REPUBLIC OF ITALY AND ORS.
v.
UNION OF INDIA AND ORS.
(Writ Petition (C) No. 135 of 2012 etc.)

JANUARY 18, 2013

[ALTAMAS KABIR, CJI AND J. CHELAMESWAR, JJ.]

International Law:

Incident of firing at a distance of about 20.5 nautical miles from the Indian sea-coast of the State of Kerala - Firing by officers of naval staff of Italy deployed on merchant ship of Italy - Resulting in death of two persons on Indian Fishing Vessel - FIR against two officers u/s. 302/34 IPC lodged in the State of Kerala - State Police investigated the matter and arrested the accused - Writ Petition u/Art. 226 of the Constitution by the accused challenging the jurisdiction of State of Kerala in registering FIR, in investigating the matter and in arresting the accused - During pendency of the writ petition criminal proceedings were also initiated against the accused in Italy under Italian Penal Code - The Consul General of Italy asserted that Italy had exclusive jurisdiction over the accused and they having acted in official capacity were entitled to sovereign and functional immunity - During pendency of the judgment of High Court, Republic of Italy invoked jurisdiction u/Art. 32 of the Constitution for the same reliefs - As the writ petition u/Art. 226 was dismissed, SLP also filed - HELD: Action by State of Kerala was without jurisdiction because the incident took place within Contiguous Zone on which the State did not have jurisdiction - Also because in the case, two sovereign countries were involved and one country had already initiated criminal proceedings against the accused, State of Kerala as one of the units of the federal unit would not have authority to try the accused - 'Declaration on Principles of International Law Concerning Family Relations

and Co-operation between States in accordance with the Charters of United Nations' has to be conducted at federal level and not at provincial level - The incident cannot be said to be an "incident of navigation" within the meaning of Art. 97 of UNCLOS - By virtue of extention of the provisions of IPC and Cr.P.C. to contiguous zone, Union of India is entitled to take cognizance, investigate and try the accused - But the same is subject to the provisions of Art. 100 of UNCLOS - Direction to Union of India to set up Special Court to try the case - Accused can also invoke provisions of Article 100 of UNCLOS whereupon the question of jurisdiction to investigate into the incident and for the courts in India to try the accused would be considered - If found that both the countries i.e. India as well as Italy have concurrent jurisdiction over the matter, the directions passed in this judgment will continue - Penal Code, 1860 - ss. 302, 307, 427 r/w s.34 - Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002 - s.3 - United Nations Convention on the Law of the Sea, 1982 - Articles 97and 100 - Maritime Zones Act, 1976 - Declaration on Principles of International Law Concerning Family Relations and Co-operation Between States in accordance with the Charters of United Nations - Constitution of India, 1950 - Article 297.

Petitioner Nos. 2 and 3 and four other officers of naval staff of Republic of Italy were deployed in the board of merchant ship which was flying the Italian Flag. The deployment was pursuant to a Government decree of Republic of Italy, which was enacted to protect the Italian ships from piracy in international seas. At a distance of about 20.5 nautical miles from the Indian Sea-Coast, off the State of Kerala, the Italian ships mistook an Indian Fishing Vessel to be a pirate vessel and opened fire on it. Two persons of the Indian Fishing Vessel were killed on account of the firing. FIR was lodged u/s. 302/34 IPC at the Police Station in the State of Kerala.

The Republic of Italy filed a writ petition challenging the jurisdiction of the State of Kerala and that of the State Police to register the FIR and to conduct investigation and to arrest them. They prayed for quashing the FIR as being without jurisdiction, contrary to law, null and void. The High Court reserved the judgment. In the meantime, the petitioners filed Writ Petition before this Court, asking for the same reliefs.

During pendency of the Writ Petition u/Art. 32, the State Police filed charge-sheet against petitioner Nos. 2 and 3 u/ss. 302, 307, 427 r/w. s. 34 IPC and u/s. 3 of the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002. When the High Court dismissed the Writ Petition, Special Leave Petition was filed before this Court.

