Schedule of the Income Tax Act were applicable only "as far as possible and with necessary modification". This was, according to Mr. Rao, evident from a plain reading of Section 29 of the RDDB Act.

The use of the expressions "as far as possible" and "with necessary modifications", argued the learned counsel, gave sufficient play at the joints to the Recovery Officer to apply the said rules in the manner considered most appropriate by him, having regard to the facts and circumstances of a given case. The High Court had, argued Mr. Rao, fallen in an error in ignoring the expressions appearing in Section 29 and proceeding with the matter as if Rule 57 of the said rules was mandatory and applicable with full force. It was also contended by the learned counsel that if Rules 57 and 58 of the Income Tax Rules were held applicable in the form in which they appear in the Second Schedule, the requirement of Rule 61 of the said Rules could not be ignored and had to be mandatorily followed. Inasmuch as the Interlocutory Application filed by the judgment-debtor for setting aside the sale had been dismissed by the Tribunal and inasmuch as there was no challenge to the said dismissal order at any stage, the High Court ought to have held that the condition precedent for setting aside the sale namely filing of a proper application was not satisfied thereby rendering the sale in favour of the appellants immune from any challenge or interference.

11. It was thirdly argued by learned counsel for the appellants that the appellants were bona fide purchasers, hence protected against any interference with the sale in their favour, no matter the decree on the basis whereof the sale had been effected had itself been set aside by High Court. Reliance in support was placed by Mr. Rao upon the decisions of this Court in *Janak Raj v. Gurdial Singh* (1967) 2 SCR 77; *Janatha Textiles and Ors. v. Tax Recovery Officer and Anr.* (2008) 12 SCC 582; (1994) 2 SCC 364, *Padanathil Ruqmini Amma Vs. P.K. Abdulla* (1996) 7 SCC 668. It was further contended that a contrary view was no doubt expressed by a Two-Judge Bench of this Court in *Chinnammal and Ors. v. P. Arumugham and Anr.* (1990) 1 SCC 513 but the conflict between the two lines of the decisions referred to above deserved to be resolved by a reference to a larger Bench.

12. Mr. Rakesh Dwivedi, learned senior counsel appearing for the respondents, per contra argued that the scope of the proceeding before the High Court in the second round was not in any way limited by the earlier remand order and the High Court could have and has indeed examined the question of validity of the auction sale. He urged that the provisions of the Income Tax Rules in the Second Schedule of the Act were applicable in the form in which the said rules were found in the statute book as no modification or amendment of the said rules had been made either by any legislative enactment or by way of Rules under the RDDB Act. He contended that the words "as far as possible" were incapable of conveying that the Recovery Officer could at his discretion play with the rules without any limitations on his power or discretion and without any guidelines under the Act or the Rules. He submitted that decision of this Court in *Chinnammal and Ors. v. P. Arumugham and Anr.* (1990) 1 SCC 513 was not in conflict with the view taken in the decisions relied upon by Mr. Rao inasmuch as the said decisions had not examined the issue as to what would constitute a bona fide purchaser to be entitled to protection in law. We propose to deal with the contentions raised by Mr. Rao ad seriatim.

13. The remand ordered by the High Court in Writ Petition No.29356/2006 was an open remand which allowed the parties to urge their respective contentions not only in regard to the rights of a bona fide purchaser, but any other contention available to them on facts and in law. This is evident from the operative portion of the order passed by the High Court which was as under:

> *"In the above circumstances, as agreed by learned counsel appearing for the parties, the impugned order dated 13.7.2006 passed by the Debt Recovery Appellate Tribunal in M.A. No.90 of 2006 is set aside and the case is remitted to the Debt Recovery Appellate Tribunal, Chennai, to determine the aforesaid issues and any other*

issue as has been raised by one or other party in M.A. No.90 of 2006, preferably within two months from the date of receipt or production of a copy of this order."

14. The language employed in the remand order apart, the High Court had not examined or determined the question whether Rule 57 of the Income Tax Rules was mandatory and if so whether there was any breach of that provision or the effect thereof. There was no discussion leave alone any finality to the determination of that aspect, so as to prevent anyone of the parties from urging their submissions on those questions. We have in that view no hesitation in rejecting the first limb of Mr. Rao's argument that the High Court could not have gone into any other question apart the rights of a bona fide purchaser in the proceedings arising after the remand order.

15. That brings us to the question whether Section 29 of the RDDB Act do not apply the Income Tax Rules in the Second Schedule of the Income Tax Act to the recovery proceedings under RDDB Act with full force and that the expression 'as far as possible' appearing in Section 29 vests the Recovery Officer with discretion to apply the said Rules depending upon the fact situation of each case. Section 29 of the RDDB Act 29 is as under:

29. Application of certain provisions of Income-tax Act.—*The provisions of the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the Income-tax:*

Provided that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act.

16. A bare reading of the above leaves no manner of doubt that the rules under Income Tax Act were applicable only "as far as possible" and with the modification as if the said provisions and the rules referred to the amount of debt due under the RDDB Act instead of the Income Tax Act. The question is whether the said two expressions render the provisions of Rule 57 directory no matter the same is couched in a language that is manifestly mandatory in nature.

17. Legislation by incorporation is a device to which legislatures often take resort for the sake of convenience. The phenomenon is widely prevalent and has been the subject matter of judicial pronouncements by Courts in this country as much as Courts abroad. Justice G.P. Singh in his celebrated work on Principles of Statutory Interpretation has explained the concept in the following words:

"Incorporation of an earlier Act into a later Act is a legislative device adopted for the sake of convenience in order to avoid verbatim reproduction of the provisions of the earlier Act into the later. When an earlier Act or certain of its provisions are incorporated by reference into a later Act, the provisions so incorporated become part and parcel of the later Act as if they had been 'bodily transposed into it. The effect of incorporation is admirably stated by LORD ESHER, M.R.: 'If a subsequent Act brings into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act as if they had been actually written in it with the pen, or printed in it.

Even though only particular sections of an earlier Act are incorporated into later, in construing the incorporated sections it may be at times necessary and permissible to refer to other parts of the earlier statute which are not incorporated. As was stated by LORD BLACKBURN: "When a single section of an Act of Parliament is introduced into another Act, I think it must be read in the

sense it bore in the original Act from which it was taken, and that consequently it is perfectly legitimate to refer to all the rest of that Act in order to ascertain what the section meant, though those other sections are not incorporated in the new Act."

18. In *Ram Kirpal Bhagat and Ors. v. State of Bihar* (1969) 3 SCC 471 this Court examined the effect of bringing into an Act the provisions of an earlier Act and held that the legislation by incorporation of the provisions of an earlier Act into a subsequent Act is that the provisions so incorporated are treated to have been incorporated in the subsequent legislation for the first time. This Court observed:

> *"The effect of bringing into an Act the provisions of an earlier Act is to introduce the incorporated Sections of the earlier Act into the subsequent Act as if those provisions have been enacted in it for the first time. The nature of such a piece of legislation was explained by Lord Esher M. R. in Re Wood's Estate [1881] 31 Ch. D.607 that "if some clauses of a former Act were brought into the subsequent Act the legal effect was to write those Sections into the new Act just as if they had been written in it with the pen".*

19. To the same effect is the decision of this Court in *Mahindra and Mahindra Ltd. v. Union of India and Anr.* (1979) 2 SCC 529 where this Court held that once the incorporation is made, the provisions incorporated become an integral part of the statute in which it is transposed and thereafter there is no need to refer to the statute from which the incorporation is made and any subsequent amendment made in it has no effect on the incorporating statute. The following passage is in this regard apposite:

> *"The effect of incorporation is as if the provisions were written out in the incorporating statute and were a part of it. Legislation by incorporation is a common legislative device employed by the legislature, where the legislature for convenience of drafting incorporates provisions from an existing statue by reference to that statute instead of setting out for itself at length the provisions which it desires to adopt. Once the incorporation is made, the provision incorporated becomes an integral part of the statute in which it is transposed and thereafter there is no need to refer to the statute from which the incorporation is made and any subsequent amendment made in it has no effect on the incorporating statute."*

20. We may also refer to the decisions of this Court in *Onkarlal Nandlal v. Rajasthan and Anr.* (1985) 4 SCC 404, *Mary Roy and Ors. v. State of Kerala and Ors.* (1986) 2 SCC 209, *Nagpur Improvement Trust v. Vasantrao and Ors. and Jaswantibai and Ors.* (2002) 7 SCC 657, and *M/s Surana Steels Pvt. Ltd. v. The Deputy Commissioner of Income Tax and Ors.* (1999) 4 SCC 306, which have reiterated the above proposition of law.

21. Applying the above principles to the case at hand Section 29 of the RDDB Act incorporates the provisions of the Rules found in the Second Schedule to the Income Tax Act for purposes of realisation of the dues by the Recovery Officer under the RDDB Act. The expressions "as far as possible" and "with necessary modifications" appearing in Section 29 have been used to take care of situations where certain provisions under the Income Tax Rules may have no application on account of the scheme under the RDDB Act being different from that of the Income Tax Act or the Rules framed thereunder. The provisions of the Rules, it is manifest, from a careful reading of Section 29 are attracted only in so far as the same deal with recovery of debts under the Act with the modification that the 'amount of debt' referred to in the Rules is deemed to be one under the RDDB Act. That modification was intended to make the position explicit and to avoid any confusion in the application of the Income Tax Rules to the recovery of debts under the

RDDB Act, which confusion could arise from a literal application of the Rules to recoveries under the said Act. Proviso to Section 29 further makes it clear that any reference "to the assessee" under the provisions of the Income Tax Act and the Rules shall be construed as a reference to the defendant under the RDDB Act. It is noteworthy that the Income Tax Rules make provisions that do not strictly deal with recovery of debts under the Act. Such of the rules cannot possibly apply to recovery of debts under the RDDB Act. For instance Rules 86 and 87 under the Income Tax Act do not have any application to the provisions of the RDDB Act, while Rules 57 and 58 of the said Rules in the Second Schedule deal with the process of recovery of the amount due and present no difficulty in enforcing them for recoveries under the RDDB Act. Suffice it to say that the use of the words "as far as possible" in Section 29 of RDDB Act simply indicate that the provisions of the Income Tax Rules are applicable except such of them as do not have any role to play in the matter of recovery of debts recoverable under the RDDB Act. The argument that the use of the words "as far as possible" in Section 29 is meant to give discretion to the Recovery Officer to apply the said Rules or not to apply the same in specific fact situations has not impressed us and is accordingly rejected.

22. In *Osmania University v. V.S. Muthurangam and Ors.* (1997) 10 SCC 741, the question that fell for consideration was whether the age of superannuation of the non-teaching staff at Osmania University should be raised to 60 years when the same had been raised to 60 years for the University's teaching staff. Since Section 38(1) of the Osmania University Act, 1959 stated that the conditions of service for all salaried staff of the University shall be uniform "as far as possible", the decision in the case turned on the meaning to be given to that phrase. It was argued by the Solicitor General on behalf of the University that the use of this phrase in Section 38(1) indicated that the provision could be departed from in certain situations. This Court ruled otherwise and held as follows :

"8...Mr. Solicitor General is justified in his contention that Section 38(1) of the Act recognizes flexibility and the expression 'as far as possible' inheres in it an inbuilt flexibility...But if uniform conditions of service for teaching and non teaching staff of the University is not otherwise impracticable, the University is under an obligation to maintain such uniformity because of the mandate of Section 38(1) of the Act. In the instant case, we do not find that it is not at all practicable for the University to maintain the parity in the age of superannuation of both teaching and non teaching staff."

(emphasis supplied)

23. It follows that while the phrase "as far as possible", may be indicative of a certain inbuilt flexibility, the scope of that flexibility extends only to what is "not at all practicable". In order to show that Rules 57 and 58 of the Second Schedule of the Income Tax Act may be departed from under the RDDB Act, it would have to be proved that the application of these Rules is "not at all practicable" in the context of RDDB Act.

24. The interchangeable use of the words "possible" and "practicable" was previously established by a three-judge Bench of this Court in *N.K. Chauhan and Ors. v. State of Gujarat and Ors.,* (1977) 1 SCC 308, where this Court observed that in simple Anglo-Saxon Practicable, feasible, possible, performable, are more or less interchangeable. Webster defines the term 'practicable' thus :

"1. That can be put into practice; feasible.

2. That can be used for an intended purpose; usable."

25. **Black's Law Dictionary** similarly defines 'practicable' as follows :

"(Of a thing) reasonably capable of being accomplished; feasible."

26. It is, therefore, reasonable to hold that the phrase "as far as possible" used in Section 29 of the RDDB Act can at best mean that the Income Tax Rules may not apply where it is not at all possible to apply them having regard to the scheme and the context of the legislation.

27. There is nothing in the provisions of Section 29 of RDDB Act or the scheme of the rules under the Income Tax Act to suggest that a discretion wider than what is explained above was meant to be conferred upon the Recovery Officer under Section 29 of the RDDB Act or Rule 57 of the Income Tax Rules which reads as under:

> *"57. (1) On every sale of immovable property, the person declared to be the purchaser shall pay, immediately after such declaration, a deposit of twenty-five per cent on the amount of his purchase money, to the officer conducting the sale; and, in default of such deposit, the property shall forthwith be resold.*
>
> *(2) The full amount of purchase money payable shall be paid by the purchaser to the Tax Recovery Officer on or before the fifteenth day from the date of the sale of the property."*

28. It is clear from a plain reading of the above that the provision is mandatory in character. The use of the word "shall" is both textually and contextually indicative of the making of the deposit of the amount being a mandatory requirement. The provisions of Rules 57 and 58 of the Income Tax Rules, have their equivalent in Order XXI Rules 84, 85 & 86 of the C.P.C. which are pari materia in language, sweep and effect and have been held to be mandatory by this Court in Manilal Mohanlal Shah and Ors. v. Sardar Sayed Ahmed Sayed Mahmed and Anr. (AIR 1954 SC 349) in the following words:

> "8. The provision regarding the deposit of 25 per cent. by the purchaser other than the decree-holder is mandatory

> as the language of the rule suggests. The full amount of the purchase-money must be paid within fifteen days from the date of the sale but the decree-holder is entitled to the advantage of a set-off. The provision for payment is, however, mandatory... (Rule 85). If the payment is not made within the period of fifteen days, the Court has the discretion to forfeit the deposit, and there the discretion ends but the obligation of the Court to re-sell the property is imperative. A further consequence of non-payment is that the defaulting purchaser forfeits all claim to the property (Rule 86)...
>
> *9...These provisions leave no doubt that unless the deposit and the payment are made as required by the mandatory provisions of the rules, there is no sale in the eye of law in favour of the defaulting purchaser and no right to own and possess the property accrues to him.*
>
> *xx xx xx xx*
>
> *11. Having examined the language of the relevant rules and the judicial decisions bearing upon the subject we are of opinion that the provisions of the rules requiring the deposit of 25 per cent. of the purchase-money immediately on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and upon non-compliance with these provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25 per cent. of the purchase-money in the first instance and the balance within 15 days. When there is no sale within the contemplation of these rules, there can be no question of material irregularity in the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the Court is bound to resell the property in the event of a default shows that the previous proceedings for sale are*

completely wiped out as if they do not exist in the eye of law. We hold, therefore, that in the circumstances of the present case there was no sale and the purchasers acquired no rights at all."

29. Relying in *Manilal Mohanlal's case* (supra) Rules 84, 85 and 86 of Order XXI were also held to be mandatory in *Sardara Singh (Dead) by Lrs. and Anr. v. Sardara Singh (Dead) and Ors.* (1990) 4 SCC 90.

30. Similarly in *Balram, son of Bhasa Ram v. Ilam Singh and Ors.* (1996) 5 SCC 705 this Court reiterated the legal position in the following words:

"7...it was clearly held [in Manilal Mohanlal] that Rule 85 being mandatory, its non-compliance renders the sale proceedings a complete nullity requiring the executing court to proceed under Rule 86 and property has to be resold unless the judgment-debtor satisfies the decree by making the payment before the resale. The argument that the executing court has inherent power to extend time on the ground of its own mistake was also expressly rejected..."

31. We may also refer to the decisions of this Court in *Rao Mahmood Ahmed Khan v. Sh. Ranbir Singh and Ors.* (1995) 4 SCC 275, *Gangabai Gopaldas Mohata v. Fulchand and Ors.* (1997) 10 SCC 387, *Himadri Coke & Petro Ltd. v. Soneko Developers (P) Ltd. And Ors.* (2005) 12 SCC 364 and *Shilpa Shares and Securities and Ors. v. The National Co-operative Bank Ltd. and Ors.* (2007) 12 SCC 165, wherein the same position has been taken.

32. In the light of the above we see no reason to hold that Rules 57 and 58 of the Income Tax Rules are anything but mandatory in nature, so that a breach of the requirements under those Rules will render the auction non-est in the eyes of law.

33. That leaves us with the third and the only other

submission made by Mr. Rao touching the rights of bonafide purchaser and whether there is any conflict between the decisions of this Court on the subject to call for a reference to a larger bench. There is, in our opinion, no doubt that there is an apparent conflict between the decisions upon which reliance was placed by learned counsel for the parties. But having regard to the view that we have taken on the question of the validity of this auction itself, we do not consider it necessary to make a reference to a larger bench to resolve the conflict. The cleavage in the judicial opinion is for the present case only of academic importance, hence need not be addressed by us or by a larger bench for the present.

34. In the result, this appeal fails and is hereby dismissed but in the circumstances without any order as to costs.

B.B.B. Appeal dismissed.

SUNDER @ SUNDARARAJAN
v.
STATE BY INSPECTOR OF POLICE
(Criminal Appeal Nos.300-301 of 2011)

FEBRUARY 5, 2013

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

Penal Code, 1860 – ss.364A, 302 and 201 – Kidnapping for ransom and murder – Of seven year old boy – Circumstantial evidence – Conviction and death sentence by courts below – Held: Conviction as well as the sentence does not call for interference – Kidnapping and demand of ransom proved by witnesses – Factum of kidnapping having been proved, the inference of consequential murder is liable to be presumed in the absence of discharge of onus by the kidnapper to prove the release of the kidnapped – Accused failed to prove the release of the deceased from his custody – Thus in the circumstances of the case, charge of murder also proved – In view of various aggravating circumstances and lack of any mitigating circumstance, award of death sentence justified – Evidence Act, 1872 – s.106 – Sentence/ Sentencing – Death sentence.

Evidence Act, 1872 – s.106 – Burden to prove – Shifting of onus – In kidnapping and murder case – Held: Once factum of kidnapping proved, onus would shift on the kidnapper to establish the release of the kidnapped from his custody.

Appellant- accused alongwith another accused was prosecuted for having kidnapped a 7 year old boy for ransom, and when the ransom was not paid, he killed the child. PWs 2 and 3 was last seen with the appellant-accused. PW-8 deposed that the appellant had called her to take the mobile number of the mother of the deceased

(PW1) and thereafter he made ransom call on the same number. Appellant-accused was also identified by two witnesses in TI Parade. Trial Court convicted the appellant-accused u/ss.364A, 302 and 201 IPC and awarded death sentence. Another accused was acquitted. High Court affirmed the conviction and also confirmed the death penalty. Hence the present appeal.

Dismissing the appeals, the Court

HELD: 1.1. The accused-appellant had been identified through cogent evidence as the person who had taken away the deceased when he disembarked from school van on the date of the incident. The factum of kidnapping of the deceased by the accused-appellant, therefore, stands duly established. [Para 24] [46-G-H; 47-A]

1.2. Having proved the factum of kidnapping, the inference of the consequential murder of the kidnapped person, is liable to be presumed. Once the person concerned has been shown as having been kidnapped, the onus would shift on the kidnapper to establish how and when the kidnapped individual came to be released from his custody. In the absence of any such proof produced by the kidnapper, it would be natural to infer/ presume, that the kidnapped person continued in the kidnapper's custody, till he was eliminated. The instant conclusion would also emerge from Section 106 of the Evidence Act, 1872. [Para 26] [48-A-C]

1.3. In the facts and circumstances of the present case, there is sufficient evidence on the record on the basis whereof even the factum of murder of the deceased at the hands of the accused-appellant stands established. In the facts and circumstances of this case, it has been duly established, that the deceased was kidnapped by the accused-appellant; the accused-appellant was not able to produce any material on the

record to show the release of the deceased from his custody. Section 106 of the Evidence Act, 1872 places the onus on him. In the absence of any such material produced by the accused-appellant, it has to be accepted, that the custody of the deceased had remained with the accused-appellant, till he was murdered. The motive/reason for the accused-appellant, for taking the extreme step was, that ransom as demanded by him, had not been paid. [Para 27] [48-G-H; 49-A-B]

1.4. The accused-appellant had made a confessional statement in the presence of PW13 stating that he had strangulated the deceased to death, whereupon his body was put into a gunny bag and thrown into a particular tank. It was thereafter, on the pointing out of the accused-appellant, that the body of the deceased was recovered from that tank. It was found in a gunny bag, as stated by the accused-appellant. PW12, the doctor concluded after holding the post-mortem examination of the dead body of the deceased, that he had died on account of suffocation, prior to his having been drowned. The instant evidence clearly nails the accused-appellant as the perpetrator of the murder of the deceased. Moreover, the statement of PW13 further revealed that the school bag, books and slate of the deceased were recovered from the residence of the accused-appellant. These articles were confirmed by PW1 as belonging to the deceased. In view of these factual and legal position the prosecution had produced sufficient material to establish not only the kidnapping of the deceased, but also his murder at the hands of the accused-appellant. [Para 28] [49-C-G]

Sucha Singh vs. State of Punjab **2001 (4) SCC 375: 2001 (2) SCR 644 – relied on.**

Sharad Birdhichand Sarda v. State of Maharashtra **1984 (4) SCC 116: 1985 (1) SCR 88;** *Tanviben PankajKumar*

Divetia vs. State of Gujarat **1997 (7) SCC 156: 1997 (1) Suppl. SCR 96; – referred to.**

2. The accused-appellant is guilty of two heinous offences, which independent of one another, provide for the death penalty. The accused caused the murder of child of 7 years. There was no previous enmity between the parties. There was no grave and sudden provocation, which had compelled the accused to take the life of an innocent child. The murder of a child, in such circumstances makes this a case of extreme culpability. On account of the non-payment of ransom, a minor child's murder was committed. This fact demonstrates that the accused had no value for human life. This too demonstrates extreme mental perversion not worthy of human condonation. The manner in which the child was murdered, and the approach and method adopted by the accused, disclose the traits of outrageous criminality in the behaviour of the accused. This approach of the accused reveals a brutal mindset of the highest order. All the aforesaid aggravating circumstances are liable to be considered in the background of the fact that the murder was committed, not of a stranger, but of a child with whom the accused was acquainted. This conduct of the accused-appellant, places the facts of this case in the abnormal and heinous category. The choice of kidnapping the particular child for ransom, was well planned and consciously motivated. Purposefully killing the sole male child, has grave repercussions for the parents of the deceased. Agony for parents for the loss of their only male child, who would have carried further the family lineage, and is expected to see them through their old age, is unfathomable. Extreme misery caused to the aggrieved party, certainly adds to the aggravating circumstances. As against the aforesaid aggravating circumstances, not a single mitigating circumstance was pointed out by the accused. Therefore, the death penalty

imposed upon the accused-appellant by the High Court is affirmed. [Paras 30 and 31] [63-B-C & D-H; 64-B-H]

Vikram Singh and Ors. vs. State of Punjab **2010 (3) SCC 56: 2010 (2) SCR 22 – relied on.**

Haresh Mohandas Rajput vs. State of Maharashtra **2011(12) SCC 56: 2011 (14) SCR 921;** *Ramnaresh and Ors. vs. State of Chhattisgarh* **2012 (3) SCR 630: 2012 (4) SCC 257;** *Brajendra Singh vs. State of M.P.* **2012 (4) SCC 289: 2012 (3) SCR 599 – referred to.**

Case Law Reference:

1985 (1) SCR 88	**referred to**	**Para 19**
1997 (1) Suppl. SCR 96	**referred to**	**Para 19**
2001 (2) SCR 644	**relied on**	**Paras 19, 26**
2011 (14) SCR 921	**referred to**	**Para 29**
2012 (4) SCC 257	**referred to**	**Para 29**
2012 (3) SCR 599	**referred to**	**Para 29**
2010 (2) SCR 22	**relied on**	**Para 31**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 300-301 of 2011.

From the Judgment & Order dated 30.09.2010 of the High Court of Judicature at Madras in R.T. No. 2 of 2010 and Crl. A. No. 525 of 2010.

K.K. Mani, Abhishek Krishna for the Appellant.

Yogesh Kanna, A. Santha Kumaran, S. Thananjayan for the Respondent.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. On 27.7.2007 Suresh aged 7 years, who lived with his mother Maheshwari (PW1) at Karkudal village in Vridhachalam Taluk, left his residence in the morning as usual, at about 8 a.m. to attend his school at Vridhachalam. Suresh was a class II student at Sakthi Matriculation School at Vridhachalam. Each morning, he along with other students from the same village, would leave for school, in a school van at about 8.00 a.m. The same school van would bring them back in the afternoon at about 4.30 p.m. On 27.7.2009, Suresh did not return home. Maheshwari (PW1) his mother got worried and made inquiries. She inquired from Kamali (PW2), and from another student from the same village, who used to travel to school in the same van with Suresh. Kamali (PW2) told Maheshwari (PW1) that a man was waiting alongside a motorcycle when the school van returned to Karkudal village on 27.7.2009. The man informed Suresh that his mother and grandmother were not well. According to Kamali (PW2), the man told Suresh, that he had been asked by Maheshwari (PW1) to bring Suresh to the hospital. Based on the aforesaid assertions, Suresh had accompanied the man on his motorcycle. After having inquired from Kamali (PW2), Maheshwari (PW1) sought information from another student Malai, but could not gather any positive information from her. Thereafter, she was informed by Kurinji Selvan (PW3) belonging to the same village, that he had seen Suresh disembarking from the Sakthi school van on 27.7.2009 at about 4.30 p.m. He also told her, that a man standing alongside a motorcycle, had called out to Suresh and had taken Suresh along with him on his motorcycle. Kurinji Selvan (PW3) advised Maheshwari (PW1) to approach the police. Maheshwari (PW1) accordingly proceeded to Police Station, Kammapuram, to register a complaint. The said complaint was registered at 7 p.m. on the date of occurrence, i.e., on 27.7.2009 itself. Based thereon, Crime no.106 of 2009 was registered under Section 366 of the Indian Penal Code.

2. At about 9.30 p.m. on the same day, i.e., on 27.7.2009

Maheshwari (PW1) received a call on her mobile phone. The caller identified himself as Shankar. The caller demanded a ransom of Rs.5 lakhs for the release of Suresh. Immediately after the receipt of the aforesaid call, Maheshwari (PW1) again rushed to the Police Station Kammapuram, and informed the Station House Officer about the call received by her.

3. The investigating officer called Kasinathan (PW13), the then Village Administrative Officer of village Karkudal, Taluka Vridhachalam, to the Vridhachalam Police Station. Having taken permission from the Tehsildar, Kasinathan (PW13) and his assistant went to Vridhachalam. From there, they went to the house of the accused, and in the presence of Kasinathan (PW13), the two accused were apprehended. In the presence of Kasinathan (PW13), the accused made confessional statements, leading to the recovery of three mobile phone sets, two of which had sim cards. The accused also acknowledged, having strangulated Suresh when ransom was not paid for his release. The accused also confessed, that they had put the dead body of Suresh in a gunny bag, and thereafter, had thrown it in the Meerankulam tank. Based on the aforesaid confessional statement, in the presence of Kasinathan (PW13), and on the pointing out of the accused, the dead body of Suresh was retrieved by personnel belonging to the fire service squad. The dead body of Suresh was found in a gunny bag which had been fished out of the above-mentioned tank. The accused also made statements to the police, whereupon the school bag, books and slate belonging to the deceased Suresh came to be recovered from the residence of the accused, in the presence of Kasinathan (PW13).

4. During the course of the investigation emerging out of the mobile phones recovered from the accused, the police identified Saraswathi (PW8), who affirmed that she had received a phone call from a person who called himself Shankar, on 27.7.2009 at about 9 p.m. She also disclosed, that the caller had enquired from her about the phone number of

Maheshwari (PW1). Saraswathi (PW8) had required the caller, to ring her up after sometime. She had received another call from Shankar and had furnished the mobile phone number of Maheshwari (PW1) to him. Consequent upon the gathering of the above information, the accused were charged under Sections 364-A (for kidnapping for ransom), 302 (murder) and 201 (for having caused disappearance of evidence) of the Indian Penal Code. The trial of the case was committed to the Court of Session, whereupon, the prosecution examined 19 prosecution witnesses. The prosecution also relied on 18 exhibits and 10 material objects. After the statements of the prosecution witnesses had been recorded, the statements of the accused were recorded under Section 313 of the Code of Criminal Procedure. Despite having been afforded an opportunity, the accused did not produce any witness in their own defence.

5. On the culmination of the trial, the accused-appellant Sunder @ Sunderajan was found guilty and convicted of the offences under Sections 364-A, 302 and 201 of the Indian Penal Code by the Sessions Judge, Mahila Court, Cuddalore. For the first two offences, the accused-appellant was awarded the death penalty along with fine of Rs.1,000/- each. For the third offence, the accused-appellant was awarded 7 years rigorous imprisonment along with a fine of Rs.1,000/-. Vide RT no.2 of 2010, the matter was placed before the High Court of Judicature at Madras (hereinafter referred to as, the High Court), for confirmation of the death sentence imposed on the accused-appellant. The accused-appellant independently of the aforesaid, filed Criminal Appeal no.525 of 2010 before the High Court, for assailing the order of his conviction. Vide its common judgment dated 30.9.2010, the High Court confirmed the death sentence imposed on the accused-appellant and simultaneously dismissed the appeal preferred by Sunder @ Sundararajan. Thus viewed, the judgment rendered by the Sessions Judge, Mahila Court at Cuddalore dated 30.7.2010 was affirmed by the High Court vis-à-vis the accused-appellant.

6. The Court of Session acquitted Balayee, accused no. 2. It is not a matter of dispute before us, that the acquittal of Balayae, was not contested by the prosecution by preferring any appeal. It is therefore apparent, that for all intents and purposes accused no.2 stands discharged from the matter on hand.

7. It is not necessary to deal with the statements of all the witnesses, in so far as the instant controversy is concerned. Even though the prosecution had rested its case, on circumstantial evidence alone, it would be necessary to refer to the statements of a few witnesses so as to deal with the submissions advanced on behalf of the accused-appellant. The deposition of the relevant witnesses is accordingly being summarized hereinafter.

8. Maheshwari (PW1) was the mother of the deceased Suresh. It was Maheshwari (PW1) who had lodged the First Information Report at Police Station, Kammapuram, on 27.7.2009. In her statement before the trial court, she asserted that she had four children, three daughters and one son. Suresh was her only son. She deposed, that she was running all domestic affairs of her household at Village Karkudal in Taluk Vridhachalam by herself, as her husband had gone abroad to earn for the family. She affirmed, that she was also engaged in agriculture. She also asserted, that her son Suresh was studying in Class II at the Sakthi Matriculation School, Vridhachalam. He used to go to school, by the school van, and used to return along with other children from school, at about 4.30 p.m. As usual, on 27.7.2009, he had gone to school in the school van at about 8.00 a.m. but since he had not returned at 4.30 p.m., she had gone out to search for him. She had enquired from other students who used to travel in the same school van along with her son. Kamali (PW2) informed her that her son Suresh had got down from the school van on 27.7.2009, in her company. Kamali (PW2) also informed her, that as soon as Suresh got down from the school van on

27.7.2009, the accused-appellant who was standing near the neem tree along side his motorcycle, called Suresh by his name, and told him that his mother and grandmother were ill, and had required him to bring Suresh to them, on his motorcycle. At the man's asking, according to Kamali (PW2), Suresh sat on the man's motorcycle, and was taken away. Maheshwari (PW1) then enquired from Malai, another student who used to travel by the same school van. Malai, however, did not remember about the presence of Suresh. Finally, Maheshwari (PW1) was told by Kurinji Selvan (PW3), a co-villager living in Karkudal village, that he had seen Suresh getting down from the school van and being taken away by a man on his motorcycle. Kurinji Selvan (PW3) advised Maheshwari (PW1), to report the matter to the police. Based on the aforesaid inputs, Maheshwari (PW1) deposed, that she had immediately gone to Police Station, Kammapuram, and had lodged a report at 7.00 p.m. Having returned to her village, Maheshwari (PW1) claims to have received a call on her mobile phone at about 9.30 p.m. According to her, the caller was the accused-appellant. The accused-appellant demanded a sum of Rs.5,00,000/- for the safe release of her son Suresh. Consequent upon the receipt of the aforesaid phone call, Maheshwari (PW1) deposed, that she had returned to the Police Station, Kammapuram, to apprise the police of the aforesaid development. According to Maheshwari (PW1), the police informed her on 30.7.2009, that the body of her son had been recovered from a lake and had been brought to Vridhachalam Hospital. In her statement, she affirmed having identified the clothes, shoes and socks as also neck tie of her son Suresh. She also identified his school bag which had the inscription 'JAYOTH'. She also identified his books as also the black colour slate having a green colour beeding around it, as that of her son Suresh. She also identified the body of her son when she set her eyes on him at Vridhachalam Hospital. During her cross-examination, she deposed that she had not approached Kurinji Selvan (PW3). It was Kurindi Selvan (PW3), who had approached her on seeing her crying. When

she disclosed to Kurinji Selvan (PW3) about her missing son, he had informed her that he had seen her son Suresh disembarking from the school van whereafter, Suresh had gone away with a man on a motorcycle.

9. Kamali entered appearance before the trial court as PW2. She asserted that she was (at the time of her deposition) studying in the 6th standard at Sakthi Matriculation School, Vridhachalam. She affirmed that Suresh, the deceased, was known to her. She deposed that on 27.7.2009, she had gone to her school in the school van, wherein there were other children from the village including Suresh. She also deposed that she along with Suresh returned to Karkudal Village on 27.7.2009, at about 3.00 p.m. in the school van. Suresh had got down from the school van, along with the other children. When the van had arrived at the village, she had seen a man standing along side a motorcycle. After Suresh got down from the school van, the man beckoned at Suresh. He informed Suresh, that his mother and grandmother were ill, and that Suresh's mother had asked him, to bring Suresh to the hospital. She deposed that when she reached her house, Maheshwari (PW1) had inquired about the whereabouts of her son, from her. She had informed Maheshwari (PW1) the factual position as narrated above. She also asserted, that she was questioned by the police during the course whereof she had informed the police, that she could identify the accused. She acknowledged that an identification parade was conducted by the Judicial Magistrate at Cuddalore Central Prison, where she had identified the accused-appellant, namely, the man who had taken Suresh on the motorcycle on 27.7.2009, when they had returned from school.

10. Kurinji Selvan deposed before the trial court as PW3. He stated that Maheshwari (PW1), Kamali (PW2), as also the deceased Suresh, were known to him. He stated that on 27.7.2009 at about 4.30 p.m. when he was going towards his paddy field on his motorcycle, the Sakthi School van had

dropped the school children of his village, at the corner of the river path. He had also stopped his motorcycle, there. He had seen the accused-appellant standing near the neem tree along side a motorcycle. He identified the nature, as also, the colour of the clothes worn by the accused-appellant. He confirmed, that the accused–appellant had called out to Suresh by his name, whereupon, Suresh had gone up to him. He deposed, that he had seen Suresh being taken away by the man, on his motorcycle. He further deposed, that when he was returning from his paddy field at about 5.30 p.m., he had seen Maheshwari (PW1) weeping. When he enquired from her, she told him, that her son was missing. Kurinji Selvan (PW3) affirmed that he had informed her, that a man had taken her son away on a motorcycle. He also advised Maheshwari (PW1) to lodge a report with the police. He further deposed, that the body of a child was recovered on 30.7.2009 and he was informed about the same at about 8.00 a.m. The body had been recovered from Meerankulam tank in Vuchipullaiyar Vayalapadi village. Having received the aforesaid information, he had proceeded to the Meerankulam tank where he identified Suresh, to the Inspector. He further deposed, that an identification parade was conducted at the Cuddalore Central Prison, in presence of the Judicial Magistrate. He affirmed, that he had identified the accused-appellant as the person who had taken Suresh, when Suresh had disembarked from the school van on 27.7.2009. He also asserted, that he had identified the motorcycle, when he was shown two motorcycles, as the one on which the accused-appellant had taken Suresh away on 27.7.2009.

11. The statement of M. Santhanam was recorded as PW6. He affirmed that he was the Correspondent and Principal of Sakthi Matriculation School. He also affirmed that Suresh was studying in his school in the 2nd standard. He confirmed that Suresh had attended the school on 27.7.2009. He produced the attendance register, wherein the presence of Suresh was duly recorded.

12. Saraswathi (PW8) appeared before the trial court and deposed, that on 27.7.2009, she had received a call on her mobile phone bearing No.9943020435 at about 9.00 p.m. The caller identified himself as Sankar and asked for the phone number of Maheshwari (PW1). She stated that she had informed the caller, to ring her after a little while, by which time she would retrieve the phone number of Maheshwari (PW1). Accordingly, the caller again spoke to her on her mobile phone, whereupon, she had conveyed the phone number of Maheshwari (PW1), to him.

13. A. Bashir, Judicial Magistrate No.1 appeared before the trial court as PW10. He deposed that he had gone to the Cuddalore Central Prison on 25.8.2009 to conduct the identification parade. He had taken his office assistant along with him. He had selected co-prisoners similar to the accused-appellant to participate in the identification parade. Persons selected by him were of the same height, weight, colour and beared. Out of these eight persons selected by him, both Kamali (PW2) and Kurinji Selvan (PW3) had identified the accused-appellant, in three different combinations.

14. Sunil (PW11), working as legal officer of the Vodafone Company, during the course of his deposition before the trial court affirmed, that he was required by the Inspector of Police, Vridhachalam, to provide him with the details of Vodafone cell phone numbers 9946205961 and 9943020435 for the period from 25.7.2009 to 28.7.2009. He affirmed that he had taken the aforesaid details from the computer and given them to the Inspector of Police. He confirmed that three calls had been made from sim number 9946205961, upto 9.39 p.m. on 27.7.2009. He also affirmed, that phone number 9943020435 was in the name of Saraswathi (PW3).

15. Dr. Kathirvel appeared before the trial court as PW12. He had conducted the post mortem on the dead body of Suresh on 30.7.2009. The dead body was identified by the police Constable, in the mortuary. He asserted that the body

was in a decomposed state. According to his analysis, the child had died within 36 to 48 hours prior to the post mortem examination. According to the opinion tendered by him, suffocation was the cause of the death of the child. And that, the child, in his opinion, had died prior to his being drowned in the water.

16. Kasinathan (PW13), the Village Administrative officer, Karkudal, while appearing before the trial court confirmed, that he was known to the accused-appellant. He deposed that on 30.7.2009, he was summoned from his residence by the Inspector of Police, Vridhachalam at about 4.30 p.m. Thereupon, he had gone to the Vridhachalam Police Station. The Inspector of Police had required Kasinathan (PW13) to be a police witness, whereupon, he had obtained permission from the Tahsildar, for being a police witness. He was taken to the house of the accused-appellant in a police jeep. They reached his house at 7.00 a.m. on 30.7.3009. As soon as the accused saw the police jeep, both of them fled from the spot. Whilst running away, the accused-appellant had fallen down, and thereupon, the police personnel had apprehended him. Women constables had apprehended Balayee (A-2). The accused-appellant had made a confessional statement to the police in the presence of Kasinathan (PW13). The accused-appellant had handed over three mobile phones to the Police Inspector in his presence. Only two of the said phones had sim cards. The accused-appellant had also produced the motorcycle, on which he had taken away Suresh, when he had got down from the school van at village Karkudal on 27.7.2009. The accused-appellant also produced a school bag containing a slate and two books from his residence in his presence. Kasinathan (PW13) admitted having signed the “mahazar” when recoveries of the aforesaid articles were made from the accused-appellant on 30.7.2009. Based on the information furnished by the accused-appellant, Kasinathan (PW13) acknowledged, that he had gone to the Meerankulam tank in Vayalapadi village, in the police jeep, along with the other police personnel. When the

gunny bag containing the dead body of the child was retrieved from the tank, the accused-appellant had identified the same as Suresh. He had also signed on the "mahazar" prepared on the recovery of the gunny bag, containing the dead body of Suresh.

17. It is not necessary to refer to the statement of other witnesses except the fact that the call details produced by Sunil (PW11) indicate that two calls were made from the Mobile Phone recovered from the accused- appellant to Saraswathi (PW8). The said calls were made at 9.22 p.m. and 9.25 p.m. respectively. The call details further indicate that from the same number, a call was made to Maheshwari (PW1) at 9.39 p.m.

18. It is on the basis of the aforesaid oral and documentary evidence that we shall endeavour to determine the issues canvassed at the hands of the learned counsel for the appellant.

19. The solitary contention advanced by the learned counsel for the appellant on the merits of the case was, that the prosecution had ventured to substantiate the allegations levelled against the appellant only on the basis of circumstantial evidence. It was sought to be pointed out, that in the absence of direct evidence, the slightest of a discrepancy, depicting the possibility of two views would exculpate the accused of guilt, on the basis of benefit of doubt. Before dealing with the circumstantial evidence relied upon against the appellant, learned counsel invited our attention to the legal position declared by this Court, on the standard of proof required for recording a conviction, on the basis of circumstantial evidence. In this behalf, learned counsel for the appellant first of all placed reliance on *Sharad Birdhichand Sarda Vs. State of Maharashtra,* (1984) 4 SCC 116. It was pointed out, that in the instant judgment this Court laid down the golden principles of standard of proof, required in a case sought to be established on the basis of circumstantial evidence. In this behalf reliance was placed on the following observations:-

"152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved as was held by this Court in *Shivaji Sahebrao Bobade v. State of Maharashtra :* 1973CriLJ1783 where the following observations were made:

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict, and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

Learned counsel for the appellant thereafter placed reliance on thedecision rendered in *Tanviben Pankajkumar Divetia Vs. State of Gujarat,* (1997) 7 SCC 156. He placed reliance on the following observations recorded therein:-

"45. The principle for basing a conviction on the basis of circumstantial evidences has been indicated in a number of decisions of this Court and the law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. This Court has clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that the Court has to be watchful and avoid the danger of allowing the suspicion to make the place of legal proof for some times, unconsciously it may happen to be a short step between moral certainty and legal proof.

It has been indicated by this Court that there is a long mental distance between 'may be true' and 'must be true' and the same divides conjectures from sure conclusions. (*Jaharlal Das v. State of Orissa :* 1991 3 SCC 27)

46. We may indicate here that more the suspicious circumstances, more care and caution are required to be taken otherwise the suspicious circumstances may unwittingly enter the adjudicating thought process of the Court even though the suspicious circumstances had not been clearly established by clinching and reliable evidences. It appears to us that in this case, the decision of the Court in convicting the appellant has been the result of the suspicious circumstances entering the adjudicating thought process of the Court."

Learned counsel also placed reliance on *Sucha Singh Vs. State of Punjab,* (2001) 4 SCC 375. The instant judgment was relied upon in order to support the contention, that circumstantial evidence could not be relied upon, where there was any vacuum in evidence. It was pointed out therefrom, that this Court has held, that each aspect of the criminal act alleged against the accused, had to be established on the basis of material of a nature, which would be sufficient to lead to the inference that there could be no other view possible, than the one arrived at on the basis of the said circumstantial evidence. In this behalf, learned counsel for the appellant placed reliance on the following observations recorded in the afore-cited judgment.

"19. Learned senior counsel contended that Section 106 of the Evidence Act is not intended for the purpose of filling up the vacuum in prosecution evidence. He invited our attention to the observations made by the Privy Council in *Attygalle*

Vs. R AIR 1936 PC 169, and also in *Stephen Seneviratne vs. The King* : AIR 1936 PC 289. In fact the observations contained therein were considered by this Court in an early decision authored by Vivian Bose, J, in *Shambhu Nath Mehra vs State of Ajmer,* AIR 1956 SC 404. The statement of law made by the learned Judge in the aforesaid decision has been extracted by us in *State of West Bengal vs. Mir Mohammad Omar,* 2000 (8) SCC 382. It is useful to extract a further portion of the observation made by us in the aforesaid decision:

"33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case."

20. We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where prosecution has succeeded in proving facts for which a reasonable inference can be

drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference."

20. Based on the aforesaid judgments, the first contention advanced on behalf of the accused-appellant was, that there was no material produced by the prosecution to establish the factum of the commission of the murder of the deceased Suresh (at the hands of the accused-appellant). According to the learned counsel, the aforesaid vacuum could not be filled up on the basis of any presumption.

21. We have considered the first contention advanced by the learned counsel for the appellant, on the basis of the contention noticed in the foregoing paragraph. In the veiled submission advanced in the hands of the learned counsel for the appellant, we find an implied acknowledgement, namely, that learned counsel acknowledges, that the prosecution had placed sufficient material on the record of the case to substantiate the factum of kidnapping of the deceased Suresh, at the hands of the accused-appellant. Be there as it may, without drawing any such inference, we would still endeavour to determine, whether the prosecution had been successful in establishing the factum of kidnapping of the deceased Suresh, at the hands of the accused-appellant. In so far as the instant aspect of the matter is concerned, reference may first be made to the statement of Saraswathi, PW-8 wherein she affirmed that on 27.7.2009, at about 9 p.m., when she was at her residence, she had received a call on her mobile phone bearing number 9943020435. The caller identified himself as Shankar. She deposed, that the caller had inquired from her about the phone number of Maheshwari (PW1). She stated, that she had responded to the said Shankar by asking him to call her after sometime, and in the meanwhile, she (Saraswathi) would gather the phone number of Maheshwari (PW1). Soon after the first

call, Saraswathi (PW8) testified, that she received a second call from the same person. On this occasion, Saraswathi (PW-8) acknowledged having provided the caller with the mobile phone number of Maheshwari (PW1). Through independent evidence the prosecution was in a position to establish that the first of the aforesaid two calls, were received by Saraswathi (PW8) at 9.22 p.m., and the second one at 9.25 p.m. The caller, on having obtained the mobile phone number of Maheshwari (PW1) then called her (Maheshwari – PW1) on the mobile phone number supplied by Saraswathi (PW8). On the basis of independent evidence the prosecution has also been able to establish, that Maheshwari, (PW1) received the instant phone call at 9.39 p.m., from the same phone number from which Saraswathi, PW-8 had received two calls. In her statement, Maheshwari (PW1) asserted, that the caller demanded a ransom of Rs.5,00,000/- for the safe return of her son, Suresh. At this juncture, as per her statement, Maheshwari (PW1) again visited the police station to apprise the police of the said development. The aforesaid material, was one of the leads, which the police had adopted in identifying the accused-appellant.

22. Beside the aforesaid, the prosecution placed reliance on the deposition of Kamali (PW2), for identifying the appellant as the kidnapper of the deceased, Suresh. In her statement Kamali (PW-2) affirmed, that she along with the deceased Suresh had returned to their village Karkudal on 27.7.2009 at about 4.30 p.m. in the school van. When they alighted from the school van, as per the deposition of Kamali (PW2), the accused- appellant was seen by her, standing besides his motor-cycle. The accused- appellant, as per the testimony of Kamali (PW2), had gestured towards Suresh with his hand. The deceased Suresh and Kamali (PW2) had accordingly gone to the accused-appellant. The accused-appellant had told Suresh, that his mother and grandmother were unwell, and he had been asked by his mother to bring him (Suresh) to the hospital. Thereafter, according to Kamali (PW2), the accused-appellant

had taken away the deceased Suresh, on his motor-cycle. It would be relevant to indicate that Kamali (PW2) duly identified the accused-appellant in an identification parade, conducted under the supervision of A. Bashir, Judicial Magistrate (PW10), on 25.8.2009 at Cuddalore Central Prison. According to the testimony of A. Bashir, Judicial Magistrate, Kamali PW-2 correctly identified the accused- appellant. The aforesaid evidence was the second basis of identifying the accused-appellant as the person, who had kidnapped the deceased Suresh.

23. The deposition of Kurinji Selvan (PW3) has already been narrated hereinabove. Kurinji Selvan (PW3) had seen Suresh disembarking from the school van on 27.7.2009 at about 4.30 p.m., when the said van had returned to village Karkudal. Kurinji Selvan (PW3) affirmed, that he had also seen the accused-appellant waiting for the arrival of the school van under a neem tree alongside his motorcycle. Kurinji Selvan (PW3) also deposed, that he had seen the accused-appellant taking away Suresh, on his motorcycle. On the date of the incident itself, he had informed Maheshwari (PW1), that Suresh had been taken away by a man on his motorcycle. In the same manner as Kamali (PW2) had identified the accused-appellant in an identification parade, Kurinji Selvan (PW3) had also participated in the identification parade conducted at Cuddalore Central Prison on 25.8.2009. He had also identified the accused-appellant in the presence of the Judicial Magistrate. The statement of Kurinji Selvan (PW3) constitutes the third basis of identifying the accused-appellant as the man who had taken away Suresh on his motorcycle on 27.7.2009.

24. Based on the evidence noticed in the three preceding paragraphs, there can be no doubt whatsoever, that the accused-appellant had been identified through cogent evidence as the person who had taken away Suresh when he disembarked from school van on 27.7.2009. The factum of

kidnapping of Suresh by the accused-appellant, therefore, stands duly established.