Primarily it was contended on behalf of petitioner Nos. 2 and 3 that the State Police had no jurisdiction to investigate the incident; that in view of public international law, the Courts of the Republic of Italy had jurisdiction to try the accused and not the Indian Courts, because the incident occurred beyond the territory of India to which location sovereignty of India did not extend; that Parliament cannot extend the application of the laws enacted by it, beyond the territory of India; that the incident which resulted in the death of two Indians was an 'incident of navigation' within the meaning of Article 97 of the United Nations Convention on the Law of the Sea (UNCLOS).

Disposing of the Writ Petition and Special Leave Petition, the Court

HELD:

<u>Per Altamas Kabir (CJI):</u>

1. India is entitled both under its Domestic Law and

the Public International Law to exercise rights of sovereignty upto 24 nautical miles from the baseline on the basis of which the width of Territorial Waters is measured. It can exercise sovereign rights within the Exclusive Economic Zone only for certain purposes. [Para 100] [656-E-F]

2. In an area in which a country exercises sovereignty, its laws will prevail over other laws in case of a conflict between the two. On the other hand, a State may have sovereign rights over an area, which stops short of complete sovereignty as in the instant case where in view of the provisions both of the Maritime Zones Act, 1976, and UNCLOS 1982, the Exclusive Economic Zone is extended to 200 nautical miles from the baseline for measurement of Territorial Waters. Although, the provisions of Section 188A I.P.C. have been extended to the Exclusive Economic Zone, the same are extended to areas declared as "designated areas" under the Act which are confined to installations and artificial islands, created for the purpose of exploring and exploiting the natural resources in and under the sea to the extent of 200 nautical miles, which also includes the area comprising the Continental Shelf of a country. However, the Exclusive Economic Zone continues to be part of the High Seas over which sovereignty cannot be exercised by any nation. [Para 96] [654-E-H; 655-A]

3. Since India is a signatory, she is obligated to respect the provisions of UNCLOS 1982, and to apply the same if there is no conflict with the domestic law. In this context, both the countries may have to subject themselves to the provisions of Article 94 of the Convention which deals with the duties of the Flag State and, in particular, sub-Article (7) which provides that each State shall cause an inquiry to be held into every marine casualty or incident of navigation on the high seas

involving a ship flying its flag and causing loss of life or serious injury to nationals of another State. It is also stipulated that the Flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation. [Para 97] [655-A-D]

4. The expression "incident of navigation" in Article 97 cannot be extended to a criminal act, involving the killing of two Indian fishermen on board an Indian fishing vessel, although, the same was not flying the Indian flag. If at all, Article 100 of the Convention may stand attracted if and when the defence version of apprehension of a pirate attack is accepted by the Trial Court. [Para 95] [653-B-D]

5. The territorial criminal jurisdiction is founded on various principles which provide that, as a matter of convenience, crimes should be dealt with by the States whose social order is most closely affected. However, some public ships and armed forces of foreign States may enjoy a degree of immunity from the territorial jurisdiction of a nation. [Para 98] [655-D-F]

6. The incident took place within the Contiguous Zone over which, both under the provisions of the Maritime Zones Act, 1976, and UNCLOS 1982, India is entitled to exercise rights of sovereignty. However, Sub-section (4) of Section 7 only provides for the Union of India to have sovereign rights limited to exploration, exploitation, conservation and management of the natural resources, both living and non-living, as well as for producing energy from tides, winds and currents, which cannot be equated with rights of sovereignty over the said areas, in the Exclusive Economic Zone. It also provides for the Union of India to exercise other ancillary rights which only clothes the Union of India with sovereign rights and not rights of sovereignty in the Exclusive Economic Zone. The said position is reinforced under Sections 6 and 7 of the Maritime Zones Act, 1976, which also provides that India's sovereignty extends over its Territorial Waters while, the position is different in respect of the Exclusive Economic Zone. Therefore, it cannot be said that Article 59 of UNCLAS permits States to assert rights or jurisdiction beyond those specifically provided in the Convention. [Para 99] [655-G-H; 656-A-D]

7. The incident of firing from the Italian vessel on the Indian shipping vessel having occurred within the Contiguous Zone, the Union of India is entitled to prosecute the two Italian marines under the criminal justice system prevalent in the country. However, the same is subject to the provisions of Article 100 of UNCLOS 1982. The "Declaration on Principles of International Law Concerning Family Relations and Cooperation between States in accordance with the Charter of the United Nations" has to be conducted only at the level of the Federal or Central Government and cannot be the subject matter of a proceeding initiated by a Provincial/State Government. [Para 100] [656-F-H; 657-A]

8. The two accused in the case are marines belonging to the Royal Italian Navy, who had been deputed on the merchant shipping vessel having Flag of Italy, purportedly in pursuance of an Italian Decree of Parliament, pursuant to which an Agreement was entered into between the Republic of Italy on the one hand and the Italian Shipowners' Confederation (Confitarma) on the other. This takes the dispute to a different level where the Governments of the two countries become involved. The Republic of Italy has, in fact, from the very beginning, asserted its right to try the two marines and has already commenced proceedings against them in Italy under penal provisions. In such a scenario, the State of Kerala, as one of the units of a federal unit, would not have any authority to try the accused who were outside the jurisdiction of the State unit. The extension of Section

188A I.P.C. to the Exclusive Maritime Zone, of which the Contiguous Zone is also a part, also did not extend the authority of the Kerala State Police beyond the territorial waters, which is the limit of its area of operations. [Para 86] [649-D-H; 650-A]

9. The incident took place at a distance of about 20.5 nautical miles from the coastline of the State of Kerala, a unit within the Indian Union. The incident, therefore, occurred not within the territorial waters of the coastline of the State of Kerala, but within the Contiguous Zone, over which the State Police of the State of Kerala ordinarily has no jurisdiction. The State of Kerala had no jurisdiction over the Contiguous Zone and even if the provisions of IPC and Cr.P.C. were extended to the Contiguous Zone, it did not vest the State of Kerala with the powers to investigate and, thereafter, to try the offence. What, in effect, is the result of such extension is that the Union of India extended the application of IPC and Cr.P.C. to the Contiguous Zone, which entitled the Union of India to take cognizance of, investigate and prosecute persons who commit any infraction of the domestic laws within the Contiguous Zone. However, such a power is not vested with the State of Kerala. [Para 84] [648-C-D, F-H; 649-A]

10. Therefore, the State of Kerala has no jurisdiction to investigate into the incident. But till such time as it is proved that the provisions of Article 100 of the UNCLOS 1982 apply to the facts of this case, it is the Union of India which has jurisdiction to proceed with the investigation and trial of the Petitioner Nos.2 and 3 in the Writ Petition. The Union of India is, therefore, directed, in consultation with the Chief Justice of India, to set up a Special Court to try this case and to dispose of the same in accordance with the provisions of the Maritime Zones Act, 1976, the Indian Penal Code, the Code of Criminal Procedure and

most importantly, the provisions of UNCLOS 1982, where there is no conflict between the domestic law and UNCLOS 1982. The pending proceedings before the Chief Judicial Magistrate shall stand transferred to the Special Court to be constituted in terms of this judgment. [Para 101] [657-A-D]

11. This will not prevent the Petitioners herein in the two matters from invoking the provisions of Article 100 of UNCLOS 1982, upon adducing evidence in support thereof, whereupon the question of jurisdiction of the Union of India to investigate into the incident and for the Courts in India to try the accused may be reconsidered. If it is found that both the Republic of Italy and the Republic of India have concurrent jurisdiction over the matter, then these directions will continue to hold good. [Para 101] 657-D-F]