25. The material question to be determined is, whether the aforesaid circumstantial evidence is sufficient to further infer, that the accused- appellant had committed the murder of Suresh. According to the learned counsel for the appellant, there is no evidence whatsoever, on the record of the case, showing the participation of the accused-appellant in any of the acts which led to the death of Suresh. It was, therefore, the submission of the learned counsel for the appellant, that even though the accused-appellant may be held guilty of having kidnapped Suresh, since it had not been established that he had committed the murder of Suresh, he cannot be held guilty of murder in the facts of this case.

26. Having given our thoughtful consideration to the submission advanced at the hands of the learned counsel for the appellant, we are of the view, that the instant submission is wholly misplaced and fallacious. Insofar as the instant aspect of the matter is concerned, reference may be made to the judgment rendered by this Court in *Sucha Singh's* case (supra), wherein it was held as under:-

> "21. We are mindful of what is frequently happening during these days. Persons are kidnapped in the sight of others and are forcibly taken out of the sight of all others and later the kidnapped are killed. If a legal principle is to be laid down that for the murder of such kidnapped there should necessarily be independent evidence apart from the circumstances enumerated above, we would be providing a safe jurisprudence for protecting such criminal activities. India cannot now afford to lay down any such legal principle insulating the marauders of their activities of killing kidnapped innocents outside the ken of others."

A perusal of the aforesaid determination would reveal, that having proved the factum of kidnapping, the inference of the consequential murder of the kidnapped person, is liable to be presumed. We are one with the aforesaid conclusion. The logic for the aforesaid inference is simple. Once the person concerned has been shown as having been kidnapped, the onus would shift on the kidnapper to establish how and when the kidnapped individual came to be released from his custody. In the absence of any such proof produced by the kidnapper, it would be natural to infer/presume, that the kidnapped person continued in the kidnapper's custody, till he was eliminated. The instant conclusion would also emerge from Section 106 of the Indian Evidence Act, 1872 which is being extracted hereunder :

> **"106 - Burden of proving fact especially within knowledge—.**When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.
>
> **Illustrations**
>
> (a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.
>
> (b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him."

27. Since in the facts and circumstances of this case, it has been duly established, that Suresh had been kidnapped by the accused-appellant; the accused-appellant has not been able to produce any material on the record of this case to show the release of Suresh from his custody. Section 106 of the Indian Evidence Act, 1872 places the onus on him. In the absence of any such material produced by the accused-appellant, it has to be accepted, that the custody of Suresh had remained with the accused-appellant, till he was murdered. The

motive/reason for the accused-appellant, for taking the extreme step was, that ransom as demanded by him, had not been paid. We are therefore, satisfied, that in the facts and circumstances of the present case, there is sufficient evidence on the record of this case, on the basis whereof even the factum of murder of Suresh at the hands of the accused-appellant stands established.

28. We may now refer to some further material on the record of the case, to substantiate our aforesaid conclusion. In this behalf, it would be relevant to mention, that when the accused-appellant was detained on 30.7.2009, he had made a confessional statement in the presence of Kasinathan (PW13) stating, that he had strangulated Suresh to death, whereupon his body was put into a gunny bag and thrown into the Meerankulam tank. It was thereafter, on the pointing out of the accused-appellant, that the body of Suresh was recovered from the Meerankulam tank. It was found in a gunny bag, as stated by the accused-appellant. Dr. Kathirvel (PW12) concluded after holding the post mortem examination of the dead body of Suresh, that Suresh had died on account of suffocation, prior to his having been drowned. The instant evidence clearly nails the accused- appellant as the perpetrator of the murder of Suresh. Moreover, the statement of Kasinathan (PW13) further reveals that the school bag, books and slate of Suresh were recovered from the residence of the accused-appellant. These articles were confirmed by Maheshwari (PW1) as belonging to Suresh. In view of the factual and legal position dealt with hereinabove, we have no doubt in our mind, that the prosecution had produced sufficient material to establish not only the kidnapping of Suresh, but also his murder at the hands of the accused-appellant.

29. Besides the submission advanced on the merits of the controversy, learned counsel for the accused-appellant also assailed the confirmation by the High Court of the death sentence imposed by the trial court. During the course of

hearing, it was the vehement contention of the learned counsel for the accused-appellant, that infliction of life imprisonment, in the facts and circumstances of this case, would have satisfied the ends of justice. It was also the contention of the learned counsel for the accused- appellant, that the facts and circumstances of this case are not sufficient to categorize the present case as a 'rarest of a rare case', wherein only the death penalty would meet the ends of justice. In order to support the aforesaid contention, learned counsel for the accused-appellant, in the first instance, placed reliance on a recent judgment rendered by this Court in *Haresh Mohandas Rajput Vs. State of Maharashtra,* (2011) 12 SCC 56, wherein, having taken into consideration earlier judgments, this Court delineated the circumstances in which the death penalty could be imposed. Reliance was placed on the following observations recorded therein:-

"Death Sentence – When Warranted:

"18. The guidelines laid down in *Bachan Singh v. State of Punjab,* (1980) 2 SCC 684, may be culled out as under:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty, the circumstances of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of

imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances have to be accorded full weightage and just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

19. In *Machhi Singh and Ors. v. State of Punjab,* (1983) 2 SCC 684, this Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in Bachan Singh to cases where the "collective conscience" of a community is so shocked that it will expect the holders of the judicial powers centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, such a penalty can be inflicted. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in a case and a just balance had to be struck between aggravating and mitigating circumstances.

20. "The rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful co-existence of the society. The crime may be heinous or brutal but may not be in the category of "the rarest of the rare case". There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and

would continue to be so, threatening its peaceful and harmonious co-existence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the-moment provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fiber of the society, e.g. crime committed for power or political ambition or indulging in organized criminal activities, death sentence should be awarded. (See: *C. Muniappan and Ors. v. State of Tamil Nadu,* AIR 2010 SC 3718; *Rabindra Kumar Pal alias Dara Singh v. Republic of India,* (2011) 2 SCC 490; *Surendra Koli v. State of U.P. and Ors.,* (2011) 4 SCC 80; *Mohd. Mannan (supra); and Sudam v. State of Maharashtra,* (2011) 7 SCC 125).

21. Thus, it is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether death sentence should be awarded, would depend upon the factual scenario of the case in hand."

Reliance was also placed, on the decision of this Court in *Ramnaresh & Ors. Vs. State of Chhattisgarh,* (2012) 4 SCC 257. Insofar as the instant judgment is concerned, learned counsel relied on the following observations:-

"The death sentence and principles governing its conversion to life imprisonment

56. Despite the transformation of approach and radical changes in principles of sentencing across the world, it has not been possible to put to rest the conflicting views on sentencing policy. The sentencing policy being a significant and inseparable facet of criminal jurisprudence, has been inviting the attention of the Courts for providing certainty and greater clarity to it.

57. Capital punishment has been a subject matter of great social and judicial discussion and catechism. From whatever point of view it is examined, one undisputable statement of law follows that it is neither possible nor prudent to state any universal formula which would be applicable to all the cases of criminology where capital punishment has been prescribed. It shall always depend upon the facts and circumstances of a given case. This Court has stated various legal principles which would be precepts on exercise of judicial discretion in cases where the issue is whether the capital punishment should or should not be awarded.

58. The law requires the Court to record special reasons for awarding such sentence. The Court, therefore, has to consider matters like nature of the offence, how and under what circumstances it was committed, the extent of brutality with which the offence was committed, the motive for the offence, any provocative or aggravating circumstances at the time of commission of the crime, the possibility of the convict being reformed or rehabilitated, adequacy of the sentence of life imprisonment and other attendant circumstances. These factors

cannot be similar or identical in any two given cases.

59. Thus, it is imperative for the Court to examine each case on its own facts, in light of the enunciated principles. It is only upon application of these principles to the facts of a given case that the Court can arrive at a final conclusion whether the case in hand is one of the 'rarest of rare' cases and imposition of death penalty alone shall serve the ends of justice. Further, the Court would also keep in mind that if such a punishment alone would serve the purpose of the judgment, in its being sufficiently punitive and purposefully preventive.

xxx xxx xxx xxx

72. The above judgments provide us with the dicta of the Court relating to imposition of death penalty. Merely because a crime is heinous per se may not be a sufficient reason for the imposition of death penalty without reference to the other factors and attendant circumstances.

73. Most of the heinous crimes under the IPC are punishable by death penalty or life imprisonment. That by itself does not suggest that in all such offences, penalty of death alone should be awarded. We must notice, even at the cost of repetition, that in such cases awarding of life imprisonment would be a rule, while 'death' would be the exception. The term 'rarest of rare' case which is the consistent determinative rule declared by this Court, itself suggests that it has to be an exceptional case.

74. The life of a particular individual cannot be taken away except according to the procedure established by

law and that is the constitutional mandate. The law contemplates recording of special reasons and, therefore, the expression 'special' has to be given a definite meaning and connotation. 'Special reasons' in contra-distinction to 'reasons' simpliciter conveys the legislative mandate of putting a restriction on exercise of judicial discretion by placing the requirement of special reasons.

75. Since, the later judgments of this Court have added to the principles stated by this Court in the case of *Bachan Singh* (supra) and *Machhi Singh* (supra), it will be useful to restate the stated principles while also bringing them in consonance, with the recent judgments.

76. The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in the case of *Bachan Singh* (supra) and thereafter, in the case of *Machhi Singh* (supra). The aforesaid judgments, primarily dissect these principles into two different compartments - one being the 'aggravating circumstances' while the other being the 'mitigating circumstances'. The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354(3) Cr.P.C.

Aggravating Circumstances:

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Cr.P.C.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances:

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused.

77. While determining the questions relateable to sentencing policy, the Court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles:

(1) The Court has to apply the test to determine, if it was the 'rarest of rare' case for imposition of a death sentence.

(2) In the opinion of the Court, imposition of any other punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

78. Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the Court, while exercising its jurisdiction. It is difficult to state it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the Court may consider in its endeavour to do complete justice between the parties.

79. The Court then would draw a balance-sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The Court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and the punishment is the principle of 'just deserts' that serves as the foundation of every criminal sentence that is

justifiable. In other words, the 'doctrine of proportionality' has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large.

80. Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole. Thus, the Courts should consider retributive and deterrent aspect of punishment while imposing the extreme punishment of death.

81. Wherever, the offence which is committed, manner in which it is committed, its attendant circumstances and the motive and status of the victim, undoubtedly brings the case within the ambit of 'rarest of rare' cases and the Court finds that the imposition of life imprisonment would be inflicting of inadequate punishment, the Court may award death penalty. Wherever, the case falls in any of the exceptions to the 'rarest of rare' cases, the Court may exercise its judicial discretion while imposing life imprisonment in place of death sentence."

Last of all, reliance was placed on the judgment rendered by this Court in *Brajendra Singh Vs. State of Madhya Pradesh,* (2012) 4 SCC 289, wherein, this Court having followed the decision rendered in *Ramnaresh & Ors. Vs. State of Chhattisgarh* (cited supra), further held as under:-

"38. First and the foremost, this Court has not only to examine whether the instant case falls under the category of 'rarest of rare' cases but also whether any other sentence, except death penalty, would be

inadequate in the facts and circumstances of the present case.

39. We have already held the Appellant guilty of an offence under Section 302, Indian Penal Code for committing the murder of his three children and the wife. All this happened in the spur of moment, but, of course, the incident must have continued for a while, during which period the deceased Aradhna received burn injuries as well as the fatal injury on the throat. All the three children received injuries with a knife similar to that of the deceased Aradhna. But one circumstance which cannot be ignored by this Court is that the prosecution witnesses have clearly stated that there was a rift between the couple on account of her talking to Liladhar Tiwari, the neighbour, PW10. Even if some credence is given to the statement made by the accused under Section 313 Cr.P.C. wherein he stated that he had seen the deceased and PW10 in a compromising position in the house of PW10, it also supports the allegation of the prosecution that there was rift between the husband and wife on account of PW10. It is also clearly exhibited in the FIR (P-27) that the accused had forbidden his wife from talking to PW10, which despite such warning she persisted with and, therefore, he had committed the murder of her wife along with the children."

30. We are one with the learned counsel for the accused-appellant, on the parameters prescribed by this Court, for inflicting the death sentence. Rather than deliberating upon the matter in any further detail, we would venture to apply the parameters laid down in the judgments relied upon by the learned counsel for the accused-appellant, to determine whether or not life imprisonment or in the alternative the death penalty, would be justified in the facts and circumstances of the present

case. We may first refer to the aggravating circumstances as under:-

(i) The accused-appellant has been found guilty of the offence under Section 364A of the Indian Penal Code. Section 364A is being extracted hereunder:-

"364A. Kidnapping for ransom, etc.—Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organization or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

A perusal of the aforesaid provision leaves no room for any doubt, that the offence of kidnapping for ransom accompanied by a threat to cause death contemplates punishment with death. Therefore, even without an accused actually having committed the murder of the individual kidnapped for ransom, the provision contemplates the death penalty. Insofar as the present case is concerned, there is no doubt, that the accused-appellant has been found to have kidnapped Suresh for ransom, and has also actually committed his murder. In the instant situation therefore, the guilt of the accused-appellant (under Section 364A of the Indian Penal Code) must be considered to be of the gravest nature, justifying the harshest punishment prescribed for the offence.

(ii) The accused-appellant has also been found guilty

of the offence of murder under Section 302 of the Indian Penal Code. Section 302 of the Indian Penal Code also contemplates the punishment of death for the offence of murder. It is, therefore apparent, that the accused-appellant is guilty of two heinous offences, which independently of one another, provide for the death penalty.

(iii) The accused caused the murder of child of 7 years. The facts and circumstances of the case do not depict any previous enmity between the parties. There is no grave and sudden provocation, which had compelled the accused to take the life of an innocent child. The murder of a child, in such circumstances makes this a case of extreme culpability.

(iv) Kidnapping of a child was committed with the motive of carrying home a ransom. On account of the non-payment of ransom, a minor child's murder was committed. This fact demonstrates that the accused had no value for human life. The instant circumstance demonstrates extreme mental perversion not worthy of human condonation.

(v) The manner in which the child was murdered, and the approach and method adopted by the accused, disclose the traits of outrageous criminality in the behaviour of the accused. The child was first strangulated to death, the dead body of the child was then tied in a gunny bag, and finally the gunny bag was thrown into a water tank. All this was done, in a well thought out and planned manner. This approach of the accused reveals a brutal mindset of the highest order.

(vi) All the aforesaid aggravating circumstances are liable to be considered in the background of the

fact, that the child was known to the accused-appellant. In the examination of the accused under Section 313 of the Code of Criminal Procedure, the accused acknowledged, that he used to see the child whenever the child was taken by his mother to her native village. Additionally, it is acknowledged in the pleadings, that the accused had developed an acquaintance with the child, when his mother used to visit her native place along with her son. Murder was therefore committed, not of a stranger, but of a child with whom the accused was acquainted. This conduct of the accused-appellant, places the facts of this case in the abnormal and heinous category.

(vii) The choice of kidnapping the particular child for ransom, was well planned and consciously motivated. The parents of the deceased had four children – three daughters and one son. Kidnapping the only male child was to induce maximum fear in the mind of his parents. Purposefully killing the sole male child, has grave repercussions for the parents of the deceased. Agony for parents for the loss of their only male child, who would have carried further the family lineage, and is expected to see them through their old age, is unfathomable. Extreme misery caused to the aggrieved party, certainly adds to the aggravating circumstances.

31. As against the aforesaid aggravating circumstances, learned counsel for the accused-appellant could not point to us even a single mitigating circumstance. Thus viewed, even on the parameters laid down by this Court, in the decisions relied upon by the learned counsel for the accused- appellant, we have no choice, but to affirm the death penalty imposed upon the accused-appellant by the High Court. In fact, we have to record the aforesaid conclusion in view of the judgment

rendered by this Court in *Vikram Singh & Ors. Vs. State of Punjab,* (2010) 3 SCC 56, wherein in the like circumstances (certainly, the circumstances herein are much graver than the ones in the said case), this Court had upheld the death penalty awarded by the High Court.

32. In view of the above, we find no justification whatsoever, in interfering with the impugned order of the High Court, either on merits or on the quantum of punishment.

33. Dismissed.

K.K.T. Appeals dismissed.

STATE OF KERALA AND OTHERS

v.

PRESIDENT, PARENT TEACHER ASSN. SNVUP AND OTHERS

(Civil Appeal No. 958 of 2013)

FEBRUARY 06, 2013

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

Education – Kerala Education Rules – Chapter XXIII – r.12(3) r/w r.16 –Irregular fixation of school staff – Staff fixation order obtained through bogus admission of students and misrepresentation of facts – Verification of actual students' strength – By Police – Justification – Whether High Court justified in directing the Secretary, General Education Department of the State to get the verification of the actual students' strength in all the aided schools in the State with the assistance of the police and to take appropriate action – Held: Due to irregular fixation of staff, the State exchequer incurs heavy financial burden by way of pay and allowances – Great responsibility, therefore, cast on the General Education Department to curb such menace which not only burden the State exchequer but also give a wrong signal to the society at large – However, investigation by the police with regard to verification of the school admission, register etc., particularly with regard to admissions of the students in the aided schools will give a wrong signal even to the students studying in the school and the presence of the police itself is not conducive to the academic atmosphere of the schools – In such circumstances, directions given by the High Court for police intervention for verification of the students' strength in all the aided schools set aside – However, direction given to the State Education Department to forthwith give effect to a circular dated 12.10.2011 to issue UID Card to all the school children and follow the guidelines and directions contained in their circular – No reason to interfere with the direction

given by the Director of Public Instructions (DPI) to take further action to fix the liabilities for the irregularity committed in the school, for which appeal pending before the State Government – State Government to consider the appeal and take appropriate decision, if it is still pending.

Dispute arose as to whether staff fixation of the school concerned for the year 2008-09 was obtained through bogus admissions of students and misrepresentation of facts. Physical verification by the Super Check Cell revealed wrong recording of attendance. Consequently, the Director of Public Instructions (DPI) passed order revising the staff fixation of the school for the year 2008-09 as per Rule 12(3) read with Rule 16 of Chapter XXIII of the Kerala Education Rules.

By the impugned order, the High Court held that manipulation by the school management was obvious, though not to the extent found by the Super Check Cell based on which the DPI had passed its order. The High Court further held that since the Education Department lacked the investigating skill or the authority to collect information from the field, it would be appropriate that the verification of actual students in all the aided schools in the State be done through the police. Holding so, the High Court directed the Secretary, Department of Education, to get verification of the actual students studying in all the aided schools in the State done through the police authorities and take appropriate action.

In the instant appeal filed by the State of Kerala, the question which arose for consideration was whether the High Court was justified in directing the Secretary, General Education Department of the State to get the verification of the actual students' strength in all the aided

schools in the State with the assistance of the police and to take appropriate action.

Allowing the appeal, the Court

HELD: 1. The State itself had admitted in the petition that there should be a better mechanism to ascertain the number of students in the aided schools which could be done by finger printing or any other modern system so that the students could be properly identified and staff fixation could be done on the basis of relevant data. An additional affidavit has been filed by the State of Kerala stating that the Government after much thought and deliberations formulated a scientific method to resolve the issue emanating from staff fixation orders every year. The affidavit says that the number of students in the school can be determined through Unique Identification Card (UID) technology and the number of divisions could be arrived at on the basis of revised pupil teacher ratio. Further, it is also pointed out that after implementation of UID as a part of scientific package, the government will remand the matter of identification of bogus admission to the DPI for considering issues afresh after corroborating the findings of Super Check Cell with UID details of the students. The State has issued a circular No. NEP (3) 66183/2011 dated 12.10.2011 which, according to the State, would take care of such situations happening in various aided schools in the State. [Paras 14, 15] [77-B-C, D-G]

2. Even though the High Court was not justified in directing police intervention, the situation that has unfolded in this case is the one that one gets in many aided schools in the State. Many of the aided schools in the State, though not all, obtain staff fixation order through bogus admissions and misrepresentation of facts. Due to the irregular fixation of staff, the State exchequer incurs heavy financial burden by way of pay

and allowances. The State has also to expend public money in connection with the payment of various scholarships, lump-sum grant, noon-feeding, free books etc. to the bogus students. A great responsibility is, therefore, cast on the General Education Department to curb such menace which not only burden the State exchequer but also will give a wrong signal to the society at large. The Management and the Headmaster of the school should be a role model to the young students studying in their schools and if themselves indulge in such bogus admissions and record wrong attendance of students for unlawful gain, how they can imbibe the guidelines of honesty, truth and values in life to the students. However, the investigation by the police with regard to the verification of the school admission, register etc., particularly with regard to the admissions of the students in the aided schools will give a wrong signal even to the students studying in the school and the presence of the police itself is not conducive to the academic atmosphere of the schools. In such circumstances, the directions given by the High Court for police intervention for verification of the students' strength in all the aided schools are set aside. [Paras 16, 17] [77-H; 78-A-F]

3. However, a direction is given to the Education Department, State of Kerala to forthwith give effect to a circular dated 12.10.2011 to issue UID Card to all the school children and follow the guidelines and directions contained in their circular. The Government can always adopt, in future, better scientific methods to curb such types of bogus admissions in various aided schools. [Para 18] [78-G]

4. There is, therefore, no reason to interfere with the direction given by the DPI to take further action to fix the liabilities for the irregularity committed in the school for

the years 2008-09 and 2009-10, for which the appeal is pending before the State Government. The State Government will consider the appeal and take appropriate decision in accordance with law, if it is still pending. [Para 19] [78-H; 79-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 958 of 2013.

From the Judgment & Order dated 15.10.2010 of the High Court of Kerala at Ernakulam in W.A. No. 1195 of 2010.

Sana Hashmi, Philip Mathew, Liz Mathew for the Appellants.

P.A. Noor Muhamed, Giffara S. for the Respondents.

The Judgment of the Court was delivered by

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

2. We are in this appeal concerned with the question whether the High Court was justified in directing the Secretary, General Education Department of the State of Kerala to get the verification of the actual students' strength in all the aided schools in the State with the assistance of the police and to take appropriate action.

3. The Assistant Educational Officer (AEO), Valappad had fixed the staff strength of S.N.V.U.P. School, Thalikulam for the year 2008-09 based on the visit report of High School Association (SS), GHS Kodakara as per Rule 12of Chapter XXIII of Kerala Education Rules (KER). Later, based on a complaint regarding bogus admissions and irregular fixation of staff for the year 2008-09 by the AEO, the Super Check Cell, Malabar Region, Kozhikode made a surprise visit in the school on 17.09.2008 and physically verified the strength of the students and noticed undue shortage of attendance on that day. The strength verified by the Super Check Cell was not sufficient

for allowing the divisions and posts sanctioned by the AEO. The Head Master of the School, however, stated in writing that the shortfall of attendance on the day of inspection was due to "Badar Day" of Muslim community and due to distribution of rice consequent to that. In order to confirm the genuineness of the facts stated by the Head Master, the Cell again visited the school on 16.12.2008. Verification could not be done on that day, hence the Cell again visited the school on 02.02.2009 and physically verified the students' strength. On that day also, there were large number of absentees as noticed on 17.09.2008. On verification of attendance register, it was found that the class teachers of respective classes had given bogus presence to all students on almost all the days. Enquiry revealed that the school authorities had obtained the staff fixation order for the year 2008-09 through bogus recordical admissions.

4. The Director of Public Instructions (DPI), Thiruvananthapuram consequently issued a notice dated 07.05.2009 to the Manager of the School of his proposal to revise roll strength and revision of staff strength by reducing one division each in Std. I, II, IV to VII and 2 divisions in Std. III and consequent posts of 5 LPSAs, 3 UPSAs in the school during the year 2008-09. The Manager of the school responded to the notice vide representation dated 27.05.2009 stating that Super Check Officials did not record the attendance particulars of the students in the visit record and had tampered with the attendance register. The Manager had also pointed out that the Headmaster was not responsible to compensate the loss suffered by the Department by way of paying salary to the teachers who had worked in the sanctioned posts. Further, it was also pointed out that the staff fixation should not be done within the academic year and re-fixation was not permissible as per Rule 12E(3) read with Rule 16 of Chapter XXIII, KER and requested not to reduce the class divisions.

5. The DPI elaborately heard the lawyers appearing for the Headmaster and the Manager of the school, affected teachers

as well as the officials of the Super Check Cell. Having heard the submissions made and perusing the records made available, the DPI found that the staff fixation of the school for the year 2008-09 was obtained through bogus admissions and misrepresentation of facts. DPI noticed that the roll strength during the year 2008-09 was 1196. There were 404 absentees on the first visit of the Cell on 17.09.2008. The Super Check Cell again visited the school on 16.12.2008 and 02.02.2009 and it was found that among 404 students absent on the first day, 179 names were bogus and irregular retentions. The physical presence of 179 students could not be verified on all the three occasions. DPI, therefore, passed an order revising the staff fixation of the school for the year 2008-09 as per Rule 12(3) read with Rule 16 of Chapter XXIII of KER. Consequently, the total number of divisions in the school was reduced to 23 from 31. In the Order dated 08.09.2009, the DIP had stated as follows:

> "The Headmaster is responsible for the admission, removals, and maintenance of records and for the supervision of work of subordinates. It is the duty of the verification officer to verify the strength correctly and to unearth the irregularities. Due to the irregular fixation of staff, the State exchequer has incurred additional and unnecessary expenditure by way of pay and allowances for 8 teachers and expenditure incurred in connection with payment of various scholarships, lump-sum grant, noon-feeding, free books etc to the bogus students. These loss sustained to the Government will be recovered from the Headmaster of the school who alone is responsible for all the above irregularities."

6. The DPI also directed to take further action to fix the liabilities and recover the amount from the Headmaster under intimation to DPI and the Super Check Officer, Kozhikode. The Headmaster and Manager of the school, aggrieved by the above-mentioned order, filed a revision petition before the State

Government. The High Court vide its judgment dated 7.12.2009 in Writ Petition (C) No. 35135 of 2009 directed the State Government to dispose of the revision petition.

7. The higher level verification was also conducted in the school with regard to the staff fixation for the year 2009-10 and on verification, it was found that many of the students in the school records were only bogus recordical admissions. Following that, the AEO issued staff fixation order for the year 2009-10 vide proceedings dated 27.03.2010.

8. Meanwhile, the President of the Parent Teachers Association (Respondent No.1 herein) filed WP (C) No. 12285 of 2010 before the High Court seeking a direction to the AEO to reckon the entire students present in the school on the 6th working day and higher level verification of District Education Officer (DEO) on 13.01.2010 for the purpose of staff fixation for the year 2009-10 and also for a declaration that the exclusion of the students who were present on the day of higher level verification on 13.01.2010 from the staff fixation order 2009-10 was illegal and also for other consequential reliefs.

9. Learned Single Judge of the High Court dismissed the Writ Petition on 07.04.2010 stating that the Parent Teachers Association have no locus standi in challenging the staff fixation order. The judgment was challenged in W.A No.1195 of 2010 by the President, Parent Teachers Association before the Division Bench of the High Court and the Bench passed an interim order on 14.07.2010. The operative portion of the same reads as follows:-

> "The inspection team has recorded that as many as 179 students whose names and particulars are furnished, represent bogus admissions for record purposes. If admission register is manipulated by recording bogus admissions in the name of non- existing students or students of other institutions, we fell criminal action also is called for against the school authorities. Since appellant has denied the findings in the inspection report, we fell a police enquiry is called for the in the matter. We, therefore, direct the Superintendent of Police, Thrissur to constitute a team of Police Officers to go through Ext.P1, verify the registered maintained by the school authorities, take the addresses as shown in the school records and conduct field enquiry as to whether the students are real persons and if so, whether they are really studying in this school or elsewhere. In other words, the result of the enquiry is to confirm to this court whether the students whose names are in the record of the school are real and if so, whether they are students in this school or any other school."

The Bench also directed to the Superintendent of Police to submit his report within one month.

10. The Superintendent of Police, following the direction given by the High Court, constituted a team under the leadership of the Circle Inspector of Police, Valappad and the team conducted detailed enquiry in respect of all the matters directed to be examined by the police. The Superintendent of Police submitted the report dated 20.09.2010 which reads as follows:

> "On the enquiry about the 187 students (179+8) which were alleged as bogus admissions as per Ext.P1, it is revealed that only 72 students were studied in S.N.V.U.P. School during the period 2008- 09 and 80 students were studied in some other schools. The addresses of 23 students have not been traced out even with the help of postman of the concerned area. On the enquiry it is also revealed that 4 students vide the admission Nos. 13008, 11875, 12883 and 13876 mentioned in Ext.P1, have not been studied anywhere during that period.
>
> The details of the 187 students, revealed in the enquiry are mentioned below:-

1. Actual No. of students studied in SNVUP School, Thalikulam during 2008-2009	72
2. No. of Students studied in some other schools	80
3. No. of students whose address have not been trace out	23
4. No. of students have not been studied anywhere	04
5. No. of students removed from the rolls. Immediately after strength inspection	08
Total	87

The report of the enquiry, submitted by the Circle Inspector of Police, Valappad showing the details of each students is also produced herewith."

11. The Division Bench of the High Court after perusing the report submitted by the Superintendent of Police found that neither the finding of the DPI based on inspections by Super Check Cell nor the claim of the Parent Teachers Association was correct since the police had found that at least 72 out of 187 students declared bogus by the DPI were real students of the school. The High Court, therefore, concluded manipulation by the school management was obvious, though not to the extent found by the Super Check Cell based on which DPI had passed the impugned order. The Division Bench expressed anguish that the management had included 80 students studying in other schools as students of the present school. It was also noticed that as many as 23 students could not be traced by the police with the help of the postman, were also included in the register.

12. The Division Bench concluded that since the Super Check Cell, the Education Department lacked the investigating

skill or the authority to collect information from the field, it would be appropriate that the verification of actual students in all the aided schools in the State would be done through the police. Holding so, the High Court gave the following direction:

"We, therefore, feel as in this case Police should be entrusted to assist the Education Department by conducting enquiry about the actual and real students studying in every aided school in the State and pass on the same to the Education Department for them to fix or re-fix the staff strength based on the data furnished by the Police. We, therefore, direct the Secretary, Department of Education, to get verification of the actual students studying in all the aided schools in the State done through the police authorities and take appropriate action. It would be open to the Government to consider photo or finger identification of the students for avoiding manipulation in the school registers. The Government is directed to complete the process by the end of this academic year and file a report in this court."

13. The State of Kerala, aggrieved by the various directions given by the Division Bench, has preferred this appeal. Ms. Liz Mathew, learned counsel appearing for the State of Kerala submitted that the High Court was not justified in giving a direction to the Secretary, Education Department in entrusting the task to State Police for verification of actual students' strength in all the aided schools, while the enquiry is being conducted by the Education Department. Learned counsel submitted that Kerala Education Act and Rules did not prescribe any mechanism for conducting enquiries by the police at the time of staff fixation. The method to be adopted in the fixation of staff in various schools is prescribed under Chapter XXIII of KER and police have no role. The Rules empower the AEO, the DEO and the Super Check Cell etc. to conduct enquiries but not by the police. Learned counsel also pointed out that the presence of the police personnel in the aided

schools in the States would not only cause embarrassment to the students studying in the school but would also cast wrong impression on the minds of the students about the conduct of their Headmaster, teachers and staff of the school.

14. We notice that the State itself had admitted in the petition that there should be a better mechanism to ascertain the number of students in the aided schools which could be done by finger printing or any other modern system so that the students could be properly identified and staff fixation could be done on the basis of relevant data. We, therefore, directed the State to evolve a better mechanism to overcome situations like the one which has occurred in the school. Fact finding authorities have categorically found that the school authorities had made bogus admissions and made wrong recording of attendance which led to the irregular and illegal fixation of staff strength of the school for the years 2008-09 and 2009-10.

15. An additional affidavit has been filed by the State of Kerala stating that the Government after much thought and deliberations formulated a scientific method to resolve the issue emanating from staff fixation orders every year. The affidavit says that the number of students in the school can be determined through Unique Identification Card (UID) technology and the number of divisions could be arrived at on the basis of revised pupil teacher ratio. Further, it is also pointed out that after implementation of UID as a part of scientific package, the government will remand the matter of identification of bogus admission to the DPI for considering issues afresh after corroborating the findings of Super Check Cell with UID details of the students. The State has issued a circular No. NEP (3) 66183/2011 dated 12.10.2011 which, according to the State, would take care of such situations happening in various aided schools in the State.

16. We are of the view even though the Division Bench was not justified in directing police intervention, the situation that has unfolded in this case is the one that we get in many

aided schools in the State. Many of the aided schools in the State, though not all, obtain staff fixation order through bogus admissions and misrepresentation of facts. Due to the irregular fixation of staff, the State exchequer incurs heavy financial burden by way of pay and allowances. The State has also to expend public money in connection with the payment of various scholarships, lump-sum grant, noon-feeding, free books etc. to the bogus students.

17. A great responsibility is, therefore, cast on the General Education Department to curb such menace which not only burden the State exchequer but also will give a wrong signal to the society at large. The Management and the Headmaster of the school should be a role model to the young students studying in their schools and if themselves indulge in such bogus admissions and record wrong attendance of students for unlawful gain, how they can imbibe the guidelines of honesty, truth and values in life to the students. We are, however, of the view that the investigation by the police with regard to the verification of the school admission, register etc., particularly with regard to the admissions of the students in the aided schools will give a wrong signal even to the students studying in the school and the presence of the police itself is not conducive to the academic atmosphere of the schools. In such circumstances, we are inclined to set aside the directions given by the Division Bench for police intervention for verification of the students' strength in all the aided schools.

18. We are, however, inclined to give a direction to the Education Department, State of Kerala to forthwith give effect to a circular dated 12.10.2011 to issue UID Card to all the school children and follow the guidelines and directions contained in their circular. Needless to say, the Government can always adopt, in future, better scientific methods to curb such types of bogus admissions in various aided schools.

19. We, however, find no reason to interfere with the direction given by the DPI to take further action to fix the

liabilities for the irregularity committed in the school for the years 2008-09 and 2009-10, for which the appeal is pending before the State Government. The State Government will consider the appeal and take appropriate decision in accordance with law, if it is still pending. Appeal is allowed as above without any order as to costs.

B.B.B. Appeal allowed.

VIJAY

v.

LAXMAN AND ANR.

(Criminal Appeal No.261 of 2013)

FEBRUARY 7, 2013

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

Negotiable Instruments Act, 1881 – ss.118(a), 138 and 139 – Cheque issued by respondent in favour of appellant – Dishonoured on account of insufficiency of funds – Complaint by appellant u/s. 138 alleging that the cheque represented repayment of personal loan granted for two months – Defence version of accused-respondent that the cheque was given merely as a security deposit in terms of a prevailing trade practice and not towards repayment of any loan; that even after eventual settlement of accounts between the parties, the cheque was not returned to the respondent, which resulted in altercation between the parties and that subsequently as a counter blast the appellant presented the cheque for encashment – Conviction of appellant by trial Court – High Court set aside the conviction – Justification – Held: Justified – Appellant failed to establish that the cheque in fact had been issued by the respondent towards repayment of personal loan – Absence of any documentary or other evidence in that regard – If the cheque was issued towards repayment of loan which was meant to be encashed within two months, it is beyond comprehension as to why the cheque was presented by the appellant on the same date it was issued – Respondent would have had no reason to ask for a loan from the appellant if he had the capacity to discharge the loan amount on the date when the cheque had been issued – Besides, the cheque was presented on the day following altercation between the parties – Also, the complaint lodged does not specify the date on which the loan amount was advanced – Nor does the

complaint indicate the date of its lodgment – Defence succeeded in dislodging the complainant-appellant's case on the strength of convincing evidence of rebuttal and thus discharged the burden envisaged u/ss. 118 (a) and 139 of the N.I. Act – Appellant's case in the realm of grave doubt – Acquittal of respondent confirmed – The Banking Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988.

The respondent supplied milk to the father of the appellant who ran a dairy farm. The appellant lodged complaint under Section 138 of the Negotiable Instruments Act, 1881contending that the respondent had borrowed from him a sum of Rs.1,15,000/- for his personal requirement and towards repayment of the same had issued a cheque for an equal amount, but the cheque when presented to the bank was dishonoured for 'insufficient funds'.

The respondent admitted the handing over of the cheque in favour of the appellant but denied that the same was towards repayment of any loan. The respondent claimed that according to the prevailing practice the appellant took security cheques from all the milk suppliers; that it is on this count that the respondent had issued the cheque in favour of the appellant which was merely by way of amount towards security; that in course of settlement of accounts, when respondent asked for return of his security cheque, the cheque was not given back to the respondent as a result of which an altercation took place between the parties due to which the respondent lodged a report at the police station on 13.8.2007 and that subsequently as a counter blast, the appellant presented the cheque for encashment merely to settle scores with the respondent/milk supplier.

The trial court convicted the respondent under Section 138 of the Negotiable Instruments Act, 1981 and

sentenced him to undergo imprisonment for one year besides imposing upon him a fine of Rs.1,20,000/-. The order was upheld by the first appellate court. In criminal revision, the High Court accepted the version given by the accused-respondent and set aside the order of conviction and sentence of the respondent holding that the order suffered from grave miscarriage of justice due to non-consideration of the defence evidence of rebuttal which demolished the complainant-appellant's case.

Dismissing the appeal, the Court

HELD:

Per Gyan Sudha Misra, J.

1.1. When a cheque is issued by a person who has signed on the cheque and the complainant reasonably discharges the burden that the cheque had been issued towards a lawful payment, it is for the accused to discharge the burden under Section 118 and 139 of the Negotiable Instruments Act, 1881 that the cheque had not been issued towards discharge of a legal debt but was issued by way of security or any other reason on account of some business transaction or was obtained unlawfully. [Para 10] [92-C-D]

1.2. In the instant case, although the accused-respondent might have failed to discharge the burden that the cheque which the respondent had issued was not signed by him, yet there appears to be a glaring loophole in the case of the appellant-complainant who failed to establish that the cheque in fact had been issued by the respondent towards repayment of personal loan since the complaint was lodged by the appellant without even specifying the date on which the loan was advanced nor the complaint indicates the date of its lodgement as the date column indicates 'nil' although as

per the appellant's own story, the respondent had assured the appellant that he will return the money within two months for which he had issued a post-dated cheque dated 14.8.2007 amounting to Rs.1,15,000/-. The respondent-accused is alleged to have issued a post-dated cheque dated 14.8.2007 but the complainant/ appellant has conveniently omitted to mention the date on which the loan was advanced which is fatal to the appellant's case as from this vital omission it can reasonably be inferred that the cheque was issued on 14.8.2007 and was meant to be encashed at a later date within two months from the date of issuance which was 14.8.2007. But it is evident that the cheque was presented before the bank on the date of issuance itself which was 14.8.2007 and on the same date i.e. 14.8.2007, a written memo was received by the appellant indicating insufficient fund. In the first place if the cheque was towards repayment of the loan amount, the same was clearly meant to be encashed at a later date within two months or at least a little later than the date on which the cheque was issued: If the cheque was issued towards repayment of loan it is beyond comprehension as to why the cheque was presented by the appellant on the same date when it was issued and the complaint was also lodged without specifying on which date the amount of loan was advanced as also the date on which complaint was lodged as the date is conveniently missing. Under the background that just one day prior to 14.8.2007 i.e.13.8.2007 an altercation had taken place between the respondent-accused and the complainant-dairy owner for which a case also had been lodged by the respondent-accused against the complainant's father/dairy owner, missing of the date on which loan was advanced and the date on which complaint was lodged, casts a serious doubt on the complainant-appellant's plea. It is, therefore, difficult to appreciate as to why the cheque which even as per the case of the appellant was towards repayment

of loan which was meant to be encashed within two months, was deposited on the date of issuance itself. The appellant thus has miserably failed to prove his case that the cheque was issued towards discharge of a lawful debt and it was meant to be encashed on the same date when it was issued specially when the appellant has failed to disclose the date on which the alleged amount was advanced to the Respondent/Accused. There are thus glaring inconsistencies indicating gaping hole in the appellant's version that the cheque although had been issued, the same was also meant to be encashed instantly on the same date when it was issued. [Para 13] [94-A-H; 95-A-F]

1.3. Although the cheque might have been duly obtained from its lawful owner i.e. the respondent-accused, it was used for unlawful reason as it appears to have been submitted for encashment on a date when it was not meant to be presented as in that event the respondent would have had no reason to ask for a loan from the appellant if he had the capacity to discharge the loan amount on the date when the cheque had been issued. In any event, it leaves the complainant's case in the realm of grave doubt on which the case of conviction and sentence cannot be sustained. [Para 14] [95-F-H; 96-A]

1.4. The High Court has rightly set aside the findings recorded by the Courts below since there were glaring inconsistencies in the appellant's case giving rise to perverse findings resulting into unwarranted conviction and sentence of the respondent. In fact, the trial court as also the first appellate court of facts seems to have missed the important ingredients of Sections 118 (a) and 139 of the Negotiable Instruments Act which made it incumbent on the courts below to examine the defence evidence of rebuttal as to whether the respondent/ accused discharged his burden to disprove the complainant's case and recorded the finding only on the

basis of the complainant's version. The High Court has rightly overruled the decision of the courts below which were under challenge as the trial court as also the 1st Appellate Court misdirected itself by ignoring the defence version which succeeded in dislodging the complainant's case on the strength of convincing evidence and thus discharged the burden envisaged under Sections 118 (a) and 139 of the N.I. Act which although speaks of presumption in favour of the holder of the cheque, it has included the provisos by incorporating the expressions "until the contrary is proved" and "unless the contrary is proved" which are the riders imposed by the Legislature under Sections 118 and 139 of the N.I. Act as the Legislature chooses to provide adequate safeguards in the Act to protect honest drawers from unnecessary harassment but this does not preclude the person against whom presumption is drawn from rebutting it and proving to the contrary. Consequently, the judgment and order of acquittal of the respondent passed by the High Court is upheld. [Para 15, 16] [96-B-H; 97-A]

K.N. Beena vs. Muniyappan And Anr. **2001 (7) Scale 331 and** *P. Venugopal vs. Madan P. Sarathi* **(2009) 1 SCC 492: 2008 (15) SCR 25 – referred to.**

Case Law Reference:

2001 (7) SCALE 331	**referred to**	**Para 9**
2008 (15) SCR 25	**referred to**	**Para 12**

Per T.S. Thakur, J. (Supplementing)

HELD:1. The High Court has rightly accepted the version given by the accused-respondent. In the first place, the story of the complainant that he advanced a loan to the respondent-accused is unsupported by any material, leave alone any documentary evidence that any such loan transaction had ever taken place. So much so,

the complaint does not even indicate the date on which the loan was demanded and advanced. It is blissfully silent about these aspects thereby making the entire story suspect. There is a presumption that the issue of a cheque is for consideration. Sections 118 and 139 of the Negotiable Instruments Act make that abundantly clear. That presumption is, however, rebuttable in nature. What is most important is that the standard of proof required for rebutting any such presumption is not as high as that required of the prosecution. So long as the accused can make his version reasonably probable, the burden of rebutting the presumption would stand discharged. Whether or not it is so in a given case depends upon the facts and circumstances of that case. It is trite that the courts can take into consideration the circumstances appearing in the evidence to determine whether the presumption should be held to be sufficiently rebutted. [Para 3] [98-D-H; 99-A]

2. In the present case, the absence of any details of the date on which the loan was advanced as also the absence of any documentary or other evidence to show that any such loan transaction had indeed taken place between the parties is a significant circumstance. So also the fact that the cheque was presented on the day following the altercation between the parties is a circumstance that cannot be brushed away. The version of the respondent that the cheque was not returned to him and the complainant presented the same to wreak vengeance against him is a circumstance that cannot be easily rejected. Super added to all this is the testimony of DW1, according to whom the accounts were settled between the father of the complainant and the accused in his presence and upon settlement the accused had demanded return of this cheque given in lieu of the advance. It was further stated by the witness that the appellant's father had avoided to return the cheque and

promised to do so on some other day. There is no reason much less a cogent one for rejecting the deposition of this witness who has testified that after the incident of altercation between the two parties the accused has been supplying milk to the witness as he is also in the same business. Non-examination of the father of the appellant who was said to be present outside the Court hall on the date the complainant's statement was recorded also assumes importance. It gives rise to an inference that the non-examination was a deliberate attempt of the prosecution to keep him away from the court for otherwise he would have to accept that the accused was actually supplying milk to him and that the accused was given the price of the milk in advance as per the trade practice in acknowledgement and by way of security for which amount the accused had issued a cheque in question. In the totality of the above circumstances, the High Court was perfectly justified in its conclusion that the prosecution had failed to make out a case against the accused-respondent and in acquitting him of the charges. [Paras 10, 11] [102-E-H; 103-A-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 261 of 2013.

From the Judgment & Order dated 29.01.2010 of the High Court of Madhya Pradesh bench at Indore in Criminal Revision Petition No. 926 of 2009.

Arpit Gupta, Anupam Lal Das for the Appellant.

Shashibhushan P. Adgaonkar, Naresh Kumar for the Respondents.

The Judgment of the Court were delivered by

GYAN SUDHA MISRA, J. 1. Leave granted.

2. This appeal by special leave which was heard at length

at the admission stage itself is directed against the judgment and order dated 29.1.2010 passed by a learned single Judge of the High Court of Madhya Pradesh Bench at Indore, in Criminal Revision No. 926/2009, whereby the conviction and sentence of one year alongwith a fine of Rupees One Lakh and Twenty Thousand imposed on the appellant for commission of an offence under Section 138 of The Banking Public Financial Institutions and Negotiable Instruments (Amendment) Act, 1988 (For short the 'N.I. Act') has been set aside and the criminal revision was allowed. The complainant-appellant, therefore, has assailed the judgment and order of the High Court which reversed the concurrent findings of fact recorded by the trial court and set aside the order of conviction and sentence of the respondent.

3. In order to appreciate the merit of this appeal, the essential factual details as per the version of the complainant-appellant is that the respondent-accused (since acquitted) had borrowed a sum of Rs.1,15,000/- from the complainant-appellant for his personal requirement which was given to him as the relationship between the two was cordial. By way of repayment, the respondent issued a cheque dated 14.08.2007 bearing No.119682 amounting to Rs.1,15,000/- drawn on Vikramaditya Nagrik Sahkari Bank Ltd. Fazalapura, Ujjain in favour of the appellant. The complainant-appellant alleged that on 14.8.2007 when the cheque was presented to the bank for encashment the same was dishonoured by the bank on account of 'insufficient funds'. The complainant-appellant, therefore, issued a legal notice after a few days on 17.8.2007 to the accused-respondent which was not responded as the respondent neither replied to the notice nor paid the said amount.

4. It is an admitted fact that the respondent-accused is a villager who supplied milk at the dairy of the complainant's father in the morning and evening and his father made payment for the supply in the evening. Beyond this part, the case of the respondent-accused is that the complainant took security

cheques from all the milk suppliers and used to pay the amount for one year in advance for which the milk had to be supplied. It is on this count that the respondent had issued the cheque in favour of the complainant which was merely by way of amount towards security which was meant to be encashed only if milk was not supplied. Explaining this part of the defence story, one of the witnesses for the defence Jeevan Guru deposed that when any person entered into contract to purchase milk from any person in the village, the dairy owner i.e. the complainant's side made payment of one year in advance and in return the milk supplier like the respondent issued cheques of the said amount by way of security. In view of this arrangement, the accused Laxman started supplying milk to the complainant's father. In course of settlement of accounts, when accused Laxman asked for return of his security cheque, since he had already supplied milk for that amount to the complainant's father Shyam Sunder, he was directed to take back the cheque later on. The accused insisted for return of the security cheque since the account had been settled but the cheque was not given back to the respondent as a result of which an altercation took place between the respondent/accused and the milk supplier due to which the accused lodged a report at the police station on 13.8.2007, since the complainant's father Shyam Sunder also assaulted the respondent-accused and abused him who had refused to return the cheque to the respondent-accused which had been issued by him only by way of security. As a counter blast, the complainant presented the cheque for encashment merely to settle scores with the Respondent/milk supplier.

5. The complaint-appellant, however, filed a complaint under Section 138 of the N.I. Act before the Judicial Magistrate 1st Class, Ujjain, who while conducting the summary trial prescribed under the Act considered the material evidence on record and held the Respondent guilty of offence under Section 138 of the N.I. Act and hence recorded an order of conviction of the respondent-accused due to which he was sentenced to

undergo rigorous imprisonment for one year and a fine of Rs.1,20,000/- was also imposed. The respondent-accused feeling aggrieved of the order preferred an appeal before the IXth Additional Sessions Judge, Ujjain, M.P. who also was pleased to uphold the order of conviction and hence dismissed the appeal.

6. The respondent-accused, thereafter, filed a criminal revision in the High Court against the concurrent judgment and orders of the courts below but the High Court was pleased to set aside the judgment and orders of the courts below as it was held that the impugned order of conviction and sentence suffered from grave miscarriage of justice due to non-consideration of the defence evidence of rebuttal which demolished the complainant's case.

7. Assailing the judgment and order of reversal passed by the High Court in favour of the respondent-accused acquitting him of the offence under Section 138 of the Act, learned counsel appearing for the complainant-appellant submitted that the learned single Judge of the High Court ought not to have interfered with the concurrent findings of fact recorded by the courts below by setting aside the judgment and order recording conviction of the respondent and sentencing him as already indicated hereinbefore. The High Court had wrongly appreciated the material evidence on record and held that the respondent-accused appeared to be an illiterate person who can hardly sign and took notice of some dispute affecting the complainant's case since an incident had taken place on 13.8.2007, while the alleged cheque was presented on 14.8.2007 for encashment towards discharge of the loan of Rs.1,15,000/-. Learned counsel also assailed the finding of the High Court which recorded that the cheque was issued by way of security of some transaction of milk which took place between the respondent-accused and father of the complainant-appellant and thus dispelled the complainant-appellant's case.

8. Learned counsel representing the respondent-accused however refuted the complainant's version and submitted that the case lodged by the complainant-appellant against the respondent was clearly with an ulterior motive to harass the respondent keeping in view the grudge in mind by lodging a false case alleging that personal loan of Rs.1,15,000/- was granted to the respondent and the answering respondent had issued cheque towards the repayment of said loan which could not stand the test of scrutiny of the High Court as it noticed the weakness in the evidence led by the complainant.

9. Having heard the learned counsels for the contesting parties in the light of the evidence led by them, we find substance in the plea urged on behalf of the complainant-appellant to the extent that in spite of the admitted signature of the respondent-accused on the cheque, it was not available to the respondent-accused to deny the fact that he had not issued the cheque in favour of the complainant for once the signature on the cheque is admitted and the same had been returned on account of insufficient funds, the offence under Section 138 of the Act will clearly be held to have been made out and it was not open for the respondent-accused to urge that although the cheque had been dishonoured, no offence under the Act is made out. Reliance placed by learned counsel for the complainant-appellant on the authority of this Court in the matter of *K.N. Beena vs. Muniyappan And Anr*[1]. adds sufficient weight to the plea of the complainant-appellant that the burden of proving the consideration for dishonour of the cheque is not on the complainant-appellant, but the burden of proving that a cheque had not been issued for discharge of a lawful debt or a liability is on the accused and if he fails to discharge such burden, he is liable to be convicted for the offence under the Act. Thus, the contention of the counsel for the appellant that it is the respondent-accused (since acquitted) who should have discharged the burden that the cheque was given merely by way of security, lay upon the Respondent/

1. 2001 (7) Scale 331.

accused to establish that the cheque was not meant to be encashed by the complainant since respondent had already supplied the milk towards the amount. But then the question remains whether the High Court was justified in holding that the respondent had succeeded in proving his case that the cheque was merely by way of security deposit which should not have been encashed in the facts and circumstances of the case since inaction to do so was bound to result into conviction and sentence of the Respondent/Accused.

10. It is undoubtedly true that when a cheque is issued by a person who has signed on the cheque and the complainant reasonably discharges the burden that the cheque had been issued towards a lawful payment, it is for the accused to discharge the burden under Section 118 and 139 of the N.I. Act that the cheque had not been issued towards discharge of a legal debt but was issued by way of security or any other reason on account of some business transaction or was obtained unlawfully. The purpose of the N.I. Act is clearly to provide a speedy remedy to curb and to keep check on the economic offence of duping or cheating a person to whom a cheque is issued towards discharge of a debt and if the complainant reasonably discharges the burden that the payment was towards a lawful debt, it is not open for the accused/signatory of the cheque to set up a defence that although the cheque had been signed by him, which had bounced, the same would not constitute an offence.

11. However, the Negotiable Instruments Act incorporates two presumptions in this regard: one containing in Section 118 of the Act and other in Section 139 thereof. Section 118 (a) reads as under:-

> *"118. Presumption as to negotiable instruments.*—Until the contrary is proved, the following presumptions shall be made—
>
> (a) *of consideration*: that every negotiable instrument was

made or drawn for consideration, and that every such instrument when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration;"

Section 139 of the Act reads as under:-

"139. Presumption in favour of holder.-It shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138 for the discharge, in whole or in part, of any debt or other liability."

12. While dealing with the aforesaid two presumptions, learned Judges of this Court in the matter of *P. Venugopal vs. Madan P. Sarathi*[2] had been pleased to hold that under Sections 139, 118 (a) and 138 of the N.I. Act existence of debt or other liabilities has to be proved in the first instance by the complainant but thereafter the burden of proving to the contrary shifts to the accused. Thus, the plea that the instrument/cheque had been obtained from its lawful owner or from any person in lawful custody thereof by means of an offence or fraud or had been obtained from the maker or acceptor thereof by means of an offence or fraud or for unlawful consideration, the burden of disproving that the holder is a holder in due course lies upon him. Hence, this Court observed therein, that indisputably, the initial burden was on the complainant but the presumption raised in favour of the holder of the cheque must be kept confined to the matters covered thereby. Thereafter, the presumption raised does not extend to the extent that the cheque was not issued for the discharge of any debt or liability which is not required to be proved by the complainant as this is essentially a question of fact and it is the defence which has to prove that the cheque was not issued towards discharge of a lawful debt.

2. (2009) 1 SCC 492.

13. Applying the ratio of the aforesaid case as also the case of *K.N. Beena vs. Muniyappan And Anr.* (supra), when we examine the facts of this case, we have noticed that although the respondent might have failed to discharge the burden that the cheque which the respondent had issued was not signed by him, yet there appears to be a glaring loophole in the case of the complainant who failed to establish that the cheque in fact had been issued by the respondent towards repayment of personal loan since the complaint was lodged by the complainant without even specifying the date on which the loan was advanced nor the complaint indicates the date of its lodgement as the date column indicates 'nil' although as per the complainant's own story, the respondent had assured the complainant that he will return the money within two months for which he had issued a post-dated cheque No.119582 dated 14.8.2007 amounting to Rs.1,15,000/- drawn on Vikramaditya Nagrik Sahkari Bank Ltd., Ujjain. Further case of the complainant is that when the cheque was presented in the bank on 14.8.2007 for getting it deposited in his savings account No.1368 in Vikarmaditya Nagrik Sahkari Bank Ltd. Fazalpura, Ujjain, the said cheque was returned being dishonoured by the bank with a note 'insufficient amount' on 14.8.2007. In the first place, the respondent-accused is alleged to have issued a post-dated cheque dated 14.8.2007 but the complainant/ appellant has conveniently omitted to mention the date on which the loan was advanced which is fatal to the complainant's case as from this vital omission it can reasonably be inferred that the cheque was issued on 14.8.2007 and was meant to be encashed at a later date within two months from the date of issuance which was 14.8.2007. But it is evident that the cheque was presented before the bank on the date of issuance itself which was 14.8.2007 and on the same date i.e. 14.8.2007, a written memo was received by the complainant indicating insufficient fund. In the first place if the cheque was towards repayment of the loan amount, the same was clearly meant to be encashed at a later date within two months or at least a little later than the date on which the cheque was issued: If the

cheque was issued towards repayment of loan it is beyond comprehension as to why the cheque was presented by the complainant on the same date when it was issued and the complainant was also lodged without specifying on which date the amount of loan was advanced as also the date on which compliant was lodged as the date is conveniently missing. Under the background that just one day prior to 14.8.2007 i.e. 13.8.2007 an altercation had taken place between the respondent-accused and the complainant-dairy owner for which a case also had been lodged by the respondent-accused against the complainant's father/dairy owner, missing of the date on which loan was advanced and the date on which complaint was lodged, casts a serious doubt on the complainant's plea. It is, therefore, difficult to appreciate as to why the cheque which even as per the case of the complainant was towards repayment of loan which was meant to be encashed within two months, was deposited on the date of issuance itself. The complainant thus has miserably failed to prove his case that the cheque was issued towards discharge of a lawful debt and it was meant to be encashed on the same date when it was issued specially when the complainant has failed to disclose the date on which the alleged amount was advanced to the Respondent/Accused. There are thus glaring inconsistencies indicating gaping hole in the complainant's version that the cheque although had been issued, the same was also meant to be encashed instantly on the same date when it was issued.

14. Thus, we are of the view that although the cheque might have been duly obtained from its lawful owner i.e. the respondent-accused, it was used for unlawful reason as it appears to have been submitted for encashment on a date when it was not meant to be presented as in that event the respondent would have had no reason to ask for a loan from the complainant if he had the capacity to discharge the loan amount on the date when the cheque had been issued. In any event, it leaves the complainant's case in the realm of grave

doubt on which the case of conviction and sentence cannot be sustained.

15. Thus, in the light of the evidence on record indicating grave weaknesses in the complainant's case, we are of the view that the High Court has rightly set aside the findings recorded by the Courts below and consequently set aside the conviction and sentence since there were glaring inconsistencies in the complainant's case giving rise to perverse findings resulting into unwarranted conviction and sentence of the respondent. In fact, the trial court as also the first appellate court of facts seems to have missed the important ingredients of Sections 118 (a) and 139 of the N.I. Act which made it incumbent on the courts below to examine the defence evidence of rebuttal as to whether the respondent/accused discharged his burden to disprove the complainant's case and recorded the finding only on the basis of the complainant's version. On scrutiny of the evidence which we did to avoid unwarranted conviction and miscarriage of justice, we have found that the High Court has rightly overruled the decision of the courts below which were under challenge as the trial court as also the 1st Appellate Court misdirected itself by ignoring the defence version which succeeded in dislodging the complainant's case on the strength of convincing evidence and thus discharged the burden envisaged under Sections 118 (a) and 139 of the N.I. Act which although speaks of presumption in favour of the holder of the cheque, it has included the provisos by incorporating the expressions "until the contrary is proved" and "unless the contrary is proved" which are the riders imposed by the Legislature under the aforesaid provisions of Sections 118 and 139 of the N.I. Act as the Legislature chooses to provide adequate safeguards in the Act to protect honest drawers from unnecessary harassment but this does not preclude the person against whom presumption is drawn from rebutting it and proving to the contrary.

16. Consequently, we uphold the judgment and order of

acquittal of the respondent passed by the High Court and hence dismissed this appeal.

T.S. THAKUR, J. 1. I have had the advantage of going through the judgment and order proposed by my esteemed colleague Gyan Sudha Misra, J. I entirely agree with the conclusion drawn by Her Ladyship that the respondent has been rightly acquitted of the charge framed against him under Section 138 of the Negotiable Instruments Act, 1881 and that the present appeal ought to be dismissed. I, however, would like to add a few words of my own in support of that conclusion.

2. The factual matrix in which the complaint under Section 138 of the Negotiable Instruments Act was filed against the respondent has been set out in the order proposed by my esteemed sister Misra J. It is, therefore, unnecessary for me to state the facts over again. All that need be mentioned is that according to the complainant the accused had borrowed a sum of Rs.1,15,000/- from the former for repayment whereof the latter is said to have issued a cheque for an equal amount payable on the Vikramaditya Nagrik Sahkari Bank Ltd. Fazalapura, Ujjain. The cheque when presented to the bank was dishonoured for 'insufficient funds'. The accused having failed to make any payment despite statutory notice being served upon him was tried for the offence punishable under the provision mentioned above. Both the courts below found the accused guilty and sentenced him to undergo imprisonment for a period of one year besides payment of Rs.1,20,000/- towards fine.

3. The case set up by the accused in defence is that he is a Milk Vendor who supplied milk to the father of the complainant who runs a dairy farm. The accused claimed that according to the prevailing practice he received an advance towards the supply of milk for a period of one year and furnished security by way of a cheque for a sum of Rs.1,15,000/-. When the annual accounts between the accused-respondent and the dairy owner-

father of the complainant was settled, the accused demanded the return of the cheque to him. The dairy owner, however, avoided return of cheque promising to do so some other day. Since the cheque was not returned to the accused despite demand even on a subsequent occasion, an altercation took place between the two leading to the registration of a first information report against the father of the complainant with the jurisdictional police. On the very following day after the said altercation, the cheque which the respondent was demanding back from the father of the complainant was presented for encashment to the bank by the complainant followed by a notice demanding payment of the amount and eventually a complaint under Section 138 against the accused. The case of the accused, thus, admitted the issue and handing over of the cheque in favour of the complainant but denied that the same was towards repayment of any loan. The High Court has rightly accepted the version given by the accused-respondent herein. We say so for reasons more than one. In the first place the story of the complainant that he advanced a loan to the respondent-accused is unsupported by any material leave alone any documentary evidence that any such loan transaction had ever taken place. So much so, the complaint does not even indicate the date on which the loan was demanded and advanced. It is blissfully silent about these aspects thereby making the entire story suspect. We are not unmindful of the fact that there is a presumption that the issue of a cheque is for consideration. Sections 118 and 139 of the Negotiable Instruments Act make that abundantly clear. That presumption is, however, rebuttable in nature. What is most important is that the standard of proof required for rebutting any such presumption is not as high as that required of the prosecution. So long as the accused can make his version reasonably probable, the burden of rebutting the presumption would stand discharged. Whether or not it is so in a given case depends upon the facts and circumstances of that case. It is trite that the courts can take into consideration the circumstances appearing in the evidence to determine whether the presumption should be held to be sufficiently

rebutted. The legal position regarding the standard of proof required for rebutting a presumption is fairly well settled by a long line of decisions of this Court.

4. In *M.S. Narayana Menon v. State of Kerala* (2006) 6 SCC 39, while dealing with that aspect in a case under Section 138 of the Negotiable Instruments Act, 1881, this Court held that the presumptions under Sections 118(a) and 139 of the Act are rebuttable and the standard of proof required for such rebuttal is preponderance of probabilities and not proof beyond reasonable doubt. The Court observed:

> *"29. In terms of Section 4 of the Evidence Act whenever it is provided by the Act that the court shall presume a fact, it shall regard such fact as proved unless and until it is disproved. The words "proved" and "disproved" have been defined in Section 3 of the Evidence Act (the interpretation clause)...*
>
> *30. Applying the said definitions of "proved" or "disproved" to the principle behind Section 118(a) of the Act, the court shall presume a negotiable instrument to be for consideration unless and until after considering the matter before it, it either believes that the consideration does not exist or considers the non-existence of the consideration so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that the consideration does not exist. For rebutting such presumption, what is needed is to raise a probable defence. Even for the said purpose, the evidence adduced on behalf of the complainant could be relied upon.*
>
> *xx xx xx xx*
>
> *32. The standard of proof evidently is preponderance of probabilities. Inference of preponderance of probabilities can be drawn not only from the materials on record but also by reference to the circumstances upon which he relies.*
>
> *xx xx xx xx*
>
> *41…Therefore, the rebuttal does not have to be conclusively established but such evidence must be adduced before the court in support of the defence that the court must either believe the defence to exist or consider its existence to be reasonably probable, the standard of reasonability being that of the 'prudent man'."*

5. The decision in *M.S. Narayana Menon* (supra) was relied upon in *K. Prakashan v. P.K. Surenderan* (2008) 1 SCC 258 where this Court reiterated the legal position as under:

> *"13. The Act raises two presumptions; firstly, in regard to the passing of consideration as contained in Section 118 (a) therein and, secondly, a presumption that the holder of cheque receiving the same of the nature referred to in Section 139 discharged in whole or in part any debt or other liability. Presumptions both under Sections 118 (a) and 139 are rebuttable in nature.*
>
> *14. It is furthermore not in doubt or dispute that whereas the standard of proof so far as the prosecution is concerned is proof of guilt beyond all reasonable doubt; the one on the accused is only mere preponderance of probability."*

6. To the same effect is the decision of this Court in *Krishna Janardhan Bhat v. Dattatraya G. Hegde* (2008) 4 SCC 54 where this Court observed:

> *"32… Standard of proof on the part of an accused and that of the prosecution a criminal case is different.*
>
> *xx xx xx xx*
>
> *34. Furthermore, whereas prosecution must prove the*

guilt of an accused beyond all reasonable doubt, the standard of proof so as to prove a defence on the part of an accused is preponderance of probabilities.

xx xx xx xx

45… Statute mandates raising of presumption but it stops at that. It does not say how presumption drawn should be held to have rebutted. Other important principles of legal jurisprudence, namely presumption of innocence as human rights and the doctrine of reverse burden introduced by Section139 should be delicately balanced."

7. Presumptions under Sections 118(a) and Section 139 were held to be rebuttable on a preponderance of probabilities in *Bharat Barrel & Drum Manufacturing Company v. Amin Chand Pyarelal* (1999) 3 SCC 35 also where the Court observed:

"11… Though the evidential burden is initially placed on the defendant by virtue of S.118 it can be rebutted by the defendant by showing a preponderance of probabilities that such consideration as stated in the pronote, or in the suit notice or in the plaint does not exist and once the presumption is so rebutted, the said presumption 'disappears'. For the purpose of rebutting the initial evidential burden, the defendant can rely on direct evidence or circumstantial evidence or on presumptions of law or fact. Once such convincing rebuttal evidence is adduced and accepted by the Court, having regard to all the circumstances of the case and the preponderance of probabilities, the evidential burden shifts back to the plaintiff who has also the legal burden."

8. In *Hiten P. Dalal v. Bratindranath Banerjee* (2001) 6 SCC 16 this Court compared evidentiary presumptions in favour of the prosecution with the presumption of innocence in the following terms:

"22… Presumptions are rules of evidence and do not conflict with the presumption of innocence, because by the latter all that is meant is that the prosecution is obliged to prove the case against the accused beyond reasonable doubt. The obligation on the prosecution may be discharged with the help of presumptions of law or fact unless the accused adduces evidence showing the reasonable possibility of the non-existence of the presumed fact.

23. In other words, provided the facts required to form the basis of a presumption of law exists, no discretion is left with the Court but to draw the statutory conclusion, but this does not preclude the person against whom the presumption is drawn from rebutting it and proving the contrary. …"

9. Decisions in *Mahtab Singh & Anr. v. State of Uttar Pradesh* (2009) 13 SCC 670, *Subramaniam v. State of Tamil Nadu* (2009) 14 SCC 415 and *Vishnu Dutt Sharma v. Daya Sapra* (2009) 13 SCC 729, take the same line of reasoning.

10. Coming then to the present case, the absence of any details of the date on which the loan was advanced as also the absence of any documentary or other evidence to show that any such loan transaction had indeed taken place between the parties is a significant circumstance. So also the fact that the cheque was presented on the day following the altercation between the parties is a circumstance that cannot be brushed away. The version of the respondent that the cheque was not returned to him and the complainant presented the same to wreak vengeance against him is a circumstance that cannot be easily rejected. Super added to all this is the testimony of DW1, Jeevan Guru according to whom the accounts were settled between the father of the complainant and the accused in his presence and upon settlement the accused had demanded return of this cheque given in lieu of the advance. It was further

stated by the witness that the complainant's father had avoided to return the cheque and promised to do so on some other day. There is no reason much less a cogent one suggested to us for rejecting the deposition of this witness who has testified that after the incident of altercation between the two parties the accused has been supplying milk to the witness as he is also in the same business. Non-examination of the father of the complainant who was said to be present outside the Court hall on the date the complainant's statement was recorded also assumes importance. It gives rise to an inference that the non-examination was a deliberate attempt of the prosecution to keep him away from the court for otherwise he would have to accept that the accused was actually supplying milk to him and that the accused was given the price of the milk in advance as per the trade practice in acknowledgement and by way of security for which amount the accused had issued a cheque in question.

11. In the totality of the above circumstances, the High Court was perfectly justified in its conclusion that the prosecution had failed to make out a case against the accused and in acquitting him of the charges. With these observations in elucidation of the conclusion drawn by my worthy colleague, I agree that the appeal fails and be dismissed.

B.B.B . Appeal dismissed.

GOPAL SINGH

v.

STATE OF UTTARAKHAND

(Criminal Appeal No. 291 of 2013)

FEBRUARY 08, 2013

[G.S. SINGHVI AND DIPAK MISRA, JJ.]

Penal Code, 1860 – s.324 – Conviction under, of accused-appellant – For firing gunshot at PW3 from a country-made pistol ('katta') thereby causing firearm injury to him – Justification of the conviction – Held: Justified – PW1 clearly stated that appellant had fired from his country made pistol which hit his nephew, PW3 – Similarly, PW2, father of PW3, vividly narrated the incident – Testimony of PW3 that when his uncle, PW1, was preparing accounts in his shop, he was suddenly hit by bullet fired by the appellant – Medical evidence made it clear that the injury was caused by firearm – PW5, the investigating officer, deposed that he had recovered pellets of 'katta' from the wall of the shop room, the place of the incident – No explanation offered by the defence for the same – Under the circumstances, solely because the 'katta' was not recovered, the prosecution version should not be disbelieved – Taking into consideration the nature of the injury and the weapon used, conviction of appellant u/s.324 IPC was justified.

Sentence / Sentencing – Accused-appellant fired gunshot at PW3 causing firearm injury to the latter – Appellant convicted u/s.324 and sentenced to 3 years RI – Sentence challenged by defence as excessive – Held: Legislature in respect of offence punishable u/s.324 IPC has provided punishment which may extend to 3 years or with fine or with both – Legislative intent is to confer discretion on the judiciary in imposition of sentence in respect of such offence where it

has not provided the minimum sentence or made it conditional – But discretion vested required to be embedded in rational concepts based on sound facts – In the instant case, the doctor did not state the injury to be grievous but on the contrary mentioned that there was no fracture and only a muscle injury – Weapon used (country made pistol) fits in to the description as provided u/s.324 IPC – Occurrence took place almost 20 years back – Parties were neighbours and nothing on record to show that appellant had any criminal antecedents – In the totality of the facts and circumstances, sentence of 1 year RI u/s.324 IPC would be adequate – That apart, appellant directed to pay Rs. 20,000/- to the victim towards compensation as envisaged u/s.357(3) CrPC – Penal Code, 1860 – s.324.

Sentence / Sentencing – Appropriate sentence – Principle of proportionality between crime and punishment – Held: Punishment should not be disproportionately excessive – Concept of proportionality allows significant discretion to the Judge but the same has to be guided by certain principles – There can neither be a strait-jacket formula nor a solvable theory in mathematical exactitude – It would depend on the facts of the case and rationalized judicial discretion – The discretion should be embedded in the conceptual essence of just punishment.

The prosecution case was that the accused-appellant alongwith other accused persons assaulted PW1 with hands, fists and stones and took away money from his shop and also from his pocket and further fired gunshot at PW3 causing firearm injury to him. The trial court convicted the appellant under Sections 307, 324 and 380 of IPC. The High Court set aside the conviction under Sections 307 and 380 IPC but maintained the conviction under Section 324 IPC upon coming to a finding that the appellant had fired a gunshot at PW3 and on that count sentenced him to undergo rigorous imprisonment for three years.

In the instant appeal, the appellant contended that the finding that he had fired a gunshot had not been proven beyond reasonable doubt inasmuch as the 'Katta' (country made pistol that was fired) had not been seized. In the alternative, the appellant contended that regard being had to the nature of the injury, the age of the appellant at the time of the incident, and the evidence on record that there was no fracture and no injury barring a muscle injury, the rigorous imprisonment of three years imposed upon him was excessive.

Disposing of the appeal, the Court

HELD: 1. PW-1 has clearly stated that the appellant had fired from his country made pistol which had hit his nephew, PW3. Similarly, PW2, the father of injured PW3, has vividly narrated the incident. It has come in the testimony of PW3 that when his uncle, PW1, was preparing accounts in his shop, he was suddenly hit by bullet fired by the appellant. From the medical evidence, it is clear that the injury was caused by firearm. PW5, the investigating officer, has deposed that he had recovered the pellets of 'Katta' from the wall of the shop room, the place of the incident. No explanation for the same has been offered by the defence. Under these circumstances, solely because the 'Katta' has not been recovered, the prosecution version should not be disbelieved. The sessions Judge, taking into consideration the nature of the injury and the weapon used, has convicted the accused under Section 324 of IPC which has been accepted by the High Court. There is no fallacy either in the analysis or in the finding recorded on that score. [Paras 12, 13] [112-G; 113-A-D, H; 114-B]

Anwarul Haq v. State of U.P. **(2005) 10 SCC 581: 2005 (3) SCR 917 – relied on.**

2.1. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect – propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. There can neither be a strait-jacket formula nor a solvable theory in mathematical exactitude. It would be dependant on the facts of the case and rationalized judicial discretion. [Para 18] [117-C-G]

2.2. The legislature in respect of an offence punishable under Section 324 of the IPC has provided punishment which may extend to three years or with fine or with both. The legislative intent is to confer discretion on the judiciary in imposition of sentence in respect of such offence where it has not provided the minimum sentence or made it conditional. The discretion vested cannot be allowed to roam in the realm of fancy but is required to be embedded in rational concepts based on sound facts. [Para 23] [119-E-F]

2.3. In the case at hand, the doctor has not stated the injury to be grievous but on the contrary, he has

mentioned that there is no fracture and only a muscle injury. The weapon used fits in to the description as provided under Section 324 of IPC. The occurrence has taken place almost 20 years back. The parties are neighbours and there is nothing on record to show that the appellant had any criminal antecedents. Regard being had to the totality of the facts and circumstances, in the obtaining factual score, the sentence of rigorous imprisonment of one year under Section 324 of IPC would be adequate. That apart, the appellants shall pay a sum of Rs. 20,000/- towards compensation as envisaged under Section 357(3) of CrPC to the victim. The said amount shall be deposited before the trial Judge who shall disburse the same in favour of the victim on proper identification. [Para 24] [119-G; 120-A-C]

Santa Singh v. The State of Punjab **(1976) 4 SCC 190: 1977 (1) SCR 229;** *Jameel v. State of Uttar Pradesh* **(2010) 12 SCC 532: 2009 (15) SCR 712;** *Shailesh Jasvantbhai and Another v. State of Gujarat and Others* **(2006) 2 SCC 359: 2006 (1) SCR 477;** *Guru Basavaraj v. State of Karnataka* **(2012) 8 SCC 734;** *Dharma Pal and Others v. State of Punjab* **AIR 1993 SC 2484:** *Merambhai Punjabhai Khachar and Others v. State of Gujarat* **AIR 1996 SC 3236 and** *Para Seenaiah and Another v. State of Andhra Pradesh and Another* **(2012) 6 SCC 800 – relied on.**

Case Law Reference:

2005 (3) SCR 917	**relied on**	**Para 12**
1977 (1) SCR 229	**relied on**	**Para 14**
2009 (15) SCR 712	**relied on**	**Para 15**
2006 (1) SCR 477	**relied on**	**Para 16**
(2012) 8 SCC 734	**relied on**	**Para 17**
AIR 1993 SC 2484	**relied on**	**Para 20**

AIR 1996 SC 3236	**relied on**	**Para 21**
(2012) 6 SCC 800	**relied on**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 291 of 2013.

From the Judgment & Orders dated 15.03.2012 of the High Court of Uttarakhand at Nainital in Criminal Appeal No. 137 of 2001.

Sunil Kumar Bharti for the Appellant.

Abhishek Atrey for the Respondent

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. In this appeal preferred by Special Leave, the appellant calls in question the legal substantiality of the judgment of conviction and order of sentence dated 15.3.2012 passed by the High Court of Uttarakhand at Nainital in Criminal Appeal No. 137 of 2001 whereby the learned Single Judge has set aside the conviction under Sections 307 and 380 of the Indian Penal Code (for short "the IPC") but maintained the conviction and sentence under Section 324 of the IPC passed by the learned Sessions Judge, Almora in Sessions Trial No. 24 of 1994.

3. The facts which are essential to be stated for adjudication of this appeal are that an FIR was lodged by Prem Singh, PW-2, alleging that about 9.00 p.m. on 20.10.1992, on hearing a gunshot sound and simultaneously the cry of his brother, Gopal Singh, PW-1, that he was being assaulted and his life was in danger, he rushed to the shop of Gopal Singh and found that accused Gopal Singh and his brother Puran Singh were beating him with hands, fists and stones. He saw Har Singh, the father of the assailants, standing outside the

shop along with two unknown persons. It was alleged that Narain Singh, PW-3, son of Prem Singh, had sustained a gunshot injury. The informant and his nephew, Surendra Singh, took the injured Gopal Singh and Narain Singh to Ranikhet Hospital. It was further alleged that the accused persons had took away Rs.25,000/- from the shop of PW-1 and Rs.1200/- from his pocket. Be it noted that after taking the injured persons to the hospital for treatment, an FIR was lodged with the Patwari, Bilekh. After the criminal law was set in motion, the Investigating Officer recorded the statements of the witnesses under Section 161 of the Code of Criminal Procedure, prepared the site plan, Ext.-7, recovered the pellets, seized the blood-stained clothes of the injured persons and got them examined by the doctor, PW-4, and, eventually, on completion of investigation, placed the charge-sheet for the offences punishable under Sections 147, 148, 452, 307 and 395 of the IPC before the learned Magistrate who, in turn, committed the matter to the Court of Session.

4. The accused persons abjured their guilt and pleaded false implication due to animosity which was founded on the harassment of Har Singh in the Gram Sabha election that was contested by Gopal Singh. Be it stated, during the pendency of the trial, Puran Singh expired as a consequence of which the trial proceeded against the accused persons, namely, Gopal Singh and Har Singh.

5. The prosecution, in order to substantiate the charges framed against the accused persons, examined five witnesses, namely, Gopal Singh, PW1, the injured, Puran Singh, PW2, the brother of the injured, Narain Singh, PW3, who received the gunshot injury, Dr. N. K Pande, PW4, who examined the injured persons and Bachhi Singh Bora, PW5, the investigating officer, and got number of documents exhibited. The defence chose not to adduce any evidence in support of the plea taken.

6. The learned Sessions Judge, on the basis of the material brought on record, acquitted Har Singh of all the

charges. However, he convicted accused Gopal Singh under Sections 307, 324 and 380 of the IPC giving credence to the testimony of PWs 1,3,4 and partly of PW 2 and sentenced him to suffer rigorous imprisonment for seven years, one year and four years respectively under said scores with the stipulation that all the sentences shall be concurrent.

7. Aggrieved by the aforesaid conviction and sentence, the accused appellant preferred Criminal Appeal No. 137 of 2001. The learned Single Judge noted the fact that Gopal Singh had not sustained the gunshot injury but injuries were caused because of blows by fist, kicks and stones as a result of which there was fracture on the 10th rib of the said injured. However, the High Court was of the opinion that Puran Singh might have applied the same means and same force and as he had died during the trial, it was advisable to extend the benefit of doubt to the appellant. Being of this view, it came to hold that the appellant is not guilty of the offence punishable under Section 307 of the IPC. At this juncture, we may state that whether the analysis of the High Court on this score is correct or not, need not be gone into as the State has not assailed the impugned judgment. Therefore, we are compelled to leave it at that.

8. As is perceivable, the High Court has found that the appellant had fired a gunshot at Narain. For the commission of the said crime, the learned trial Judge had convicted him under Section 324 of IPC and sentenced him to undergo rigorous imprisonment for three years. The High Court did not find any flaw in the analysis of the learned Sessions Judge on that count and gave its stamp of approval to the same. As far as the conviction under Section 380 is concerned, the High Court acquitted the accused-appellant.

9. Mr. Sunil Kumar Bharti, learned counsel for the appellant, contended that the finding that the appellant had fired a gunshot has not been proven beyond reasonable doubt inasmuch as the 'Katta' (country made pistol that was fired)

has not been seized. In the alternative, it is urged by him that regard being had to the nature of the injury, the age of the appellant at the time of the incident, the evidence on record that there was no fracture and no injury barring a muscle injury, the rigorous imprisonment of three years is excessive and it deserves to be reduced.

10. Dr. Abhishek Atrey, learned counsel for the State supporting the judgment of conviction as well as the order of sentence, submitted that the learned Sessions Judge has correctly analysed the testimony of PWs who have deposed about the occurrence and further taken note of the fact that there has been recovery of pellet from the wall of the shop room of Gopal Singh and, accordingly has opined that the injury was caused on Narain Singh from the gunshot fired from the 'Katta' (country made pistol) by the accused and, therefore, the conclusion arrived at on that base cannot be found fault with. Meeting the alternative argument which pertains to the imposition of excessive sentence, the learned counsel for the State would urge that in a case of the present nature, the rigorous imprisonment of three years cannot be regarded as disproportionate.

11. At the very outset, we may state with profit that a counter case was filed by the accused persons but there was no allegation in the FIR that the gunshot was fired from the licensed gun of Prem Singh and, eventually, the said case has ended up in acquittal.

12. Coming to the evidence on record, it is noticeable that PW-1 has clearly stated that accused Gopal Singh had fired from his country made pistol which had hit his nephew, Narain Singh. In the cross-examination, what has been elicited is that Prem Singh, father of Narain Singh, an ex-serviceman, is a holder of licensed gun. He has categorically stated that the occurrence had taken place inside his shop room. There has been no cross-examination on these counts. Similarly, Prem

Singh, the father of injured Narain Singh, has vividly narrated the incident. The cross-examination basically relates to enmity and theft of money. PW 3 is the injured Narain Singh. It has come in his testimony that when his uncle, Gopal Singh, was preparing accounts in his shop, he was suddenly hit by bullet fired by the accused, Gopal Singh. It is interesting to note that what has been elicited from the testimony is that his father had a licensed gun. From the medical evidence, it is limpid that the injury was caused by firearm. PW5, the investigating officer, has deposed that he had recovered the pellets of 'Katta' from the wall of the shop room, the place of the incident. Under these circumstances, we are disposed to think that solely because the 'Katta' has not been recovered, the prosecution version should not be disbelieved. In this context, we may refer with profit to the decision in *Anwarul Haq v. State of U.P.*[1] wherein it was held that solely because the knife that was used in committing the offence had not been recovered during the investigation could not be a factor to disregard the evidence of the prosecution witnesses who had deposed absolutely convincingly about the use of the weapon. That apart, the Court also referred to the evidence of the doctor which mentioned about the use of weapon It is worth noting that this Court observed that though the doctor's opinion about the weapon was theoretical, yet it cannot be totally wiped out. Regard being had to the aforesaid, this Court maintained the sentence of one year rigorous imprisonment under Section 324 of IPC as imposed by the trial Court and concurred with by the High Court.

13. We may hasten to clarify that we are placing reliance on the aforesaid dictum as in the case at hand there is the doctor's evidence that the injury has been caused by the gunshot and the pellets have been recovered from the walls of the shop room of the accused appellant and no explanation for the same has been offered by the defence. What has been elicited in the cross-examination is that Prem Singh, the father

1. (2005) 10 SCC 581.

of the injured, had a licensed gun. We really fail to fathom how the said elicitation would render any assistance to the defence. The learned sessions Judge, taking into consideration the nature of the injury and the weapon used, has convicted the accused under Section 324 of IPC which has been accepted by the High Court. We perceive no fallacy either in the analysis or in the finding recorded on that score.

14. The alternative submission of the learned counsel for the appellant is that when the learned Sessions Judge as well as the High Court has only found that the conviction under Section 324 is sustainable, then the sentence of rigorous imprisonment of three years should not have been awarded. In this regard, it is fruitful to refer to the pronouncement in *Santa Singh v. The State of Punjab*[2] wherein Bhagwati, J. (as his Lordship then was), speaking for the Court, while interpreting the words used in Section 235(2) of the Code of Criminal Procedure, adverted to the concept of proper sentence and opined thus: -

> "..... a proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances — extenuating or aggravating — of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of return of the offender to a normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These are factors which have to be taken into account by the court in deciding upon the appropriate

2. (1976) 4 SCC 190.

sentence, and, therefore, the legislature felt that, for this purpose, a separate stage should be provided after conviction when the court can hear the accused in regard to these factors bearing on sentence and then pass proper sentence on the accused."

The aforesaid principle has been followed in many a dictum of this Court.

15. In *Jameel v. State of Uttar Pradesh,*[3] this Court reiterated the principle by stating that the punishment must be appropriate and proportional to the gravity of the offence committed. Speaking about the concept of sentencing, the Court observed thus: -

> **"15.** In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.
>
> **16.** It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence."

In the said case, there was a fracture of bone and the trial Court had convicted the appellant therein under Section 308 of IPC and sentenced him to undergo rigorous imprisonment

3. (2010) 12 SCC 532.

for two years.

16. In *Shailesh Jasvantbhai and Another v. State of Gujarat and Others,*[4] the Court has observed thus:

> "The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that: "State of criminal law continues to be - as it should be -a decisive reflection of social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration".

17. Recently, this Court in *Guru Basavaraj v. State of Karnataka,*[5] while discussing the concept of appropriate sentence has expressed that:

4. (2006) 2 SCC 359.

5. (2012) 8 SCC 734.

"It is the duty of the court to see that appropriate sentence is imposed regard being had to the commission of the crime and its impact on the social order. The cry of the collective for justice which includes adequate punishment cannot be lightly ignored."

18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect – propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasize, these are certain illustrative aspects put forth in a condensed manner. We may hasten to add that there can neither be a strait-jacket formula nor a solvable theory in mathematical exactitude. It would be dependant on the facts of the case and rationalized judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a Court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant

factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment.

19. A Court, while imposing sentence, has to keep in view the various complex matters in mind. To structure a methodology relating to sentencing is difficult to conceive of. The legislature in its wisdom has conferred discretion on the Judge who is guided by certain rational parameters, regard been had to the factual scenario of the case. In certain spheres the legislature has not conferred that discretion and in such circumstances, the discretion is conditional. In respect of certain offences, sentence can be reduced by giving adequate special reasons. The special reasons have to rest on real special circumstances. Hence, the duty of Court in such situations becomes a complex one. The same has to be performed with due reverence for Rule of La, the collective conscience on one hand and the doctrine of proportionality, principle of reformation and other concomitant factors on the other. The task may be onerous but the same has to be done with total empirical rationality sans any kind of personal philosophy or individual experience or any a-priori notion.

20. Keeping in view the aforesaid analysis, we would refer to the view in respect of sentence this Court had imposed under Section 324 of IPC, regard being had to the concept of appropriate sentence. In *Dharma Pal and Others v. State of Punjab*[6], while converting the conviction under Section 307 of the IPC to Section 324 of IPC, this Court thought it appropriate to sentence the convicts to one year rigorous imprisonment. Be it noted, the Court observed that though the injuries inflicted by the appellants therein were somewhat serious, yet the conviction under Section 307 of the IPC was not made out.

6. AIR 1993 SC 2484.

21. In *Merambhai Punjabhai Khachar and Others v. State of Gujarat*[7], while this Court took note of the fact that the injury was caused by pellet, the ingredients of Section 307 of IPC were not satisfied and, accordingly, the Court converted the offence under Section 324 and sentenced the accused to undergo R.I. for one year and pay a fine of Rs. 1000/-, in default, S.I. for one month.

22. In *Para Seenaiah and Another v. State of Andhra Pradesh and Another*[8], regard being had to the obtaining factual matrix therein, the sentence of rigorous imprisonment of one year under Section 324 of IPC with a fine of Rs. 1,000/- and, in default, imprisonment for three months was held to be justified.

23. At this juncture, we may repeat at the cost of repetition that imposition of sentence, apart from the illustrations which have been stated to be mitigating factors would depend upon many a other factors which will depend/vary from case to case. The legislature in respect of an offence punishable under Section 324 of the IPC has provided punishment which may extend to three years or with fine or with both. The legislative intent, as we perceive, is to confer discretion on the judiciary in imposition of sentence in respect of such offence where it has not provided the minimum sentence or made it conditional. We have already highlighted that the discretion vested cannot be allowed to roam in the realm of fancy but is required to be embedded in rational concepts based on sound facts.

24. In the case at hand, the doctor has not stated the injury to be grievous but on the contrary, he has mentioned that there is no fracture and only a muscle injury. The weapon used fits in to the description as provided under Section 324 of IPC. The occurrence has taken place almost 20 years back. The parties are neighbours and there is nothing on record to show that the

7. AIR 1996 SC 3236.

8. (2012) 6 SCC 800.

appellant had any criminal antecedents. Regard being had to the totality of the facts and circumstances, we think it appropriate that in the obtaining factual score, the sentence of rigorous imprisonment of one year under Section 324 of IPC would be adequate. That apart, we are inclined to direct that the appellants shall pay a sum of Rs. 20,000/- towards compensation as envisaged under Section 357 (3) of the Code to the victim. The said amount shall be deposited before the learned trial Judge who shall disburse the same in favour of the victim on proper identification.

25. With the aforesaid modification in the sentence, the appeal stands disposed of.

B.B.B . Appeal disposed of.

VIJOY KUMAR PANDEY
v.
ARVIND KUMAR RAI & ORS.
(Civil Appeal No. 1310 of 2013)

FEBRUARY 13, 2013

[T.S. THAKUR AND M.Y. EQBAL, JJ.]

Service Law – Selection – School Service Commission – Post of Headmaster – No panel/select list of candidates prepared by the Commission in accordance with the statutory regulations – Effect of – Held: Since no panel was published, no recommendation or appointment could be claimed by any one of the candidates competing for the post concerned – Preparation and publication of a panel was the least which any candidate seeking appointment on the basis thereof was required to establish – Publication of such a panel was absolutely essential not only because the entire process was regulated by statutory regulations but also in the interest of transparency and probity in matters concerning appointments to offices under the State and in matters affecting rights of the citizens in discharge of governmental functions – Since no panel, as envisaged under the provisions of the regulations ever came into existence, claim by respondent for appointment on the basis of such a non-existent panel was untenable as the panel itself was stillborn – Directions issued by Supreme Court keeping in view the peculiar facts and circumstances of the case – West Bengal School Service Commission (Procedure for selection of persons for appointment to the post of teachers including Head Masters/ Head Mistresses Superintendent of Senior Madarasa in recognized non-Government Aided Schools and procedure for conduct of business of the Commission) Regulations, 1988.

Against the vacant post of a Headmaster, the School

Service Commission short listed three candidates for consideration. 'K', one of the candidates found ineligible questioned the rejection of his candidature in Writ Petition No.6117 of 2004 filed before the High Court and obtained an interim order staying publication of the panel for the post of Headmaster. In 2009 'K' withdrew the petition. A Single Judge of the High Court (Dipankar Datta, J.) while dismissing the writ petition as withdrawn vacated all interim orders but directed vide order 12th March, 2009 that the period during which the panel could not be operated due to the interim order passed in the writ petition should be excluded for computing the life of the panel.

The School Service Commission took no further steps in the matter nor was the panel published. This led to the filing of Writ Petition No.5866 of 2009 filed by respondent No.1 in which he sought a mandamus directing the School Service Commission to recommend his name for appointment against the available vacancy. The petition was dismissed by a Single Judge of the High Court (Dipankar Datta, J.) by order dated 27th July, 2009 on ground that since more than five years had elapsed ever since the selection process was initiated and since no panel had been published by the School Service Commission it was not possible to direct the Commission to appoint respondent no.1 as Headmaster of the school.

Respondent no.1 filed appeal against order dated 27th July, 2009 passed by Dipankar Datta, J in Writ Petition No.5866 of 2009. The appellant, on the other hand, filed appeal against order dated 12th March, 2009 passed by Dipankar Datta, J. in Writ Petition No.6117 of 2004. The Division Bench by order dated 29th January, 2010 set aside order dated 27th July, 2009 passed by Dipankar Datta, J. with a direction to the School Service Commission to act in terms of the earlier order dated 12th

March, 2009 passed by the very same Hon'ble Judge. The correctness of the judgment dated 29th January, 2010 was questioned in the instant appeal.

The question that arose for consideration was whether any panel of candidates had been prepared by the Commission in accordance with the provisions of the West Bengal School Service Commission (Procedure for selection of persons for appointment to the post of teachers including Head Masters/Head Mistresses Superintendent of Senior Madarasa in recognized non-Government Aided Schools and procedure for conduct of business of the Commission), Regulations, 1988; and if so, whether the same continued to be valid and subsisting to entitle the selected candidates or any one of them to a mandamus directing the competent authority to make an appointment on the basis thereof.

Allowing the appeal, the Court

HELD: 1.1. In its order dated 27th July, 2009 passed in W.P. No.5866 of 2009, Dipankar Datta, J. noticed the non-preparation and publication of a panel and clearly held that since the panel has not been published, no recommendation or appointment could be claimed by any one of the candidates competing for the same. Preparation and publication of a panel was the least which any candidate seeking appointment on the basis thereof was required to establish. Publication of such a panel was absolutely essential not only because the entire process was regulated by statutory regulations but also because the publication was essential in the interest of transparency and probity in matters concerning appointments to offices under the State and in matters affecting rights of the citizens in discharge of governmental functions. [Para 10] [130-D-F, G-H; 131-A]

1.2. Since no panel, as envisaged under the provisions of the regulations, ever came into existence, the question of determining the life of the panel by excluding the period during which there was an interim stay in accordance with the order of Dipankar Datta, J. in its order dated 12th March, 2009 did not arise. It follows that the claim made by respondent nol. for appointment on the basis of such a non-existent panel was untenable as the panel itself was stillborn. The preparation of a select list or a panel does not by itself entitle the candidate whose name figures in such a list/panel to seek an appointment or claim a mandamus. No vested right is created by the inclusion of the name of a candidate in any such panel which can for good and valid reasons be scrapped by the competent authority alongwith the entire process that culminated in the preparation of such a panel. [Para 12] [132-B-E]

1.3. Even assuming the preparation of a panel gave rise to any such right, since in the instant case, no panel had actually ever been prepared and published nor has the same been produced before the High Court or before this Court, the direction issued to the Commission to act on the basis of the panel was wholly unjustified and unsustainable. The view taken by Dipankar Datta, J. in his order dated 27th July, 2009 that considerable time had expired since the selection process was initiated and that other candidates who may have in the meantime become qualified for consideration may be deprived of the right to compete was a reason enough for the High Court to decline a mandamus. In the facts and circumstances of the case, the Division Bench of the High Court, committed an error in upsetting that direction. Also there is no real conflict between the orders passed by Dipankar Datta, J. on 12th March, 2009 and that passed on 27th July 2009, inasmuch as the question of the adding to the life of the panel the period during which there was a stay would

arise only if there was a panel drawn in terms of the Regulations. [Para 17] [134-C-F]

State of Andhra Pradesh & Ors. *v. D. Dastagiri & Ors.* **(2003) 5 SCC 373: 2003 (3) SCR 877;** *Shankarsan Dash* v. *Union of India* **(1991) 3 SCC 47: 1991 (2) SCR 567;** *Punjab State Electricity Board v. Malkiat Singh* **(2005) 9 SCC 22: 2004 (5) Suppl. SCR 329;** *State of Bihar & Ors. v. Secretariat Assistant Successful Examinees Union & Ors.* **(1994) 1 SCC 126: 1993 (3) Suppl. SCR 134;** *Director, SCTI for Medicine Science and Technology v. M. Pushkaran* **(2007) 12 SCC 465;** *Union of India v. Kali Dass Batish* **(2006) 1 SCC 779: 2006 (1) SCR 261;** *Rakhi Ray & Ors. v. The High Court of Delhi* **(2010) 2 SCC 637: 2010 (2) SCR 239 and** *State of Orissa & Anr. v. Rajkishore Nanda & Ors.* **2010 (6) SCALE 126 – relied on.**

2. Respondent No.1 was appointed as Headmaster during the pendency of the litigation at the pain of contempt proceedings against the parties. That appointment came sometime in September 2010. Not only because the respondent has been holding the post for two years, but also because his removal would not immediately result in any benefit either to the institution or to the appellant, therefore, he is permitted to continue holding the post but only till such time a fresh selection is made against the vacancy. It is, however, made clear that respondent No.1 shall be entitled to all the monetary benefits for the period during which he actually works as the Headmaster of the school. The fact that he so works would not, however, create any equity in his favour nor constitute an additional weightage in the new selection process. [Paras 18, 19] [134-F-G; 135-A-B, C-D]

Case Law Reference:

2003 (3) SCR 877	**relied on**	**Para 11**
1991 (2) SCR 567	**relied on**	**Para 13**

2004 (5) Suppl. SCR 329	**relied on**	**Para14**
1993 (3) Suppl. SCR 134	**relied on**	**Para 14**
(2007) 12 SCC 465	**relied on**	**Para 14**
2006 (1) SCR 261	**relied on**	**Para 14**
2010 (2) SCR 239	**relied on**	**Para 15**
2010 (6) SCALE 126	**relied on**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1310 of 2013.

From the Judgment & Order dated 29.01.2010 of the High Court at Calcutta in F.M.A. No. 1415 of 2009.

Mahendra Anand, Bharat Singh, Saurabh Kumar, Amit Pawan for the Appellant.

Dhruv Mehta, Abhinav Singh, B.P. Yadav, Saurabh Sharma, Sarla Chandra for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. This appeal by special leave is directed against the judgement and order dated 29th January, 2010 passed by the Division Bench of the High Court of Judicature at Calcutta whereby in FMA No.1415/2009 filed by the respondent No.1 has been allowed, the order passed by the Single Judge of that Court set aside and the respondent-School Service Commission directed to act in terms of an earlier order dated 12th March 2009 passed by that Court in Writ Petition No. 6117(W) of 2004. The controversy arises in the following backdrop.

3. Against the vacant post of Headmaster at Howrah Siksha Niketan, as many as five candidates applied for

appointment to the School Service Commission, West Bengal. The Commission found two of those applying for the post to be ineligible but short listed the remaining three for consideration. Kavindra Narayan Roy, one of the candidates found ineligible questioned the rejection of his candidature in Writ Petition No.6117 (W) of 2004 filed before the High Court of Calcutta and obtained an interim order staying publication of the panel. That order continued to remain operative for nearly five years till 2009 when the writ petitioner-Kavindra Narayan Roy withdrew the said petition as he had by that time attained the age of superannuation. The Single Judge of the High Court of Calcutta while dismissing the writ petition as withdrawn vacated all interim orders but directed that the period during which the panel could not be operated due to the interim order passed in the writ petition should be excluded for computing the life of the panel.