Aban Loyd Chiles Offshore Limited vs. Union of India and Anr. **(2008) 11 SCC 439; 2008 (6) SCR 468;** *Maganbhai Ishwarbhai Patel vs. Union of India and Anr.* **(1970) 3 SCC 400: 1969 (3) SCR 254;** *Vishaka and Ors. vs. State of Rajasthan and Ors.* **(1997) 6 SCC 241: 1997 (3) Suppl. SCR 404;** *Gramophone Co. of India vs. Birendra Bahadur Pandey* **(1984) 2 SCC 534: 1984 (2) SCR 664;** *Hukumchand Mills vs. State of Madhya Pradesh* **AIR 1964 SC 1329: 1964 SCR 857;** *N. Mani vs. Sangeetha Theatre and Ors.* **(2004) 12 SCC 278;** *Mobarik Ali Ahmad vs. State of Bombay* **AIR 1957 SC 857: 1958 SCR 328 - referred to.**

S.S. Lotus (Fr. v. Turk.) **(1927) P.C.I.J.;** *Trendtex Trading Corporation vs. Bank of Nigeria* **(1997) 1 Q.B. 529 - referred to.**

Per J. Chelameswar, J: (Supplementing)

HELD: 1.1. The authority of the Sovereign to make laws and enforce them against its subjects is undoubted

in constitutional theory. Though written Constitutions prescribe limitations, either express or implied on such authority, under the Constitution of India, such limitations with respect to territory are provided under Article 245(1) of the Constitution. [Para 3] [658-E; 659-A]

1.2. Article 297 of the Indian Constitution deals with 'maritime territory'. Article 297(3) authorises the Parliament to specify from time to time the limits of various maritime zones such as, territorial waters, continental shelf, etc. Clauses (1) and (2) of the said article make a declaration that all lands, minerals and other things of value and all other resources shall vest in the Union of India. [Paras 5 and 6] [659-F; 660-A-B]

1.3. Two things follow from the declaration under Article 297. Firstly, India asserts its authority not only on the land mass of the territory of India specified under Article 1, but also over the areas specified under Article 297. It authorises the Parliament to specify the limits of such areas (maritime zones). The nature of the said authority may not be the same for the various maritime zones indicated in Article 297. However, the preponderance of judicial authority appears to be that the sovereignty of the coastal state extends to the territorial waters. [Para 7] [661-A-C]

1.4. The sovereignty of a 'coastal State' extends to its territorial waters, is a well accepted principle of International Law though there is no uniformly shared legal norm establishing the limit of the territorial waters - "maritime territory". Whether the maritime territory is also a part of the national territory of the State is a question on which difference of opinion exists. [Para 8] [661-C-E; 662-A]

1.5. The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 80 of 1976 whereby limit of territorial waters was fixed at

12, was made by the Parliament in exercise of the authority conferred under Article 297. Except Sections 5 and 7, rest of the Sections of the Act, came into force on 26-08-1976. Sections 5 and 7 came into force, subsequently, on 15-01-1977, by virtue of a notification contemplated under Section 1(2). Section 3(1) declares that the sovereignty of India extends, and has always extended, to the territorial waters of India. [Para 10] [662-D-F]

1.6. In view of the scheme of the Maritime Zone Act, as apparent from Section 5(5)(a) and Section 7(7)(a) there of the application of "any enactment for the time being in force in India" (like the Indian Penal Code and the Code of Criminal Procedure), is not automatic either to the contiguous zone or exclusive economic zone. It requires a notification in the official gazette of India to extend the application of such enactments to such maritime zone. The Maritime Zones Act further declares that once such a notification is issued, the enactment whose application is so extended "shall have effect as if" the contiguous zone or exclusive economic zone, as the case may be, "is part of the territory of India". Creation of such a legal fiction is certainly within the authority of the Sovereign Legislative Body. [Para 13] [664-E; 665-A-C]

1.7. Though Article 245 speaks of the authority of the Parliament to make laws for the territory of India, Article 245(2) expressly declares - "No law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation". The declaration is a fetter on the jurisdiction of the Municipal Courts including Constitutional Courts to either declare a law to be unconstitutional or decline to give effect to such a law on the ground of extra territoriality. [Para 16] [666-B-D]

1.8. Section 2 read with Section 4 of IPC makes the provisions of the Code applicable to the offences

committed "in any place without and beyond" the territory of India; (1) by a citizen of India or (2) on any ship or aircraft registered in India, irrespective of its location, by any person not necessarily a citizen. Such a declaration was made as long back as in 1898. By an amendment in 2009 to the said Section, the Code is extended to any person in any place "without and beyond the territory of India", committing an offence targeting a computer resource located in India. Similarly, Parliament enacted the Suppression of Unlawful Acts Against Safety of Maritime Navigation And Fixed Platforms on Continental Shelf Act, 2002. Thereby the legislature expressly extended the application of the said Act beyond the limits of the territorial waters of India. [Paras 20 and 21] [667-E; 668-A-C, E]

1.9. The Parliament always asserted its authority to make laws, which are applicable to persons, who are not corporeally present within the territory of India (whether or not they are citizens) when such persons commit acts which affect the legitimate interests of this country. In furtherance of such assertion and in order to facilitate the prosecution of the offenders contemplated under Section 4(1) and (2) of IPC, Section 188 of Cr.P.C. prescribes the jurisdiction to deal with such offences. Each one of the above referred enactments also contains a provision parallel to Section 188. [Paras 25 and 26] [670-B-D]

R v. Baster **1971 2 All ER 359 (C.A.) - referred to.**

1.10. The Parliament, undoubtedly, has the power to make and apply the law to persons, who are not citizens of India, committing acts, which constitute offences prescribed by the law of this country, irrespective of the fact whether such acts are committed within the territory of India or irrespective of the fact that the offender is corporeally present or not within the Indian territory at the time of the commission of the offence. It is not open for any Municipal Court including this Court to decline to apply the law on the ground that the law is extra-territorial in operation when the language of the enactment clearly extends the application of the law. [Para 29] [672-A-C]

B.K.Wadeyar v. M/s. Daulatram Rameshwarlal **AIR 1961 SC 311: 1961 SCR 924 - relied on.**

Aban Loyd Chilies Offshore Ltd. v. Union of India and Ors. **(2008) 11 SCC 439: 2008 (6) SCR 468 - referred to.**

2.1. The expression "incident of navigation" occurring under Article 97 of the UNCLOS, 1982 is not a defined expression. Therefore, necessarily the meaning of the expression must be ascertained from the context and scheme of the relevant provisions of the UNCLOS. [Para 35] [673-E-F]

2.2. Irrespective of the meaning of the expression "incident of navigation", Article 97 has no application to the exclusive economic zone. Even under UNCLOS, Article 57 stipulates that "the exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured". It follows from a combined reading of Articles 55 and 57 that within the limit of 200 nautical miles, measured as indicated under Article 57, the authority of each coastal State to prescribe the limits of exclusive economic zone is internationally recognised. The declaration under Section 7(1) of the Maritime Zones Act, which stipulates the limit of the exclusive economic zone, is perfectly in tune with the terms of UNCLOS. Therefore, Article 97 of UNCLOS has no application to the exclusive economic zone, of which the contiguous zone is a part and that is the area relevant, in the context of the incident in question. For that reason, it cannot be said that the incident, which resulted in the death of two Indians is an "incident of navigation" within the meaning of Article 97 of the United Nations Convention on the Law of the Sea

and therefore, no penal proceedings may be instituted against the two marines except before the Judicial authorities of the 'Flag State' or the State of which the marines are nationals. [Paras 2(1) and 36] [658-D-E; 674-D-G]

Case Law Reference:

In the Judgment of ALTAMAS KABIR, CJI.

2008 (6) SCR 468	**referred to**	**Para 30, 50**
(1927) P.C.I.J	**referred to**	**Para 33, 95, 98**
1969 (3) SCR 254	**referred to**	**Para 40**
1997 (3) Suppl. SCR 404	**referred to**	**Para 40**
1984 (2) SCR 664	**referred to**	**Para 50**
1964 SCR 857	**referred to**	**Para 58**
(2004) 12 SCC 278	**referred to**	**Para 66**
(1997) 1 Q.B. 529	**referred to**	**Para 67**
1958 SCR 328	**referred to**	**Para 76**

In the judgement of J. Chelameswar, J:

1961 SCR 924	**relied on**	**Para 8**
1971 2 All ER 359 (C.A.)	**referred to**	**Para 27**
2008 (6) SCR 468	**referred to**	**Para 30, 33**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 135 of 2012.