4. The School Service Commission, it appears, took no further steps in the matter nor was the panel published. This led to the filing of the two writ petitions one of which happened to be Writ Petition No.5866 (W) of 2009 filed by respondent No.1-Shri Arvind Kumar Rai in which the said petitioner sought a mandamus directing the School Service Commission to recommend his name for appointment against the available vacancy. His case was that since the Rajaram Choudhary who was placed at serial no.1 in the merit list had retired from service, he alone could be considered for appointment as he figured at serial No.2 of the list.

5. The above petition came up before Dipankar Datta, J. and was dismissed by an order dated 27th July, 2009 holding that since more than five years had elapsed ever since the selection process was initiated and since no panel had been published by the School Service Commission it was not possible to direct the Commission to appoint the petitioner-Shri Arvind Kumar Rai as Headmaster of the school. The Court further held that during the intervening period of five years

several other candidates would have acquired eligibility for consideration/appointment against the post of Headmaster of school and that in fairness to all of them they ought to be given a chance to offer their candidature. The Court further held that as the panel had not been published the writ petitioner could not claim a recommendation as of right and that discretionary remedy under Article 226 of the Constitution could be exercised only when the Court was satisfied that it was equitable to do so.

6. The appellant-Vijoy Pandey, too, in the meantime, filed Writ Petition No.7310 (W) of 2009 in which he prayed for a direction to the respondents to rescind, cancel and withdraw the panel for the post of Headmaster of the school prepared on the basis of the interview held on 6th January, 2004. A Single Bench of the Calcutta High Court entertained the said petition and by an order dated 4th August, 2009 directed status quo to be maintained regarding appointment to the post of Headmaster. Three appeals came to be filed in the above background before the Division Bench of the High Court. One of these appeals filed by Arvind Kumar Rai was directed against order dated 27th July, 2009 passed by Dipankar Datta, J in Writ Petition No.5866 of 2009. The second appeal, too, was filed by Arvind Kumar Rai assailing order dated 4th August, 2009 passed by Soumitra Pal J. in Writ Petition No.7310 of 2009 directing status quo to be maintained. The third appeal was filed by appellant-Vijoy Kumar Pandey against order dated 12th March, 2009 passed by Dipankar Datta, J. in Writ Petition No.6117 (W) of 2004 whereby the School Service Commission had been directed to exclude the period during which there was an interim order, while computing the life of the panel.

7. The first of the abovementioned three appeal was allowed by the Division Bench by an order dated 29th January, 2010 setting aside order dated 27th July, 2009 passed by Dipankar Datta, J. with a direction to the School Service

Commission to act in terms of the earlier order dated 12th March, 2009 passed by the very same Hon'ble Judge. Taking note of the said order of the Division Bench the second mentioned appeal preferred against the interim order dated 4th August, 2009 passed by Soumitra Pal J. was held to be infructuous and was disposed of by the Division Bench by an order dated 23rd August, 2010. The Court was of the view that in the light of the direction issued by a coordinate Bench directing the School Service Commission to give effect to the order dated 12th March, 2009 passed by the Dipankar Dutta, J. it was not possible to give any contrary direction to the Commission and that the interim order passed by the Single Judge to that effect had lost its force on that count.

8. As regards the appeal filed by the appellant-Vijoy Kumar Pandey the Division Bench in its order dated 23rd August, 2010 held that in the light of the order dated 29th January, 2010 passed by a coordinate Bench there was no scope of challenging order dated 12th March, 2009 passed by Dipankar Datta, J. The Court made it clear that the appellant will be free to seek appropriate remedy before the appropriate forum in accordance with law. A special leave petition filed against the aforementioned order dated 23rd August, 2010 passed by the Division Bench was withdrawn and was dismissed by this Court by order dated 21st January, 2011.

9. The present appeal assails the correctness of the judgment and order dated 29th January, 2010 whereby the Division Bench of the High Court has allowed F.M.A. No.1415 of 2009 and set aside order dated 27th July, 2009 passed by Dipankar Datta J. in Writ Petition No.5866 (W) of 2009 with W.P. 6117 (W) of 2004 and directed that the Commission shall act in accordance with order dated 12th March, 2009 passed by the same Hon'ble Judge in Writ Petition No.6117(W) of 2004.

10. We have heard learned counsel for the parties at considerable length. Even though we have retraced in detail the

chequered history of the litigation between the parties the question that falls for determination actually lies in a narrow compass. The question precisely is whether any panel of candidates has been prepared by the Commission in accordance with the provisions of the West Bengal School Service Commission (Procedure for selection of persons for appointment to the post of teachers including Head Masters/ Head Mistresses Superintendent of Senior Madarasa in recognized non-Government Aided Schools and procedure for conduct of business of the Commission), Regulations, 1988; and if so, whether the same continued to be valid and subsisting to entitle the selected candidates or any one of them to a mandamus directing the competent authority to make an appointment on the basis thereof. We must regretfully say that although repeated rounds of litigation have engaged the attention of the High Court, the High Court has not adverted to the question whether a panel was indeed prepared and published. It is only in its order dated 27th July, 2009 passed in W.P. No.5866 of 2009 that Dipankar Datta, J. has noticed the non-preparation and publication of such a panel and clearly held that since the panel has not been published, no recommendation or appointment could be claimed by any one of the candidates competing for the same. We need hardly emphasise that preparation and publication of a panel was the least which any candidate seeking appointment on the basis thereof was required to establish. We repeatedly asked Mr. Dhruv Mehta, learned senior counsel appearing for Mr. Arvind Kumar Rai, the contesting respondent whether any such panel was ever prepared and published as it ought to be, having regard to the very nature of the procedure prescribed under the Regulations mentioned above. To the credit of Mr. Mehta, we must say that he fairly conceded that no such panel was ever published. Not only that, Mr. Mehta did not dispute the proposition, and in our opinion rightly so, that publication of such a panel was absolutely essential not only because the entire process was regulated by statutory regulations but also because the publication was essential in the interest of

transparency and probity in matters concerning appointments to offices under the State and in matters affecting rights of the citizens in discharge of governmental functions.

11. We may at this stage refer to a decision of this Court in *State of Andhra Pradesh & Ors. v. D. Dastagiri & Ors.,* (2003) 5 SCC 373. In that case although the State Government had notified the vacancies and the process of recruitment had been initiated, the results of the interviews thus conducted were not declared and no select list was published. The recruitment process was subsequently cancelled. The respondent candidates filed writ petitions before the High Court seeking a mandamus directing the appellants to appoint them, which were allowed. However, this Court allowed the appeals against the High Court's order, observing:

"**4.** *In the counter-affidavit filed on behalf of the respondents … it is stated that the process of selection was cancelled at the last stage i.e. before publishing the list of selected candidates on the sole ground that the State Government wasted to introduce prohibition and obviously the Government felt that there was no need of Excise Constables during imposition of prohibition in the State. There is serious dispute as to the completion of the selection process. According to the appellants, the selection process was not complete. No record has been placed before us to show that the selection process was complete, but, it is not disputed that the select list was not published. In para 16 of the counter affidavit, referred above, the respondents themselves had admitted that the selection process was cancelled at the last stage. In the absence of publication of select list, we are inclined to think that the selection process was not complete. Be that as it may, even if the selection process was complete and assuming that only select list remained to be published, that does not advance the case of the respondents for the simple reason that even the*

candidates who are selected and whose names find place in the select list, do not get vested right to claim appointment based on the select list…"

(emphasis supplied)

12. We too have at hand a situation where no panel, as is envisaged under the provisions of the regulations, ever came into existence. That being so, the question of determining the life of the panel by excluding the period during which there was an interim stay in accordance with the order of Dipankar Datta, J. in its order dated 12th March, 2009 did not arise. It follows that the claim made by respondent-Arvind Kumar Rai for appointment on the basis of such a non-existent panel was untenable as the panel itself was still born. We need not burden this judgment by referring to the decisions of this Court in which this Court has repeatedly held that the preparation of a select list or a panel does not by itself entitle the candidate whose name figures in such a list/panel to seek an appointment or claim a mandamus. No vested right is created by the inclusion of the name of a candidate in any such panel which can for good and valid reasons be scrapped by the competent authority alongwith the entire process that culminated in the preparation of such a panel.

13. In *Shankarsan Dash v. Union of India,* (1991) 3 SCC 47 a Constitution Bench of this Court was examining whether candidates declared successful in a selection process acquire an indefeasible right to get appointed against available vacancies. The contention that they do acquire such a right was repelled in the following words:

"7. *It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates*

to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the licence of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the recruitment test, and no discrimination can be permitted."

(emphasis supplied)

14. Above decision has been followed in a long line of subsequent decisions of this Court including those rendered in *Punjab State Electricity Board v. Malkiat Singh,* (2005) 9 SCC 22; *State of Bihar & Ors. v. Secretariat Assistant Successful Examinees Union & Ors.,* (1994) 1 SCC 126; *Director, SCTI for Medicine Science and Technology v. M. Pushkaran,* (2007) 12 SCC 465; *Union of India v. Kali Dass Batish,* (2006) 1 SCC 779 [which is a three Judge Bench decision].

15. In *Rakhi Ray & Ors. v. The High Court of Delhi,* (2010) 2 SCC 637, a three-Judge Bench of this Court held:

"… A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate…."

16. Following the decision in *Shankarsan Dass* case (supra), this Court in *State of Orissa & Anr. v. Rajkishore Nanda & Ors.,* 2010 (6) SCALE 126 held:

"A person whose name appears in the select list does not acquire any indefeasible right of appointment. Empanelment at the best is a condition of eligibility for purpose of appointment and by itself does not amount to selection or create a vested right to be appointed. The vacancies have to be filled up as per the statutory rules and in conformity with the constitutional mandate."

17. Even assuming the preparation of a panel gave rise to any such right, since no panel had actually ever been prepared and published nor has the same been produced before the High Court or before us, we have no hesitation in holding that the direction issued to the Commission to act on the basis of the panel was wholly unjustified and unsustainable. The view taken by Dipankar Datta, J. in his order dated 27th July, 2009 that considerable time had expired since the selection process was initiated and that other candidates who may have in the meantime become qualified for consideration may be deprived of the right to compete was a reason enough for the High Court to decline a mandamus. In the facts and circumstances of the case, the Division Bench of the High Court, in our view, committed an error in upsetting that direction. We also see no real conflict between the orders passed by Dipankar Datta, J. on 12th March, 2009 and that passed on 27th July 2009, inasmuch as the question of the adding to the life of the panel the period during which there was a stay would arise only if there was a panel drawn in terms of the Regulations.

18. We were informed by the parties that the respondent No.1 has been appointed as Headmaster during the pendency of the litigation at the pain of contempt proceedings against the parties. That appointment has come sometime in September 2010. Since, the order passed which appears to have culminated in the making of the appointment is being set aside, the question is whether we should direct immediate removal of the respondent or continuance of the arrangement till such time fresh selection process is initiated and completed in

accordance with law. In our opinion, not only because the respondent has been holding the post for two years, but also because his removal would not immediately result in any benefit either to the institution or to the appellant before us, we, therefore, permit him to continue holding the post but only till such time a fresh selection is made against the vacancy.

19. In the result, we allow this appeal, set aside the order passed by the Division Bench and affirm that passed by Dipankar Datta, J. dated 27th July, 2009 with the above direction. We make it clear that the respondent No.1 shall be entitled to all the monetary benefits for the period during which he actually works as the Headmaster of the school. The fact that he so works would not, however, create any equity in his favour nor constitute an additional weightage in the new selection process.

20. Parties are directed to bear their own costs.

B.B.B. Appeal allowed.

R. KUPPUSAMY

v.

STATE REP. BY INSPECTOR OF POLICE, AMBEILIGAI

(Criminal Appeal No.1706 of 2008)

FEBRUARY 19, 2013

[T.S. THAKUR AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Penal Code, 1860 – s.302 – Murder – Life imprisonment – Homicidal death of 10 month old girl child due to drowning – Prosecution case that the child had been thrown into the well by her father (appellant) as there were problems between the appellant and his parents regarding the child being unlucky for the family – Conviction of appellant by Courts below on basis of extra-judicial confessional statement made by him before PW1 – Justification of – Held: Justified – Extra judicial confessional statement attributed to appellant found to be voluntary, truthful and unaffected by any inducement that could render it unreliable or unworthy of credence – It was made by appellant to PW1 almost immediately after commission of the crime – Corroboration by medical evidence and deposition of other witnesses – Deposition of PW1 inspires confidence in the absence of any material deficiency in the same either in terms of what has been recorded by him or the procedure that he followed while doing so – More importantly, no suggestion that PW1 had any animosity or other reason which would impel him to go so far as to involve the appellant in a case of murder – Courts below correctly appreciated the deposition of PW1 and found him to be reliable.

Evidence – Extra judicial confession – Appreciation of – Held: An extra judicial confession is capable of sustaining a conviction provided the same is not made under any inducement, is voluntary and truthful – Whether or not these

attributes of an extra judicial confession are satisfied in a given case will, however, depend upon the facts and circumstances of each case –It is eventually the satisfaction of the Court as to the reliability of the confession, keeping in view the circumstances in which the same is made, the person to whom it is alleged to have been made and the corroboration, if any, available as to the truth of such a confession that will determine whether the extra judicial confession ought to be made a basis for holding the accused guilty.

Evidence – Medical evidence – Appreciation of – On facts, the medical evidence adduced suggests that death of the deceased child was caused by drowning – Congestion of his lungs implies presence of excess fluids in the lungs, a sign suggesting that the child would have inhaled excess fluid while in water – Presence of watery fluid even in stomach of the deceased an important sign of death by drowning – It is almost impossible for water to get into the stomach, if a body is submerged after death – Absence of any other marks on the body of the child also supports the prosecution case that the child had indeed died of drowning.

The prosecution case was that the appellant had murdered his ten month old daughter by throwing her in a well (resulting in the child's death by drowning), as there were problems between the appellant and his parents regarding the child being unlucky for the family. The appellant had allegedly made an extra-judicial confession before PW1, the Village Administrative Officer (VAO). Placing reliance upon the said extra-judicial confession, the Courts below convicted the appellant under Section 302 IPC and sentenced him to life imprisonment.

In the instant appeal, the conviction of the appellant was challenged on grounds 1) that making of the confessional statement was, in the facts and

circumstances of the case, not only improbable but wholly unsupported and uncorroborated by any independent evidence; and 2) that extra judicial confession by its very nature is a weak type of evidence which ought to be corroborated by independent evidence in order to support a conviction of the maker of the confession, and no such corroboration was forthcoming in the instant case.

Dismissing the appeal, the Court

HELD: 1. An extra judicial confession is capable of sustaining a conviction provided the same is not made under any inducement, is voluntary and truthful. Whether or not these attributes of an extra judicial confession are satisfied in a given case will, however, depend upon the facts and circumstances of each case. It is eventually the satisfaction of the Court as to the reliability of the confession, keeping in view the circumstances in which the same is made, the person to whom it is alleged to have been made and the corroboration, if any, available as to the truth of such a confession that will determine whether the extra judicial confession ought to be made a basis for holding the accused guilty. [Para 7] [145-C-E]

Gura Singh v. State of Rajasthan **(2001) 2 SCC 205: 2000 (5) Suppl. SCR 408;** *Sahadevan and Anr. v. State of Tamil Nadu* **(2012) 6 SCC 403;** *Balbir Singh and Anr. v. State of Punjab* **1996 (SCC) Crl. 1158 and** *Jaspal Singh @ Pali v. State of Punjab* **(1997) 1 SCC 510 – relied on.**

2.1. In the case at hand the trial Court as also the first Appellate Court have both found the extra judicial confession attributed to the appellant to be voluntary, truthful and unaffected by any inducement that could render it unreliable or unworthy of credence. The conclusion drawn by the Courts below is not vitiated by any error of fact or law. The confessional statement in the

case at hand has been made by the appellant almost immediately after the commission of the crime. The appellant is alleged to have gone over to PW-1, Village Administrative Officer, and narrated to the witness the genesis of the incident leading to his throwing his baby daughter into the well at a short distance from his house. PW-1 recorded the confessional statement of the appellant, which was marked Exh. P-1 at the trial, and got the same signed from the appellant and took the appellant with him to the jurisdictional police station. [Para 8] [145-F-H; 146-A-C]

2.2. The deposition of PW-1 inspires confidence in the absence of any material deficiency in the same either in terms of what has been recorded by him or the procedure that he followed while doing so. More importantly, there is no suggestion that this witness had any animosity or other reason which would impel him to go so far as to involve the appellant in a case of murder. Courts below have correctly appreciated the deposition of this witness and found him to be reliable. [Para 10] [146-H; 147-A-B]

3. The statement is corroborated by medical evidence and the deposition of other witnesses. The medical evidence adduced in the case suggests that the death of the deceased child was homicidal and that the same was caused by drowning. The deposition of the doctor PW-10 is clear on this aspect. The doctor has reported the lungs of the deceased to be congested. Congestion of lungs implies presence of excess fluids in the lungs, a sign suggesting that the child would have inhaled excess fluid while in water. In addition, there is a finding by the doctor that there was 200 MLs. of watery fluid even in the stomach of the deceased. According to Modi's Jurisprudence and Toxicology, the presence in the stomach of a certain quantity of water is regarded as an important sign of death by drowning. It is almost

impossible for water to get into the stomach, if a body is submerged after death. All this suggests that the death was caused by taking in water which one usually does while struggling in a drowning situation. Absence of any other marks on the body of the child also supports the prosecution case that the deceased had indeed died of drowning. The confessional statement thus gets sufficient corroboration as to the cause of the death of the child. That apart the depositions of other witnesses examined before the trial Court also lend corroboration to the prosecution version. [Paras 11, 12 and 13] [147-C-D, E-H; 148-A-B]

Modi's *Jurisprudence and Toxicology* **– referred to.**

4. It is thus manifest that there is considerable corroborative evidence on record to support the extra judicial confessional statement of the appellant in which the appellant has referred to some kind of suspicion and disagreement between him and his parents regarding the child because of which he threw the child into the well. It is not one of those cases where the confessional statement is made to a person whose credibility is suspected nor is it a case where there is no corroboration forthcoming from other evidence on record. On both counts the view taken by the Courts below appears to be perfectly justified. The same, therefore, warrants no interference under Article 136 of the Constitution. [Para 18] [150-A-C]

Case Law Reference:

2000 (5) Suppl. SCR 408	**relied on**	**Para 5**
(2012) 6 SCC 403	**relied on**	**Para 5, 6**
1996 (SCC) Crl. 1158	**relied on**	**Para 6**
(1997) 1 SCC 510	**relied on**	**Para 6**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1706 of 2008.

From the Judgment & Order dated 26.02.2007 of the High Court of Madras, Madurai Bench in Criminal Appeal (MD) No. 224 of 2005.

Mahalakshmi Pavani, G. Balaji, Mukesh Kumar Singh (for Mahalakshmi Balaji & Co.) for the Appellant.

M. Yogesh Kanna, A. Santha Kumaran for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. The short question that falls for determination in this appeal by special leave is whether the Courts below were justified in convicting the appellant for the offence of murder punishable under Section 302 IPC and in awarding imprisonment for life to him on the basis of an extra-judicial confession that he is alleged to have made before the Village Administrative Officer, Veriappur, (VAO for short). The extra judicial confession was, according to the prosecution, reduced to writing by the VAO and found sufficient by the trial Court as also by the High Court to hold the appellant guilty of having committed the offence with which he was charged. That finding and the consequent orders recorded by the Courts below have been assailed by learned counsel for the appellant who argued that the making of the confessional statement was, in the facts and circumstances of the case, not only improbable but wholly unsupported and uncorroborated by any independent evidence. Relying upon several decisions of this Court, it was argued that the extra judicial confession was by its very nature a weak type of evidence which ought to be corroborated by independent evidence in order to support a conviction of the maker of the confession. No such corroboration was, according to Ms. Mahalakshmi Pavani forthcoming in the instant case, which rendered the conviction and order of sentence passed by the Courts below unsustainable in law.

2. Before we refer to the evidence adduced by the prosecution at the trial in support of the charge framed against the appellant we may briefly recapitulate the factual matrix in which the offence is alleged to have been committed.

According to the prosecution the appellant is a resident of Veriappur village of Annamalaiputhur village within the police station limits of Oddanchatram. He got married to one Yuvarani nearly two years before the incident. Within about 10 months of the marriage, the couple was blessed with a female child whom they named Savitha. The prosecution case is that the accused-appellant had developed some suspicion about the birth of the child though it is not very clear whether the suspicion was about the paternity of the child or the child being unlucky for the family. Be that as it may, around the time the incident occurred the appellant is said to have visited his village to perform the mundan ceremony of the child who was just about 10 months old. His parents were not, however, much excited about the mundan ceremony to be followed by the feast. They are alleged to have told the appellant that ever since the child was born, the family was facing problems. The prosecution version further is that since the appellant had already developed a suspicion about the child, he at about 11.00 a.m. on 18th March, 2005 picked up the child and threw her in a well resulting in the child's death by drowning. After throwing the child into the well the appellant is alleged to have gone to PW-5 Sakthivel, Vice President of Veripur Panchayat Board, and told him that he had thrown his daughter into the well. PW-5 Sakthivel is said to have advised the appellant to go to PW-1 S.K. Natarajan, Village Administrative Officer of Veriappur. The appellant accordingly went to PW-1 S.K. Natarajan and narrated the incident to him. PW-1 S.K. Natarajan is alleged to have recorded the statement made by the appellant and taken the appellant along with him to the police station where the former lodged the first information report regarding the incident and produced the extra judicial confession made by the appellant before the police.

3. A case was in the above backdrop registered in the police station at Amblikkai under Section 302 IPC and investigation started in the course whereof the dead body of the child was subjected to post-mortem which revealed that the

child had died because of drowning. A charge sheet was eventually laid by the police against the appellant for committing the murder of his daughter to which charge the appellant pleaded not guilty resulting in his trial before the Court of Sessions at Dindigul.

4. At the trial the prosecution examined as many as 11 witnesses in support of its case. The appellant did not choose to lead any evidence in his defence but pleaded innocence and false implication in the statement made by him under Section 313 Cr.P.C. The trial Court eventually came to the conclusion that the charge framed against the appellant stood proved on the basis of the extra judicial confession made by him before PW-1 S.K. Natarajan, Village Administrative Officer of Veriappur. The Court accordingly pronounced him guilty and sentenced him to undergo life imprisonment. Aggrieved by the order passed by the trial Court, the appellant preferred Criminal Appeal No.224 of 2005 before the High Court of Madras. The High Court concurred with the view taken by the trial Court and dismissed the appeal. In the process, the High Court affirmed the finding recorded by the trial Court that the appellant had indeed made an extra judicial confession which was, according to the High Court, reliable and provided a safe basis for the Court to hold him guilty. The present appeal assails the correctness of the aforementioned judgments and orders as already noticed above.

5. It is common ground that there is no eye witness to the occurrence leading to the death of the unfortunate female child who was just about ten months old. The prosecution case rests entirely on the extra judicial confession attributed to the appellant which has been found by the trial Court as also the High Court to be voluntary and truthful. That a truthful extra judicial confession made voluntarily and without any inducement can be made a basis for recording a conviction against the person making the confessions was not disputed before us at the hearing. What was argued by Ms. Mahalakshmi Pavani,

counsel appearing for the appellant, was that an extra judicial confession being in its very nature an evidence of a weak type, the Courts would adopt a cautious approach while dealing with such evidence and record a conviction only if the extra judicial confession is, apart from being found truthful and voluntary, also corroborated by other evidence. There was, according to the learned counsel, no such corroboration forthcoming in the present case which according to her was sufficient by itself to justify rejection of the confessional statement as a piece of evidence against the appellant. Reliance, in support of the contention urged by the learned counsel, was placed upon the decisions of this Court in *Gura Singh v. State of Rajasthan* (2001) 2 SCC 205 and *Sahadevan and Anr. v. State of Tamil Nadu* (2012) 6 SCC 403. In *Gura Singh's* case (supra) a two-Judge Bench of this Court was also dealing with an extra judicial confession and the question whether the same could be made a basis for recording the conviction against the accused. This Court held that despite the inherent weakness of an extra judicial confession as a piece of evidence, the same cannot be ignored if it is otherwise shown to be voluntary and truthful. This Court also held that extra judicial confession cannot always be termed as tainted evidence and that corroboration of such evidence is required only as a measure of abundant caution. If the Court found the witness to whom confession was made to be trustworthy and that the confession was true and voluntary, a conviction can be founded on such evidence alone. More importantly, the Court declared that Courts cannot start with the presumption that extra judicial confession is always suspect or a weak type of evidence but it would depend on the nature of the circumstances, the time when the confession is made and the credibility of the witnesses who speak about such a confession and whether the confession is voluntary and truthful.

6. In *Sahadevan's* case (supra) a two-Judge Bench of this Court comprehensively reviewed the case law on the subject and concluded that an extra judicial confession is an admissible

piece of evidence capable of supporting the conviction of an accused provided the same is made voluntarily and is otherwise found to be truthful. This Court also reiterated the principle that if an extra judicial confession is supported by a chain of cogent circumstances and is corroborated by other evidence, it acquires credibility. To the same effect are the decisions of this Court in *Balbir Singh and Anr. v. State of Punjab* 1996 (SCC) Crl. 1158 and *Jaspal Singh @ Pali v. State of Punjab* (1997) 1 SCC 510.

7. It is unnecessary, in the light of above pronouncements, to embark upon any further review of the decisions of this Court on the subject. The legal position is fairly well-settled that an extra judicial confession is capable of sustaining a conviction provided the same is not made under any inducement, is voluntary and truthful. Whether or not these attributes of an extra judicial confession are satisfied in a given case will, however, depend upon the facts and circumstances of each case. It is eventually the satisfaction of the Court as to the reliability of the confession, keeping in view the circumstances in which the same is made, the person to whom it is alleged to have been made and the corroboration, if any, available as to the truth of such a confession that will determine whether the extra judicial confession ought to be made a basis for holding the accused guilty.

8. In the case at hand the trial Court as also the first Appellate Court have both found the extra judicial confession attributed to the appellant to be voluntary, truthful and unaffected by any inducement that could render it unreliable or unworthy of credence. Having heard learned counsel for the parties at considerable length and having gone through the evidence adduced at the trial, we are of the view that the conclusion drawn by the Courts below is not vitiated by any error of fact or law. The confessional statement in the case at hand has been made by the appellant almost immediately after the commission of the crime. The appellant is alleged to have gone over to PW-

1 S.K. Natarajan, Village Administrative Officer, who was the concerned Village Administrative Officer of Veriappur and narrated to the witness the genesis of the incident leading to his throwing baby Savitha into the well at a short distance from his house. PW-1 S.K. Natarajan recorded the confessional statement of the appellant, which was marked Exh. P-1 at the trial, and got the same signed from the appellant and took the appellant with him to the jurisdictional police station. At the police station PW-1 S.K. Natarajan got the first information report regarding the incident registered as Crime No.61/05 setting legal process into motion in the course whereof Investigating Officer was taken to the well by the appellant in which he had thrown the child. At the well, the Inspector of police prepared the Mahazar which was signed by the witness including PW-1 S.K. Natarajan himself and took charge of the dead body of the child which had, by that time, been brought out of the well. A towel lying about 20 ft. from the well was also seized.

9. PW-1 S.K. Natarajan was cross-examined at length but there is nothing in the cross-examination that could possibly discredit his deposition. No enmity has ever existed between the witness and the appellant to suggest a false implication of the appellant. The only significant suggestion made in the course of the cross-examination, is that the confessional statement was not recorded by the witness in his office as stated by him but at the police station and in the presence of the sub-inspector concerned. This suggestion has been denied by the witness including the suggestion that the statement ought to have been recorded in the prescribed form under the rules and the reason why it was not so recorded was because the statement had been put in black and white at the police station using an ordinary white paper. The witness stated that the statement was recorded on a plain paper because the prescribed forms were not readily available in his office.

10. The deposition of PW-1 S.K. Natarajan inspires

confidence in the absence of any material deficiency in the same either in terms of what has been recorded by him or the procedure that he followed while doing so. More importantly, there is no suggestion that this witness had any animosity or other reason which would impel him to go so far as to involve the appellant in a case of murder. Courts below have, in our opinion, correctly appreciated the deposition of this witness and found him to be reliable. The concurrent finding of fact returned by the two Courts, has not, in our opinion caused any miscarriage of justice to warrant our taking a different view.

11. Coming to the question whether the statement was corroborated by other evidence, we find that such corroboration is indeed forthcoming in the form of medical evidence and the deposition of other witnesses. The medical evidence adduced in the case suggests that the death of the deceased child was homicidal and that the same was caused by drowning. The deposition of PW-10 Dr. A. Muthusamy, in our opinion, is clear on this aspect, although it was vehemently contended by Ms. Mahalakshmi Pavani, that the doctor had not mentioned the presence of water in the lungs of the child which, according to her, showed that the story of the child dying by drowning was unsupported by medical evidence. The fact, however, remains that the doctor has reported the lungs of the deceased to be congested. Congestion of lungs implies presence of excess fluids in the lungs, a sign suggesting that the child would have inhaled excess fluid while in water. In addition, there is a finding by the doctor that there was 200 MLs. of watery fluid even in the stomach of the deceased. According to *Modi's Jurisprudence and Toxicology,* the presence in the stomach of a certain quantity of water is regarded as an important sign of death by drowning. It is almost impossible for water to get into the stomach, if a body is submerged after death.

12. All this suggests that the death was caused by taking in water which one usually does while struggling in a drowning situation. Absence of any other marks on the body of the child

also supports the prosecution case that the deceased had indeed died of drowning. The confessional statement thus gets sufficient corroboration as to the cause of the death of the child.

13. That apart the depositions of other witnesses examined before the trial Court also lend corroboration to the prosecution version. For instance PW-2 Kanakaran deposed that he was plucking chilly in his field near the field of the appellant on the fateful day. At around 12.00 noon the witness heard someone crying at Chelimedu. The witness and other persons in the vicinity rushed and looked into the well only to find the dead body of the child floating. The witness descended into the well and picked up the child and brought her out. The child was dead. The wife of the appellant was crying and saying that the child had been thrown into the well and that the appellant had killed her.

14. In cross-examination the witness expressed ignorance about any 'mundan' ceremony or arrangements for the same having been made by the appellant and that he had no invitation for any such ceremony. The wife of the appellant was, according to the witness, saying that the appellant 'suspected the birth' of the child meaning thereby that the appellant was either suspicious about the paternity of the child or her being unlucky for the family.

15. To the same effect is the statement of PW-3 Palanisamy according to whom the wife of the appellant was crying aloud. Persons from the nearby fields came running to the well and so did this witness. The appellant's wife was heard saying that the child had been killed. Kanakaran PW-2 climbed down the well and brought the body of the child out and kept the same on the western side of the well. Inspector of police reached in due course and interrogated him.

16. PW-4 Manoharan was declared hostile but was cross-examined and confronted with the statement made before the police regarding the appellant having been seen by him

walking away from the place of occurrence under tension. PW-5 Sakthivel, President of Veripur Panchayat Board, stated that the appellant had come to him and told him that the child had fallen into the well and asked him as to what he should do in the matter. He had told him to go to Maniakarar. This witness was also declared hostile and confronted with the statement made before the police under Section 161 of the Cr.P.C.

17. Statement of PW-6 Palaniammal who happened to be the grandmother of the deceased child is also significant. This witness stated that the child was born 10 months after the marriage of the appellant. The wife of the appellant had stayed on with her parents' for seven months after the child was born. She was finally brought to her matrimonial house by the witness and the appellant. Three months later, on 18th March, 2005 the appellant returned from Pondicherry where he worked and told her that he had come for performing the 'mundan' ceremony of his daughter and asked the witness why she was going to the field when such a ceremony was being held. The witness stated that if the ceremony had to be organised he should have informed them ten days earlier so that they could have arranged to perform the ceremony in a grand manner. The witness told him that since she had engaged two persons for picking groundnuts, he should take his father and perform the mundan. In due course, the father of the appellant also reached the field and while picking up groundnuts along with the labourers, they received the information that the child was missing. They rushed back only to find the child floating in the well. The presence of the appellant in the village on the date of the occurrence is established by the deposition of this witness and so is the fact that the parents of the appellant were not much concerned or happy to join the proposed mundan ceremony. The prosecution case, it is important to note, is that ever since the child's birth, there were problems between the appellant and his parents regarding the child being unlucky for the family which resulted in the unfortunate incident of the appellant throwing the child into the well.

18. It is manifest from the above that there is considerable corroborative evidence on record to support the extra judicial confessional statement of the appellant in which the appellant has referred to some kind of suspicion and disagreement between him and his parents regarding the child because of which he threw the child into the well. Suffice it to say that it is not one of those cases where the confessional statement is made to a person whose credibility is suspected nor is it a case where there is no corroboration forthcoming from other evidence on record. On both counts the view taken by the Courts below appears to us to be perfectly justified. The same, therefore, warrants no interference from us under Article 136 of the Constitution.

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

B.B.B. Appeal dismissed.

STATE OF ASSAM

v.

RIPA SARMA

(Special Leave Petition (Civil) No. 2671 of 2011)

FEBRUARY 20, 2013

[SURINDER SINGH NIJJAR AND M.Y. EQBAL, JJ.]

Constitution of India, 1950 – Article 136 – Special Leave Pettion – Against the judgment of High Court dismissing the review petition – Held: In absence of challenge to the main judgment of High Court, the SLP filed challenging only the subsequent order rejecting the review petition, is not maintainable.

Shanker Motiram Nale vs. Shiolalsing Gannusing Rajput **(1994) 2 SCC 753;** *Suseel Finance and Leasing Company vs. M. Lata and Ors.* **(2004) 13 SCC 675;** *M.N. Haider and Ors. vs. Kendriya Vidyalaya Sangathan and Ors.* **(2004) 13 SCC 677 – relied on.**

Eastern Coalfields Limited vs. Dugal Kumar **(2008) 14 SCC 295: (2008) 11 SCR 369 – held per incuriam.**

Case Law Reference:

(1994) 2 SCC 753	**relied on**	**Para 5**
(2004) 13 SCC 675	**relied on**	**Para 5**
(2004) 13 SCC 677	**relied on**	**Para 5**
(2008) 11 SCR 369	**held per incurium**	**Para 7**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (C) No. 2671 of 2011.

From the Judgment & Order dated 26.02.2010 of the

Gauhati High Court in Review Petition No. 8 of 2010.

Jayant Bhushan, Avijit Roy (for Corporate Law Group), Parthiv K. Goswami, S. Hari Haran, Charu Mathur, J.M. Sharma, Raka B. Phookan, Neha Tandon Phookan, Shailesh Madiyal for the Appearing parties.

The following Order of the Court was delivered

O R D E R

1. We have heard Mr. Avijit Roy, learned counsel for the petitioner-State of Assam as well as Mr. Jayant Bhushan, learned senior counsel appearing for the respondent at length.

2. Mr. Jayant Bhushan has raised a preliminary objection to the maintainability of the special leave petition.

3. The petitioner herein has challenged the order passed by the Division Bench of the Gauhati High Court dated 26th February, 2010 dismissing the review petition filed by the petitioner seeking review of the judgment and order dated 20th November, 2007 rendered in Writ Appeal No. 279 of 2007. The Division Bench has dismissed the review petition on the ground that in substance, the applicant seeks rehearing of Writ Appeal No. 279 of 2007 on the basis of certain facts, which were not brought to the notice of the Court at the time of hearing of the appeal.

4. It is not disputed before us that judgment and order dated 20th November, 2007 passed in Writ Appeal No. 279 of 2007 was not challenged by way of a special leave petition before this Court. In fact, the aforesaid judgment and order is not even challenged in the present special leave petition. Therefore, the special leave petition is restricted in its challenge, to the order passed by the Division Bench dismissing the review petition on 26th February, 2010.

5. In support of the submission that the present special

leave petition is not maintainable, Mr. Bhushan has relied on three judgments of this Court. In *Shanker Motiram Nale versus Shiolalsing Gannusing Rajput* reported in (1994) 2 SCC 753, it has been held that the special leave petition which has been filed against the order rejecting the review petition would be barred under Order 47 Rule 7 of the Civil Procedure Code, 1908. The aforesaid judgment has been followed by this Court in *Suseel Finance and Leasing Company versus M. Lata and Others* reported in (2004) 13 SCC 675. This Court held that not only was it bound by the aforesaid judgment in Shanker Motiram Nale case, but was also in agreement with it. The law laid down in both the aforesaid judgments was further reiterated in the case of *M.N. Haider and Others versus Kendriya Vidyalaya Sangathan and Others* reported in (2004) 13 SCC 677.

6. In view of the above, the law seems to be well settled that in the absence of a challenge to the main judgment, the special leave petition filed challenging only the subsequent order rejecting the review petition, would not be maintainable.

7. Faced with this situation, Mr. Avijit Roy, learned counsel appearing for the State of Assam seeks to rely on a subsequent judgment of this Court in *Eastern Coalfields Limited versus Dugal Kumar* reported in (2008) 14 SCC 295. He has made a specific reference to paragraphs 22 and 23 of the judgment. In paragraph 23 of the judgment, it is observed as follows :-

> "It was submitted by the learned counsel for the appellant that when the review petition was dismissed, the order passed by the Division Bench in intra-court appeal got merged in the order of review petition. But even otherwise, when the order passed in the review petition is challenged, it would not be proper to dismiss this appeal particularly when leave was granted in SLP after hearing the parties. We, therefore, reject the objection raised by the writ petitioner."

8. A perusal of the aforesaid paragraph would clearly show that the judgments noticed by us in the earlier part of the order were not brought to the notice of the Court in Eastern Coalfields Limited case. This apart, the submission with regard to the merger of the main order with the order in review has been merely noticed, and not accepted. The preliminary objection seems to have been rejected on the ground that since leave has been granted in the special leave petition, it would not be proper to dismiss the same without hearing the parties.

9. In the present case, the preliminary objection has been raised at the threshold. In addition, it is an inescapable fact that the judgment rendered in Eastern Coalfields Limited has been rendered in ignorance of the earlier judgments of the Benches of coequal strength, rendering the same *per incuriam.* Therefore, it cannot be elevated to the status of *precedent.* In view of the above, we accept the preliminary objection raised by Mr. Jayant Bhushan, learned senior counsel.

10. The special leave petition is, accordingly, dismissed.

11. Since the special leave petition has been dismissed, no orders are required to be passed on the application for impleadment as party respondent.

K.K.T. SLP Dismissed.

K.S. PANDURANGA
v.
STATE OF KARNATAKA
(Criminal Appeal No. 373 of 2013)

MARCH 01, 2013

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

Prevention of Corruption Act, 1988 – s.7, s.13(1)(d) r/w s.13(2) and s.20 – Conviction of accused-appellant u/s.7 and u/s.13(1)(d) r/w s.13(2) – Justification of – Held: On facts, justified – Demand and acceptance of illegal gratification is a condition precedent for constituting an offence under the Act – Statutory presumption u/s.20 can be dislodged by the accused by bringing on record some evidence, either direct or circumstantial, that money was accepted other than for the motive or the reward – In the case at hand, explanation offered by the appellant does not deserve any acceptance – Considering the nature of his work, it is evident that appellant was in a responsible position and capable of granting official favour to the complainant – Defence story of appellant borrowing money from DW1 and repaying loan to the complainant in presence of DW1 concocted and totally improbable – Prosecution established the factum of recovery from the appellant and also proved the demand and acceptance of illegal gratification by appellant as motive/ reward for showing official favour to the complainant.

Prevention of Corruption Act, 1988 – s.20 – Statutory presumption under – Can be dislodged by the accused by bringing on record some evidence – Duty of the Court in this regard – Held: When some explanation is offered, the court is obliged to consider the explanation u/s.20 – Consideration of the explanation has to be on the touchstone of preponderance of probability – It is not to be proven beyond all reasonable doubt.

Appeal – Appeal against conviction – Dismissed – Dismissal challenged – Plea of accused-appellant that the appellate Court (High Court) should not have decided the appeal on merits in absence of the appellant's counsel – Held: Not tenable – The court deciding the criminal appeal is not bound to adjourn the matter if both the appellant or his counsel/ lawyer are absent though the court may, as a matter of prudence or indulgence, do so – It can dispose of the appeal after perusing the record and judgment of the trial court – It cannot be said that the court cannot decide a criminal appeal in absence of the counsel for the accused-appellant.

Sentence / Sentencing – Appellant convicted and sentenced by courts below under provisions of the Prevention of Corruption Act for committing criminal act relating to demand and acceptance of bribe – Plea of appellant before Supreme Court for reduction of the period of sentence to the period already undergone in custody – Held: Not tenable – Relevant statutory provisions under the Prevention of Corruption Act provide for a minimum sentence – Where minimum sentence is provided, it is not appropriate to exercise jurisdiction under Article 142 of the Constitution to reduce the sentence on the ground of any mitigating factor – However, regard being had to the age and ailments of the accused-appellant, sentence of imprisonment u/s.13(1)(d) r/ w s.13(2) reduced from two years (as imposed by High Court) to the statutory minimum sentence of one year – Prevention of Corruption Act, 1988 – s.7 and s.13(1)(d) r/w s.13(d) – Constitution of India, 1950 – Article 142.

The prosecution case was that the accused-appellant had demanded and accepted illegal gratification of Rs.5,000/- as motive / reward for showing official favour to PW1-transport operator, i.e., allotting transport loads and that thus, by means of corrupt and illegal means, abused his position and obtained a pecuniary advantage.

The trial court convicted the appellant under Sections 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988. In appeal, the High Court confirmed the conviction.

In the instant appeal, the conviction of the appellant was challenged on merits as also on the ground that the High Court could not have heard the appeal in absence of the counsel for the accused-appellant and proceeded to deliver the judgment.

Disposing of the appeal with modification in the sentence, the Court

HELD: 1.1. In *Bani Singh* case, a three Judge Bench of the Supreme Court was called upon to decide whether the High Court was justified in dismissing the appeal filed by the accused-appellants therein against the order of conviction and sentence issued by the trial court for non-prosecution. From the aforesaid decision, the following principles can be culled out: (i) that the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits; (ii) that the court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent; (iii) that the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so; (iv) that it can dispose of the appeal after perusing the record and judgment of the trial court; (v) that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused-appellant if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so; and (vi) that if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation. [Paras 21, 22] [173-D; 175-A-D]

1.2. The two Judge Bench in *Mohd. Sukur Ali* case had not noticed the binding precedent in *Bani Singh* case. The dictum in *Mohd. Sukur Ali* case to the effect that the court cannot decide a criminal appeal in the absence of counsel for the accused and that too if the counsel does not appear deliberately or shows negligence in appearing, being contrary to the ratio laid down by the larger Bench in *Bani Singh*, is per incuriam. The contention of the appellant that the High Court should not have decided the appeal on its merits without the presence of the counsel does not deserve acceptance. That apart, it is noticeable that after the judgment was dictated in open court, the counsel appeared and he was allowed to put forth his submissions and the same have been dealt with. [Paras 23, 36] [175-G; 182-B-C, D-E]

Bani Singh and Others v. State of U.P. **AIR 1996 SC 2439: 1996 (3) Suppl. SCR 247 and** *Government of A.P. and Another v. B. Satyanarayana Rao (dead) by LRs and Ohers* **(2000) 4 SCC 262: 2000 (2) SCR 1009 – relied on.**

Mohd. Sukur Ali v. State of Assam **(2011) 4 SCC 729: 2011 (3) SCR 209 – held, per incuriam.**

A.S. Mohammed Rafi v. State of Tamil Nadu **(2011) 1 SCC 688: 2010 (14) SCR 792;** *Man Singh and Another v. State of Madhya Pradesh* **(2008) 9 SCC 542: 2008 (13) SCR 966;** *Bapu Limbaji Kamble v. State of Maharashtra* **(2005) 11 SCC 413;** *Shyam Deo Pandey and Others v. The State of Bihar* **AIR 1971 SC 1606: 1971 (0) Suppl. SCR 133;** *Challappa Ramaswami v. State of Maharashtra* **AIR 1971 SC 64: 1970 (2) SCC 426;** *Siddanna Apparao Patil v. State of Maharashtra* **AIR 1970 SC 977: 1970 (3) SCR 909;** *Govinda Kadtuji Kadam v. The State of Maharashtra* **AIR 1970 SC 1033: 1970 (3) SCR 525;** *Ram Naresh Yadav and Others v. State of Bihar* **AIR 1987 SC 1500;** *Union of India and Another v. Raghubir Singh (Dead) by LRs etc.* **(1989) 2 SCC 754: 1989 (3) SCR 316;** *N.S. Giri v. Corporation of City of*

Mangalore and Others **(1999) 4 SCC 697: 1999 (3) SCR 771;** *LIC of India v. D.J. Bahadur* **(1981) 1 SCC 315: 1981 (1) SCR 1083;** *New Maneck Chowk Spg. And Wvg Co. Ltd. v. Textile Labour Assn.* **AIR 1961 SC 867;** *Hindustan Times Ltd. v. Workmen* **AIR 1963 SC 1332;** *Pradip Chandra Parija and others v. Pramod Chandra Patnaik and Others* **(2002) 1 SCC 1: 2001 (5) Suppl. SCR 460;** *Chandra Prakash and Others v. State of U.P. and Another* **(2002) 4 SCC 234: 2002 (2) SCR 913;** *Rattiram and Others v. State of Madhya Pradesh* **(2012) 4 SCC 516: 2012 (3) SCR 496;** *Indian Oil Corporation Ltd. v. Municipal Corporation and Another* **AIR 1995 SC 1480: 1995 (3) SCR 246;** *A.R. Antulay v. R.S. Nayak* **(1988) 2 SCC 602: 1988 (1) Suppl. SCR 1;** *Punjab Land Development & Reclamation Corpn. Ltd. v. Labour Court* **(1990) 3 SCC 682: 1990 (3) SCR 111;** *State of U.P. v. Synthetics and Chemicals Ltd.* **(1991) 4 SCC 139 and** *Siddharam Satlingappa Mhetre v. State of Maharashtra* **(2011) 1 SCC 694: 2010 (15) SCR 201 – referred to.**

Powell v. Alabama **77 L Ed 158: 287 US 45 (1932);** ***Anastaplo, in re:*** **366 US 82 (1961) – referred to.**

2.1. On merits, on a perusal of the Mahazar (Exht.-4), it is evident that a sum of Rs.5,000/- was recovered from the accused-appellant. The plea put forth by the defence is that the accused had borrowed Rs.20,000/- from the complainant and to pay it back he had availed a loan from DW-1, an auto driver. DW-1 has deposed that the accused needed Rs.20,000/- to pay back a loan to PW-1 and he had given the said sum to him in his house and, thereafter, had accompanied the accused to his office and PW-1 was taken to a side by the accused where he gave the money to him. The said witness has stated that he had not known for what purpose the accused had given the money to PW-1. He had not even produced any document in support of his deposition that he had given Rs.20,000/- to the accused as a loan. The said witness,

to make his story credible, has also gone to the extent of stating that he had accompanied the accused to his office where the accused took PW-1 to one side of the room and paid the money. The testimony of this witness has to be discarded as it is obvious that he has put forth a concocted and totally improbable version. [Para 39] [183-C-G]

2.2. On a scrutiny of the testimony of PW-2, it is demonstrable that there had been demand of money from PW-2 and acceptance of the same. As far as the official favour is concerned, though the allotment of work was done by the Manager, it has come out in the evidence of PW-4 that the immediate assignment of the loads of contractors was the responsibility of the accused. He had the responsibility for assignment of loads and in that connection, he had demanded the bribe. It has also come out from Exht. P-11 that the responsibility of the accused was assignment or identification of lorries. In view of the said evidence, it is difficult to accept the plea that he had no responsibility and, hence, he could not have granted any favour. [Para 40] [184-B-D]

2.3. Keeping in view that the demand and acceptance of the amount as illegal gratification is a condition precedent for constituting an offence under the Act, it is to be noted that there is a statutory presumption under Section 20 of the Act which can be dislodged by the accused by bringing on record some evidence, either direct or circumstantial, that money was accepted other than for the motive or the reward as stipulated under Section 7 of the Act. When some explanation is offered, the court is obliged to consider the explanation under Section 20 of the Act and the consideration of the explanation has to be on the touchstone of preponderance of probability. It is not to be proven beyond all reasonable doubt. In the case at hand, the explanation offered by the accused does not deserve any

acceptance and, accordingly, the finding recorded on that score by the trial Judge and the stamp of approval given to the same by the High Court cannot be faulted. The prosecution has established the factum of recovery and has also proven the demand and acceptance of the amount as illegal gratification. Therefore, the conviction recorded against the accused is unimpeachable. [Paras 41, 42] [184-E-H; 185-A-B]

State of Maharahstra v. Dnyaneshwar Laxaman Rao Wankhede **(2009) 15 SCC 200: 2009 (11) SCR 513 – relied on.**

3. The submission of the appellant for reduction of the period of sentence to the period already undergone in custody cannot be accepted. The appellant has been convicted under Section 7 of the Act and sentenced to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs.15,000/- and on failure to pay fine, to suffer further rigorous imprisonment for three months. Section 7 of the Act provides a punishment with imprisonment which shall not be less than six months which may extend to five years and liability to pay fine. Section 13(2) stipulates that a public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to pay fine. On reading of both the provisions, it is clear that minimum sentence is provided for the aforesaid offence. There is a purpose behind providing the minimum sentence. Where the minimum sentence is provided, it is not appropriate to exercise jurisdiction under Article 142 of the Constitution of India to reduce the sentence on the ground of any mitigating factor as that would tantamount to supplanting the statutory mandate and further it would amount to ignoring the substantive statutory provision that prescribes minimum

sentence for a criminal act relating to demand and acceptance of bribe. However, regard being had to the facts and circumstances of the case, the age of the accused and the ailments he has been suffering, as highlighted before this Court, the sentence of imprisonment imposed under Section 13(1)(d) read with Section 13(2) of the Act is reduced to one year and the sentence under Section 7 of the Act is maintained. [Paras 43, 44] [185-D-H; 186-A-C]

Narendra Champaklal Trivedi v. State of Gujarat **(2012) 7 SCC 80: 2012 (6) SCR 165 – relied on.**

Case Law Reference:

2011 (3) SCR 209	held per incuriam	Para 10,17, 18
287 US 45 (1932	referred to	Para 10,15, 16
2010 (14) SCR 792	referred to	Para 10, 17
2008 (13) SCR 966	referred to	Para 10, 13
(2005) 11 SCC 413	referred to	Para 10, 11, 23
366 US 82 (1961)	referred to	Para 15
1971 (0) Suppl. SCR 133	referred to	Para 19, 21
1970 (2) SCC 426	referred to	Para 19
1970 (3) SCR 909	referred to	Para 19
1970 (3) SCR 525	referred to	Para 10
AIR 1987 SC 1500	referred to	Para 20
1996 (3) Suppl. SCR 247	relied on	Para 21
1989 (3) SCR 316	referred to	Para 24

1999 (3) SCR 771	**referred to**	**Para 25**
1981 (1) SCR 1083	**referred to**	**Para 25**
AIR 1961 SC 867	**referred to**	**Para 25**
AIR 1963 SC 1332	**referred to**	**Para 25**
2001 (5) Suppl. SCR 460	**referred to**	**Para 26**
2002 (2) SCR 913	**referred to**	**Para 27**
2012 (3) SCR 496	**referred to**	**Para 28**
1995 (3) SCR 246	**referred to**	**Para 28**
1988 (1) Suppl. SCR 1	**referred to**	**Para 30**
1990 (3) SCR 111	**referred to**	**Para 32**
(1991) 4 SCC 139	**referred to**	**Para 33**
2010 (15) SCR 201	**referred to**	**Para 34**
2000 (2) SCR 1009	**relied on**	**Para 35**
2009 (11) SCR 513	**relied on**	**Para 42**
2012 (6) SCR 165	**relied on**	**Para 43**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 373 of 2013.