Under Article 32 of the Constitution of iNdia.

WITH

SLP (C) No. 20370 of 2012.

Gourab K. Banerji, ASG, Harish N. Salve, Suhail Dutt, V. Giri, Diljeet Titus, Viplav Sharma, Baljit Singh Kalha, Ujjwal Sharma, Abhixit Singh, Achint Singh Gyani, Ankur Manchanda, Jagjit Singh Chhabra, Raghav Shankar, Jaswant Perraye, S.A. Haseeb, Parul Kumar, Sahil Tagotra, Jhuma Sen, Supriya Jain, D.S. Mahra, B. Krishna Prasad, Gautam Jha, Arjun Krishnan, Ramesh Babu, M.R., Mohammed Sadique T.A., Sushrut Jindal, Rekha Pandey, Rashmi Malhotra, Sahil Tagotra, R. Malhotra for the appearing parties.

The Judgments of the Court was delivered by

ALTAMAS KABIR, CJI. 1. The past decade has witnessed a sharp increase in acts of piracy on the high seas off the Coast of Somalia and even in the vicinity of the Minicoy islands forming part of the Lakshadweep archipelago. In an effort to counter piracy and to ensure freedom of navigation of merchant shipping and for the protection of vessels flying the Italian flag in transit in International seas, the Republic of Italy enacted Government Decree 107 of 2011, converted into Law of Parliament of Italy No.130 of 2nd August, 2011, to protect Italian ships from piracy in International seas. Article 5 of the said legislation provides for deployment of Italian Military Navy Contingents on Italian vessels flying the Italian flag, to counter the growing menace of piracy on the seas. Pursuant to the said law of Parliament of Italy No.130 of 2nd August, 2011, a Protocol of Agreement was purportedly entered into on 11th October, 2011, between the Ministry of Defence - Naval Staff and Italian Shipowners' Confederation (Confitarma), pursuant to which the Petitioner Nos.2 and 3 in the writ Petition, who are also the Petitioner Nos.1 and 2 in the Special Leave Petition, were deployed along with four others, as "Team Latorre", on board the "M.V. Enrica Lexie" on 6th February, 2012, to protect the said vessel and to embark thereon on 11th February, 2011, from Galle in Sri Lanka. The said Military Deployment Order was sent by the Italian Navy General Staff to the concerned Military Attaches in New Delhi, India and Muscat, Oman. A change in the disembarkation plans, whereby the planned port

of disembarkation was shifted from Muscat to Djibouti, was also intimated to the concerned Attaches.

2. While the aforesaid vessel, with the Military Protection Detachment on board, was heading for Djibouti on 15th February, 2012, it came across an Indian fishing vessel, St. Antony, which it allegedly mistook to be a pirate vessel, at a distance of about 20.5 nautical miles from the Indian sea coast off the State of Kerala, and on account of firing from the Italian vessel, two persons in the Indian fishing vessel were killed. After the said incident, the Italian vessel continued on its scheduled course to Djibouti.

When the vessel had proceeded about 38 nautical miles on the High Seas towards Djibouti, it received a telephone message, as well as an e-mail, from the Maritime Rescue Co-ordination Centre, Mumbai, asking it to return to Cochin Port to assist with the enquiry into the incident. Responding to the message, the M.V. Enrica Lexie altered its course and came to Cochin Port on 16th February, 2012. Upon docking in Cochin, the Master of the vessel was informed that First Information Report (F.I.R.) No.2 of 2012 had been lodged with the Circle Inspector, Neendakara, Kollam, Kerala, under Section 302 read with Section 34 of the Indian Penal Code (I.P.C.) in respect of the firing incident leading to the death of the two Indian fishermen. On 19th February, 2012, Massimilano Latorre and Salvatore Girone, the Petitioner Nos.2 and 3 in Writ Petition No.135 of 2012, were arrested by the Circle Inspector of Police, Coastal Police Station, Neendakara, Kollam, from Willington Island and have been in judicial custody ever since.