From the Judgment & Order dated 03.06.2011 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 353 of 2004.

S.N. Bhat for the Apellant.

V.N. Raghupathy for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The appellant was convicted for the offences punishable under Sections 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 (for short "the Act") by the learned Special Judge, Bangalore, and sentenced to undergo one year rigorous imprisonment and to pay a fine of Rs. 10,000/-, in default, to suffer a further rigorous imprisonment for two months on the first score and four years rigorous imprisonment and to pay a fine of Rs.15,000/- and on failure to pay fine to suffer further rigorous imprisonment for three months on the second count, with the stipulation that both the sentences shall be concurrent.

3. In appeal, the High Court of Karnataka by the impugned judgment, confirmed the conviction, but reduced the sentence to two years' rigorous imprisonment from four years as far as the imposition of sentence for the offence under Section 13(1)(d) read with Section 13(2) of the Act is concerned and maintained the sentence in respect of the offence under Section 7 of the Act.

4. The accusations which led to the trial of the accused-appellant are that H.R. Prakash, PW-1, the owner of Prakash Transport, was having a contract for the transport of transformers belonging to Karnataka Vidyuth Karkhane (KAVIKA), Bangalore, and the said agreement was for the period 15.9.2000 to 14.9.2001. Under the said agreement, the transporter was required to transport transformers from Bangalore to various places all over Karnataka. Despite the agreement for transportation, three months prior to the lodgment of the complaint, the transport operator did not get adequate transport work. The appellant, who was working as Superintendent of KAVIKA, Bangalore, was incharge of the dispatch department and, therefore, PW-1 approached him. At that juncture, a demand of Rs.10,000/- was made as illegal gratification to give him more transport loads. The accused-appellant categorically told PW-1 that unless the amount was paid, no load could be allotted to his company. Eventually, a bargain was struck for payment of Rs.5,000/- to get the load.

As PW-1 was not interested in giving the bribe amount to the accused, he approached the Lokayukta and lodged a complaint as per Exht. P-1 which was registered as Criminal Case No. 9 of 2001. The investigating agency of Lokayukta, after completing the formalities, got a trap conducted. During the trap, a sum of Rs.5,000/- was recovered from the custody of the accused. After completion of all the formalities, sanction order was obtained from the competent authority and charge sheet was placed before the competent court for the offences punishable under Sections 7 and 13(1)(d) read with Section 13(2) of the Act.

5. The accused persons pleaded innocence and took the plea of false implication.

6. The prosecution, in order to substantiate the allegations against the accused, examined PWs 1 to 6 and marked the documents, Exhts. P-1 to P-12, and brought on record MOs-1 to 12. The defence, in order to establish its stand, examined a singular witness, DW-1.

7. The learned trial Judge posed three questions, namely, (i) whether the sanction order obtained to prosecute the accused was valid and proper; (ii) whether the prosecution had been able to prove that the accused had demanded and accepted the illegal gratification of Rs.5,000/- as a motive or reward for the purpose of showing an official favour to the complainant, i.e., allotting transport loads and thereby committed the offence under Section 7 of the Act; and (iii) whether the prosecution had proven that the accused, by means of corrupt and illegal means, abused his position and obtained a pecuniary advantage in the sum of Rs.5,000/-, as a result of which he committed an offence punishable under Section 13(1)(d) read with Section 13(2) of the Act. The learned Special Judge, analyzing the evidence on record, answered all the questions in the affirmative and came to hold that the prosecution had been able to bring home the charge and,

accordingly, recorded the conviction and imposed the sentence as mentioned earlier.

8. On appeal being preferred, the High Court confirmed the conviction and the sentence on the foundation that the recovery, demand and acceptance of illegal gratification had been established to the hilt.

9. We have heard Mr. S.N. Bhat, learned counsel for the appellant. None has represented the State.

10. The first plank of submission of the learned counsel for the appellant is that the High Court could not have heard the appeal in the absence of the counsel for the accused and proceeded to deliver the judgment. It is urged by him that though at a later stage, the counsel appeared and put forth his contention, yet the fundamental defect in proceeding to deal with the appeal vitiates the verdict. To bolster the said submission, he has commended us to the decision in *Mohd. Sukur Ali v. State of Assam*[1]. In the said case, the Division Bench held as follows: -

> **"5.** We are of the opinion that even assuming that the counsel for the accused does not appear because of the counsel's negligence or deliberately, even then the court should not decide a criminal case against the accused in the absence of his counsel since an accused in a criminal case should not suffer for the fault of his counsel and in such a situation the court should appoint another counsel as amicus curiae to defend the accused. This is because liberty of a person is the most important feature of our Constitution. Article 21 which guarantees protection of life and personal liberty is the most important fundamental right of the fundamental rights guaranteed by the Constitution. Article 21 can be said to be the "heart and soul" of the fundamental rights."

1. (2011) 4 SCC 729.

After so stating, the Bench relied upon the decision of the US Supreme Court in *Powell v. Alabama*[2] which was cited with approval by this Court in *A.S. Mohammed Rafi v. State of Tamil Nadu*[3]. Reference was also made to *Man Singh and Another v. State of Madhya Pradesh*[4] and *Bapu Limbaji Kamble v. State of Maharashtra*[5]. Eventually, the Bench held as follows: -

> "The Founding Fathers of our Constitution were themselves freedom fighters who had seen civil liberties of our people trampled under foreign rule, and who had themselves been incarcerated for long period under the formula "Na vakeel, na daleel, na appeal" (No lawyer, no hearing, no appeal). Many of them were lawyers by profession, and knew the importance of counsel, particularly in criminal cases. It was for this reason that they provided for assistance by counsel under Article 22(1), and that provision must be given the widest construction to effectuate the intention of the Founding Fathers."

After so holding, the learned Judges set aside the impugned judgment of the High Court and remitted the matter to take a fresh decision after hearing the learned counsel for the appellant in the High Court whose name was not shown in the cause list and the name of the former counsel was shown. We may hasten to clarify whether in the said case the matter should have been remitted or not is presently not the concern. The question is whether the ratio laid down by the Division Bench that even if the counsel for the accused does not appear because of his negligence or deliberately, then the court should not decide the case against the accused in the absence of his counsel as he should not suffer for the fault of the counsel.

2. 77 L Ed 158 : 287 US 45 (1932).
3. (2011) 1 SCC 688.
4. (2008) 9 SCC 542.
5. (2005) 11 SCC 413.

11. At this stage, we think it appropriate to refer to the decisions which have been relied on by the Division Bench. In *Bapu Limbaji Kamble* (supra), the High Court had convicted the appellant under Section 302 of the IPC on the charge of murdering his wife by strangulating her to death. At the time of hearing of the appeal, the counsel for the accused did not appear. The High Court perused the evidence and decided the matter. In that context, this Court stated thus:-

> "We are of the view that the High Court should have appointed another advocate as amicus curiae before proceeding to dispose of the appeal. We say so especially for the reason that there are arguable points in the appeal such as the delay in giving the report to the police, the material discrepancy between the version in the FIR and the deposition of PW 4 and the non-disclosure by PW 3 of the alleged confession made by the accused after PW 4 came to the house. The question whether there is clinching circumstantial evidence to convict the appellant also deserves fuller consideration. Without expressing any view on the merits of the case, we set aside the impugned order of the High Court and remand the matter for fresh disposal by the High Court expeditiously, after nominating an amicus to assist the Court."

12. From the aforesaid passage, it is demonstrable that this Court has not stated as a principle that whenever the counsel does not appear, the court has no other option but to appoint an amicus curiae and, thereafter, proceed with the case. What has been stated above is that as there were arguable points in appeal and further whether there was clinching circumstantial evidence to convict the appellant or not, deserved a fuller consideration and in that backdrop, the Court directed for nominating an amicus to assist the Court. On a fair reading of the aforesaid passage, it is quite clear that the direction was issued in the special circumstances of the case.

13. In *Man Singh and Another* (supra), the learned single

Judge of the High Court had dismissed the appeal preferred by the appellant who had called in question the legal propriety of his conviction for the offence punishable under Section 8/18(b) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and such other offences. This Court observed that when the appeal was called, the counsel who was appointed through the Legal Aid Committee did not appear and the learned single Judge heard the matter with the assistance of the learned panel lawyer for the respondent State. It was contended before this Court that the High Court should not have dismissed the appeal without engaging another counsel or at least without appointing an amicus curiae. Resisting the said contention, it was contended by the State that the High Court analysed the relevant evidence including the evidence of the two relevant witnesses and, hence, no fault could be found with the judgment. The two-Judge Bench, after recording the said stand and stance, opined thus:-

> **"5.** We need not deal with the merits of the case as we find that the learned counsel appointed by the Legal Aid Committee did not appear on the date fixed before the High Court. The High Court could have in such circumstances required the Legal Aid Committee to appoint another counsel. Considering the seriousness of the offence, it would have been appropriate for the High Court to do so."

14. On a careful reading of the decision in its entirety and what has been aforestated, it is vivid that it has not been laid down as a ratio that in each circumstance, the High Court should appoint a counsel failing which the judgment rendered by it would be liable to be set aside.

15. In *A.S. Mohammed Rafi v. State of Tamil Nadu* (supra), the Division Bench, after referring to Article 22(1), the dictum in *Powell* (supra) and *Anastaplo, In re*[6], the immortal

6. 6 L Ed 2d 135 : 366 US 82 (1961).

words authored by Thomas Erskine (1750-1823) "*The Rights of Man"*, the Sixth Amendment of the US Constitution, the Biography of Clarence Darrow, i.e, *Attorney for the Damned*, Harper Lee's famous novel *To Kill a Mocking Bird* and Chapter II of the Rules framed by the Bar Council of India, opined thus: -

> **"24.** Professional ethics require that a lawyer cannot refuse a brief, provided a client is willing to pay his fee, and the lawyer is not otherwise engaged. Hence, the action of any Bar Association in passing such a resolution that none of its members will appear for a particular accused, whether on the ground that he is a policeman or on the ground that he is a suspected terrorist, rapist, mass murderer, etc. is against all norms of the Constitution, the statute and professional ethics. It is against the great traditions of the Bar which has always stood up for defending persons accused for a crime. Such a resolution is, in fact, a disgrace to the legal community. We declare that all such resolutions of Bar Associations in India are null and void and the right-minded lawyers should ignore and defy such resolutions if they want democracy and rule of law to be upheld in this country. It is the duty of a lawyer to defend no matter what the consequences, and a lawyer who refuses to do so is not following the message of *The Gita*."

Be it noted, in the said case, the Bar Association of Coimbatore had passed a resolution that no member of the Coimbatore Bar Association would defend the accused policemen in criminal case against them in the said case.

16. Prior to that, the Division Bench has quoted the observations of Sutherland, J. (pp. 170-171) from *Powell case* (supra) that deals with the fate of an accused who is not given the assistance of a counsel. The relevant part is reproduced below: -

"The right to be heard would be, in many cases, of little

avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

17. We have referred to the said judgment in extenso as it has been stated in *Mohd. Sukur Ali* (supra) that the said passage has been quoted with approval in *A.S. Mohammed Rafi* (supra).

18. On a studied perusal of the said decision, it is noticeable that the Court has stated about the role of the lawyer and the role of the Bar Association in the backdrop of professional ethics and norms of the Constitution. It has been categorically held therein that the professional ethics require that a lawyer cannot refuse a brief, provided a client is willing to pay his fee and the lawyer is not otherwise engaged and, therefore, no Bar Association can pass a resolution to the effect that none of its members will appear for a particular accused whether on the ground that he is a policeman or on the ground that he is a suspected terrorist. We are disposed to think that in *Mohd. Sukur Ali* (supra), the aforesaid case was cited only to highlight the role of the Bar and the ethicality of the lawyers. It does not flow from the said pronouncement that it is obligatory on the part of the Appellate Court in all circumstances to engage amicus curiae in a criminal appeal to argue on behalf of the

accused failing which the judgment rendered by the High Court would be absolutely unsustainable.

19. At this juncture, it is apt to survey the earlier decisions of this Court in the field. In *Shyam Deo Pandey and Others v. The State of Bihar*[7], a two-Judge Bench of this Court was dealing with a criminal appeal which had arisen from the order of the High Court whereby the High Court, on perusal of the judgment under appeal, had dismissed the criminal appeal challenging the conviction. The Court referred to Section 423 of the Old Code and came to hold that the criminal appeal could not be dismissed for default of appearance of the appellants or their counsel. The Court has either to adjourn the hearing of the appeal or it should consider the appeal on merits and pass final orders. It is further observed that the consideration of the appeal on merits at the stage of final hearing and to arrive at a decision on merits and pass final orders will not be possible unless the reasoning and findings recorded in the judgment under appeal is tested in the light of the record of the case. The Court referred to the earlier Section 421 of the Code which dealt with dismissal of an appeal summarily and was different from an appeal that had been admitted and required to be dealt with under Section 423 of the Code. It is worth noting that reliance was placed on *Challappa Ramaswami v. State of Maharashtra*[8] wherein reliance was placed on *Siddanna Apparao Patil v. State of Maharashtra*[9] and *Govinda Kadtuji Kadam v. The State of Maharashtra*[10].

20. In *Ram Naresh Yadav and Others v. State of Bihar,*[11] a different note was struck by expressing the view in the following terms: -

7. AIR 1971 SC 1606.
8. AIR 1971 SC 64.
9. AIR 1970 SC 977.
10. AIR 1970 SC 1033
11. AIR 1987 SC 1500.

"It is no doubt true that if counsel do not appear when criminal appeals are called out it would hamper the working of the court and create a serious problem for the court. And if this happens often the working of the court would become well nigh impossible. We are fully conscious of this dimension of the matter but in criminal matters the convicts must be heard before their mattes are decided on merits. The court can dismiss the appeal for non-prosecution and enforce discipline or refer the matter to the Bar Council with this end in view. But the matter can be disposed of on merits only after hearing the appellant or his counsel. The court might as well appoint a counsel at State cost to argue on behalf of the appellants."

21. In *Bani Singh and Others v. State of U.P.,*[12] a three-Judge Bench was called upon to decide whether the High Court was justified in dismissing the appeal filed by the accused-appellants therein against the order of conviction and sentence issued by the trial court for non-prosecution. The High Court had referred to the pronouncement in *Ram Naresh Yadav* (supra) and passed the order. The three-Judge Bench referred to the scheme of the Code, especially, the relevant provisions, namely, Section 384 and opined that since the High Court had already admitted the appeal following the procedure laid down in Section 385 of the Code, Section 384 which enables the High Court to summarily dismiss the appeal was not applicable. The view expressed in *Sham Deo's case* (supra) was approved with slight clarification but the judgment in *Ram Naresh Yadav's case* (supra) was over-ruled. The three-Judge Bench proceeded to lay down as follows: -

".....It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. This is the requirement of the Code on a plain reading of Ss. 385-386 of the Code. The law does not enjoin that the Court shall adjourn the case if both the appellant and his lawyer are absent. If the Court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgment of the trial Court. We would, however, hasten to add that if the accused is in jail and cannot, on his own, come to Court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused-appellant if his lawyer is not present. If the lawyer is absent, and the Court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so. We are, therefore, of the opinion and we say so with respect, that the Division Bench which decided Ram Naresh Yadav's case (AIR 1987 SC 1500) did not apply the provisions of Ss. 385-386 of the Code correctly when it indicated that the Appellate Court was under an obligation to adjourn the case to another date if the appellant or his lawyer remained absent.

16. Such a view can bring about a stalemate situation. The appellant and his lawyer can remain absent with impunity, not once but again and again till the Court issues a warrant for the appellant's presence. A complaint to the Bar Council against the lawyer for non-appearance cannot result in the progress of the appeal. If another lawyer is appointed at State cost, he too would need the presence of the appellant for instructions and that would place the court in the same situation. Such a procedure can, therefore, prove cumbersome and can promote indiscipline. Even if a case is decided on merits in the absence of the appellant, the higher Court can remedy the situation if there has been a failure of justice. This would apply equally if the accused is the respondent for the obvious reason that if the appeal cannot be disposed of without hearing the respondent or his lawyer, the progress of the appeal would be halted."

(Emphasis supplied)

12. AIR 1996 SC 2439.

22. From the aforesaid decision, the principles that can be culled out are (i) that the High Court cannot dismiss an appeal for non-prosecution simpliciter without examining the merits; (ii) that the court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent; (iii) that the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so; (iv) that it can dispose of the appeal after perusing the record and judgment of the trial court; (v) that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused-appellant if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so; and (vi) that if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation.

23. In *Bapu Limbaju Kamble* (supra), and *Man Singh* (supra), this Court has not laid down as a principle that it is absolutely impermissible on the part of the High Court to advert to merits in a criminal appeal in the absence of the counsel for the appellant. We have already stated that the pronouncement in *A.S. Mohammed Rafi* (supra), dealt with a different situation altogether and, in fact, emphasis was on the professional ethics, counsel's duty, a lawyer's obligation to accept the brief and the role of the Bar Associations. The principle laid down in *Sham Deo Pandey* (supra), relying on *Siddanna Apparao Patil* (supra), was slightly modified in *Bani Singh* (supra). The two-Judge Bench in *Mohd. Sukur Ali* (supra), had not noticed the binding precedent in *Bani Singh* (supra).

24. In *Union of India and Another v. Raghubir Singh (Dead) by LRs etc.,*[13] the question arose with regard to the

13. (1989) 2 SCC 754.

effect of the law pronounced by the Division Bench in relation to a case relating to the same point subsequently before a Division Bench or a smaller number of Judges. Answering the said issue, the Constitution Bench has ruled thus: -

> "It is in order to guard against the possibility of inconsistent decisions on points of law by different Division Benches that the Rule has been evolved, in order to promote consistency and certainty in the development of the law and its contemporary status, that the statement of the law by a Division Bench is considered binding on a Division Bench of the same or lesser number of Judges. This principle has been followed in India by several generations of Judges. We may refer to a few of the recent cases on the point. In *John Martin v. State of West Bengal,*[14] a Division Bench of three-Judges found it right to follow the law declared in *Haradhan Saha v. State of West Bengal*[15], decided by a Division Bench of five Judges, in preference to *Bhut Nath Mate v. State of West Bengal*[16] decided by a Division Bench of two Judges. Again in *Indira Nehru Gandhi v. Raj Narain*,[17] Beg, J. held that the Constitution Bench of five Judges was bound by the Constitution Bench of thirteen Judges in *Kesavananda Bharati v. State of Kerala*[18]. In *Ganapati Sitaram Balvalkar v. Waman Shripad Mage*[19], this Court expressly stated that the view taken on a point of law by a Division Bench of four Judges of this Court was binding on a Division Bench of three-Judges of the Court. And in *Mattulal v. Radhe Lal*,[20] this Court specifically observed that where the view expressed

14. (1975) 3 SCC 836.
15. (1975) 3 SCC 198.
16. (1974) 1 SCC 645.
17. 1975 Supp SCC 1.
18. (1973) 4 SCC 225.
19. (1981) 4 SCC 143.
20. (1974) 2 SCC 365.

by two different Division Benches of this Court could not be reconciled, the pronouncement of a Division Bench of a larger number of Judges had to be preferred over the decision of a Division Bench of a smaller number of Judges. This Court also laid down in *Acharya Maharajshri Narandraprasadji Anandprasadji Maharaj v. State of Gujarat*[21] that even where the strength of two differing Division Benches consisted of the same number of Judges, it was not open to one Division Bench to decide the correctness or otherwise of the views of the other. The principle was reaffirmed in *Union of India v. Godfrey Philips India Ltd.*[22]"

25. In *N.S. Giri v. Corporation of City of Mangalore and Others,*[33] while taking note of the decision in *LIC of India v. D.J. Bahadur*[24] in the context of binding precedent under Article 141, the learned Judges observed thus: -

"…..suffice it to observe that the Constitution Bench decision in *New Maneck Chowk Spg. and Wvg. Co. Ltd. v. Textile Labour Assn.*[25] and also the decision of this Court in *Hindustan Times Ltd. v. Workmen*[26] which is a four-Judge Bench decision, were not placed before the learned Judges deciding *LIC of India case*. A decision by the Constitution Bench and a decision by a Bench of more strength cannot be overlooked to treat a later decision by a Bench of lesser strength as of a binding authority; more so, when the attention of the Judges deciding the latter case was not invited to the earlier decisions available."

26. Another Constitution Bench in *Pradip Chandra Parija*

21. (1975) 1 SCC 11.
22. (1985) 4 SCC 369.
23. (1999) 4 SCC 697.
24. (1981) 1 SCC 315.
25. AIR 1961 SC 867.
26. AIR 1963 SC 1332.

and Others v. Pramod Chandra Patnaik and Others[27] has laid down that judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three learned Judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, the reasons why it could not agree with the earlier judgment.

27. In *Chandra Prakash and Others v. State of U.P. and Another,*[28] the Constitution Bench referred to the view expressed in *Raghubir Singh's case* and *Parija's case* and opined that in *Parija's case* it has been held that judicial discipline and propriety demanded a Bench of two learned Judges to follow the decision of a Bench of three learned Judges.

28. Recently, in *Rattiram and Others v. State of Madhya Pradesh,*[29] the three-Judge Bench, referring to the decision in *Indian Oil Corporation Ltd. v. Municipal Corporation and Another*[30] wherein a two-Judge Bench had the occasion to deal with the concept of precedent, stated as follows: -

"27. In *Indian Oil Corpn. Ltd. v. Municipal Corpn.* the Division Bench of the High Court had come to the conclusion that *Municipal Corpn., Indore v. Ratnaprabha*[31] was not a binding precedent in view of the later decisions of the co-equal Bench of this Court in *Dewan Daulat Rai Kapoor v. New Delhi Municipal Committee*[32] and *Balbir Singh v. MCD*[33]. It is worth noting

27. (2002) 1 SCC 1.
28. (2002) 4 SCC 234.
29. (2012) 4 SCC 516.
30. AIR 1995 SC 1480.
31. (1976) 4 SCC 622.
32. (1980) 1 SCC 685.
33. (1985) 1 SCC 167.

that the Division Bench of the High Court proceeded that the decision in *Ratnaprabha* was no longer good law and binding on it. The matter was referred to the Full Bench which overruled the decision passed by the Division Bench. When the matter travelled to this Court, it observed thus: (*Indian Oil Corpn. Ltd. case*, SCC p. 100, para 8)

> "*8*. … The Division Bench of the High Court in *Municipal Corpn., Indore v. Ratnaprabha Dhanda*[34] was clearly in error in taking the view that the decision of this Court in *Ratnaprabha* was not binding on it. In doing so, the Division Bench of the High Court did something which even a later co-equal Bench of this Court did not and could not do."

29. Regard being had to the principles pertaining to binding precedent, there is no trace of doubt that the principle laid down in *Mohd. Sukur Ali* (supra) by the learned Judges that the court should not decide a criminal case in the absence of the counsel of the accused as an accused in a criminal case should not suffer for the fault of his counsel and the court should, in such a situation, must appoint another counsel as amicus curiae to defend the accused and further if the counsel does not appear deliberately, even then the court should not decide the appeal on merit is not in accord with the pronouncement by the larger Bench in *Bani Singh* (supra). It, in fact, is in direct conflict with the ratio laid down in *Bani Singh* (supra). As far as the observation to the effect that the court should have appointed amicus curiae is in a different realm. It is one thing to say that the court should have appointed an amicus curiae and it is another thing to say that the court cannot decide a criminal appeal in the absence of a counsel for the accused and that too even if he deliberately does not appear or shows a negligent attitude in putting his appearance to argue the matter. With great respect, we are disposed to think, had the

34. 1989 MPLJ 20.

decision in *Bani Singh* (supra) been brought to the notice of the learned Judges, the view would have been different.

30. Presently, we shall proceed to deal with the concept of per incuriam. In *A.R. Antulay v. R.S. Nayak,*[35] Sabyasachi Mukharji, J. (as His Lordship then was), while dealing with the said concept, had observed thus: -

> "*42*. … 'Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong."

31. Again, in the said decision, at a later stage, the Court observed: -

> "47. ... It is a settled rule that if a decision has been given per incuriam the court can ignore it."

32. In *Punjab Land Development & Reclamation Corpn. Ltd. v. Labour Court,*[36] another Constitution Bench, while dealing with the issue of per incuriam, opined as under:

> "*40*. The Latin expression 'per incuriam' means through inadvertence. A decision can be said generally to be given per incuriam when this Court has acted in ignorance of a previous decision of its own or when a High Court has acted in ignorance of a decision of this Court."

33. In *State of U.P. v. Synthetics and Chemicals Ltd.,*[37] a two-Judge Bench adverted in detail to the aspect of per incuriam and proceeded to highlight as follows:

> "*40*. 'Incuria' literally means 'carelessness'. In practice per

35. (1988) 2 SCC 602.
36. (1990) 3 SCC 682.
37. (1991) 4 SCC 139.

incuriam appears to mean per ignoratium. English courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'. (*Young v. Bristol Aeroplane Co. Ltd.*[38]) Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution which embodies the doctrine of precedents as a matter of law."

34. In *Siddharam Satlingappa Mhetre v. State of Maharashtra,*[39] while addressing the issue of per incuriam, a two-Judge Bench, after referring to the dictum in *Bristol Aeroplane Co. Ltd.* (supra) and certain passages from *Halsbury's Laws of England* and *Raghubir Singh (supra)*, has stated thus:

"*138*. The analysis of English and Indian Law clearly leads to the irresistible conclusion that not only the judgment of a larger strength is binding on a judgment of smaller strength but the judgment of a co-equal strength is also binding on a Bench of Judges of co-equal strength. In the instant case, judgments mentioned in paras 124 and 125 are by two or three Judges of this Court. These judgments have clearly ignored the Constitution Bench judgment of this Court in *Sibbia case*[40] which has comprehensively dealt with all the facets of anticipatory bail enumerated under Section 438 of the Code of Criminal Procedure. Consequently, the judgments mentioned in paras 124 and 125 of this judgment are per incuriam."

35. In *Government of A.P. and Another v. B. Satyanarayana Rao (dead) by LRs and Others*[41] this Court has observed that the rule of per incuriam can be applied where

38. (1944) 2 All ER 293 (CA).

39. (2011) 1 SCC 694.

40. (1980) 2 SCC 565.

41. (2000) 4 SCC 262.

a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue.

36. In view of the aforesaid annunciation of law, it can safely be concluded that the dictum in *Mohd. Sukur Ali* (supra) to the effect that the court cannot decide a criminal appeal in the absence of counsel for the accused and that too if the counsel does not appear deliberately or shows negligence in appearing, being contrary to the ratio laid down by the larger Bench in *Bani Singh* (supra), is per incuriam. We may hasten to clarify that barring the said aspect, we do not intend to say anything on the said judgment as far as engagement of amicus curiae or the decision rendered regard being had to the obtaining factual matrix therein or the role of the Bar Association or the lawyers. Thus, the contention of the learned counsel for the appellant that the High Court should not have decided the appeal on its merits without the presence of the counsel does not deserve acceptance. That apart, it is noticeable that after the judgment was dictated in open court, the counsel appeared and he was allowed to put forth his submissions and the same have been dealt with.

37. At this juncture, we are obligated to state that in certain cases this Court had remitted the matters to the High Court for fresh hearing and in certain cases the burden has been taken by this Court. If we allow ourselves to say so, it depends upon the facts of the each case. In the present case, as we perceive, the High Court has dealt with all the contentions raised in the memorandum of appeal and heard the learned counsel at a later stage and, hence, we think it apposite to advert to the contentions raised by the learned counsel for the appellant as regards the merits of the case.

38. On merits it has been argued by Mr. Bhat that the essential ingredients of Section 7 of the Act have not established inasmuch as no official work was pending with the accused-appellant and the allotment work was done by the

Manager and, hence, he could not have shown any official favour. It has also been contended that mere recovery of bribed money from the possession of the accused is not sufficient to establish the offence and it is the duty of the prosecution to prove the demand and acceptance of money as illegal gratification but the same has not been proven at all.

39. To appreciate the said submission, we have carefully perused the judgment of the learned trial Judge as well as that of the High Court and the evidence brought on record. On a perusal of the Mahazar (Exht.-4), it is evident that a sum of Rs.5,000/- was recovered from the accused. That apart, the factum of recovery has really not been disputed. The plea put forth by the defence is that the accused had borrowed Rs.20,000/- from the complainant and to pay it back he had availed a loan from DW-1, an auto driver. In support of the said stand on behalf of the accused, DW-1, an auto-driver, has been examined, who has deposed that the accused needed Rs.20,000/- to pay back a loan to PW-1 and he had given the said sum to him in his house and, thereafter, had accompanied the accused to his office and PW-1 was taken to a side by the accused where he gave the money to him. The said witness has stated that he had not known for what purpose the accused had given the money to PW-1. He had not even produced any document in support of his deposition that he had given Rs.20,000/- to the accused as a loan. It is interesting to note that the said witness, to make his story credible, has also gone to the extent of stating that he had accompanied the accused to his office where the accused took PW-1 to one side of the room and paid the money. The testimony of this witness has to be discarded as it is obvious that he has put forth a concocted and totally improbable version. The learned Sessions Judge as well as the High Court is correct in holding that the testimony of this witness does not inspire confidence and we accept the same.

40. The next limb of the said submission is that the

accused was not in-charge of allotment of work and, hence, could not have granted any benefit to the complainant and the allegation of the prosecution that he had shown an official favour to the complainant has no legs to stand upon. On a scrutiny of the testimony of PW-2, it is demonstrable that there had been demand of money from PW-2 and acceptance of the same. As far as the official favour is concerned, though the allotment of work was done by the Manager, it has come out in the evidence of PW-4 that the immediate assignment of the loads of contractors was the responsibility of the accused. He had the responsibility for assignment of loads and in that connection, he had demanded the bribe. It has also come out from Exht. P-11 that the responsibility of the accused was assignment or identification of lorries. In view of the said evidence, it is difficult to accept the plea that he had no responsibility and, hence, he could not have granted any favour. It is well settled in law that demand and acceptance of the amount as illegal gratification is *sine qua non* for constitution of an offence under the Act and it is obligatory on the part of the prosecution to establish that there was an illegal offer of bribe and acceptance thereof.

41. Keeping in view that the demand and acceptance of the amount as illegal gratification is a condition precedent for constituting an offence under the Act, it is to be noted that there is a statutory presumption under Section 20 of the Act which can be dislodged by the accused by bringing on record some evidence, either direct or circumstantial, that money was accepted other than for the motive or the reward as stipulated under Section 7 of the Act. When some explanation is offered, the court is obliged to consider the explanation under Section 20 of the Act and the consideration of the explanation has to be on the touchstone of preponderance of probability. It is not to be proven beyond all reasonable doubt. In the case at hand, we are disposed to think that the explanation offered by the accused does not deserve any acceptance and, accordingly, we find that the finding recorded on that score by the learned

trial Judge and the stamp of approval given to the same by the High Court cannot be faulted.

42. In view of the aforesaid analysis, we find that the prosecution has established the factum of recovery and has also proven the demand and acceptance of the amount as illegal gratification. Therefore, the conviction recorded against the accused is unimpeachable. The said conclusion is in consonance with pronouncement of this Court in *State of Maharahstra v. Dnyaneshwar Laxaman Rao Wankhede.*[42]

43. The alternative submission of the learned counsel for the appellant relates to sentence. It is his submission that the appellant has been suffering from number of ailments and there has been immense tragedy in his family life and, hence, the sentence should be reduced to the period already undergone. As is evincible, the appellant has been convicted under Section 7 of the Act and sentenced to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs.15,000/- and on failure to pay fine, to suffer further rigorous imprisonment for three months. Section 7 of the Act provides a punishment with imprisonment which shall not be less than six months which may extend to five years and liability to pay fine. Section 13(2) stipulates that a public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to pay fine. On reading of both the provisions, it is clear that minimum sentence is provided for the aforesaid offence. There is a purpose behind providing the minimum sentence. It has been held in *Narendra Champaklal Trivedi v. State of Gujarat*[43] that where the minimum sentence is provided, it is not appropriate to exercise jurisdiction under Article 142 of the Constitution of India to reduce the sentence on the ground of any mitigating factor as that would tantamount to supplanting the statutory mandate and

42. (2009) 15 SCC 200.

43. (2012) 7 SCC 80.

further it would amount to ignoring the substantive statutory provision that prescribes minimum sentence for a criminal act relating to demand and acceptance of bribe.

44. In view of the aforesaid analysis, we are unable to accept the submission of the learned counsel for the appellant to reduce the period of sentence to the period already undergone in custody. However, regard being had to the facts and circumstances of the case, the age of the accused and the ailments he has been suffering, which has been highlighted before us, we reduce the sentence of imprisonment imposed under Section 13(1)(d) read with Section 13(2) of the Act to one year and maintain the sentence under Section 7 of the Act. The imposition of sentence of fine on both the scores remains undisturbed.

45. With the aforesaid modification in the sentence, the appeal stands disposed of.

B.B.B. Appeal disposed of.

RAJAMANI
v.
STATE OF KERALA
(Criminal Appeal No. 397 of 2013)

MARCH 06, 2013

[T.S. THAKUR AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Kerala Abkari Act (1 of 1077) – s.55(a) – Conviction under – For illegal trade in liquor – Trial court sentenced the accused to seven years imprisonment and imposed fine of Rs.1 lakh with default clause – High Court reduced the sentence to five years imprisonment and enhanced the amount of fine to Rs.2 lakhs – Notice by Supreme Court limited on the question of sentence – Held: In view of the circumstances of the case that the accused was only a driver of the lorry in which the goods were transported, and the investigating agency did not make any endeavour to expose the racketeers, the sentence of the accused is reduced to three years imprisonment and fine is reduced to Rs.1 lakh.

Appellant-accused, a driver of a lorry was caught carrying contraband and was prosecuted u/s.55 of Kerala Abkari Act (1 of 1077). Trial court convicted the accused and sentenced him to imprisonment of seven years and imposed fine of Rs.1 lakh with default clause. High Court affirmed the conviction but reduced the sentence to five years imprisonment and enhanced the fine to Rs.2 lakhs with default clause. In appeal, this Court issued notice limited to the question of sentence.

Disposing of the appeal, the Court

HELD: 1. The appellant was a driver by profession. The quantity of contraband was thus large. That could

and ought to be one of the factors to be taken into consideration while determining the quantum of sentence awarded to him. What was equally important is whether the appellant was the owner of the contraband or had any financial interest in its possession or transportation. There is nothing on record to suggest that the appellant had any such interest. The Investigating Officer ought to have made an endeavour to identify those behind the purchase and transport of the contraband. He should have looked for the consignor and consignee both. Arrest and prosecution of the driver of the lorry in which the goods were being carried can hardly be enough to weed out illegal trade in liquor. So long as the kingpins are not identified and brought to book, the purpose sought to be served by the law prescribing a deterrent punishment cannot be achieved. In matters of illegal trade whether in liquor, drugs or other contrabands, the smaller fish only gets caught while the sharks who flourish in such trade often go scot free. The arrest and prosecution of the carriers of contrabands is in that view mere lip service to the avowed purpose underlying the legislation. [Para 6] [190-D-H]

2.In the totality of the circumstances and the facts of the cases, the sentence awarded to the appellant is reduced from five years to three years rigorous imprisonment and a fine of rupees one lakh. In default of payment of fine the appellant shall suffer imprisonment for a further period of one year. [Para 7] [191-B-C]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 397 of 2013.

From the Judgment & Order dated 15.03.2012 of the High Court of Kerala at Ernakulam in Crl. A. No. 1345 of 2003.

P.V. Dinesh, Bineesh for the Appellant.

Jogy Scaria, K.K. Sudhesh for the Respondent.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted.

2. The appellant was prosecuted for an offence punishable under Section 55(a) of the Kerala Abkari Act (1 of 1077). He was found guilty by the Trial Court and sentenced to undergo imprisonment for a period of seven years besides a fine of rupees one lakh. In default of payment a further sentence of one year simple imprisonment was also awarded. The co-accused in the case was, however, acquitted by the Trial Court.

3. Aggrieved by the conviction and the sentence awarded to him, the appellant preferred Criminal Appeal No.1345 of 2003 before the High Court of Kerala at Ernakulam. The High Court reappraised the evidence on record and came to the conclusion that the charge framed against the appellant had been rightly held to be proved by the Trial Court. The conviction recorded against the appellant was accordingly affirmed but the sentence awarded to him reduced from seven years to five years but with an enhanced fine of rupees two lakhs in default of payment whereof the appellant was to undergo a further imprisonment of two years.

4. When the special leave petition filed by the appellant against the above judgment and order came up for preliminary hearing before this Court on 26th November, 2012, we issued notice to the respondent limited to the question of quantum of sentence awarded to the appellant. We have accordingly heard learned counsel for the parties on that limited question.

5. Section 55 (a) of the Act makes any contravention of the Act or of any rule made thereunder in regard to "import, transport, transit or any intoxicating drug" punishable with imprisonment for a term that may extend to ten years and a fine which shall not be less than rupees one lakh. It reads:

"55. ***For Illegal import, etc.*** *– Whoever in contravention of this Act or of any rule made under this Act –*

(a) Imports, exports, transports, transits or possesses liquor or any intoxicating drug; or

xxx xxx xxx

shall be punished.-

(1) for any offence other than an offence falling under clause (d) or clause (e), with imprisonment for a term which may extend to ten years and with fine which shall not be less than rupees one lakh and

xxx xxx xxx"

6. The appellant is a driver by profession. He was found carrying 218 plastic cans. Each one of those cans contained 33 litres of spirit. The quantity of contraband was thus very large. That could and ought to be one of the factors to be taken into consideration while determining the quantum of sentence awarded to him. What was equally important is whether the appellant was the owner of the contraband or had any financial interest in its possession or transportation. There is nothing on record to suggest that the appellant had any such interest. The Investigating Officer ought to have made an endeavour to identify those behind the purchase and transport of the contraband. He should have looked for the consignor and consignee both. That is because arrest and prosecution of the driver of the lorry in which the goods were being carried can hardly be enough to weed out illegal trade in liquor. So long as the kingpins are not identified and brought to book the purpose sought to be served by the law prescribing a deterrent punishment cannot be achieved. It is common knowledge that in matters of illegal trade whether in liquor, drugs or other contrabands, the smaller fish only gets caught while the sharks who flourish in such trade often go scot free. The arrest and prosecution of the carriers of contrabands is in that view mere lip service to the avowed purpose underlying the legislation. No

reason is forthcoming in the present case why no effort was made by the Investigating Agency to expose the racketeers without whose support and involvement such a big consignment of spirit could not have been purchased nor its transportation arranged.

7. In the totality of the above circumstances and the fact that the petitioner was only a driver of the lorry in which the goods were being transported, we are inclined to reduce the sentence awarded to him from five years to three years rigorous imprisonment and a fine of rupees one lakh. In default of payment of fine the appellant shall suffer imprisonment for a further period of one year. The orders passed by the trial Court and the High Court shall stand modified to the above extent.

8. This appeal is disposed of in the above terms.

K.K.T. Appeal disposed of.

JOYDEB PATRA & ORS.

v.

STATE OF WEST BENGAL

(Criminal Appeal No. 203 of 2007)

MARCH 06, 2013

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

Penal Code, 1860 – s.302/34 – Alleged murder of woman by poisoning – By her husband and his relatives – Conviction by courts below, solely on the basis of ocular testimony of the doctor who had conducted postmortem – Courts below placed onus on the accused to prove that the deceased did not die on account of homicide – Held: The Inquest Report, Postmortem Report and Chemical Examiner's Report do not show that death occurred due to poisoning – Prosecution failed to establish beyond reasonable doubt that poison was administered to the deceased – Courts below wrongly shifted the onus on the accused persons to prove that they were not guilty – Burden to prove the guilt is on the prosecution and only when this burden is discharged, accused are required to prove any fact within their special knowledge u/s.106 of Evidence Act – Evidence Act, 1872 – s.106.

Sucha Singh Vs. State of Punjab **(2001) 4 SCC 375: 2001 (2) SCR 644;** *Vikramjit Singh Vs. State of Punjab* **(2006) 12 SCC 306: 2006 (9) Suppl. SCR 375 – relied on.**

Case Law Reference:

2001 (2) SCR 644	**relied on**	**Para 8**
2006 (9) Suppl. SCR 375	**relied on**	**Para 8**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 203 of 2007.

From the Judgment & Orders dated 28.07.2006 of the High Court of Calcutta in Criminal Appeal No. 397 of 1988.

Dr. Sumant Bharadwaj, Vivekanand Mishra, Archana Pathak Dave, Ajit Kumar Gupta, K.K. Shukla, Ankita Chaudhary, Manoj Kumar, Mridula Ray Bharadwaj for the Appellants.

Bijan Kumar Ghosh, Avijit Bhattacharjee for Respondent.

The Order of the Court was delivered by

ORDER

A.K. PATNAIK, J. 1. This is an appeal against the judgment dated 28.07.2006 of the Division Bench of the Calcutta High Court in Criminal Appeal No. 397 of 1988.

2. The facts very briefly are that Madhabi Patra @ Khendi got married to Joydeb Patra, the Appellant No. 1 herein. Through the marriage she got a daughter. She again became pregnant and when she was carrying the pregnancy for nine months, a ceremonial function called 'Sadh' was arranged on 18th Baisak, 1393 B.S. After taking food, Madhabi fell ill and her condition deteriorated quickly and she died late in the night. According to the prosecution, Madhabi (the deceased) had died because poison was administered to her with the food by the appellants. Accordingly, after investigation, a charge-sheet was filed and the Appellant No. 1 and his father, brother (appellant No. 2), sister (appellant No. 3) and mother (appellant No. 4) were tried and convicted under Section 302/34, I.P.C. The accused persons filed Criminal Appeal No. 397 of 1988 before the High Court of Calcutta but by the impugned judgment, the High Court maintained the conviction of the appellants.

3. We are told that the father of the Appellant No. 1 died when the appeal was pending before the High Court and appellant No. 3 died during the pendency of the appeal before this Court.

4. We have heard learned counsel for the appellants and learned counsel for the State at length and we find that the conviction of the appellants is solely based on the evidence of PW 12 who conducted the postmortem on the body of the deceased that the death was due to poisoning. The Trial Court and the High Court have taken a view that as the deceased died on account of poisoning, onus was on the appellants to show that the deceased did not die on account of homicide but suicide. We also find on a reading of the lengthy judgments of the Trial Court as well as the High Court that the explanation given by the accused persons before the Courts explaining their suspicious conduct has been rejected by the two Courts as not believable and it has been ultimately held that the appellants were guilty of the offence under Section 302 read with Section 34, IPC.

5. On a perusal of the evidence, however, we find that in the Inquest Report (Ext. B) prepared on 03.05.1986 (the date on which the deceased died) it is stated that though the relatives of the deceased stated that she has taken poison, no froth was seen on the nostril and mouth of the deceased. The postmortem report (Ext. P 2) prepared on 4.5.1986 by PW 12 does not state the cause of death of the deceased. PW 12 has stated in the postmortem report:

> "Opinion as to the cause of death is kept reserved pending to receipt of C.E.'s report on the preserved viscera."

Thus PW 12 has not been able to reach a conclusion about the cause of death of the deceased when he examined the dead body of the deceased one day after the death of the deceased and has instead preferred to await the report of the Chemical Examiner of the Forensic Science Laboratory, Government of West Bengal. The report of the Senior Chemical Examiner, Forensic Science Laboratory, Government of West Bengal finds place in the record of the Trial Court. This report states that the glass jar contained a stomach with its contents,

portion of liver, gall bladder, kidneys and spleen said to be of Madhabi Patra and the test tube contained some salt solution said to be a sample preservative used in the above viscera. The report states the following result of the examination:

> "No poison could be detected in the viscera said to be of Khendi @ Madhabi Patra."

6. After reading the postmortem Report (Ext. P 2) and the report of the Senior Chemical Examiner, Forensic Science Laboratory, Government of West Bengal, we are of the considered opinion that there was no evidence to show that the death of the deceased was caused by administering poison. Nonetheless, an effort was made by the prosecution at the time of examination of PW 12 in Court almost after two years i.e. on 9th June, 1988 to establish that the death of the deceased was caused on account of administering poison to her. In our view, the Trial Court and the High Court should not have relied on the evidence of PW 12 given in Court more than two years after the deceased died to hold that poison was administered to the deceased when there was nothing in evidence either in the postmortem report or in the report of the Senior Chemical Examiner, Forensic Science Laboratory, Government of West Bengal to show that poison had been administered to the deceased. Since the prosecution has failed to establish beyond reasonable doubt that poison was administered to the deceased, the very foundation of the case of the prosecution stood demolished.

7. Learned counsel for the State, Mr. Bijan Ghosh, vehemently submitted that since the death took place in the house of the appellants, burden was on the appellants to prove as to how the death of the deceased actually took place. He submitted that the death of the deceased obviously took place under very mysterious circumstances and when the medical facilities were very near to the place of occurrence, the appellants should have availed the medical facilities but have not done so and this conduct of the appellants has given scope

to the prosecution to believe that they were guilty of the offence under Section 302/34, I.P.C.

8. We are afraid, we cannot accept this submission of Mr. Ghosh. This Court has repeatedly held that the burden to prove the guilt of the accused beyond reasonable doubt is on the prosecution and it is only when this burden is discharged that the accused could prove any fact within his special knowledge under Section 106 of the Indian Evidence Act to establish that he was not guilty. In *Sucha Singh Vs. State of Punjab* (2001) 4 SCC 375, this Court held:

> "We pointed out that Section 106 of the Evidence Act is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt, but the section would apply to cases where prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inference."

Similarly, in *Vikramjit Singh Vs. State of Punjab* (2006) 12 SCC 306, this Court reiterated:

> "Section 106 of the Indian Evidence Act does not relieve the prosecution to prove its case beyond all reasonable doubt. Only when the prosecution case has been proved the burden in regard to such facts which was within the special knowledge of the accused may be shifted to the accused for explaining the same. Of course, there are certain exceptions to the said rule, e.g., where burden of proof may be imposed upon the accused by reason of a statute."

9. As the prosecution has not been able to discharge its burden of establishing beyond reasonable doubt that the

deceased died due to poisoning, in our view, the trial court and the High Court could not have held the appellants guilty just because the appellants have not been able to explain under what circumstances the deceased died.

10. We accordingly allow this appeal and set aside the impugned judgment of the High Court as well as the judgment of the Trial Court and direct that the bail bonds of the appellants will stand discharged.

K.K.T. Appeal allowed.

RAMSWAROOP AND ANOTHER
v.
STATE OF MADHYA PRADESH
(Criminal Appeal No. 673 of 2008)

MARCH 12, 2013

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

Penal Code, 1860 – s.148, s.302 r/w s.149, ss.452 and 325 r/w s.149 – Murder – Unlawful assembly assaulted victim with various weapons resulting in his death – One injured eye-witness – Conviction of accused-appellants – Justification – Held: Justified – No reason to disbelieve the version of injured eye-witness (PW-5), the mother of the victim who sustained injuries while trying to save her son – High Court rightly concluded that the appellants caused fatal blows due to which the victim succumbed to injuries while on the way to hospital – Also, as per the medical evidence, the injuries received by the victim at the instance of the appellants were sufficient to cause death in the ordinary course of nature.

Sentence / Sentencing – Murder case – Death caused due to assault with various weapons – Accused-appellants convicted u/s.302 IPC and sentenced to life imprisonment – Plea of appellants for leniency in sentencing – Held: Not tenable, since prosecution established its case beyond reasonable doubt, particularly, role of the appellants who caused fatal injuries – Conviction u/s.302 being affirmed, the Court cannot impose a lesser sentence than what is prescribed by law, however, taking note of the age of appellant no.2, he is free to make a representation to the Government for remission – Penal Code, 1860 – s.302.

The prosecution case was that the cows of the deceased had damaged the crops standing in the field of the accused-appellants and this had resulted in a

heated altercation between the parties; that thereafter the accused-appellants and the other accused persons formed an unlawful assembly and carrying lathis and other weapons in their hands they chased the deceased and entered into his house and thereafter assaulted him with the said weapons which ultimately proved fatal. PW5, mother of the deceased, also allegedly sustained injuries while trying to save her son at the hands of the accused.

The trial court convicted the appellants and the other accused persons under Sections 148, 302 read with Sections 149, 452 and 325 read with Section 149 of IPC and sentenced them to RI for 1 year under Section 148 of IPC, life imprisonment under Section 302 read with Section 149 of IPC and RI for 2 years under Section 452 and Section 325 read with Section 149 of IPC. The conviction and sentence of the appellants was confirmed by the High Court, and therefore the instant appeal.

Dismissing the appeal, the Court

HELD: 1. PW-5, in her evidence, has stated that their cows had damaged the crops standing in the field of accused-Badri. She also explained that when accused-Badri was trying to take away their cows to the cattle pond, her son reached there and there was heated altercation between them. According to her, the incident took place near their house and the fields of the accused are also situated opposite to her house. She explained that after entering into her house, the accused persons gave lathi blows to the deceased and when she intervened, she was also beaten up and her left hand was broken. She specifically named the persons including the present appellants who inflicted fatal blows on the chest of her son. It is further seen from her evidence that her injured son was taken to the Police Station and it was he who made a complaint about the occurrence and from

there he was taken to the hospital for treatment, however, he died on the way to hospital. Inasmuch as PW-5 was an injured witness, who, in fact, tried to save her son at the hands of the accused, after going into her entire statement, this Court concurs with the conclusion arrived at by the trial Court as well as the High Court insofar as the present appellants are concerned. The evidence of PW-5 and conviction based on her statement is acceptable and sustainable. PW-11, son of the deceased, is also an eye-witness to the incident. He witnessed the incident and narrated the whole story alleging the role played by each one of the accused but his statement was recorded after 14 days and no explanation was offered for the same. Even if the evidence of PW-11 is eschewed, there is no reason to disbelieve the version of injured eye-witness (PW-5), mother of the deceased. [Paras 7, 8 and 10] [204-C-G; 205-C, G-H; 206-A]

2. The High Court has rightly concluded that the present appellants have caused fatal blows due to which the deceased succumbed to injuries while on the way to hospital. Also, as per the medical evidence, the injuries received by him at the instance of the present appellants were sufficient to cause death in the ordinary course of nature. [Para 11] [206-B-C]

3. The plea of appellants for leniency in sentence cannot be accepted since the prosecution has established its case beyond reasonable doubt, particularly, the role of the appellants who caused fatal injuries. Since the conviction under Section 302 is being affirmed, the Court cannot impose a lesser sentence than what is prescribed by law, however, taking note of the age of appellant no. 2, he is free to make a representation to the Government for remission and if any such representation is made, it is for the Government to pass appropriate orders as per the rules applicable. In the

circumstances, the sentence cannot be altered to the period already undergone as requested by the appellants. [Para 12] [206-C-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 673 of 2008.

From the Judgment & Order dated 25.08.2005 of the High Court of Madhya Pradesh bench Gwalior in Criminal Appeal No. 82 of 1992.

Lakhan Singh Chauhan, Anil Shrivastav for the Appellants.

Vibha Datta Makhija for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal has been filed against the judgment and order dated 25.08.2005 passed by the High Court of Madhya Pradesh, Bench at Gwalior in Criminal Appeal No. 82 of 1992 whereby the Division Bench of the High Court partly allowed the appeal and confirmed the judgment dated 02.04.1992 passed by the IInd Additional Session Judge, Shivpuri, Madhya Pradesh in Session Case No. 157/1989 against the appellants herein under Sections 148, 302 read with 149, 452 and 325 read with 149 of the Indian Penal Code, 1860 (for short 'IPC').

2. **Brief facts:**

(a) As per the prosecution, on 09.09.1989, at about 12 noon, two cows belonging to Badri (since deceased) entered into the field of Ramjilal and Badri (accused), who is having the same name as that of the deceased and damaged the crops standing in the field which resulted into an altercation between them. During altercation, Badri (since deceased) inflicted a lathi blow on the head of accused-Badri and, thereafter, he ran away from the spot. Thereafter, the appellants herein along with

Ramjilal, Badri, Roshan and Brijmohan carrying luhangi (lethal weapon) and lathis in their hands reached the house of Badri (since deceased).

(b) It is the further case of the prosecution that Chintu Mahte (Appellant No. 2 herein) dragged him from his house and Ramswaroop (Appellant No. 1 herein) gave a luhangi blow on the left rib of the deceased. Ramjilal and Chintu Mahte gave lathi blows on his neck and left rib respectively. Roshan gave a lathi blow on his neck and Badri (accused) gave a lathi blow on his left cheek. The above said acts of the accused resulted into severe injuries on the body of the deceased which were sufficient to cause death in the ordinary course of nature.

(c) During the above said incident, Gourabai (PW-5), mother of the deceased, rushed to save her son whereupon the accused Badri gave a lathi blow on her right hand due to which she also sustained injuries.

(d) On the very same day, i.e. on 09.09.1989, Badri (since deceased) along with his mother and son-Narayan (PW-11) lodged an FIR at Police Chowki Amol Patha based on which Crime No. 12/1989 under Sections 147, 148, 149, 325 and 452 of IPC was registered against the accused persons. Thereafter, Badri (since deceased) was immediately rushed to the hospital for medical examination and treatment but he died on the way. Gourabai (PW-5) – the injured was also referred for medical examination.

(e) After completion of the investigation, a charge sheet was filed against all the accused persons for the offences punishable under Sections 148, 302 read with Sections 149, 452 and 325 read with Section 149 of IPC and the case was committed to the Court of IInd Additional Session Judge, Shivpuri and numbered as Session Case No. 157/1989.

(f) The Additional Session Judge, by judgment dated 02.04.1992, convicted all the accused persons under Sections

148, 302 read with Sections 149, 452 and 325 read with Section 149 of IPC and sentenced them to suffer rigorous imprisonment (RI) for 1 year under Section 148 of IPC, life imprisonment under Section 302 read with Section 149 of IPC and RI for 2 years for the offences punishable under Section 452 and Section 325 read with Section 149 of IPC.

(g) Aggrieved by the judgment and order of the Additional Session Judge, all the accused persons preferred an appeal being Criminal Appeal No. 82 of 1992 before the High Court of Madhya Pradesh, Bench at Gwalior.

(h) By impugned judgment and order dated 25.08.2005, the High Court confirmed the conviction and sentence of accused Ramswaroop and Chintu Mahte (appellants herein) under all the charges. The appeal in respect of accused Badri was abated due to his death during the pendency of the appeal. The High Court set aside the conviction of rest of the appellants therein, namely, Ramjilal, Roshan Lal and Brij Mohan under Section 302 read with Section 149 of IPC while affirming the conviction under Sections 148, 452 and 325 read with Section 149 of IPC and modified the sentence to the period already undergone.

(i) Questioning the conviction and sentence, Ramswaroop and Chintu Mahte, the appellants herein filed the above appeal.

3. Heard Mr. Lakhan Singh Chauhan, learned counsel appearing for the appellants-accused and Ms. Vibha Datta Makhija, learned counsel appearing for the respondent-State.

4. The only point for consideration in this appeal is whether the prosecution has established its case against the present appellants beyond reasonable doubt?

5. Since the present appeal relates to Ramswaroop and Chintu Mahte (appellants herein), there is no need to traverse the role of all the other accused. There is no serious dispute about unlawful assembly by the accused persons and initial

incident of causing damage of crops by the cows of the complainant. It is also clear from the materials placed by the prosecution that after the altercation in the field, all the accused armed with lathis and weapons in their hands chased the deceased and entered into his house.

6. The prosecution heavily relied on the evidence of the injured eye-witness Gourabai, who is none else than the mother of the deceased, who also sustained injuries while saving her son at the hands of the accused. She was examined as PW-5.

7. Gourabai (PW-5), in her evidence, has stated that their cows had damaged the crops standing in the field of Badri. She also explained that when accused-Badri was trying to take away their cows to the cattle pond, her son Badri (since deceased) reached there and there was heated altercation between them. According to her, the incident took place near their house and the fields of the accused are also situated opposite to her house. She explained that after entering into her house, the accused persons gave lathi blows to the deceased and when she intervened, she was also beaten up and her left hand was broken. She specifically named the persons including the present appellants who inflicted fatal blows on the chest of her son. It is further seen from her evidence that her injured son was taken to the Police Station and it was he who made a complaint about the occurrence and from there he was taken to the hospital for treatment, however, he died on the way to hospital. Inasmuch as PW-5 being an injured witness, who, in fact, tried to save her son at the hands of the accused, after going into her entire statement, we concur with the conclusion arrived at by the trial Court as well as the High Court insofar as the present appellants are concerned.

8. It is not in dispute that PW-5 also sustained injuries while saving her son and was present at the spot. She was medically examined by Dr. R.K. Goel (PW-14), who submitted the report which states as under:

"He had seen two contusions. One of size 3 cm x 2 cm on the middle of right forearm, above this injury, there was a lacerated wound of size 1 cm x ½ cms. Swelling was also there and the same was paining on touching. The other contusion was on the upper side of left forearm of size 1 cm x 1 cm. For injury No.1 X-ray examination was advised. Injury No.2 was found simple in nature. Both the injuries were caused by some hard and blunt object. Ramkishan (PW-10) is the witness of inquest report as well as notice (Ex.P/24) which was issued to him for preparation of the same."

In such circumstance, we fully accept the evidence of PW-5 and conviction based on her statement is acceptable and sustainable.

9. *Coming to the injuries sustained by the deceased at the hands of the accused, Dr. S.P. Jain (PW-4) had performed the* post mortem *on the dead body and found the following injuries:*

"1. One contusion over left Pectoral region extending upto amilla of size 8 cm x 4 cm.

2. One abrasion of right side of chest lower part of size 5 cm x 1 cm.

On opening of chest, fractures were found on the 4th, 5th, 6th and 7th rib. Pleura was also found torn. The middle and upper part of left lung was also found torn. About one litre of blood had collected in pleura cavity. Both the chambers were empty. Injuries were caused by hard and blunt object within twenty four hours. His examination report is Ex.P/7. In the re-examination he has submitted that the injuries mentioned in the post mortem report (Ex.P/7) were sufficient to cause death in the ordinary course of nature."

10. Narayan (PW-11), son of the deceased, is also an eye-witness to the incident. He witnessed the incident and narrated the whole story alleging the role played by each one of the accused but his statement was recorded after 14 days and no

explanation was offered for the same. Even if we eschew the evidence of PW-11, as observed earlier, there is no reason to disbelieve the version of injured eye-witness (PW-5), mother of the deceased.

11. The High Court has rightly concluded that the present appellants, viz., Ramswaroop and Chintu Mahte have caused fatal blows due to which Badri succumbed to injuries while on the way to hospital. Also, as per the medical evidence, the injuries received by him at the instance of the present appellants were sufficient to cause death in the ordinary course of nature.

12. Finally, learned counsel for the appellants while pointing out that Ramswaroop (Appellant No. 1 herein) has served 7 years, 4 months and 18 days in jail and Chintu Mahte (Appellant No. 2 herein), aged about 80 years, has served 6 years, 4 months and 18 days, pleaded for leniency. We are unable to accept the above claim of the learned counsel for the appellants since the prosecution has established its case beyond reasonable doubt, particularly, the role of the appellants who caused fatal injuries. Since we are affirming the conviction under Section 302, the Court cannot impose a lesser sentence than what is prescribed by law, however, taking note of the age of Chintu Mahte (Appellant No. 2 herein), he is free to make a representation to the Government for remission and if any such representation is made, it is for the Government to pass appropriate orders as per the rules applicable. In the above circumstance, the sentence cannot be altered to the period already undergone and the said request of the counsel for the appellants is rejected.

13. Under these circumstances, there is no merit in the appeal, on the other hand, we fully agree with the conclusion arrived at by the High Court. Consequently, the appeal fails and the same is dismissed.

B.B.B. Appeal dismissed.

THE OFFICIAL LIQUIDATOR, U.P. AND UTTARAKHAND
v.
ALLAHABAD BANK AND ORS.
(Civil Appeal No. 2511 of 2013)

MARCH 12, 2013.

[H.L. DATTU AND DIPAK MISRA, JJ.]

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 – s.30 – Auction/sale by Recovery Officer under 1993 Act – In a winding-up proceedings, appointment of Official Liquidator by Company Court – Official Liquidator's challenge to the auction/sale before Company Court – Jurisdiction of Company Court to entertain the challenge – Held: 1993 Act is a complete code in itself and the tribunal (DRT) has exclusive jurisdiction for the purpose of sale of the properties for realization of the dues to the Banks and financial institutions – But at the time of auction/sale, it is required to associate the Official Liquidator – 1993 Act clearly provides that any person aggrieved by the act of Recovery Officer can prefer an appeal – The Official Liquidator whose association is mandatorily required can be regarded as person aggrieved by the action taken by Recovery Officer – In view of the fact that 1993 is a special legislation, appeal thereunder is the only remedy, and Company Court has no jurisdiction in such matter – Doctrine of Election is also not applicable in this case – Thus Official Liquidator can take recourse only to the mode of appeal under 1993 Act and cannot approach the Company Court – Companies Act, 1956 – Jurisdiction – Doctrine – Doctrine of Election.

High Court – Jurisdiction of – Under Companies Act – Nature of – Held: Jurisdiction of High Court under Companies Act is ordinary in nature and not extraordinary or inherent.

The question for consideration in the present appeal was whether the Company Judge under the Companies Act, 1956 has jurisdiction at the instance of the Official Liquidator to set aside the auction or sale held by the Recovery Officer under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 or whether the Official Liquidator was required to follow the route as engrafted under the 1993 Act by filing an appeal assailing the auction and the resultant confirmation of sale.

Disposing of the appeal, the Court

HELD: 1. The Recovery of Debts due to Banks and Financial Institutions Act, 1993 is a comprehensive Code dealing with all the facets pertaining to adjudication, appeal and realization of the dues payable to the banks and financial institutions and the tribunal (DRT) has the exclusive jurisdiction for the purpose of sale of the properties for realization of the dues of the banks and financial institutions. [Paras 11 and 19] [218-A-B; 223-F]

Damji Valji Shah v. LIC of India **AIR 1966 SC 135: 1965 SCR 665 – relied on.**

Andhra Bank v. Official Liquidator and Anr. **(2005) 5 SCC 75: 2005(2) SCR 776;** *Jitendra Nath Singh v. Official Liquidator and Ors.* **(2013) 1 SCC 462;** *International Coach Builders Ltd. v. Karnataka State Financial Corpn.* **(2003) 10 SCC 482: 2003 (2) SCR 631;** *A.P. State Financial Corpn. v. Official Liquidator* **(2000) 7 SCC 291: 2000 (2) Suppl. SCR 288 – referred to.**

2. While exercising jurisdiction under the Companies Act, the High Court exercises ordinary jurisdiction and not any extraordinary or inherent jurisdiction and that is why, the legislature has appropriately postulated that the jurisdiction of the High Court under Articles 226 and 227 of the Constitution would not be affected. Thus, the DRT

has exclusive jurisdiction to sell the properties in a proceeding instituted by the banks or financial institutions, but at the time of auction and sale, it is required to associate the Official Liquidator. Once the Official Liquidator is associated, he has a role to see that there is no irregularity in conducting the auction and appropriate price is obtained by holding an auction in a fair, transparent and non-arbitrary manner in consonance with the Rules framed under the 1993 Act. [Paras 22 - 24] [225-B-F]

Jyoti Bhushan Gupta and Ors. v. The Banaras Bank Ltd. **AIR 1962 SC 403: 1962 Suppl. SCR 73;** *Pravin Gada and Anr. v. CentralBank of India and Ors.* **(2013) 2 SCC 101 – relied on.**

3. An appeal lies to the DRT challenging the action of the Recovery Officer. In the instant case, the Official Liquidator was not satisfied with the manner in which the auction was conducted and he thought it apposite to report to the Company Judge who set aside the auction. The Official Liquidator has been conferred locus to put forth his stand in the said matters. Therefore, anyone who is aggrieved by any act done by the Recovery Officer can prefer an appeal. Such a statutory mode is provided under the 1993 Act, which is a special enactment. The DRT has the powers under the 1993 Act to make an enquiry as it deems fit and confirm, modify or set aside the order made by the Recovery Officer in exercise of powers u/ss. 25 to 28 (both inclusive) of the 1993 Act. Thus, the auction, sale and challenge are completely codified under the 1993 Act, regard being had to the special nature of the legislation. [Para 26] [226-D-E, F-H; 227-A]

Union of India and Anr. v. Delhi High Court Bar Association and Ors. **(2002) 4 SCC 275: 2002 (2) SCR 450 – relied on.**

4. The intendment of the legislature while enacting 1993 Act, is that the dues of the banks and financial institutions are realized in promptitude. It is not a situation where the Official Liquidator can have a choice either to approach the DRT or the Company Court. The language of the 1993 Act, being clear, provides that any person aggrieved can prefer an appeal. The Official Liquidator whose association is mandatorily required can indubitably be regarded as a person aggrieved relating to the action taken by the Recovery Officer which would include the manner in which the auction is conducted or the sale is confirmed. Under these circumstances, the Official Liquidator cannot even take recourse to the doctrine of election. It is difficult to conceive that there are two remedies. If there is only one remedy, the doctrine of election does not apply. An order passed under Section 30 of the 1993 Act by the DRT is appealable. Thus, the Official Liquidator can only take recourse to the mode of appeal and further appeal under the 1993 Act and not approach the Company Court to set aside the auction or confirmation of sale when a sale has been confirmed by the Recovery Officer under the 1993 Act. [Para 27] [227-D, F-H; 228-A-C]

Rajasthan State Financial Corpn. and Anr. v. Official Liquidator and Anr. **(2005) 8 SCC 190: 2005 (3) Suppl. SCR 1073;** *Allahabad Bank v. Canara Bank and Anr.* **(2000) 4 SCC 406: 2000 (2) SCR 1102 – relied on.**

M.V. Janardhan Reddy v. Vijaya Bank and Ors. **(2008) 7 SCC 738: 2008 (7) SCR 520 – distinguished.**

Case Law Reference:

2000 (2) SCR 1102	**relied on**	**Para 6**
2005 (3) Suppl. SCR 1073	**relied on**	**Para 6**
2008 (7) SCR 52	**distinguished**	**Para 6**

1965 SCR 665	**relied on**	**Para 14**
2005 (2) SCR 776	**referred to**	**Para 15**
(2013) 1 SCC 462	**referred to**	**Para 15**
2003 (2) SCR 631	**referred to**	**Para 16**
2000 (2) Suppl. SCR 288	**referred to**	**Para 16**
1962 Suppl. SCR 73	**relied on**	**Para 21**
(2013) 2 SCC 101	**relied on**	**Para 23**
2002 (2) SCR 450	**relied on**	**Para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2511 of 2013.

From the Judgment & Order dated 11.11.2010 of the High Court of Judicature at Allahabad in Special Appeal No. 1815 of 2009.

Ravindra Kumar for the Appellant.

Debal Banerji, C. Mukund, Ashok Jain, Pankaj Jain, Bijoy Kumar Jain, Vivek Chaudhary, Pankaj Bhatia (for Dr. Kailash Chand) for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The spinal issue that has spiralled to this Court is whether the Company Judge under the Companies Act, 1956 (for short "the 1956 Act") has jurisdiction at the instance of the Official Liquidator to set aside the auction or sale held by the Recovery Officer under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for brevity "the RDB Act") or whether the Official Liquidator is required to follow the route as engrafted under the RDB Act by filing an appeal assailing the auction and the resultant confirmation of sale.

3. Regard being had to the controversy involved which is in the realm of pure question of law, it is not necessary to exposit the facts in detail. Hence, the necessitous facts are adumbrated herein. The respondent, Allahabad Bank, a secured creditor with whom certain properties were mortgaged, filed Original Application No. 153 of 1999 under Section 9 of the RDB Act for recovery of a sum of Rs.39,93,47,701/- with interest from the company, namely, M/s. Rajindra Pipes Limited, which was decreed by the Debt Recovery Tribunal, Jabalpur (DRT) vide its order dated 7.3.2000. The Debt Recovery Certificate being DRC No. 164 of 2000 was issued for recovery of the aforesaid amount which was subsequently transferred to the DRT at Allahabad. Be it noted, Company Petition No. 113 of 1997 was filed before the learned Company Judge in the High Court of Judicature at Allahabad who, vide order dated 26.7.2000, had passed an order for winding up of the company, as a consequence of which the Official Liquidator had taken over the possession of the assets of the company on 24.7.2002. After receipt of the Recovery Certificate, the Recovery Officer attached the immoveable properties of the wound-up company by order dated 29.8.2002. The moveable properties of the company were attached as per order dated 23.12.2003. At this juncture, the Allahabad Bank filed an application before the Company Court for impleading it as a necessary party and protect its rights getting it out of the winding up proceedings. A prayer was made before the Company Court to grant permission to proceed with the sale of the attached properties by the Recovery Officer, Debt Recovery Tribunal (DRT). The learned Company Judge, on 13.2.2004, granted permission for proceeding with the attachment and sale of the assets for recovery of the dues under the RDB Act. It is worth stating here that no condition was imposed.

4. After auction and confirmation of sale by the DRT, the auction-purchaser filed an application before the learned Company Judge for issuance of a direction to the Official Liquidator to give physical possession. The Company Court,

by order dated 4.4.2007, set aside the sale certificate on the ground that the Official Liquidator was neither heard in the matter nor was he given an opportunity to represent before the Recovery Officer for the purposes of representing the workmen's dues and a portion of the workmen's liability under Section 529-A of the 1956 Act. A direction was issued to the Recovery Officer to proceed to sell the assets only after associating the Official Liquidator and after giving him hearing to represent the claims of the workmen.

5. As the facts get further unfolded, after associating the Official Liquidator, the auction was held and the Recovery Officer proceeded with the confirmation of sale. At that stage, the Official Liquidator filed his objections pertaining to fixation of the reserve price, the non-inclusion of certain assets and the manner in which the auction was conducted. The Recovery Officer, after hearing the Bank and the Official Liquidator, confirmed the sale and a date was fixed for handing over the possession to the auction-purchaser, but the same could not be done as the Official Liquidator chose not to remain present. Thereafter, the auction-purchaser filed an application before the learned Company Judge for issue of a direction to the Official Liquidator to hand over the possession of the properties in respect of which the sale had been confirmed by the Recovery Officer of DRT. Similar prayer was also made by the Allahabad Bank by filing another application. As is evincible from the factual narration, the Official Liquidator filed his report and the Company Court, on consideration of both the applications and the report of the Official Liquidator, by order dated 24.10.2009, set aside the auction and confirmation of sale dated 27.2.2009 on the foundation that the auction had not been properly held and directed the properties mortgaged with the Allahabad Bank to be auctioned after proper identification of the properties and obtaining of a fair valuation report from a Government approved valuer.

6. Being dissatisfied with the aforesaid order, the Allahabad Bank preferred Special Appeal No. 1815 of 2009

before the Division Bench. Apart from raising various contentions justifying the sale, a stand was put forth that the Company Court had no jurisdiction to set aside the sale held by the Recovery Officer under the RDB Act. The said submission of the Bank was resisted principally on the ground that it is the duty of the Official Liquidator and the Company Court to watch the best interest of the company and in exercise of such power of supervision, if there is any irregularity in conducting the auction for obtaining adequate price, the same is liable to be lancinated by the Company Court. The Division Bench referred to the earlier orders passed by the Company Court, the provisions of the RDB Act, grant of permission by the Company Court to the Allahabad Bank to remain outside the winding up proceeding to realize the debt of the appellant by associating itself in the recovery proceeding in accordance with the RDB Act, the direction issued to the Official Liquidator to give access to the Recovery Officer to proceed with the recovery of legal and valid dues of the Bank and the non-imposition of any condition that the sale required prior approval of the learned Company Judge and, heavily relying on the decisions rendered in *Allahabad Bank v. Canara Bank and Another*[1] and *Rajasthan State Financial Corpn. and Another v. Official Liquidator and Another*[2] and distinguishing the decision in *M.V. Janardhan Reddy v. Vijaya Bank and Others,*[3] came to hold that when an auction is conducted and there is confirmation of sale by the Recovery officer of the tribunal under the RDB Act, it is open to the Official Liquidator to file an appeal and raise his grievances before the Tribunal in accordance with the provisions of the RDB Act and the Company Court has no jurisdiction to set aside the sale. Being of this view, the Division Bench declined to express any opinion on the merits of the case and opined that it is open to the Official Liquidator to take up all the grounds available to him in appeal. As a consequence of the aforesaid conclusion, the

1. (2000) 4 SCC 406.
2. (2005) 8 SCC 190.
3. (2008) 7 SCC 738.

order passed by the Company Judge nullifying the confirmation of sale and directing fresh auction was set aside. The defensibility of the said order is called in question by the Official Liquidator before this Court.

7. We have heard Mr. Ravindra Kumar, learned counsel for the appellant, Mr. Debal Banerji, learned senior counsel for the respondent-Allahabad Bank, and Mr. Vivek Chaudhary, learned counsel for the respondent No. 2.

8. At the very inception, it is condign to state that there is no dispute over the facts as narrated hereinabove, for the only cavil relates to the issue of jurisdiction. It is to be noted that the irregularity in the conduct of the auction or the manner in which the sale had been confirmed has not been addressed to by the Division Bench as it has restricted its delineation to the jurisdictional spectrum. Therefore, we shall only restrict our address as to which is the appropriate forum for the Official Liquidator to agitate the grievance.

9. It is apt to note that the RDB Act has been enacted in the backdrop that the banks and financial institutions had been experiencing considerable difficulties in recovering loans and enforcement of securities charged with them and the procedure for recovery of debts due to the banks and financial institutions which were being followed had resulted in a significant portion of the funds being blocked. The Statement of Objects and Reasons of the RDB Act clearly emphasise the considerable difficulties faced by the banks and financial institutions in recovering loans and enforcement of securities charged with them. Emphasis has been laid on blocking of funds in unproductive assets, the value of which deteriorates with the passage of time. Reference has been made to the "Tiwari Committee Report" which had suggested for setting up of special tribunals for recovery of dues of the banks and financial institutions by following a summary procedure.

10. The purpose of the RDB Act, as is evincible, is to

provide for establishment of tribunals and Appellate Tribunals for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto. Section 17 of the RDB Act deals with jurisdiction, powers and authority of the tribunals. It confers jurisdiction on the tribunal to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions. It also states about the powers of the Appellate Tribunal. Section 18 creates a bar of jurisdiction stating that no court or other authority shall have, or be entitled to exercise any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) relating to the matters specified in Section 17. Section 19 provides how an application of the tribunal is to be presented. The said provision deals, comprehensively, with all the aspects. Section 19(18) confers immense powers on the tribunal to pass appropriate orders to do certain acts, namely, appoint a Receiver of any property, remove any person from the possession, confer upon Receiver all such powers and appoint a Commissioner, etc. Sub-section (19) of the said Section provides that where a certificate of recovery is issued against a company registered under the Companies Act, 1956 (1 of 1956), the Tribunal may order the sale proceeds of such company to be distributed among its secured creditors in accordance with the provisions of Section 529A of the Companies Act, 1956 and to pay the surplus, if any, to the company. Section 20 provides an appeal to the Appellate Tribunal; Section 21 provides for deposit of the amount of debt due on filing appeal; and Section 22 deals with the procedure and powers of the Tribunal and the Appellate Tribunal. Chapter V of the RDB Act deals with recovery of debts determined by the tribunal. Section 25 provides for the modes of recovery of debts; Section 26 stipulates about the validity of certificate and amendment thereof; Section 27 deals with the power of stay of proceeding under certificate and amendment or withdrawal thereof; and Section 28 deals with the other methods of

recovery. It is worthy to note that Section 29 states that the provisions of the Second and Third Schedule of the Income-Tax Act, 1961 and the Income-Tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, be applicable with necessary modifications as if the said provisions and the rules referred to the amount of debt due under the RDB Act instead of the Income-Tax Act. The defendant has been equated with an assessee. Section 30 provides that any person aggrieved by an order of the Recovery Officer made under the RDB Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal. It confers powers on the tribunal to make such inquiry as it deems fit and confirm, modify or set aside the order made by the Recovery Officer in exercise of its powers under Sections 25 to 28 (both inclusive).

11. Section 34 lays down that the RDB Act would have overriding effect. Section 34, being pertinent, is set out hereinbelow: -

> "**34. Act to have over-riding effect**. – (1) Save as provided under sub-section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.
>
> (2) The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act, 1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984), the Sick Industrial Companies (special Provisions) Act, 1985 (1 of 1986) and the Small Industries Development Bank of India Act, 1989 (39 of 1989)."

We have referred to the Objects and Reasons and the

relevant provisions of the RDB Act to highlight that it is a comprehensive Code dealing with all the facets pertaining to adjudication, appeal and realization of the dues payable to the banks and financial institutions.

12. Presently, we shall advert to the analysis made in *Allahabad Bank's case.* In the said case, this Court was concerned with the issue relating to the impact of the provisions of the RDB Act on the provisions of the 1956 Act. Allahabad Bank had come to this Court against an order passed by the learned Company Judge under Sections 442 and 537 of the 1956 Act whereby the Company Court, in winding up petition, had stayed the sale proceedings taken out by the Allahabad Bank before the Recovery Officer under the RDB Act. The stand of the Allahabad Bank was that the tribunal under the RDB Act could itself deal with the question of appropriation of sale proceeds in respect of the sale of the company's properties held at the instance of the Bank and the priorities. After stating the facts, the Court posed the questions that required to be adverted to: -

> "Questions have been raised by the respondent as to whether the Tribunal can entertain proceedings for recovery, execution proceedings, and also for distribution of monies realized by sales of properties of a company against which winding-up proceedings are pending, whether leave is necessary and as to which court is to distribute the sale proceeds and according to what priorities among various creditors."

13. The two-Judge Bench, after referring to the dictionary provisions, especially the "debt" as defined in Section 2(g), Sections 17, 18 and 19(22) and Section 31 of the RDB Act, came to hold that the provisions of Sections 17 and 18 of the RDB Act are exclusive so far as the question of adjudication of the liability of the defendant to the Allahabad Bank was concerned. Dealing with the facet of the execution of the certificate by the Recovery Officer, the Division Bench referred

to Section 34 of the RDB Act and opined thus: -

> "Even in regard to "*execution"*, the jurisdiction of the Recovery Officer is exclusive. Now a procedure has been laid down in the Act for recovery of the debt as per the certificate issued by the Tribunal and this procedure is contained in Chapter V of the Act and is covered by Sections 25 to 30. It is not the intendment of the Act that while the basic liability of the defendant is to be decided by the Tribunal under Section 17, the banks/financial institutions should go to the civil court or the Company Court or some other authority outside the Act for the actual realization of the amount. The certificate granted under Section 19(22) has, in our opinion, to be executed only by the Recovery Officer. No dual jurisdiction at different stages are contemplated."
>
> [Emphasis supplied]

14. While dealing with the issue whether the RDB Act overrides the provisions of Sections 442, 446 and 537 of the 1956 Act, after analyzing the said provisions and delving into the concept of leave and control by the Company Court, the learned Judges relied on the pronouncement in *Damji Valji Shah v. LIC of India*[4] and came to hold that there is no need for the appellant bank to seek leave of the Company Court to proceed with the claim before the DRT or in respect of the execution proceedings before the Recovery Officer. It was also categorically held that the said litigation cannot be transferred to the Company Court. In the ultimate eventuate, the bench ruled that in view of Section 34 of the RDB Act, the tribunal has exclusive jurisdiction and, hence, the Company Court cannot use its powers under Section 442 of the 1956 Act against the tribunal/Recovery Officer and, therefore, Sections 442, 446 and 537 of the 1956 Act could not be applied against the tribunal. Be it noted, emphasis was laid on speedy and summary

4. AIR 1966 SC 135.

remedy for recovery of the amount which was due to the banks and financial institutions and the concept of special procedure as recommended by the Tiwari Committee Report of 1981 was stressed upon. It was concluded that the special provisions made under the RDB Act have to be applied. The Court addressed itself to the special and general law and ruled that in view of Section 34 of the RDB Act, it overrides the Companies Act to the extent there is any thing inconsistent between the Acts. In the ultimate analysis, the learned Judges stated thus: -

> "For the aforesaid reasons, we hold that the at the stage of *adjudication* under Section 17 and *execution* of the certificate under Section 25 etc. the provisions of the RDB Act, 1993 confer exclusive jurisdiction on the Tribunal and the Recovery Officer in respect of debts payable to banks and financial institutions and there can be no interference by the Company Court under Section 442 read with Section 537 or under Section 446 of the Companies Act, 1956. In respect of the monies realized under the RDB Act, the question of *priorities* among the banks and financial institutions and other creditors can be decided only by the Tribunal under the RDB Act and in accordance with Section 19(19) read with Section 529-A of the Companies Act and in no other manner. The provisions of the RDB Act, 1993 are to the above extent inconsistent with the provisions of the Companies Act, 1956 and the latter Act has to yield to the provisions of the former. This position holds good during the pendency of the winding-up petition against the debtor Company and also after a winding-up order is passed. No leave of the Company Court is necessary for initiating or continuing the proceedings under the RDB Act, 1993."
>
> [Emphasis added]

15. While dealing with the claim of the workmen, the Bench proceeded to state that the "workmen's dues" have priority over

all other creditors, secured and unsecured, because of Section 529-A(1)(a) of the 1956 Act. Be it noted, this has been so stated in paragraph 76 of the decision in *Allahabad Bank's case*. The correctness of this statement was doubted and the matter was referred to the larger Bench. A three-Judge Bench in *Andhra Bank v. Official Liquidator and Another*[5] opined that it was only a stray observation as such a question did not arise in the said case as Allahabad Bank was undisputably an unsecured creditor and, accordingly, the larger Bench opined that the finding of this Court in *Allahabad Bank's case* to the aforesaid extent did not lay down the correct law. The said exposition of law has further been reiterated in *Jitendra Nath Singh v. Official Liquidator and Others*[6]. We have referred to the aforesaid decisions only to highlight that this part of the judgment in *Allahabad Bank's case* has been overruled.

16. In *International Coach Builders Ltd. v. Karnataka State Financial Corpn.,*[7] the question arose whether there was any conflict between the State Financial Corporation Act, 1951 and the Companies Act, 1956 and, in that context, the learned Judges relied on the decision in *A.P. State Financial Corpn. v. Official Liquidator*[8] and came to hold that there is no conflict between the provisions of the SFC Act and the 1956 Act and even the rights under Section 29 of the SFC Act are not intended to operate in the situation of winding-up of a company. It is further opined that even assuming that there is a conflict, the amendments made in Sections 529 and 529-A of the 1956 Act would override and control the rights under Section 29 of the SFC Act. The Division Bench proceeded to state that though the 1956 Act may be general law, yet the provisions introduced therein in 1985 were intended to confer special rights on the workers and *pro tanto* must be treated as special law made by the Parliament and, hence, the said provisions would override the provisions contained in Section 29 of the SFC Act, 1951.

5. (2005) 5 SCC 75.
6. (2013) 1 SCC 462.
7. (2003) 10 SCC 482.
8. (2000) 7 SCC 291.

17. In *Rajasthan State Financial Corporation and another* (supra), when the appeal came up for hearing before the two learned Judges, a submission was put forth that there was a conflict between the decisions in *Allahabad Bank* (supra) and *International Coach Builders Ltd.* (supra) and, taking note of the importance of the question of law involved, the matter was referred to a larger Bench. The three-Judge Bench analysed the ratio laid down in *Allahabad Bank's case and International Coach Builders Ltd.* (supra) and, after referring to various authorities, held that once a winding-up proceeding has commenced and the Liquidator is put in charge of the assets of the company being wound up, the distribution of the proceeds of the sale of the assets held at the instance of the financial institutions coming under the RDB Act or of financial corporations coming under the SFC Act can only be with the association of the Official Liquidator and under the supervision of the Company Court. The right of a financial institution or of the Recovery Tribunal or that of a financial corporation or the court which has been approached under Section 31 of the SFC Act to sell the assets may not be taken away, but the same stands restricted by the requirement of the Official Liquidator being associated with it, giving the Company Court the right to ensure that the distribution of the assets in terms of Section 529-A of the Companies Act takes place. Thereafter, the bench summed up the legal position. The pertinent part of the said summation is reproduced below: -

> (i) A Debt Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, though its Recovery officer but only after notice to the Official Liquidator or the Liquidator appointed by the Company Court and after hearing him.

xxx xxx xxx

(iv) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the SFC Act are not set in motion, the creditor concerned is to approach the Company Court for appropriate directions regarding the realization of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the company-in-liquidation."

18. From the aforesaid verdict, it is vivid that the larger Bench approved the law laid down in *Allahabad Bank* (supra). In fact, it is noticeable that the larger Bench has observed that in *Allahabad Bank's case,* a view has been taken that the RDB Act being a subsequent legislation and being a special law would prevail over the general law, the 1956 Act, but the said argument is not available as far as the SFC Act is concerned.

19. From the aforesaid authorities, it clearly emerges that the sale has to be conducted by the DRT with the association of the Official Liquidator. We may hasten to clarify that as the present controversy only relates to the sale, we are not going to say anything with regard to the distribution. However, it is noticeable that under Section 19(19) of the RDB Act, the legislature has clearly stated that distribution has to be done in accordance with Section 529-A of the 1956 Act. The purpose of stating so is that it is a complete code in itself and the tribunal has the exclusive jurisdiction for the purpose of sale of the properties for realization of the dues of the banks and financial institutions.

20. Mr. Revindra Kumar, learned counsel for the appellant, would contend that he, being an Official Liquidator, is liable to report to the Company Court and, therefore, the Company Court has jurisdiction to accept or reject the report and, hence it has jurisdiction to set aside the sale held by the Recovery Officer under the RDB Act. The learned counsel would submit

with emphasis that the role of a Company Court cannot be marginalized as it has the control over the assets of the company. Per contra, Mr. Debal Banerji, learned senior counsel for the Allahabad Bank, would submit that the jurisdiction of the Company Court cannot be equated with the jurisdiction exercised by the High Court under Articles 226 and 227 of the Constitution of India.

21. To appreciate the aforesaid submission, we may fruitfully refer to the dictum in *Jyoti Bhushan Gupta and Others v. The Banaras Bank Ltd.,*[9] wherein the learned Judges, while stating about the jurisdiction of the Company Court, have opined that the jurisdiction is ordinary; it does not depend on any extraordinary action on the part of the High Court. The jurisdiction is also original in character because the petition for exercise of the jurisdiction is entertainable by the High Court as a court of first instance and not in exercise of its appellate jurisdiction. As the High Court adjudicates upon the liability of the debtor to pay the debts due by him to the Company, the jurisdiction is, therefore, civil. It has been further observed that normally a creditor has to file a suit to enforce liability for payment of a debt due to him from his debtor. The Legislature has, by Section 187 of the 1956 Act, empowered the High Court in a summary proceeding to determine the liability and to pass an order for payment, but on that account, the real character of the jurisdiction exercised by the High Court is not altered. After further analyzing, the four-Judge Bench proceeded to state thus: -

"The jurisdiction to deal with the claims of companies ordered to be wound up is conferred by the Indian Companies Act and to that extent the letters Patent are modified. There is, however, no difference in the character of the original civil jurisdiction which is conferred upon the High Court by Letters Patent and the jurisdiction conferred by special Acts. When in exercise of its authority conferred

9. AIR 1962 SC 403.

by a special statute the High Court in an application presented to it as a court of first instance declares liability to pay a debt, the jurisdiction exercised is original and civil and if the exercise of that jurisdiction does not depend upon any preliminary step invoking exercise of discretion of the High Court, the jurisdiction is ordinary."

22. The aforesaid enunciation makes it clear as crystal that while exercising jurisdiction under the 1956 Act, the High Court is exercising ordinary jurisdiction and not any extraordinary or inherent jurisdiction and that is why, the legislature has appropriately postulated that the jurisdiction of the High Court under Articles 226 and 227 of the Constitution would not be affected.

23. The aforesaid analysis makes it luculent that the DRT has exclusive jurisdiction to sell the properties in a proceeding instituted by the banks or financial institutions, but at the time of auction and sale, it is required to associate the Official Liquidator. The said principle has also been reiterated in *Pravin Gada and Another v. Central Bank of India and Others.*[10]

24. Once the Official Liquidator is associated, needless to say, he has a role to see that there is no irregularity in conducting the auction and appropriate price is obtained by holding an auction in a fair, transparent and non-arbitrary manner in consonance with the Rules framed under the RDB Act.

25. At this juncture, we may refer with profit to what a three-Judge Bench, while dealing with the constitutional validity of the RDB Act, in *Union of India and Another v. Delhi High Court Bar Association and Others,*[11] had the occasion to observe:-

"By virtue of Section 29 of the Act, the provisions of the Second and Third Schedules to the Income Tax Act, 1961

10. (2013) 2 SCC 101.

11. (2002) 4 SCC 275.

and the Income Tax (Certificate Proceedings) Rules, 1962, have become applicable for the realization of the dues by the Recovery Officer. Detailed procedure for recovery is contained in these Schedules to the Income Tax Act, including provisions relating to arrest and detention of the defaulter. It cannot, therefore, be said that the Recovery Officer would act in an arbitrary manner. Furthermore, Section 30, after amendment by the Amendment Act, 2000, gives a right to any person aggrieved by an order of the Recovery Officer, to prefer an appeal to the Tribunal. Thus now an appellate forum has been provided against any orders of the Recovery Officer which may not be in accordance with the law. There is, therefore, sufficient safeguard which has been provided in the event of the Recovery Officer acting in an arbitrary or an unreasonable manner."

26. We have referred to the said passage for the purpose of highlighting that an appeal lies to the DRT challenging the action of the Recovery Officer. In the case at hand, the Official Liquidator was not satisfied with the manner in which the auction was conducted and he thought it apposite to report to the learned Company Judge who set aside the auction. Needless to emphasise, the Official Liquidator has a role under the 1956 Act. He protects the interests of the workmen and the creditors and, hence, his association at the time of auction and sale has been thought appropriate by this Court. To put it differently, he has been conferred locus to put forth his stand in the said matters. Therefore, anyone who is aggrieved by any act done by the Recovery Officer can prefer an appeal. Such a statutory mode is provided under the RDB Act, which is a special enactment. The DRT has the powers under the RDB Act to make an enquiry as it deems fit and confirm, modify or set aside the order made by the Recovery Officer in exercise of powers under Sections 25 to 28 (both inclusive) of the RDB Act. Thus, the auction, sale and challenge are completely

codified under the RDB Act, regard being had to the special nature of the legislation.

27. It has been submitted by Mr. Banerji, learned senior counsel, that if the Company Court as well as the DRT can exercise jurisdiction in respect of the same auction or sale after adjudication by the DRT, there would be duality of exercise of jurisdiction which the RDB Act does not envisage. By way of an example, the learned senior counsel has submitted that there are some categories of persons who can go before the DRT challenging the sale and if the Official Liquidator approaches the Company Court, then such a situation would only bring anarchy in the realm of adjudication. The aforesaid submission of the learned senior counsel commends acceptance as the intendment of the legislature is that the dues of the banks and financial institutions are realized in promptitude. It is to be noted that when there is inflation in the economy, the value of the mortgaged property/assets depreciates with the efflux of time. If more time is consumed, it would be really difficult on the part of the banks and financial institutions to realize their dues. Therefore, this Court in *Allahabad Bank's case* has opined that it is the DRT which would have the exclusive jurisdiction when a matter is agitated before the DRT. The dictum in the said case has been approved by the three-Judge Bench in *Rajasthan State Financial Corporation and Another* (supra). It is not a situation where the Official Liquidator can have a choice either to approach the DRT or the Company Court. The language of the RDB Act, being clear, provides that any person aggrieved can prefer an appeal. The Official Liquidator whose association is mandatorily required can indubitably be regarded as a person aggrieved relating to the action taken by the Recovery Officer which would include the manner in which the auction is conducted or the sale is confirmed. Under these circumstances, the Official Liquidator cannot even take recourse to the doctrine of election. It is difficult to conceive that there are two remedies. It is well settled in law that if there is only one remedy, the

doctrine of election does not apply and we are disposed to think that the Official Liquidator has only one remedy, i.e., to challenge the order passed by the Recovery Officer before the DRT. Be it noted, an order passed under Section 30 of the RDB Act by the DRT is appealable. Thus, we are inclined to conclude and hold that the Official Liquidator can only take recourse to the mode of appeal and further appeal under the RDB Act and not approach the Company Court to set aside the auction or confirmation of sale when a sale has been confirmed by the Recovery Officer under the RDB Act.

28. We will be failing in our duty if we do not take notice of the decision in *M.V. Janardhan Reddy* (supra) wherein the sale was aside by the Company Judge. It may be stated here that the Company Court had imposed a condition that the permission of the Company Court shall be obtained before the sale of the properties, immoveable or moveable, is confirmed or finalized. On the aforesaid basis, this Court opined that when the bank was permitted to go ahead with the proposed sale of the assets of the company under liquidation by way of auction but such sale was subject to confirmation by the Company Court and all the parties were aware about the condition as to confirmation of sale by the Company Court, it was not open to the Recovery Officer to confirm the sale and, therefore, the sale was set aside by the Company Court, being in violation of the order. Thus, we find that the facts in the said case were absolutely different and further this Court did not deal with the jurisdiction of the Company Court vis-à-vis DRT as the said issue really did not arise. Hence, it is not an authority for the proposition that the Official Liquidator can approach the Company Court to set aside the auction or sale conducted by the Recovery Officer of the DRT.

29. In view of the aforesaid analysis, we concur with the view expressed by the Division Bench and hold that the Official Liquidator can prefer an appeal before the DRT. As he was prosecuting the lis in all genuineness before the Company

Court and defending the order before the Division Bench, we grant him four weeks' time to file an appeal after following the due procedure. On such an appeal being preferred, the DRT shall deal with the appeal in accordance with law. The DRT is directed to decide the appeal within a period of two months after offering an opportunity of hearing to all concerned. Till the appeal is disposed of, the interim order passed by this Court shall remain in force. We hasten to clarify that we have not expressed anything on the merits of the case.

30. Consequently, the appeal is disposed of in the above terms leaving the parties to bear their respective costs.

K.K.T. Appeal disposed of.

BHARAT BHUSHAN & ANR.
v.
STATE OF MADHYA PRADESH
(Criminal Appeal No. 982 of 2007)

MARCH 12, 2013.

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

Penal Code, 1860 – ss.304B and 498A – Prosecution under – Of husband and his relatives – Conviction by courts below – Plea of accused-appellant Nos.2 and 4 that they were living separately and hence act of cruelty cannot be attributed to them – Appeal confined to appellant Nos.2 and 4 – Held: The case of the said appellants not covered either u/s. 304B or u/s.498A – Act of cruelty or harassment against the deceased not established, hence the said appellants cannot be held guilty u/ss.304B and 498A.

Prosecution u/ss. 304B and 498A IPC was initiated against accused alleging demand of dowry and treating the deceased with cruelty. Trial court convicted the accused persons. High Court confirmed the order of conviction holding that appellant Nos.2 and 4 though not residing with the deceased, were responsible for committing cruelty by keeping silent and by not coming to the rescue of the deceased. The present appeal is confined only to appellant Nos.2 and 4 as the Special Leave Petition qua the other two accused was dismissed.

Allowing the appeal, the Court

HELD: 1. The criminal liability u/s. 304B IPC is attracted not just by the demand of dowry but by the act of cruelty or harassment by the husband or any relative of her husband in connection with such demand; thus,

unless such an act of cruelty or harassment is proved to have been caused by the accused to the deceased, soon before her death, in connection with the demand of dowry, the accused cannot be held to be liable for the offence of dowry death u/s. 304B IPC. Similarly, Section 498A IPC provides that the act of cruelty to a woman by her husband or his relative would be punishable and would be attracted only if the husband or his relative commits an act of cruelty within the meaning of clauses (a) and (b) in the Explanation to Section 498A IPC. [Para 7] [234-E-G]

2. The opinion of the High Court that by keeping silence and by not coming forward to settle the dispute with regard to the dowry, the appellant Nos. 2 and 4 were guilty of the offences u/ss. 498A and 304B IPC, is not correct. There might have been a demand of dowry by the appellants at the time of marriage and it is quite possible that the demand of dowry might have persisted even after the marriage, but unless it is established that the appellant Nos. 2 and 4 committed some act of cruelty or harassment towards a woman, they cannot be held guilty of the offences u/ss. 304B and 498A IPC. The act of remaining silent cannot be by any stretch of imagination construed to be an act of cruelty or harassment towards the deceased within the meaning of Section 304B IPC. The act of remaining silent with regard to the settlement of the dowry demand will also not amount to cruelty within the meaning of either clause (a) or clause (b) of the Explanation of Section 498A IPC. [Paras 6 and 8] [233-G-H; 234-A-C; 235-A-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 982 of 2007.

From the Judgment & Order dated 07.04.2006 of the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 1225 of 2004.

Raghenth Basant, Goutam Khanzanchi, Senthil Jagadeesan for the Appellant.

Vibha Datta Makhija for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK J. 1. This is an appeal against the judgment dated 7th April, 2006 of the Madhya Pradesh High Court, Jabalpur Bench in Criminal Appeal No. 1225 of 2004 by which the High Court has maintained the judgment of the XIIIth Additional Sessions Judge (Fast Track Court), Jabalpur in Sessions Trial No. 671 of 2003 convicting the appellants under Sections 304B and 498A of the Indian Penal Code.

2. On 12th February, 2007, this Court dismissed the petition for special leave to appeal qua petitions Nos. 1 and 3 and issued notice confined to appellant nos. 2 and 4 and on 18th October, 2007, this Court had also granted bail to the said two appellants. Hence this appeal is confined to the appeal of appellant Nos. 2 and 4.

3. The facts very briefly are that Madhuri got married to appellant No. 1 at Jabalpur on 10th June, 2003 and she came to the house of her parents on 5th August, 2003. In the house of her parents, she committed suicide by hanging to the ceiling on 17th August, 2003. The father of the deceased lodged a report with the Police on 17th August, 2003, saying that he had brought his daughter to the house on 5th August, 2003 and she was not sent back to her in-laws' house on account of the illness of his wife and she committed suicide. The Police investigated the case and filed a charge sheet against the appellants under Section 304B and 498A of the Indian Penal Code. The trial court convicted the appellants and the High Court has maintained the conviction.

4. We have heard learned counsel for the appellants and learned counsel for the State at length and we find that the trial

court has held on the basis of the evidence led by the prosecution witnesses that appellant Nos. 2 and 4 along with appellant No.1 demanded colour TV, '50,000/- in cash and a Hero Honda Motor Cycle towards dowry at the time of marriage and just after one day of the marriage did not supply proper meal even to the deceased and, accordingly, held that this was an act of cruelty towards the newly married bride and the appellant Nos. 2 and 4 along with the appellant Nos. 1 and 3 were jointly and directly liable under Sections 304B and 498A IPC.

5. In the appeal before the High Court, it was contented on behalf of appellant nos. 2 and 4 that they were living separately and as such no act of cruelty or harassment towards the deceased could be attributed to them. The High Court, however, held that the deceased who was a newly wedded girl would certainly be in a mental agony when her parents were making efforts to call appellant Nos. 2 and 4 along with the other appellants to come and settle the dispute with regard to the dowry and yet the appellants refused to go and settle the matter merely on the ground that they were from the groom's side. The High Court further held that such conduct of the appellant Nos. 2 and 4 would certainly be an act of cruelty and would also result in mental distress to a newly married girl who was married just two months before committing suicide. The High Court was of the opinion that appellant Nos. 2 and 4 in keeping silence and in not coming to the rescue of the deceased committed cruelty even though they had not caused any physical cruelty to the deceased and were liable for the offences under Section 498A and 304B of the Indian Penal Code.

6. We are unable to agree with this opinion of the High Court that by keeping silence and by not coming forward to settle the dispute with regard to the dowry, the appellant Nos. 2 and 4 were are guilty of the offences under Sections 498A and 304B of the IPC. In the facts of this case, as found both by

the trial court and by the High Court, the deceased got married to the appellant No. 1 on 10th June, 2003 and she went back to the house of the appellants on 5th August, 2003 and committed suicide on 17th August, 2003 while she was in the house of her parents. True, there may have been a demand of dowry by the appellants at the time of marriage and it is quite possible that the demand of dowry may have persisted even after the marriage but unless it is established that the appellant Nos. 2 and 4 committed some act of cruelty or harassment towards a woman, they cannot be held guilty of the offences under Sections 304B and 498A IPC.

7. Section 304B IPC provides that where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband, or in connection with, any demand for dowry, such death shall be called 'dowry death' and such husband or relative shall be deemed to have caused her death. Hence the criminal liability under Section 304B IPC is attracted not just by the demand of dowry but by the act of cruelty or harassment by the husband or any relative of her husband in connection with such demand; thus, unless such an act of cruelty or harassment is proved to have been caused by the accused to the deceased soon before her death in connection with the demand of dowry, the accused cannot be held to be liable for the offence of dowry death under Section 304B IPC. Similarly, Section 498A IPC provides that the act of cruelty to a woman by her husband or his relative would be punishable and would be attracted only if the husband or his relative commits an act of cruelty within the meaning of clauses (a) and (b) in the Explanation to Section 498A IPC.

8. In this case, the finding of the High Court is that the appellant Nos. 2 and 4 did not come forward to participate in the settlement of the dowry on the ground that they belonged

to the groom's family and remained silent. This act of remaining silent cannot be by any stretch of imagination construed to be an act of cruelty or harassment towards the deceased within the meaning of Section 304B IPC. The act of remaining silent with regard to the settlement of the dowry demand will also not amount to cruelty within the meaning of either clause (a) or clause (b) of the Explanation of Section 498A IPC.

9. In the result, we allow this appeal of appellant Nos. 2 and 4 and set aside the impugned judgment of the High Court as well as the judgment of the trial court and direct that the bail bonds furnished by appellant nos. 2 and 4 will stand discharged.

K.K.T. Appeal allowed.

KAMLENDRA SINGH @ PAPPU SINGH

v.

STATE OF M.P.

(Criminal Appeal No. 451 of 2013)

MARCH 15, 2013

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

Juvenile Justice (Care and Protection of Children) Act, 2000 – Conviction u/s. 307 IPC – Plea of juvenility before Supreme Court – Held: The accused was a juvenile on the date of the incident – Therefore, sentence awarded by courts below set aside – Case records directed to be placed before the Juvenile Justice Board – Penal Code, 1860 – s.307.

Appellant-accused filed the present appeal challenging his conviction u/s. 307 IPC. He pleaded to be a juvenile on the date of the incident. In order to substantiate his plea, he produced High School Board Marksheet/certificate and a copy of admission register. The documents were verified by the Police as genuine.

Allowing the appeal, the Court

HELD: 1. As per the documents, viz. High School mark sheet/certificate and the school admission register, the appellant was a juvenile on the date of the incident. The principle laid down in the **Ashwini Kumar* **case squarely applies to the facts of the present case. Therefore, the sentence awarded by the trial court, confirmed by the High Court is set aside and the case records are directed to be placed before the concerned Juvenile Justice Board for awarding the appropriate sentence. [Para 7] [238-E-G]**

Ashwani Kumar Saxena v. State of M.P.* **(2012) 9 SCC 750: 2012 (10) SCR 540 – relied on.

Case Law Reference:

2012 (10) SCR 540 relied on Para 7

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 451 of 2013.

From the Judgment & Order dated 17.07.2012 of the High Court of Madhya Pradesh, Jabalpur, M.P. in Criminal Appeal No. 2443 of 1997.

S.K. Dubey, Rajesh, D. Singh, Y. Tiwari for the Appellant.

Vibha Datta Makhija for the Respondent.

The Judgment of the Court was delivered by

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

2. The appellant, along with two others, were charge sheeted for offences punishable under Sections 341, 294, 307 read with Section 34 IPC for conspiring to murder of one Atul Mishra on 27.8.1993 in Rewa at Allahabad Road, near Kalewa Hotel. For the said purpose, the appellant accused gave a country made pistol to the accused Raj Kumar Singh and exhorted him to shoot Atul Mishra. Raj Kumar Singh fired at Atul Mishra with the said country made pistol and he succumbed to his injuries.

3. The trial Court convicted him under Sections 341, 307 read with Section 34 IPC, but acquitted him of the charges under Section 294 IPC. For the offence under Section 341 IPC, he was sentenced to undergo rigorous imprisonment for one month and for the offence under Section 307 IPC, he was sentenced to rigorous imprisonment for one year along with a fine of Rs.500/-. Both the sentences were directed to run concurrently.

4. On appeal, the High Court set aside the conviction and sentence for the offence punishable under Section 341 IPC, but the conviction as well as the sentence awarded for offence punishable under Section 307 IPC was maintained, against

which this appeal has been preferred.

5. Shri S.K. Dubey, learned senior counsel appearing for the appellant, submitted that the appellant was a juvenile on the date of the incident i.e. 27.8.1993, though the claim of juvenility was not raised either before the trial Court or the High Court. In order to establish the date of birth of the accused, the High School Board Mark-sheet /Certificate and a copy of the admission register were produced before this Court. Those documents would indicate that on the date of the incident, the date of birth of the accused is 25.2.1977. If that be so, the age of the accused on the date of the incident was 16 years 6 months and 2 days.

6. When the matter came up for hearing on 9.11.2012, this Court directed the State of Madhya Pradesh to find out whether the appellant was a juvenile on the date of the incident and the veracity of the documents mentioned above. The State Government got those documents verified through the Additional Superintendent of Police and reported that the documents are genuine.

7. Going by those documents, evidently, the date of birth of the appellant is 25.2.1977. If that be so, the appellant was a juvenile on the date of the incident. We have extensively examined the provisions of the Juvenile of Justice (Care and Protection of Children) Act, 2000 in *Ashwani Kumar Saxena v. State of M.P.* (2012) 9 SCC 750 and we are of the view that the principle laid down in the above judgment squarely applies to the facts of the present case. Under such circumstances, we are inclined to set aside the sentence awarded by the trial Court, confirmed by the High Court and the case records are directed to be placed before the concerned Juvenile Justice Board for awarding the appropriate sentence. Ordered accordingly.

8. The appeal is allowed as above.

K.K.T. Appeal allowed.

CHAIRMAN, RUSHIKULYA GRAMYA BANK
v.
BISAWAMBER PATRO & OTHERS
(Civil Appeal No. 2760 of 2013)

APRIL 2, 2013

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Service Law – Promotion – On the basis of seniority-cum-merit – Employer laying down a bench mark, besides the criteria fixed by promotion rules – Propriety of – Held: The employer has discretion to fix minimum merit having in mind requirements of the post.

The question for consideration in the instant appeals was whether it was open to the management of the appellant-Bank to lay down a benchmark, besides the criteria fixed by the rules for grant of promotion on seniority-cum-merit basis.

Allowing the appeals, the Court

HELD: The minimum necessary merit for promotion, is a matter that is decided by the management, having in mind the requirements of the post to which promotions are to be made. The employer has the discretion to fix different minimum merit, for different categories of posts, subject to the relevant rules. [Para 14] [246-G-H]

Rajendra Kumar Srivastava and Ors. v. Samyut Kshetriya Gramin Bank and Others **(2010) 1 SCC 335: 2009 (15) SCR 936 – relied on.**

State of Kerala N.M. Thomas **(1976) 2 SCC 310: 1976 (1) SCR 906;***Bhagwandas Tiwari v. Dewas Shajapur Kshetriya Gramin Bank* **(2006) 12 SCC 574: 2006 (8) Suppl. SCR 760;** *B.V. Sivaiah v. K. Addanki Babu* **(1998) 6 SCC 720*:* 1998 (3) SCR 782 – referred to.**

Case Law Reference:

1976 (1) SCR 906	**referred to**	**Para 10**
2006 (8) Suppl. SCR 760	**referred to**	**Para 10**
1998 (3) SCR 782	**referred to**	**Para 10**
2009 (15) SCR 936	**relied on**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2760 of 2013.

From the Judgment & Order daed 12.02.2008 of the High Court of Orissa at Cuttack in Writ Petition No. 13076 of 2004.

WITH

C.A. Nos. 2761, 2762, 2763, 2764, 2765, 2766, 2767 of 2013.

Dr. Lakshme Narsimha, S. Udaya Kumar Sagar, Bina Madhavan, Karan Kanwal (for Lawyer's Knit & Co.) for the Appellant.

C.K. Sasi, Abhisth Kumar, P.P. Singh for the Respondents.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. Leave granted in all the special leave petitions.

2. All the appeals are at the instance of a Regional Rural Bank, namely, Rushikulya Gramya Bank, and the matter relates to promotion from one scale to another. Out of the eight appeals, six relate to promotion from Junior Management Scale-I to Middle Management Scale-II and in the remaining two appeals (arising from SLP (Civil) No.17974 of 2008 and SLP(civil) No.18898 of 2008), the matter relates to promotion

from Clerk to Junior Management Scale-I.

3. The short question that arises in these appeals is whether it is open to the management of the Bank to lay down a benchmark, besides the criteria fixed by the rules for grant of promotion on seniority-cum-merit basis.

4. The appellant - bank issued a circular No.024/2004-05, dated June 23, 2004 notifying the vacancies inter alia in the seventeen posts of Middle Management Scale-II and eight posts of Junior Management Scale-I. The circular stated that the process of promotion shall be conducted as per the promotion rules of the Government of India. For promotion to the post of Middle Management Scale-II, the zone of consideration was four times the number of vacancies and for promotion to the post of Junior Management Scale – I, all eligible candidates were permitted to take the exam.

5. The rules governing promotion from Junior Management Scale-I to Middle Management Scale-II, in so far as relevant for the present, are as under:-

*2 (a) to (c) xxxxxxxx

(d) Whether promotion to be made on seniority basis or merit:

Promotion shall be made on the basis of seniority-cum-merit.

(e) Eligibility:	xxxxxxx
(f) Mode of Selection:	The Selection of the candidates shall be made by the committee on the basis of written test, interview and assessment of Performance Appraisal Reports for the preceding

	five years as an officer in Sealed/Field Supervisor.
(g) Composition of Committee:	xxxxxxxxx
(h) Reckoning of the minimum eligibility:	xxxxxxxxx
(i) Number of candidates to be considered for promotion:	xxxxxxxxx
(j) Selection process for promotion:	The selection shall be on the basis of performance in the written test, interview and performance Appraisal Report for preceding five years as per the division of marks given below.
(A) Written Test:	60 marks
(B) Interview:	20 marks
(C) Performance Appraisal Reports:	20 marks
TOTAL marks:	100 marks

(A) Written test (60 marks)

The candidates shall be required to appear for written test comprising of two parts viz. Part (A) covering Banking Law and practice of Banking and Part (B) covering Credit Policy, Credit Management including Priority Sector, Economics and Management.

:60 marks allotted written test shall be further divided as under:

Part "A" 30 marks
Part "B" 30 marks

A list of only those candidates who **secure minimum 40% marks in each part shall be prepared and such** candidates shall be called for interview.

(B) Interview (20 marks):

There shall be no minimum qualifying marks for the interview.

(C) Performance appraisal Reports (20) marks):

Performance Appraisal Reports for the preceding five years shall be considered for the purpose of awarding marks for promotion."

In case of promotion from Clerk to Junior Management Class-I scale the division of marks is as under:-

"(A) Written test	:	70 marks
(B) Interview marks	:	20 marks
(C) Performance Appraisal Reports	:	10 marks.
Total Marks	:	100 marks."

70 marks allotted to written test are further divided as under:

"English	:	35 marks
Bank Law Practice	:	35 marks
Total Marks	:	70"

6. A candidate in order to qualify must secure a minimum of 40 per cent marks each in English and banking law practice.

7. The appellant – bank, in addition to the requirement of 40% qualifying marks in the written test further fixed the qualifying mark of 60% for general candidates and 55% marks for SC/ST candidates on the aggregate marks comprising written test, performance appraisal reports and interview.

8. The names of all candidates who got 60% or above in the aggregate were put in the list for promotion strictly as per their seniority. All candidates were promoted in order of seniority, irrespective of anyone among them having got marks in excess of 60% in the aggregate.

9. The respondents in each of the appeals who were unsuccessful in getting promotions, challenged the select list of the promoted candidates by filing writ petitions before the Orissa High Court. The High Court heard W.P.(civil) No.14359/2003 (giving rise to civil appeal, arising from SLP(Civil) No.19292/2008)) as the leading case. It allowed the Writ Petition holding that prescription of the benchmark of 60% marks in the aggregate was in violation of the promotion policy and the rules governing the field. It, accordingly, allowed the Writ Petition and directed the appellant-bank to make fresh selection in accordance with the Rules. (The other writ petitions giving rise to the other appeals were disposed of following the judgment passed in W.P.(Civil) No.14359/2004).

10. In taking the view that the prescription of the minimum qualifying marks in the aggregate was in contravention of promotion based on seniority-cum-merit, the High Court relied upon the decisions of this Court in *State of Kerala v. N.M.*

Thomas[1], *Bhagwandas Tiwari v. Dewas Shajapur Kshetriya Gramin Bank*[2], and *B.V. Sivaiah v. K. Addanki Babu*[3].

11. In a more recent decision in *Rajendra Kumar Srivastava and Others v. Samyut Kshetriya Gramin Bank and Others*[4], this Court re-visited the issue of fixing a high percentage as the minimum qualifying marks for promotion on seniority-cum-merit basis. It examined all the three decisions (besides others) relied upon by the High Court, namely, *Bhagwandas Tiwari* (supra), *B.V. Sivaiah* (supra) and *N.M. Thomas* (supra).

12. In *Rajendra Kumar Srivastava,* the Court framed the following two questions for consideration:

> "8. On the contentions urged, the following two questions arise for our consideration:
>
> (i) Whether minimum qualifying marks could be prescribed for assessment of past performance and interview, where the promotions are to be made on the principle of seniority-cum- merit?
>
> (ii) Whether the first respondent Bank was justified in fixing a high percentage (78%) as the minimum qualifying marks (minimum merit) for promotion?

13. Answering both the questions in the affirmative, the Court on an analysis of the earlier decisions observed and held that:

> **"13.** Thus it is clear that a process whereby eligible candidates possessing the minimum necessary merit in the feeder posts is first ascertained and thereafter,

1. (1976) 2 SCC 310.
2. (2006) 12 SCC 574.
3. (1998) 6 SCC 720.
4. (2010) 1 SCC 335.

> promotions are made strictly in accordance with seniority, from among those who possess the minimum necessary merit is recognised and accepted as complying with the principle of "seniority-cum-merit". What would offend the rule of seniority-cum-merit is a process where after assessing the minimum necessary merit, promotions are made on the basis of merit (instead of seniority) from among the candidates possessing the minimum necessary merit. If the criteria adopted for assessment of minimum necessary merit is bona fide and not unreasonable, it is not open to challenge, as being opposed to the principle of seniority-cum-merit. We accordingly hold that prescribing minimum qualifying marks to ascertain the minimum merit necessary for discharging the functions of the higher post, is not violative of the concept of promotion by seniority-cum-merit.

14. The next question is whether fixing of 78% as minimum qualifying marks (that is, as the minimum necessary merit) is unreasonable and arbitrary. The Rules in this case provide that the mode of selection is by interview and assessment of performance reports for the preceding three years as officer Scale I. The seniority list of officers in Scale I was published on 4-12-1996. Thereafter, the promotion process was held by earmarking 60 marks for assessment of performance reports (at the rate of 20 marks per year) and 40 marks were allotted for interview. The officers possessing the minimum qualifying marks of 78%, were then promoted on the basis of seniority. What should be the minimum necessary merit for promotion, is a matter that is decided by the management, having in mind the requirements of the post to which promotions are to be made. The employer has the discretion to fix different minimum merit, for different categories of posts, subject to the relevant rules. For example, for promotions at lower levels, it may fix lesser minimum qualifying marks and fix a comparatively higher

minimum qualifying marks for higher posts."

14. The decision of the High Court, thus, appears to be clearly contrary to the view taken by this Court in Rajendra Kumar Srivastava.

15. The decision of the High Court is, accordingly, set aside. The writ petitions filed by the respondents before the Orissa High Court are dismissed. The select list prepared by the appellant-bank is affirmed. The appeals are allowed but with no order as to costs.

K.K.T. Appeals dismissed.

SHABIR AHMED TELI

v.

STATE OF JAMMU & KASHMIR

(Criminal Appeal No. 700 of 2006)

APRIL 11, 2013

[AFTAB ALAM AND R.M. LODHA, JJ.]

Ranbir Penal Code – s.302 – Murder – Life imprisonment – Appellant allegedly killed his neighbor by firing several gun shots at him – Alleged motive behind the killing was refusal by the deceased to give his daughter in marriage to the appellant – Conviction of accused-appellant – Justification of – Held: Justified – Statements of the PWs made it clear that the family members of the deceased were full of fear of the appellant, who had an unruly and violent background – Appellant used to come to the house of the deceased as he wished and give to his family members open threats of dire consequences for not giving his daughter to him in marriage – Ocular evidence reliable – Evidences of each of the six witnesses internally sound and corroborated the testimonies of the other witnesses.

Investigation – Slow and shoddy investigation – Effect on the prosecution case – Held: On facts, keeping in view the unruly and violent background of the accused-appellant, truthfulness of the prosecution case to be tested on the intrinsic worth of the prosecution evidence leaving aside the failings of the police investigation.

The prosecution case was that the appellant killed his neighbor by firing several gun shots at him. The alleged motive behind the killing was refusal by the deceased to give his daughter in marriage to the appellant. The trial court convicted the appellant under section 302 of the Ranbir Penal Code and sentenced him to undergo life

imprisonment. The order was upheld in appeal by the High Court and therefore the instant appeal.

Dismissing the appeal, the Court

HELD: 1. In the instant case, the police investigation was painfully slow, reluctant and shoddy. Applying the normal standards for judging the soundness and correctness of a criminal charge, the facts and circumstances of the case would tend to considerably weaken the case of the prosecution. However, in order to understand the highly unusual way in which the police investigation took place, it is necessary to probe further and to see the personality of the accused-appellant. The appellant is described by the prosecution witnesses as a member of "*Ikhwan*". The "*Ikhwan"* is supposed to be a loose organization that was made of surrendered militants in Kashmir who worked or purported to work as informers for the security forces and were also used for liquidating the secessionist militants. The members of the "*Ikhwan"* were mostly unruly, violent elements generally believed to enjoy the patronage and protection of the security forces. Common people feared them and as it would appear from this case even the State police was wary of laying a hand on them. In this background, the truthfulness of the prosecution case is to be tested on the intrinsic worth of the prosecution evidence leaving aside the failings of the police investigation. [Paras 8, 9 and 12] [255-E; 256-B-D; 257-F]

2. In support of its case, the prosecution examined six eye witnesses. Four of the eye-witnesses are the family members of the deceased, being his son, widow, daughter and son-in-law. The other two are residents of the same village, unrelated both to the deceased and the appellant. From the statements of the prosecution witnesses, it is clear that the family members of the deceased were full of fear of the appellant. The appellant

was a neighbour of the deceased; he would come to the house of the deceased as he wished and give to his family members open threats of dire consequences for not giving his daughter to him in marriage. The family members of the deceased had the apprehension that to give effect to his threats he might do something dreadful. The deceased's daughter was sent away to live with some relatives in some other place for fear that she might be kidnapped by the appellant. PW.7 stated before the court that he was a marriage broker and about three years ago he had fixed the marriage of the daughter of the deceased in some family at Palipura. This greatly displeased the appellant who came to his house carrying a rifle and asked him to break the marriage fixed by him and giving the threat that otherwise he would kill him. He also said that the appellant was connected with *Ikhwan*. [Paras 10, 11 and 13] [257-B-E, G-H]

3. The testimonies of the eye-witnesses are found to be intrinsically sound and reliable. There is no reason not to accept the evidences of those ocular witnesses. The evidences of each of the six witnesses are sound internally and corroborate the testimonies of the other witnesses. Both the trial court and the High Court rightly held the appellant guilty of the charge of murder. [Paras 19 and 20] [259-D-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 700 of 2006.

From the Judgment & Order dated 16.10.2003 of the High Court of Jammu & Kashmir at Sringar in Criminal Appeal No. 4 of 2002 & Crl. Reference No. 27 of 2002.

M. Qamaruddin, M. Qamaruddin for the Appellant.

Sunil Fernandes, Suhaas Joshi for the Respondent.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. This appeal by special leave is directed against the judgment and order dated October 16, 2003 passed by the Jammu & Kashmir High Court in Criminal Appeal No.4 of 2002 with criminal reference No.27 of 2002. By the impugned judgment, the High Court dismissed the appellant's appeal and affirmed the judgment and order passed by the trial court by which the appellant was convicted under section 302 of the Ranbir Penal Code and sentenced to undergo life imprisonment.

2. According to the prosecution case, on August 6, 1997, at about 8:30 P.M. one Gani Shah (the deceased) was returning to his house after offering the '*Isha*' (late evening) prayers at the local mosque in *village* Magray-pora of *tehsil* Anantnag. The appellant intercepted him in the lane, at a spot just outside the kitchen of the house of the deceased and taking aim at him fired several shots from the gun, which he was carrying. Gani Shah, hit by the gunshots fell down dead on the spot. His wife and son and some neighbours who gathered at the place of occurrence lifted him physically and took him inside the house. It is further the case of the prosecution that the appellant wanted to marry the younger daughter of Gani Shah, namely, Lovely. But the proposal for marriage sent by him was rejected both by Gani Shah and Lovely and it was in retribution of the rejection of his marriage proposal that he killed Gani Shah.

3. Apparently, no one from the victim's family went to the police to report the matter. On the following morning, i.e., on August 7, 1997, the village *Chowkidar*, Ghulam Rasool Shah learnt that Gani Shah had been killed. Then, he along with the village *Numberdar*, Mohd. Ahsan Dar went to the police station at Achabal and reported the matter there at 8:15 A.M. In the report, he simply stated that on August 6, 1997, at 8:30 P.M. one Gani Shah, son of Gh. Mohd. Shah, while he was coming to his house from the mosque after offering the '*Isha namaz*', was attacked with gunfire by unknown gunmen outside his own kitchen and he died on the spot. He also made it clear that neither he nor the *Numberdar* had witnessed the occurrence; that they had only heard that one Gani Shah was killed by unidentified gunmen by gunshots fired from an automatic weapon, the previous evening after the '*Isha Namaz*'. The information given by the Chowkidar was reduced to writing by the SHO and was registered as FIR No.21/1997 of Police Station Achabal.

4. The police after investigation submitted charge-sheet against the appellant following which the case was committed to the court of sessions where the appellant was charged for commission of offences under sections 302/341/201 RPC read with sections 7/25 of the Arms Act. The appellant pleaded not guilty and the case was set for prosecution evidence. At that stage, the public prosecutor filed an application for further investigation of the case under section 170(8) of the Code of Criminal Procedure. The court allowed the prayer and on further investigation the police submitted a supplementary report, this time naming three others Mansoor Ahmad Wagey, Nasir Ahmad Hajam and Shabir Ahmad Hajam, also as accused. The newly added accused were charged for commission of offences under sections 302/341/201/109 RPC and 7/25 of the Arms Act.

5. At the conclusion of the trial, however, the trial court acquitted the three other accused who were named in the supplementary charge-sheet but held and found the appellant guilty of committing murder of Gani Shah. It, accordingly, convicted and sentenced the accused, as noted above, by judgment and order dated August 23, 2002/September 21, 2002. As the sentence awarded to the appellant was life imprisonment, the trial court made a reference to the High Court for confirmation under section 374 of the Code of Criminal Procedure, which was registered as Reference No.27 of 2002. The appellant in turn preferred an appeal against the judgment

and order passed by the trial court which was registered in the High Court as Criminal Appeal No.4 of 2002. The High Court upheld the criminal reference and dismissed the appeal filed by the appellant by the judgment and order dated October 16, 2003.

6. The appellant has now come to this Court in appeal by special leave.

7. There are certain features of this case that stand out and that need to be dealt with at the outset.

(I). According to the prosecution, the occurrence took place on August 6, 1997 at 8:30 P.M. Achabal Police Station is at a distance of 3 kilometers from village Magray-pora where the occurrence took place. Nonetheless, no one from the victim's family went to report the matter to the police. It was only the following morning that the *Chowkidar* and the *Numberdar* of the village went to the police station and there they reported that Gani Shah was killed by "unknown gunmen". They also made it clear that they were not the witnesses of the occurrence and they had only heard that Gani Shah was killed by "unidentified gunmen".

(II). On getting information about the occurrence, the police came to the place of occurrence at Magrey-Pora at about 8:30 or 8:45 a.m. and went back after about half an hour, leaving behind the body of the deceased with the family members for burial.

(III). On that date (August 7, 1997) the police recorded the statements only of the informant Rasool Shah and Dr. Shabbir Ahmad, Medical Officer, PHC, Achabal, whom they had brought with them to examine the deceased. The informant Rasool Shah stated that he was a chowkidar of village Kanganhal and resided there. On August 6, 1997 at about 8:30 in the evening he heard a gunshot but fearing terrorist fire he did not come out from his house. On the next morning he came to village Magrey-Pora and came

to learn that Abdul Gani Shah, while he was returning to his house after offering Isha prayer in the mosque, was killed by an unknown gunman. He once again made it clear that he was not a witness to the occurrence nor did he have any information as to who killed Abdul Gani Shah, the previous night. Dr. Shabir Ahmad in his statement recorded under section 161 Cr.P.C. said that on medical examination it was apparent that the death (of Gani Shah) was caused due to bullet shots and loss of blood; further, that the cause of death being apparent, there was no need for any post-mortem.

(IV). No post-mortem was held on the body of the deceased Gani Shah. Dr. Basheer Ahmad Paddar, Assistant Surgeon, Achabal, who was examined as one of the prosecution witness stated that on August 7, 1997 the police had taken him to Magrey-pora where he was shown the dead body of Gani Shah. On examination he found three gunshot injuries on the body of the deceased. He identified the death certificate dated August 7, 1997 given by him which was marked as Ex.PWM1. He further said that no detailed post-mortem was conducted because the cause of death was apparent. He added that the cause of death was due to multiple gunshot wounds resulting in hemorrhage and shock with cardio-respiratory arrest. He also said that he could not tell the time of death as it was not recorded in certificate given by him. He was also unable to state the distance from which the shots might have been fired.

(V). Zakir Hussain Shah and Abdul Rehman Shah who are the son and the son-in-law respectively of the deceased and who are among the six eye witnesses later examined before the trial court, were first examined by the police on August 9, 1997. Fatah, the widow of the deceased and Zubaida, one of the daughters of the deceased who too are eye-witnesses of the occurrence were first examined by the police under Section 161 of the RPC and on August

13, 1997 and August 15, 1997 respectively. The remaining two eye-witnesses namely, Mohd. Aslam Shah and Ali Mohd. Lone, who are not the family members of the deceased, and who are also the eye witnesses of the occurrence were examined by the police on October 7, 1997. The statements of all these witnesses were also recorded before a Magistrate under section 164 of the RPC on May 5, 2000.

(VI). The appellant was arrested on May 15, 2000 that is to say after about three years of the occurrence.

(VII). No gun was recovered from the appellant or from any other accused in the case and it was for that reason that the trial court acquitted the appellant of the charge under section 7/25 of the Arms Act.

(VIII). The charge-sheet was finally submitted after almost three years of the occurrence.

8. Applying the normal standards for judging the soundness and correctness of a criminal charge, the aforesaid facts and circumstances would tend to considerably weaken the case of the prosecution. But the question is why the police investigation was so painfully slow, reluctant and shoddy? We have seen the village *Chowkidar* saying that he heard the gun shot at 8.30 in the evening of August 6, 1997 but he did not venture out of his house for fear of terrorist fire. Next morning when he went to report the matter to the police he seems to be at pains to make it clear that he had not witnessed the occurrence and as far as he was concerned the killer was some unknown gunman. On getting the report, the police come to the village but do not stay for more than half an hour. There is no investigation at the site of the killing. No statement is taken of any witness. No need is felt to have the post-mortem of the body of the deceased. The empty cartridges fallen at the site of the killing that were collected by the witnesses are handed over to the police but those are either thrown away or put away somewhere as never again to see the light of the day. No

attempt is made to look for the accused, much less to arrest him even though he lived in village Magray-pora itself. No attempt is made to search for or recover the weapon of crime which, according to the charge-sheet submitted by the police almost three years after the occurrence, was an AK-47 rifle.

9. In order to understand the highly unusual way in which the police investigation took place, it is necessary to probe further and to see the personality of the appellant. The appellant is described by the prosecution witnesses as a member of "*Ikhwan*". The "*Ikhwan"* is supposed to be a loose organization that was made of surrendered militants in Kashmir who worked or purported to work as informers for the security forces and were also used for liquidating the secessionist militants. The members of the "*Ikhwan*[1]*"* were mostly unruly, violent elements generally believed to enjoy the patronage and protection of the security forces. Common people feared them and as it would appear from this case even the state police was wary of laying a hand on them.

Zakir Husain Shah (PW.2) stated:

> "Accused Shabbir Ahmad Teli had relationship with Ikhwan Tanjeem."

He further said:

> "I used to see the accused persons with army men, however, at the time of occurrence, army men were not with him."

Abdul Rehman Shah (PW.3) stated before the court:

> "Accused Shabbir Teli was concerned with Ikhwan and the said Tanjeem gave rifle to him."

Zubaida Zakir Husain Shah (PW.4) stated before the court:

> "Shabbir Ahmad Teli had gun and was working with Ikhwan. Other accused persons have no concern with Tanjeem.

1. The full name of the group was "Ikhwan-ul-Muslemin" which literally means the Brotherhood of Muslims.

However, the above-named accused persons were friend of Shabbir Ahmad."

Mohammad Afzal Shah (PW.7) stated before the court:

"Accused Shabbir Tali was not wearing Maran but he was in police uniform and was having rifle in his hands."

10. From the statements of the prosecution witnesses, it is also clear that the family members of the deceased were full of fears of the appellant. The appellant was a neighbour of the deceased; he would come to the house of the deceased as he wished and give to his family members open threats of dire consequences for not giving Lovely to him in marriage. The family members of the deceased had the apprehension that to give effect to his threats he might do something dreadful. Lovely was sent away to live with some relatives in some other place for fear that she might be kidnapped by the appellant.

11. Mohammad Afzal Shah who was examined as PW.7 stated before the court that he was a marriage broker and about three years ago he had fixed the marriage of Lovely, the daughter of the deceased in some family at Palipura. This greatly displease the appellant who came to his house carrying a rifle and asked him to break the marriage fixed by him and giving the threat that otherwise he would kill him. He also said that the appellant was connected with *Ikhwan*.

12. In this background, we propose to test the truthfulness of the prosecution case on the intrinsic worth of the prosecution evidence leaving aside the failings of the police investigation.

13. In support of its case, the prosecution examined six eye witnesses. Four of the eye-witnesses are the family members of the deceased, being his son (Zakir Husain Shah), widow (Fatah), daughter (Zubaida) and son-in-law (Abdul Rehman Shah). The other two, namely Mohammad Aslam Shah and Ali Mohammad Lone are residents of the same village, unrelated both to the deceased and the appellant.

14. From the deposition of PW.2 Zakir Husain Shah, it appears that after doing the '*Isha Namaz*' on August 6, 1997, he returned to his house leaving behind his father in the mosque. As he came to the house, there was a gunshot outside in the lane. On hearing the shot, he and his mother Fatima came out of the house carrying a lantern. He saw the appellant standing in the lane carrying an automatic rifle. The appellant threatened them and asked them to go back inside the house. They came back to the house and watched from the open window. He saw his father coming out of the mosque and Manzoor Ahmad (one of the three accused acquitted by the trial court) who was standing near the mosque signaling to the appellant that his father was returning to the house. As his father came near the house, the appellant, taking aim at him, fired several shots from his gun, as a result of which his father fell down at the spot and died. He also stated that on hearing the first gunshot (that was perhaps meant to announce the arrival of the appellant at the spot or to scare away any people from there), his sister Zubaida too had come out of the house and she and her husband Abdul Rehman Shah were also present at the spot when the appellant killed his father by firing at him from his gun. Zakir Husain Shah was subjected to long and searching cross-examination but there is nothing that can be said to create any doubt about the veracity of his narrative. His deposition is truthful, clear and definite.

15. The other three family members, namely, Fatah, the wife of the deceased, Abdul Rehman Shah, son-in-law of the deceased and Zubaida, the daughter of the deceased also narrated the same facts. Their evidences are quite consistent and fully corroborative of each other. Zubaida also said that as her father fell down hit by the shots fired by the appellant, she rushed to him and took her head in her lap and he took his last breath in her arms.

16. Apart from the four family members, the prosecution case is also supported by Mohammad Aslam Shah and Ali Mohammad Lone.

17. Mohammad Aslam Shah testified that he saw the appellant with the gun standing near the kitchen of the house of the deceased. As the deceased arrived there, on his way back from the mosque, the appellant fired four shots from his gun hitting the deceased in his chest and killing him on the spot. Mohammad Aslam Shah also stated that the occurrence was witnessed, besides him, by Zakir Husain, Zubaida, Fatah and Rehman Shah and some other witnesses including Ali Mohammad Lone.

18. Ali Mohammad Lone who was a neighbour of the deceased and the accused unequivocally stated that he saw the appellant carrying a gun and as the deceased arrived at the spot, he took aim at him and opened fire. Gani Shah, hit by the shots, fell down. He also stated that the motive behind the killing was the refusal by the deceased to give his daughter Lovely in marriage to the appellant.

19. We have carefully examined the testimonies of the eye-witnesses and we find that those are intrinsically sound and reliable. There is no reason for this Court not to accept the evidences of those ocular witnesses. The evidences of each of the six witnesses are sound internally and corroborate the testimonies of the other witnesses.

20. On a careful consideration of all the materials on record and on hearing counsel for the parties, we are of the view that both the trial court and the High Court rightly held the appellant guilty of the charge of murder. We see no merit in the appeal. It is, accordingly, dismissed.

21. The bail bonds of the appellant are cancelled. The appellant is directed to surrender within one month from today failing which the trial court should take coercive steps for taking him in custody to make him serve out the remaining period of his sentence.

B.B.B. Appeal dismissed.

ARVIND KUMAR SHARMA

v.

VINEETA SHARMA & ANR.

(Civil Appeal Nos. 3884-3886 of 2013)

APRIL 15, 2013

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

Practice and Procedure – Consolidation of proceedings in two suits – The suits filed by husband before Family Court – One seeking divorce and other seeking permanent and temporary injunction restraining the wife from entering matrimonial home – In the second suit ex-parte ad interim injunction granted – Plea of wife to consolidate both the proceedings, rejected by Family Court – Appeal by wife praying for consolidation of the two proceedings – High Court stayed the operation of ex-parte ad interim injunction as well as hearing of both the suits – Held: High Court committed mistake in granting a relief which was not even prayed for – Order of High Court set aside – Both the suits directed to be consolidated and be tried together.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3884-3886 of 2013.

From the Judgment & Order dated 29.02.2012 in AO No. 61 of 2012, dated 21.06.2012 in CLMA No. 1925 of 2012 in AO No. 61 of 2012 and dt. 13.07.2012 in CLMA No. 6976 of 2012 in AO No. 61 of 2012 of the High Court of Uttarakhand at Nainital.

Dhruv Mehta, Tayenjam Momo Singh for the Appellant.

P.N. Gupta and Bharti Gupta for the Respondents.

The following Order of the Court was delivered

ORDER

1. Leave granted.

2. The original prayer made by the respondent No.1 before the Principal Judge, Family Court, Dehradun was that the proceedings in Original Suit No. 74 of 2009 and Original Suit No.263 of 2009 should be consolidated and tried together. This prayer was rejected by the Family Court by its judgment and order dated 27th January, 2012. Consequently, respondent No.1 filed appeal before the High Court. The High Court noticed the fact that the appellant - husband has filed two suits. In one suit, he is seeking divorce from the wife. In the other suit, he is seeking permanent injunction as well as temporary injunction, restraining the wife from entering the matrimonial home of the couple. It is also noticed by the High Court that in the second suit, ex parte ad interim order of injunction had been granted in favour of the husband. The aforesaid suit is still pending. Instead of deciding the issue on merits, the High Court admitted the appeal and stayed the operation of the ex parte ad interim order of injunction as well as hearing of both the suits until the appeal is heard and decided.

3. In our opinion, the aforesaid order cannot be sustained. The High Court has granted a relief which was not even prayed for by the respondent, who was the appellant before the High Court. At best, the High Court could have directed that both the suits filed by the husband shall be consolidated and tried together.

4. Mr. Dhruv Mehta, learned Senior Advocate appearing for the appellant, submits that the relations between husband and wife have deteriorated to such an extent that it would not be possible for the appellant to spend any time with the respondent – wife. Therefore, it would not be appropriate to order that wife be permitted entry into the matrimonial home.

5. We are of the considered opinion that it would not be

appropriate for the High Court or for this Court to make any observations on the merits of the controversy involved between the parties as the same shall have to be decided by the appropriate Court where the proceedings are pending. We, therefore, set aside the order passed by the High Court. We allow the appeal filed by the respondent before the High Court. Both the suits filed by the husband are consolidated and shall be tried together as prayed for by the respondent wife. We also direct the Court which is designated to decide the aforesaid two matters to decide the same as expeditiously as possible.

6. The appeals are disposed of in the above terms. No costs.

K.K.T. Appeals disposed of.

RANJIT KUMAR MURMU
v.
M/S LACHMI NARAYAN BHOMROJ & ORS.
(Civil Appeal No. 7263 of 2012)

APRIL 15, 2013

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

West Bengal Kerosene Control Order, 1968 – Paras 8 to 11 – Allocation of monthly quota to kerosene oil dealers – Quota allotted to appellant-dealer reduced by the Director of Consumer Goods – Order upheld by District Magistrate – Appeal before Principal Secretary/ Commissioner of Food and Supply Department which set aside the order of District Magistrate – Jurisdiction of Principal Secretary/Commissioner to entertain the appeal – Challenged – Held: Order passed by District Magistrate, could not be termed as an order under para 8 or 9 of the Control Order and thus, no appeal was maintainable under para 10 of the Control Order before the Principal Secretary/ Commissioner – Even if the order of District Magistrate was passed under para 11 of the Control Order, such order was not appealable under para 10 or before the Principal Secretary /Commissioner – The State has the inherent power to alter or to set aside any order passed by the District Magistrate but it should follow the procedure as prescribed by the law – From the order passed by the Principal Secretary/Commissioner, it is apparent that the order was passed in capacity of his designated post and not on behalf of the State – High Court justified in holding that the Principal Secretary /Commissioner was not competent to hear the appeal.

The respondent, a Kerosene Dealer under the provisions of the West Bengal Kerosene Control Order, 1968, had been allotted a specified quota of Kerosene Oil

per month. The Director of Consumer Goods, Food and Supplies Department, Government of West Bengal passed order whereby the respondents' monthly quota got enhanced while quota allocated to another dealer, viz. the appellant was correspondingly reduced. The District Magistrate, the competent authority under the Control Order, upheld the allocation of monthly quota made to the respondents and the appellant by the Director of Consumer Goods.

The appellant filed writ petition challenging the order of the District Magistrate, but later withdrew the same and filed appeal before the Principal Secretary and Commissioner Food, Food and Supplies Department, Government of West Bengal who set aside the order of the District Magistrate.

The respondents filed writ petition challenging the maintainability of the appeal and jurisdiction of the Principal Secretary to entertain such appeal. The High Court set aside the order passed by the Principal Secretary and Commissioner of the Food and Supplies Department of the State Government holding that it was not competent to hear the appeal and therefore the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1. Under paragraph 8 of the West Bengal Kerosene Control Order, 1968, the Director or the District Magistrate, as the case may be, are vested with the power to refuse to grant or renew a licence following the procedure as mentioned therein. On the other hand, Paragraph 9 of the Control Order deals with the power of Director/District Magistrate for cancellation or suspension of license in case of any malpractice or contravention of any provision of this Order. Any person aggrieved by the Order passed under Paragraph 8 or

Paragraph 9 of the Control Order may within 30 days prefer an appeal under Paragraph 10. [Paras 12, 13 and 14] [269-C-E; 270-B]

1.2. The impugned order passed by the District Magistrate cannot be termed as an order passed under Paragraph 8 or Paragraph 9 of the Control Order. In such a situation, no appeal is maintainable under Paragraph 10 before the Principal Secretary or the Commissioner, Food and Supply Department, Government of West Bengal. Even if it is assumed that the order of the District Magistrate was under Paragraph 11 of the Control Order, such an order is not appealable under Paragraph 10 or before the Principal Secretary and Commissioner of Food and Supply Department, Govt. of West Bengal. [Paras 17, 18] [271-G; 272-A-B]

2. The State has indeed the inherent power to alter or to set aside any order passed by the District Magistrate but it should follow the procedure as prescribed by the law, such an order should be passed by the authority empowered to do so on behalf of the State in the name of Governor of the State. From the impugned order passed by the Principal Secretary and Commissioner, Food and Supply Department, it is apparent that the said order has been passed in the capacity of his designated post and not on behalf of the State. [Paras 19, 20] [272-C-D]

3. The appellant submitted that the writ petition was withdrawn by the appellant to move before the competent authority. But that does not mean that while withdrawing such case, the Court or any individual can confer jurisdiction upon any authority who otherwise is not so empowered under the Statute. There is no infirmity or illegality in the impugned order passed by the District Magistrate as affirmed by the High Court. [Paras 21, 22] [272-E-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7263 of 2012.

From the Judgment & Order dated 02.02.2012 of the High Court at Calcutta in A.P.O.T. No. 237 of 2010.

Pallav Shishodia, Pijush K. Roy, Kumar Gupta for the Appellant.

V. Giri, Timir Baran Saha, Ranjan Mukherjee for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. This appeal has been preferred by the appellant against the Judgment dated 2nd February, 2012 passed by the Division Bench of the Calcutta High Court in A.P.O.T No.237 of 2010. The Division Bench while dismissing the appeal preferred by the appellant held that the Principal Secretary, Food and Supplies Department is not an appellate authority with respect to an order passed under Paragraph 11 of the West Bengal Kerosene Control Order, 1968 and thereby affirmed the order passed by the learned Single Judge.

2. The relevant facts of the case are as follows:

One Purushottam Das Jhunjhunwala was issued with a Kerosene Dealer licence in the year 1997 and was carrying on his business in the name of M/s Lachmi Narayan Bhomroj, as a sole proprietor. Upon his death, his heirs were temporarily allowed to carry on kerosene business under the same name as per the provisions of West Bengal Kerosene Control Order, 1968 (hereinafter referred to as the 'Control Order').

On or about 6th March, 2006, a fresh licence was issued to the partnership firm of the legal heirs of said Purushottam Das Jhunjhunwala (respondents herein) on compassionate ground.

Even though the licence was issued on 6th March, 2006, no supply was effected. After much persuasion from the part of respondents the authority allotted a quota of 72 K.L. of Kerosene Oil per month as against the quota of 168 K.L. per month originally allotted to their late father.

3. Partners of M/s Lachmi Narayan Bhomroj made representation citing the above matter before the concerned authorities. The Director of Consumer Goods, Food and Supplies Department, Government of West Bengal passed an order on 12th August, 2009 whereby the quota of 168 K.L. of Kerosene Oil was restored in favour of respondents. By virtue of this restoration while respondents' quota got enhanced there was corresponding reduction in the allocation to the appellant.

4. Being aggrieved by the reduction of allocation, the appellant filed a Writ Petition No. 899/09 before the Calcutta High Court challenging the order dated 12th August, 2009 which was disposed of by a learned Single Judge on 4th September, 2009 directing the Joint Director of Consumer Goods to hear the matter and take a decision. In an appeal being APOT No. 367 of 2009 against the said order the Division Bench modified the order and directed the District Magistrate, Purulia, the competent authority under the Control Order to hear and pass an appropriate order.

5. Pursuant to the aforesaid order, the District Magistrate, Purulia, passed an order dated 6.10.2009 upholding the allocation of monthly quota made to both the agents by Director of Consumer Goods vide letter dated 12th August, 2009.

6. Being aggrieved, the appellant preferred a writ petition No. 1093/2009 challenging the order of the District Magistrate. When the matter was taken up by the learned Single Judge on 23rd December, 2009, learned counsel for the appellant on instruction withdraw the writ petition to enable the appellant to move departmentally. The writ petition was accordingly dismissed as withdrawn.

7. Thereafter, the appellant preferred an appeal to the Principal Secretary and Commissioner Food, Food and Supplies Department, Government of West Bengal whereupon the Principal Secretary and Commissioner Food passed an order dated 8th March, 2010 setting aside the order of the District Magistrate, Purulia with a direction to restore supply of 192 K.L. Kerosene Oil per month in favour of the appellant. It was also ordered to reduce the quota of M/s Lachmi Narayan Bhomroj (respondent) to 70 K.L. Kerosene Oil per month.

8. The aforesaid order dated 8th March, 2010 passed by the Principal Secretary was challenged by the respondents M/s Lachmi Narayan Bhomroj and others in Writ Petition No. 365/2010. They questioned the maintainability of the appeal and jurisdiction of the Principal Secretary to entertain such appeal. Learned single Judge by order dated 26th March, 2010 held that the Principal Secretary was not competent to hear the appeal and to set aside the order passed by the District Magistrate. Hence, the writ petition was allowed and the order passed by Principal Secretary was set aside. The aforesaid order has been affirmed by the Division Bench.

9. Learned counsel for the appellant submitted that the Division Bench committed serious error of law by holding that the State Government is not an appellate authority with respect to the order passed under Paragraph 11 of the Control Order. The appeal against the order passed by the District Magistrate lies to the State Government and that the High Court also failed to notice that in the present case the amended provision of the Paragraph 10 of the Control Order is applicable which came into effect prior to the order passed by the District Magistrate on 16th December, 2009.

10. On the other hand, learned counsel for the respondent contended that the Principal Secretary and Commissioner of Food and Supplies Department had no jurisdiction to hear an appeal over an order passed by the District Magistrate.

11. In the said circumstances, the questions that arise for our consideration are:

(i) Whether the impugned order was passed by the State Government?

(ii) If not so, whether the Principal Secretary and Commissioner of the Food and Supply Department has jurisdiction to entertain the appeal against the order passed by District Magistrate.

12. Under paragraph 8 of the Control Order, the Director or the District Magistrate, as the case may be, are vested with the power to refuse to grant or renew a licence following the procedure as mentioned therein. It reads as follows:

*"**8. Refusal to grant or renew license**:- The Director, or the District Magistrate, having jurisdiction, may, after giving the agent or the dealer or hawker concerned an opportunity of stating his case in writing and for reasons to be recorded in writing, refuse to grant or renew a license under this Order."*

13. On the other hand, Paragraph 9 of the Control Order deals with the power of Director/District Magistrate for cancellation or suspension of license in case of any malpractice or contravention of any provision of this Order. Paragraph 9 reads as follows:

*"**9. Cancellation or suspension of license**:- If it appears to the Director or the District Magistrate having jurisdiction that an agent or a dealer has indulged in any malpractice or contravened any provision of this order or any condition of the license or any direction given under paragraph 12 of the order, he may forthwith temporarily suspend the license;*

Provided that the agent or the dealer whose license has been so suspended shall be given an opportunity of being heard before cancellation of the license or revocation of the order of suspension of the license finally by an order in writing to be made within 30 days from the date of suspension of the license. The order shall be passed ex parte if the dealer whose license has been so suspended fails to appear at the hearing."

14. Any person aggrieved by the Order passed under Paragraph 8 or Paragraph 9 of the Control Order may within 30 days prefer an appeal under Paragraph 10, which reads as follows:

*"**10. Appeal** – Any person aggrieved by an order passed under paragraph or paragraph 9 of this order may within 30 days from the date of the order, prefer an appeal –*

(a) in Calcutta.

(i) where the order is passed by the Director of Consumer Goods, Department of Food and Supplies, to the State Government.

(ii) where the order is passed by any other authorised by the State Government under Clause (d) of paragraph 3, to the Director of Consumer Goods, Department of Food and Supplies, and

(b) elsewhere;

(i) where the order is passed by the District Magistrate or the Deputy Commissioner of a District, to the State Government

(ii) Where the order is passed by any other officer authorised by the District Magistrate of the Deputy Commissioner of a district under Clause (e) of paragraph 3, to the District Magistrate or the deputy commissioner, as the case may be, of the District".

15. From the aforesaid provision, it is evident that no appeal lies to the Principal Secretary or the Commission of Food and Supply Department.

16. Paragraph 11 relates to issue of delivery order or permit by the Director or the District Magistrate, which reads as under:

> *"**11. Issue of delivery order or permit** – (1) The Director or the District Magistrate having jurisdiction may issue a delivery order or permit requiring an agent within his jurisdiction to supply kerosene to –*
>
> *(a) a dealer, or*
>
> *(b) other person or establishment requiring kerosene for his or its own consumption, in any particular area, if in the opinion of the Director or the District Magistrate, as the case may be, this is considered necessary, or*
>
> *(c) an agent.*
>
> *(2) No person other than oil distributing company, an agent or a dealer shall transport kerosene or store kerosene or shall have in his possession kerosene exceeding ten liters at a time except under and in accordance with a permit issued by the Director or the District Magistrate having jurisdiction."*

17. The impugned order passed by the District Magistrate, Purulia on 6th October, 2009 cannot be termed as an order passed under Paragraph 8 or Paragraph 9 of the Control Order. In such a situation, no appeal is maintainable under Paragraph 10 before the Principal Secretary or the Commissioner, Food and Supply Department, Government of West Bengal.

18. In the present case, the District Magistrate, Purulia passed an order dated 6.10.2009 whereby the quantum of Kerosene Oil allotted per month to respondent got enhanced. By the same order quantum of Kerosene Oil allotted to the appellant got reduced. Even if it is assumed that the order of the District Magistrate was under Paragraph 11 of the Control Order, such an order is not appealable under Paragraph 10 or before the Principal Secretary and Commissioner of Food and Supply Department, Govt. of West Bengal.

19. The State has indeed the inherent power to alter or to set aside any order passed by the District Magistrate but it should follow the procedure as prescribed by the law, such an order should be passed by the authority empowered to do so on behalf of the State in the name of Governor of the State.

20. From the impugned order passed by the Principal Secretary and Commissioner, Food and Supply Department, it is apparent that the said order has been passed in the capacity of his designated post and not on behalf of the State.

21. Learned counsel for the appellant submitted that the writ petition was withdrawn by the appellant to move before the competent authority. But that does not mean that while withdrawing such case, the Court or any individual can confer jurisdiction upon any authority who otherwise is not so empowered under the Statute.

22. We, therefore, do not find any infirmity or illegality in the impugned order passed by the District Magistrate as affirmed by the Single Judge and the Division Bench. In absence of any merit the appeal is dismissed. The parties shall bear their respective costs.

B.B.B. Appeal dismissed.

MARIAPPAN
v.
STATE OF TAMIL NADU
(Criminal Appeal No. 926 of 2009)

APRIL 18, 2013

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

Penal Code, 1860 – ss.84, 299, 302 and 449 – Murder – Defence of insanity – Accused-appellant repeatedly assaulted his paternal aunt with a 'aruval' *and thereby caused her death – Conviction of appellant by trial court and High Court – Challenged – Plea of insanity by appellant seeking protection u/s.84 IPC – Held: Physical and mental condition of the accused at the time of commission of offence, is paramount for bringing the case within purview of s.84 – In the case on hand, no evidence as to the unsoundness of mind of the appellant-accused at the time of the occurrence – Appellant had come to the house of the deceased one day prior to the occurrence, demanded money and threatened the deceased of grave consequences and on the next day, when the demand was not fulfilled, he trespassed into the house, pushed away PWs 1 and 2, bolted the door from inside and inflicted repeated* 'aruval' *blows on the deceased which resulted into her death – All these aspects also show that at the relevant time, appellant was not insane as claimed by him – Further, appellant was examined as a defence witness and according to the trial Judge, as a witness, he made his statement clearly and cogently and meticulously followed the court proceedings – The trial Judge, after noting appellant's answers in respect of the questions u/s. 313 CrPC concluded that he could not be termed as an "insane" person – Burden of proving an offence is always on the prosecution and never shifts, however, existence of circumstances bringing the case within exception u/s.84 IPC lies on the accused – Appellant*

failed to discharge the burden as stated in s.105 of the Evidence Act – Evidence Act, 1872 – s.105.

The prosecution case was that on account of a land dispute the accused-appellant repeatedly assaulted his paternal aunt with a 'aruval' and thereby caused her death. The trial court as well as the High Court convicted the appellant under Sections 449 and 302 of IPC and sentenced him to undergo RI for 5 years under Section 449 of IPC and RI for life for the offence under Section 302 of IPC.

In the instant appeal, the appellant raised the plea of insanity seeking protection under Section 84 of the IPC. The appellant placed reliance on the evidence of DW-1- the Doctor who stated that the accused was suffering from Paranoid Schizophrenia. The other material relied on in support of the plea of insanity is Ex. D-2, the termination order of the Inspector General of Police, Northern Sector, CRPF, New Delhi wherein it is stated that the appellant was medically unfit for service in CRPF due to Paranoid Schizophrenia.

The question which therefore arose for consideration was whether at the time of the alleged incident, i.e., on 05.11.2001, the accused-appellant was suffering from "Paranoid Schizophrenia" and, hence, he was entitled to the benefit of exception under Section 84 of IPC.

Dismissing the appeals, the Court

HELD: 1. In the instant case, from the materials analyzed, discussed and concluded by the trial Court and the High Court, it is clearly established that it was the accused-appellant who committed the murder. [Para 8] [281-E]

2. Section 84 IPC makes it clear that a person, who, at the time of doing it, by reason of unsoundness of

mind, commits anything, he is permitted to claim the above exception. In other words, insanity or unsoundness of mind are the stages when a person is incapable of knowing the nature of the act or unable to understand what is wrong or right and must relate to the period in which the offence has been committed. Further Section 105 of the Indian Evidence Act, 1872 makes it clear that though the burden of proving an offence is always on the prosecution and never shifts, however, the existence of circumstances bringing the case within the exception under Section 84 IPC lies on the accused. On a reading of Sections 84 and 299 IPC and Sections 105 and 101 of the Evidence Act, it is clear that "when a person is bound to prove the existence of any fact, the burden of proof lies on that person". At the time of commission of offence, the physical and mental condition of the person concerned is paramount for bringing the case within the purview of Section 84. [Paras 10, 11 and 15] [282-B, C-E, G; 284-H; 285-A-D]

Shrikant Anandrao Bhosale vs. State of Maharashtra **(2002) 7 SCC 748: 2002 (2) Suppl. SCR 612 and** *Sudhakaran vs. State of Kerala* **(2010) 10 SCC 582: 2010 (12) SCR 873 – relied on.**

Modi's Medical Jurisprudence and Toxicology, **22nd Edition, paras 10 and 11 and** *Modi's Medical Jurisprudence and Toxicology,* **23rd Edition, paras 26 and 28 – referred to.**

3.1. In the case on hand, though the Doctor (DW-1) attached with the Government Rajaji Hospital, Madurai, who treated the accused from 11.07.2001 to 08.08.2001 has stated that the appellant-accused was suffering from paranoid schizophrenia, it is not in dispute that after 08.08.2001, there is no material or information on record that he was suffering from the same. It is relevant to mention that the date of occurrence was 05.11.2001 i.e.

nearly after three months of the treatment by DW-1. In the same way, Ex. D-2, the termination order of the Inspector General of Police, Northern Sector, CRPF, New Delhi is also not helpful because of the language used in Section 84 of IPC. As a matter of fact, DW-2, father of the accused-appellant has not stated anything about the behaviour of the deceased. He has also not stated anything that he is a mentally ill person and not able to do his routine works properly. In fact, from Ex. D-2, which is a letter from the Department, it is seen that the appellant-accused made a written request for rejoining stating improvement in his health. [Para 16] [285-E-H; 286-A]

3.2. It is also relevant to note that the appellant came to the house one day prior to the occurrence, demanded money and threatened the deceased of grave consequences and on the next day, when the demand was not fulfilled, he trespassed into the house, pushed away PWs 1 and 2, bolted the door from inside and inflicted repeated aruval blows on the deceased resulted into her death. All these aspects also show that at the relevant time, he was not insane as claimed by him. [Para 17] [286-A-C]

3.3. Another factor which goes against the appellant-accused is that he himself was examined as a defence witness No.3. According to trial Judge, as a witness, he made his statement clearly and cogently and it was also observed that he was meticulously following the court proceedings, acting suitably when the records were furnished for perusal. The trial Judge has also pointed out that during the entire proceedings, the accused has nowhere stated that he was insane earlier to the date of incident. The trial Judge, after noting his answers in respect of the questions under Section 313 CrPC has concluded that the accused could not be termed as an "insane" person. [Para 18] [286-C-E]

4. In view of the materials placed and the decision arrived at by the trial Court and of the fact that there is no evidence as to the unsoundness of mind of the appellant-accused at the time of the occurrence, namely, on 05.11.2001 and also taking note of the fact that the accused-appellant failed to discharge the burden as stated in Section 105 of the Evidence Act, the conclusion arrived at by the trial Court and affirmed by the High Court is confirmed. [Para 19] [286-E-G]

Case Law Reference:

2002 (2) Suppl. SCR 612	**relied on**	**Para 13**
2010 (12) SCR 873	**relied on**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 926 of 2009.

From the Judgment & Order dated 17.10.2006 of the High Court of Madras, bench at Madurai in Crl. A.No. 1556 of 2003.

Anil Shrivastav for the Appellant.

M. Yogesh Kanna, A. Santha Kumaran, Sasikala for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal has been filed against the final judgment and order dated 17.10.2006 passed by the Madurai Bench of the Madras High Court in Criminal Appeal No. 1556 of 2003, whereby the High Court dismissed the appeal filed by the appellant herein and confirmed the order dated 29.08.2003 passed by the Additional District and Sessions Judge (Fast Track Court No. IV), Madurai at Periakulam in S.C. No. 390 of 2002.

2. Brief facts

(a) The case on hand relates to the death of a woman in

her house over a land dispute by the appellant-accused, claiming the plea of insanity under Section 84 of the Indian Penal Code, 1860 (in short 'the IPC'). Parvathi @ Kili (the deceased), her husband Parasivam Chettiar (PW-6) and their grand daughters viz., Chellakili (PW-1) and Parmala (PW-2) were living together at Ammapatti village. The deceased was the paternal aunt of the appellant-accused.

(b) There was a dispute between the family of the appellant-accused and the deceased over a portion of land belonging to one Chinnamanur Pillayar Kovil, which was taken on lease by PW-6 through one Chinnamanur Karuvaya Pillai. The family of the appellant-accused claimed that the said land was only leased out to them. When the family of the appellant-accused demanded to handover the disputed land, PW-6, in turn, after the death of the said Chinnamanur Karuvaya Pillai, handed over the land to one Karuppaya Pillai (PW-11), son of Karuvaya Pillai which resulted in strained relationship between both the families as the appellant-accused was demanding money for the same.

(c) One day prior to the date of occurrence, i.e., on 04.11.2001, when PWs 1 and 2 were also at home, the appellant-accused came to the house of the deceased and questioned about the whereabouts of PW-6 and also told her that they have taken their land and money and threatened to kill them. At that time, PW-5, brother-in-law of PW-6 came there and pacified the appellant-accused. Thereafter, the appellant-accused left the place by saying that he would come again tomorrow and warned that if the money is not paid, he would kill her and her husband.

(d) On 05.11.2001, at 8.00 a.m., while the deceased was in the kitchen, the appellant-accused entered into the house and closed the door from inside. When PWs 1 & 2 asked about the conduct of the appellant-accused, he said that if the deceased and her husband are not paying his money, he is going to kill them and went to the kitchen. Thereafter, the

appellant-accused pulled the tuft of the deceased in his left hand and gave a cut on her neck with Aruval and when she warded off with her right hand, it resulted into injuries to her fingers. At that time, PWs 1 & 2 requested the accused to leave her. Again, the accused caught hold of the tuft of her in his left hand and gave repeated Aruval blows on her head as a result of which she died instantaneously. Thereafter, the accused left the place with Aruval in his hand and after opening the door he said that he is going to kill PW-6 also. On raising hue and cry by PWs 1 & 2, the neighbors came there. PW-1 along with PW-5 went to the Uthamapalayam Police Station and after recording the statement given by PW-1 the sub-Inspector of Police (PW-16) registered a case being Crime No. 386 of 2001 for the offence punishable under Section 302 of the IPC. On the same day, at 4.30 p.m., the appellant-accused was arrested and the dead body was also sent for post mortem. After completion of the investigation, a charge sheet was filed and the case was committed to the Court of Additional District and Sessions Judge, (Fast Track Court No. IV) Madurai at Periakulam and numbered as Sessions Case No. 390/2002.

(e) The Additional District and Sessions Judge, by order dated 29.08.2003, convicted the appellant-accused under Sections 449 and 302 of IPC and sentenced him to undergo RI for 5 years under Section 449 of IPC along with a fine of Rs.5,000/-, in default, to further undergo RI for 1 (one) year and to undergo RI for life for the offence under Section 302 of IPC alongwith a fine of Rs.10,000/-, in default, to further undergo RI for 5 years.

(f) Aggrieved by the said order, the appellant filed an appeal being Criminal Appeal No. 1556 of 2003 before the Madurai Bench of the Madras High Court. By impugned judgment dated 17.10.2006, the High Court dismissed the appeal and confirmed the order dated 29.08.2003 passed by the Additional District and Sessions Judge (Fast Track Court No. IV), Madurai.

(g) Against the said order, the appellant-accused has filed this appeal by way of special leave petition.

3. Heard Mr. Anil Shrivastav, learned counsel for the appellant and Mr. M. Yogesh Khanna, learned counsel for the respondent-State.

4. The one and only contention projected by learned counsel for the appellant-accused is that at the time of the alleged incident, the accused was suffering from "Paranoid Schizophrenia" and, hence, he is entitled to the benefit of exception under Section 84 of IPC.

Discussion:

5. Before considering the above issue, it is to be noted that whether the prosecution has established the guilt against the accused by examining PWs 1 and 2, the grand daughters of the deceased Parvathi, as eye-witnesses. It is the evidence of PW-6 – husband of the deceased that one day before the date of incident, when PWs 1 and 2 were at home along with his wife-Parvathi, the appellant-accused came to their house and demanded money and also threatened her before leaving the place that he would come again tomorrow and if money is not paid, he would kill both the deceased and her husband PW-6. It is also stated by PWs 1 and 2 that on the next day, at 8.00 a.m., when the deceased was cooking food in the kitchen, the accused trespassed into the house, bolted the door from inside and, thereafter, caused fatal injuries to the deceased with the Aruval. It is further stated that on raising hue and cry, PWs 3 and 4, the neighbours, came at the spot and saw the accused running from the house with aruval.

6. The evidence of PWs 3 and 5-the neighbours, proves the occurrence that had happened one day prior to the date of the incident and also the shoutings of the accused-appellant threatening and demanding money. PW-6 has also explained in his evidence about the dispute relating to the lease of the

temple land through one Chinnamanur Kuruvaya Pillai and handing over the said land to PW-11, son of the said Chinnamanur Kuruvaya Pillai. According to PW-6, because of the said land, there were strained relationship between the two families for more than 10 years and the appellant-accused used to quarrel with him and his wife as to how the land leased out to their family could be handed over to PW-11 and was demanding money for the same.

7. The evidence of PWs 1 and 2 – the eye-witnesses, the evidence of PWs 3 and 4, who saw the accused running after the occurrence with Aruval (M.O.1) and the recovery of the weapon at the instance of the accused which was found to be stained with human blood of "O" group, as per the serologist report (Ex.P.12), tallied with the blood group of the deceased as the clothes of the deceased viz., M.O.s 1 to 4 were also stained with human blood "O" group clearly prove the case of the prosecution. Further, the medical evidence through PW-9-the Doctor, who conducted the post mortem and issued the report (Ex.P-3) strengthened the version of PWs 1 and 2.

8. From the materials analyzed, discussed and concluded by the trial Court and the High Court, it clearly establishes that it was the accused-appellant who committed the murder.

9. Coming to the only contention put-forward by the appellant-accused that the accused was suffering from Paranoid Schizophrenia, learned counsel for the appellant placed reliance on the evidence of DW-1-the Doctor attached to Government Rajaji Hosital, Madurai who treated the accused from 11.07.2001 to 08.08.2001. In his evidence, DW-1 has stated that the accused was suffering from Paranoid Schizophrenia. The other material relied on in support of the plea of insanity is Ex. D-2, the termination order of the Inspector General of Police, Northern Sector, CRPF, New Delhi wherein it is stated that the accused is medically unfit for service in CRPF due to Paranoid Schizophrenia. It is further contended that the appellant has also relied on the statement of PW-2,

grand-daughter of the deceased, that the wife of the accused obtained divorce on the ground that the accused was mentally ill.

10. Since the appellant has raised the plea of insanity seeking protection under Section 84 of the IPC, it is useful to refer the same:

> **"84. Act of a person of unsound mind.-** Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law."

The above section makes it clear that a person, who, **at the time of doing it,** by reason of unsoundness of mind, commits anything, he is permitted to claim the above exception. (emphasis supplied). In other words, insanity or unsoundness of mind are the stages when a person is incapable of knowing the nature of the act or unable to understand what is wrong or right and must relate to the period in which the offence has been committed.

11. It is also useful to refer Section 105 of the Indian Evidence Act, 1872 which reads as under:

> **"105. Burden of proving that case of accused comes within exceptions.-** When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, (45 of 1860), or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances."

Though the burden of proving an offence is always on the prosecution and never shifts, however, the existence of circumstances bringing the case within the exception under Section 84 IPC lies on the accused.

12. With these provisions, let us examine whether at the time of the incident, the accused was suffering from unsoundness of mind, i.e., on 05.11.2001.

13. Learned counsel for the appellant-accused heavily relied on the decision of this Court in *Shrikant Anandrao Bhosale vs. State of Maharashtra,* (2002) 7 SCC 748 wherein this Court considered the similar issue. A reference made from Modi's Medical Jurisprudence and Toxicology, 22nd Edition, as quoted in paras 10 and 11 are relevant, which reads thus:

> **"10.** What is paranoid schizophrenia, when it starts, what are its characteristics and dangers flowing from this ailment? Paranoid schizophrenia, in the vast majority of cases, starts in the fourth decade and develops insidiously. Suspiciousness is the characteristic symptom of the early stage. Ideas of reference occur, which gradually develop into delusions of persecution. Auditory hallucinations follow, which in the beginning, start as sounds or noises in the ears, but afterwards change into abuses or insults. Delusions are at first indefinite, but gradually they become fixed and definite, to lead the patient to believe that he is persecuted by some unknown person or some superhuman agency. He believes that his food is being poisoned, some noxious gases are blown into his room and people are plotting against him to ruin him. Disturbances of general sensation give rise to hallucinations, which are attributed to the effects of hypnotism, electricity, wireless telegraphy or atomic agencies. The patient gets very irritated and excited owing to these painful and disagreeable hallucinations and delusions. Since so many people are against him and are interested in his ruin, he comes to believe that he must be a very important man. The nature of delusions thus may change from persecutory to the grandiose type. He entertains delusions of grandeur, power and wealth, and generally conducts himself in a haughty and overbearing manner. The patient usually retains his memory and orientation and does not show

> signs of insanity, until the conversation is directed to the particular type of delusion from which he is suffering. When delusions affect his behaviour, he is often a source of danger to himself and to others. (*Modi's Medical Jurisprudence and Toxicology, 22nd Edn.*)
>
> **11.** Further, according to Modi, the cause of schizophrenia is still not known but heredity plays a part. The irritation and excitement are effects of illness. On delusion affecting the behaviour of a patient, he is a source of danger to himself and to others."

14. It is useful to refer the decision relied on by learned counsel for the State i.e. *Sudhakaran vs. State of Kerala,* (2010) 10 SCC 582. The facts in that case are identical to the case on hand. Here again, this Court referred to Modi's Medical Jurisprudence and Toxicology, 23rd Edition about paranoid schizophrenia. The following statement in paras 26 and 28 are relevant:

> **"26.** The defence of insanity has been well known in the English legal system for many centuries. In the earlier times, it was usually advanced as a justification for seeking pardon. Over a period of time, it was used as a complete defence to criminal liability in offences involving mens rea. It is also accepted that insanity in medical terms is distinguishable from legal insanity. In most cases, in India, the defence of insanity seems to be pleaded where the offender is said to be suffering from the disease of schizophrenia.
>
> **28.** The medical profession would undoubtedly treat the appellant herein as a mentally sick person. However, for the purposes of claiming the benefit of the defence of insanity in law, the appellant would have to prove that his cognitive faculties were so impaired, at the time when the crime was committed, as not to know the nature of the act."

15. After adverting to Sections 84 and 299 IPC and Sections 105 and 101 of the Evidence Act, this Court

concluded that "when a person is bound to prove the existence of any fact, the burden of proof lies on that person". This Court also held as under:

> **"35.** It is also a settled proposition of law that the crucial point of time for ascertaining the existence of circumstances bringing the case within the purview of Section 84 is the time when the offence is committed. We may notice here the observations made by this Court in *Ratan Lal v. State of M.P.* In para 2 of the aforesaid judgment, it is held as follows:
>
> > "It is now well settled that the crucial point of time at which unsoundness of mind should be established is the time when the crime is actually committed and the burden of proving this lies on the [appellant]."

As concluded, we also reiterate that at the time of commission of offence, the physical and mental condition of the person concerned is paramount for bringing the case within the purview of Section 84.

16. In the case on hand, though the Doctor (DW-1) attached with the Government Rajaji Hospital, Madurai, who treated the accused from 11.07.2001 to 08.08.2001 has stated that the appellant-accused was suffering from paranoid schizophrenia, it is not in dispute that after 08.08.2001, there is no material or information on record that he was suffering from the same. It is relevant to mention that the date of occurrence was 05.11.2001 i.e. nearly after three months of the treatment by DW-1. In the same way, Ex. D-2, the termination order of the Inspector General of Police, Northern Sector, CRPF, New Delhi is also not helpful because of the language used in Section 84 of IPC. As a matter of fact, DW-2, father of the accused-appellant has not stated anything about the behaviour of the deceased. He has also not stated anything that he is a mentally ill person and not able to do his routine works properly. In fact, it was brought to our notice that in Ex. D-2,

which is a letter from the Department, it is seen that the appellant-accused made a written request for rejoining stating improvement in his health.

17. It is also relevant to note that the appellant came to the house one day prior to the occurrence, demanded money and threatened the deceased of grave consequences and on the next day, when the demand was not fulfilled, he trespassed into the house, pushed away PWs 1 and 2, bolted the door from inside and inflicted repeated aruval blows on the deceased resulted into her death. All these aspects also show that at the relevant time, he was not insane as claimed by him.

18. Another factor which goes against the appellant-accused is that he himself was examined as a defence witness No.3. According to learned trial Judge, as a witness, he made his statement clearly and cogently and it was also observed that he was meticulously following the court proceedings, acting suitably when the records were furnished for perusal. The trial Judge has also pointed out that during the entire proceedings, the accused has nowhere stated that he was insane earlier to the date of incident. The trial Judge, after noting his answers in respect of the questions under Section 313 of the Code of Criminal Procedure, 1973 has concluded that the accused could not be termed as an "insane" person.

19. In the light of the above discussion and in view of the materials placed and the decision arrived at by the trial Court and of the fact that there is no evidence as to the unsoundness of mind of the appellant-accused at the time of the occurrence, namely, on 05.11.2001 and also taking note of the fact that the accused failed to discharge the burden as stated in Section 105 of the Evidence Act, we fully agree with the conclusion arrived at by the trial Court and affirmed by the High Court.

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

B.B.B. Appeal dismissed.

ROOP SINGH
v.
STATE OF MADHYA PRADESH
(Criminal Appeal No. 1345 of 2005)

JUNE 18, 2013

[A.K. PATNAIK AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860:

ss. 376 and 450 – Rape – Consent – Connotation of – Explained – Held: The evidence on record is clear that the victim was not a willing party to the sexual intercourse committed by the accused and it cannot be said that she voluntarily participated in it after fully exercising her choice in favour of assent – Nor can it be held that the accused was falsely implicated in the offences.

The appellant was convicted and sentenced to 7 years RI u/s 376 IPC and 3 years RI u/s 450 IPC for committing rape on her neighbor, the complainant (PW5), in the night when she and her sister-in-law (PW4) were sleeping in the house and her husband was out to irrigate the fields. The High Court dismissed the appeal of the convict.

Dismissing the appeal, the Court

HELD 1.1. So far as the plea of consent is concerned, unless there is voluntary participation by the woman to a sexual act after fully exercising the choice in favour of assent, the court cannot hold that the woman gave consent to the sexual intercourse. In the instant case, it cannot be said that the complainant had given her consent to the sexual intercourse committed by the appellant. The evidence of PW-4 and PW-5 is clear that

the complainant was sleeping within 2-3 feet away from her sister-in-law (PW-4). PW-5 has stated in her evidence that her sister-in-law (PW-4) woke up when she shouted. There is no discrepancy in the evidence of PW-5 and PW-4 on this point. The evidence on record is clear that PW-5 was not a willing party to the sexual intercourse and this Court cannot hold that PW-5 voluntarily participated in the sexual intercourse with the appellant after fully exercising her choice in favour of assent. [para 6-7] [291-C-D, G; 292-C-D]

State of U.P. v. *Chhotey Lal* **2011 (1) SCR 406 = (2011) 2 SCC 550; and** *State of H.P. v. Mango Ram* **2000 (2) Suppl. SCR 626 = (2000) 7 SCC 224 – referred to.**

1.2. As regards the plea of false implication owing to a land dispute between the two families, the trial court has held that there is no proof of any litigation being there between the parties. In the absence of any evidence to show that there was a dispute between the families in relation to a land on account of which PW-4 and PW-5 would have lodged the FIR against the appellant, the Court cannot hold that the appellant had been falsely implicated in the offences punishable u/ss 450 and 376, IPC. [para 8] [292-E-G]

Case Law Reference:

2011 (1) SCR 406	**referred to**	**para 5**
2000 (2) Suppl. SCR 626	**referred to**	**para 7**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1345 of 2005.

From the Judgment & Order dated 13.12.2004 of the High Court of Judicature, Madhya Pradesh, bench at Gwalior in Criminal Appeal No. 452 of 2002.

R.C. Kohli for the Appellant.

Vibha Datta Makhija, Archi Agnihotri for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is an appeal by way of special leave under Article 136 of the Constitution against the judgment dated 13.12.2004 of the Madhya Pradesh High Court, Gwalior Bench.

2. The facts very briefly are that a First Information Report (for short 'FIR') was lodged by the complainant in Police Station, Civil Lines, Morena, on 01.03.2000 at 7.50 p.m. in the evening. In her verbal statement which was registered as FIR, the complainant stated that on the previous night while she was sleeping in her house in village Tighrapura in a room at about 2 a.m., the appellant, who was her neighbour, entered into her house and forcibly committed intercourse with her when her sister-in-law Guddi Bai sleeping in a nearby cot woke up after listening to weeping of the complainant and then the appellant ran away. The complainant further stated that her husband Rajesh had been to the well to give water to the field and when he came in the morning she told him about the incident and he went to Khadiahar to call her father-in-law Ram Bhajan but he did not meet him and then the complainant has come with her husband to lodge the FIR. Pursuant to the FIR, an x-ray was conducted on the complainant. The complainant was also medically examined. Investigation was conducted and the statements of witnesses were recorded by the police and charge-sheet was filed against the appellant under Section 450, IPC, (house trespass in order to commit an offence) and Section 376, IPC, (rape).

3. At the trial of Sessions Case No.129 of 2000, the FIR was marked as Ex.P-6. Dr. Yogender Singh, who carried out the x-ray examination, was examined as PW-1 and the x-ray report was marked as Ex.P-1. Dr. Smt. Chandra Jatav, who

conducted the medical examination on the complainant, was examined as PW-2 and her examination report was marked as Ex.P-5. The *Petticoat* of the complainant along with the slide of her vaginal liquid were sent to the Forensic Science Laboratory (FSL), Gwalior, and the FSL report was marked as Ex.P-7. Guddi Bai, the sister-in-law of the complainant, was examined as PW-4 and the complainant was examined as PW-5. On the basis of the ocular evidence of PW-4 and PW-5 and the medical evidence and FSL report, the learned Sessions Judge, Morena, convicted the appellant by judgment dated 31.07.2002 and sentenced him to three years rigorous imprisonment and a fine of Rs.250/- for the offence under Section 450, IPC and also sentenced him to seven years rigorous imprisonment and a fine of Rs.500/- for the offence under Section 376(1) IPC. Aggrieved, the appellant filed Criminal Appeal No.452 of 2002 before the Madhya Pradesh High Court, Gwalior Bench, but by the impugned judgment the High Court maintained the conviction and sentences under Sections 376 and 450, IPC, and dismissed the appeal.

4. At the hearing of this appeal, Mr. R.C. Kohli made two submissions before us: (i) the appellant was not guilty of the offence of rape as PW-5, the complainant, had given her consent to the sexual intercourse as would be clear from the evidence on record; and (ii) the complainant has made out a false case against the appellant because of a grudge that the family of the complainant bore against the appellant over a land dispute.

5. Ms. Vibha Datta Makhija, learned counsel appearing for the State, on the other hand, referred to the evidence of PW-5 to show that the complainant made all efforts to resist the appellant and submitted that this was thus not a case where the complainant had given her consent for the sexual intercourse. She cited the judgment in *State of U.P. v. Chhotey Lal* [(2011) 2 SCC 550] to submit that the word "consent" in the definition of rape in Section 376, IPC, connotes exercise

of intelligence based on knowledge of the significance and moral quality of the act to which consent is given and also presupposes a choice of the woman who is said to have given consent between resistance and assent. In reply to submission of Mr. Kohli that the complainant had made the false allegation of rape against the appellant only because of the dispute over the land between the appellant and the family of the complainant, Ms. Vibha Datta Makhija submitted that the trial court has held that there is no evidence whatsoever in support of this defence taken by the appellant.

6. We cannot accept the submission of Mr. Kohli that the complainant had given her consent to the sexual intercourse committed by the appellant. The evidence of PW-4 and PW-5 is that the complainant was sleeping within 2-3 feet away from her sister-in-law (PW-4) and she could not have given her consent for the sexual intercourse when her sister-in-law was sleeping within a short distance from her. Moreover, from the evidence of PW-4, we find that there were three rooms in the house where PW-4 and PW-5 were sleeping and the husband of PW-5 was not in the house and hence PW-5 and the appellant would have moved on to another room if PW-5 was willing for the intercourse. PW-5 has also stated in her evidence:

> *"I made efforts to remove aside the accused but did not scratch him. It is wrong to say that I had got done the bad act from the accused, or unknown person, with sweet-will."*

PW-5 has further stated in her evidence that her sister-in-law (PW-4) woke up when she shouted and prior to that she did not wake up and she was sleeping and there is no discrepancy in the evidence of PW-5 and PW-4 on this point. Hence, the evidence on record is clear that PW-5 was not a willing party to the sexual intercourse.

7. In *State of U.P. v. Chhotey Lal (supra),* the following passage from the judgment of a three-Judge Bench of this

Court in *State of H.P. v. Mango Ram* [(2000) 7 SCC 224] on the meaning of 'consent' for the purpose of the offence of rape as defined in Section 375, IPC, is quoted:

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

Thus, unless there is voluntary participation by the woman to a sexual act after fully exercising the choice in favour of assent, the Court cannot hold that the woman gave consent to the sexual intercourse. From the evidence of PW-4 and PW-5 discussed above, we cannot hold that PW-5 voluntarily participated in the sexual intercourse with the appellant after fully exercising her choice in favour of assent.

8. On the second contention of the learned counsel for the appellant that PW-5 has falsely named the appellant out of grudge arising out of a dispute on the land between the two families, we find that the trial court has held that there is no proof of any litigation being there between both the parties. Learned counsel for the appellant has also not brought to our notice any evidence to show that there was any land dispute between the two families. In the absence of any evidence to show that there was a dispute between the families in relation to a land on account of which PW-4 and PW-5 had lodged the FIR against the appellant, the Court cannot hold that the appellant had been falsely implicated in the offences under Sections 450 and 376, IPC.

9. In the result, we do not find any merit in the appeal and we accordingly dismiss the same.

R.P. Appeal dismissed.

VIJAY JAIN
v.
STATE OF MADHYA PRADESH
(Criminal Appeal No. 486 of 2013 etc.)

JUNE 20, 2013

[A.K. PATNAIK AND RANJAN GOGOI, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985:

s.8/21 (c) – Conviction on the ground of seizure of contraband goods from accused – Non production of contraband goods before court – Effect of – Held: As the prosecution has not produced before court, the brown sugar alleged to have been seized from appellants and has also not offered any explanation therefor and as the evidence of witnesses to seizure does not establish seizure of brown sugar from appellants, judgment of trial court convicting the appellants and that of High Court maintaining the conviction are not sustainable and, as such, are set aside.

The appellants were convicted u/s 8/21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and sentenced to 10 years RI with a fine of Rs. 1 lakh each. The trial court and the High Court accepted the prosecution case that on a raid conducted by PW-11, the Thanedar Incharge (TI) of the police station, the appellant in Crl. A. No. 484 of 2013 was apprehended outside a flat with a suit case containing brown sugar and the other appellant was apprehended, inside the said flat, with brown sugar. The brown sugar from the appellants was stated to have been seized.

In the instant appeals, it was mainly contended that the conviction of the appellants could not be sustained for non-production before the trial court of the contraband

goods alleged to have been seized from them and the finding of the trial court that the contraband goods were produced in court was perverse.

Allowing the appeals, the Court

HELD: 1.1. The finding of the trial court that the seized contraband goods were produced in a suitcase is contrary to the evidence of P.W. 11 (the TI). There is no mention in the evidence of P.W. 11 of any brown sugar having been found in the suit case. The only evidence before the court was that in the suit case in which the contraband goods were kept, when opened, there was only a big packet wrapped in cloth which contained clothes in a blue coloured polythene. There is, however, evidence that samples were prepared of 25.25gms which were shown to the witnesses and were marked B1 B2, but P.W. 3 (the witness of seizure) has stated before the court that these samples were not prepared in his presence and P.W. 2 (the other witness of seizure) has stated before the court that the witnesses were not taken to the site where the materials were seized. [para 11] [300-F-G; 301-G-H; 302-A-B]

1.2. As the prosecution has not produced before the court, the brown sugar alleged to have been seized from the appellants and has also not offered any explanation therefor and as the evidence of the witnesses (PW 2 and PW3) to the seizure of the materials does not establish the seizure of brown sugar from the possession of the appellants, the judgment of the trial court convicting the appellants and that of the High Court maintaining the conviction are not sustainable and, as such, are set aside. [para 12] [302-C-D]

Jitendra & Anr v. State of M.P. **2003 (3) Suppl. SCR 918 = (2004) 10 SCC 562;** *Ashok v. State of M.P.* **2011 (4) SCR 253 = (2011) 5 SCC 123 – relied on.**

Noor Aga v. State of Punjab and Another **2008 (10) SCR 379 = (2008) 16 SCC 417 – referred to.**

Case Law Reference:

2003 (3) Suppl. SCR 918	**relied on**	**para 4**
2011 (4) SCR 253	**relied on**	**para 4**
2008 (10) SCR 379	**referred to**	**para 8**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 486 of 2013.

From the Judgment & Order dated 21.02.2011 of the High Court of Madhya Pradesh, Bench at Indore in Criminal Appeal No. 1048 of 2007.

WITH

Crl. A. No. 484 of 2013

Sushil Kumar Jain, Puneet Jain, Pratibha Jain for the Appellant.

Ayesha Choudhary, Musharraf Choudhary, C.D. Singh for the Respondent.

The following Order of the Court was delivered

ORDER

1. These are appeals by way of special leave under Article 136 of the Constitution of India against the judgment and order dated 21st February, 2011 of the Madhya Pradesh High Court, Indore Bench in Criminal Appeal Nos. 1048 and 1172 of 2007.

2. The facts very briefly are that on 5th May, 2004, R.C. Pathak, Thanedar Incharge (TI) of Police Station Annapura conducted raid at 15:15 hours at Kshitij Apartment, Usha Nagar Square and apprehended Nilesh Suryakant Shah, the appellant in Criminal Appeal No. 484 of 2013 outside Flat No. 305 of the Apartment as he was alleged to have been carrying brown

sugar in a suit case. After seizing the alleged brown sugar from Nilesh, R.C.Pathak entered Flat No.305 and apprehended the appellant Vijay Jain as it was alleged that he also had brown sugar in his clothes. R.C. Pathak also seized the alleged brown sugar from Vijay. Thereafter he handed over investigation to his successor, R.D.Bhardwaj, Thanedar Incharge of Raj Nagar Police Station and after investigation charge sheet was filed against Nilesh and Vijay for the offence under Section 8/21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act").

3. The two appellants denied the charges and trial was conducted by the Special Judge(NDPS), Indore. At the trial, the prosecution examined as many as 12 witnesses. Shirish Babu Tiwari and Manoj Dubey who witnessed the seizure were examined as P.Ws 2 and 3. R.C. Pathak was examined as P.W. 11 and Lokendra Singh Yadav who was in charge of the Malkhana in which the brown sugar was said to have been stored was examined as P.W. 5. The learned Special Judge (NDPS), Indore by judgment dated 17th August, 2007, convicted the appellants and sentenced them both for 10 years rigorous imprisonment and imposed a fine of '1 lakh on each. Aggrieved, the appellants filed Criminal Appeal Nos. 1048 and 1172 of 2007 before the High Court, but by the impugned common judgment, the High Court maintained the conviction and sentence and dismissed the appeals. Aggrieved the appellants have filed these appeals.

4. Mr. Sushil Kumar Jain, learned counsel appearing for the appellants raised several contentions to assail the conviction of both the appellants. For deciding these appeals, we will consider only the contention of Mr. Jain that the contraband goods have not been produced before the trial court. He submitted that this Court has held in *Jitendra & Anr. v. State of M.P.* (2004) 10 SCC 562 that where there is non-production of the contraband goods alleged to have been seized from the accused, the conviction for the offence under

Section 20(b) of the NDPS Act cannot be sustained. He also cited the decision of this Court in *Ashok v. State of M.P.* (2011) 5 SCC 123 in which a similar view has been taken that where the narcotic drug or the psychotropic substance alleged to have been seized from the possession of the accused is not produced before the trial court as a material exhibit and there is no explanation for its non-production, there is no evidence to connect the forensic expert report with the drug or the substance that was seized from the possession of the accused and in such a case the conviction is not maintainable.

5. Mr. Jain further submitted that although the contention that the contraband goods were not produced before the Court was raised, the trial court recorded a finding that on 24th February, 2005, the seized materials were deposited in Court and this finding was arrived at by referring to item no. 4 in the order sheet of the Court dated 24th February, 2005. He submitted that the trial court has held that a suitcase had been produced before the Court and the seized articles were kept in the suit case. He submitted that the evidence of P.W. 11 on the contrary is that a big suit case from the store of materials was produced before the trial court and when the lock of the suit case was broken and the suit case was opened, a big packet wrapped in cloth was found and a blue coloured polythene was seen in which clothes were there. He submitted that the finding of the trial court, therefore, that the contraband goods were produced in Court was perverse as there was no evidence whatsoever to support the said finding. He argued that though a submission was made also before the High Court on behalf of the appellants that the contraband was not produced in Court, the High Court brushed aside the submission by recording a bald finding that the contraband has been produced before the Court without delay. He submitted that the finding of the High Court that the contraband has been produced in Court is, therefore, contrary to the evidence recorded.

6. Mr. Jain submitted that the prosecution had also taken

a stand in the alternative before the trial court that the contraband goods were destroyed and, produced before the trial court only the samples of the contraband goods. He referred to the provisions of Section 52A of the NDPS Act to submit that in a case of destruction of contraband goods the procedure as laid down in sub-section (2) of Section 52A of the Act has to be followed and in case of destruction, the inventory prepared at the time before destruction and the photographs of the narcotic drugs and psychotropic substances and the list of samples drawn under sub-section (2) of Section 52A of the Act as certified by the Magistrate are treated as primary evidence in respect of the offence. He vehemently argued that since no such procedure has been followed, the alternative plea taken by the prosecution that the contraband goods have been destroyed and could not be produced before the Court cannot be accepted.

7. Mr. Jain also submitted that P.W.3 in his evidence before the Court, has admitted that the police personnel did not take search of any one in front of him and there was no action in front of him regarding seizure of the brown sugar from any person nor any action was done regarding preparation of samples and sealing nor was any action taken in front of him with regard to affixing chits and seizing the materials nor with regard to arrest of any person. He submitted that P.W.3 also stated in his evidence that his signatures were only taken on 'A' to 'A' part of Exhibit P.5 to P.6 and 'B' to 'B' part of Exhibit P.3 and P.4 and from 'A' to 'A' part of Exhibit P7 to 26 in the Panchnama. He vehemently argued that prosecution has thus not been able to prove through P.W.3 that the contraband goods were actually seized from the possession of the appellants. He pointed out that P.W. 3 in fact has been declared hostile. He submitted that similarly P.W. 2 has stated in his evidence that no panch was taken to the site and that would show that the signatures were taken in the Panchnama by the police without taking the seizure witnesses to the place where the materials were alleged to have been seized from the possession of the

appellants. He submitted that the facts in this case, therefore, are similar to the case in *Jitendra* (supra) in which this Court found that the panch witnesses had turned hostile and held that in the absence of non-production of the seized drugs the conviction under the NDPS Act was not maintainable.

8. Ms. Ayesha Choudhary learned counsel appearing for the State of Madhya Pradesh, on the other hand, relied on the judgments of the trial court as well as the High Court for the findings recorded therein that the contraband goods were produced before the Court. In the alternative, she submitted that it has been held by this Court in *Noor Aga v. State of Punjab and Another* (2008) 16 SCC 417 that even if it is accepted for the sake of arguments that the bulk quantity of heroin was destroyed, the samples were essentially to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52A of the NDPS Act. She submitted that since the samples of the contraband goods in this case which were seized from the two appellants were produced and marked as Exhibits A1, A2 and B1,B2, the prosecution has been able to establish the fact of recovery of the contraband goods from the two appellants.

9. Paragraph 96 of the judgment of this Court in *Noor Aga's* case (supra) on which learned counsel for the State very strongly relies is quoted herein below:-

> "Last but not the least, physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it is accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin as envisaged under Section 52-A of the Act."

Thus, in paragraph 96 of the judgment in *Noor Aga's* case, this Court has held that the prosecution must in any case

produce the samples even where the bulk quantity is said to have been destroyed. The observations of this Court in the aforesaid paragraph of the judgment do not say anything about the consequence of non-production of the contraband goods before the Court in a prosecution under the NDPS Act.

10. On the other hand, on a reading of this Court's judgment in *Jitendra's case* (supra), we find that this Court has taken a view that in the trial for an offence under the NDPS Act, it was necessary for the prosecution to establish by cogent evidence that the alleged quantities of the contraband goods were seized from the possession of the accused and the best evidence to prove this fact is to produce during the trial, the seized materials as material objects and where the contraband materials alleged to have been seized are not produced and there is no explanation for the failure to produce the contraband materials by the prosecution, mere oral evidence that the materials were seized from the accused would not be sufficient to make out an offence under the NDPS Act particularly when the panch witnesses have turned hostile. Again, in *the case of Ashok* (supra), this Court found that the alleged narcotic powder seized from the possession of the accused was not produced before the trial court as material exhibit and there was no explanation for its non-production and this Court held that there was therefore no evidence to connect the forensic report with the substance that was seized from the possession of the appellant.

11. In the present case, finding of the trial court that the seized contraband goods were produced in a suitcase is contrary to the evidence of P.W. 11, which is to the following effect:-

> "81. Note – A big suit case from the Store materials on which No. 466/05 is written has been received in a white cloth along with seal of the sealing material. In this the lock is of Nos. and the lock is not getting open because of this A.G.P. is directed to call some technical person for

opening the lock, on this A.G.P. Had called Shri Shakoor who expressed that the lock of Nos. and cannot be opened, it can be broken. In the case, the evidence material is important and therefore it was directed to break the lock, the lock was opened. In the suit case on the opening a big packet wrapped in cloth was found but the cloth in torn and blue coloru polythene is being seen in which clothes are there. The cloth which is rolled on blue colour of polythene there is no seal visible on it, nor any description is being seen, because the cloth is damp and has been in contaminated condition and is torn and no note is marked on it. In the polythere there are 5 pants and 5 shirts which are in wet condition.

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111. Today I cannot say that in what colour bag the rest of the substance was packed in the bag. The material which was seized from Vijay Jain out of it two samples 25-25 gms. were made and marked B1 and B2 which were shown to the witness when he said that they were taken out from the material found with Vijay Jain on site. No other packet except the two samples and rest of material were made on the site. The said both the packets which have been submitted in the court are sealed and on them the seizure chit is not affixed showed the B1 B2 packet and asked that the seal of Police Station is affixed then the witness said the seal of Police Station is affixed then the witness said that it is the seal of Tehsildar Indore. Leaving aside rest of the substance and mobile the other seized material from Vijay is submitted in the Court. This is true that I had not given the mobile for sealing to the Incharge of Stores. Today I cannot say that where that mobile is."

Thus the only evidence before the Court was that in the suitcase in which the contraband goods were allegedly kept when opened, there was only a big packet wrapped in cloth and the cloth was torn and there was a blue coloured polythene in

which there were clothes. There is no mention in the evidence of P.W. 11 of any brown sugar having been found in the suit case. There is, however, evidence that samples were prepared of 25.25gms which were shown to the witnesses and were marked B1 B2 but we find that P.W. 3 has stated before the Court in his examination that these samples were not prepared in his presence and P.W. 2 has stated before the Court that the witnesses were not taken to the site where the materials were seized.

12. We are thus of the view that as the prosecution has not produced the brown sugar before the Court and has also not offered any explanation for non-production of the brown sugar alleged to have been seized from the appellants and as the evidence of the witnesses (PW 2 and PW3) to the seizure of the materials does not establish the seizure of the brown sugar from the possession of the appellants, the judgment of the trial court convicting the appellants and the judgment of the High Court maintaining the conviction are not sustainable.

13. In the result, we allow these appeals and set aside the impugned judgment of the trial court as well as the High Court. The appellants are stated to be in jail. They shall be released forthwith if not required in connection with any other case.

R.P. Appeals allowed.