3. On 20th February, 2012, the petitioner Nos.2 and 3 were produced before the Chief Judicial Magistrate (C.J.M.), Kollam, by the Circle Inspector of Police, Coastal Police Station, Neendakara, who prayed for remand of the accused to judicial custody.

4. The petitioners thereupon filed Writ Petition No.4542 of 2012 before the Kerala High Court, under Article 226 of the Constitution, challenging the jurisdiction of the State of Kerala and the Circle Inspector of Police, Kollam District, Kerala, to register the F.I.R. and to conduct investigation on the basis thereof or to arrest the petitioner Nos.2 and 3 and to produce them before the Magistrate. The Writ Petitioners prayed for quashing of F.I.R. No.2 of 2012 on the file of the Circle Inspector of Police, Neendakara, Kollam District, as the same was purportedly without jurisdiction, contrary to law and null and void. The Writ Petitioners also prayed for a declaration that their arrest and detention and all proceedings taken against them were without jurisdiction, contrary to law and, therefore, void. A further prayer was made for the release of the Petitioner Nos.2 and 3 from the case.

5. Between 22nd and 26th February, 2012, several relatives of the deceased sought impleadment in the Writ Petition and were impleaded as Additional Respondents Nos.4, 5 and 6.

6. During the pendency of the Writ Petition, the Presenting Officer within the Tribunal of Rome, Republic of Italy, intimated the Ministry of Defence of Italy on 24th February, 2012, that Criminal Proceedings No.9463 of 2012 had been initiated against the Petitioner Nos.2 and 3 in Italy. It was indicated that punishment for the crime of murder under Section 575 of the Italian Penal Code is imprisonment of at least 21 years.

7. After entering appearance in the writ petition, the Union of India and its Investigating Agency filed joint statements therein on 28th February, 2012, on behalf of the Union of India and the Coast Guard, with the Kerala High Court, along with the Boarding Officers Report dated 16th-17th February, 2012, as an annexure. On 5th March, 2012, the Consul General filed a further affidavit on behalf of the Republic of Italy, annexing additional documents in support of its claim that the accused had acted in an official capacity. In the affidavit, the Consul

General reasserted that Italy had exclusive jurisdiction over the writ petitioners and invoked sovereign and functional immunity.

8. The Kerala High Court heard the matter and directed the Petitioners to file their additional written submissions, which were duly filed on 2nd April, 2012, whereupon the High Court reserved its judgment. However, in the meantime, since the judgment in the Writ Petition was not forthcoming, the Petitioners filed the present Writ Petition under Article 32 of the Constitution of India on 19th April, 2012, inter alia, for the following reliefs:-

"(i) Declare that any action by all the Respondents in relation to the alleged incident referred to in Para 6 and 7 above, under the Criminal Procedure Code or any other Indian law, would be illegal and ultra vires and violative of Articles 14 and 21 of the Constitution of India; and

(ii) Declare that the continued detention of Petitioners 2 and 3 by the State of Kerala is illegal and ultra vires being violative of the principles of sovereign immunity and also violative of Art. 14 and 21 of the Constitution of India; and

(iii) Issue writ of Mandamus and/or any other suitable writ, order or direction under Article 32 directing that the Union of India take all steps as may be necessary to secure custody of Petitioners 2 and 3 and make over their custody to Petitioner No.1."

9. During the pendency of the said Writ Petition in this Court, the Kerala State Police filed charge sheet against the Petitioner Nos.2 and 3 herein on 18th May, 2012 under Sections 302, 307, 427 read with Section 34 Indian Penal Code and Section 3 of the Suppression of Unlawful Acts against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002, hereinafter referred to as 'the SUA

Act'. On 29th May, 2012, the learned Single Judge of the Kerala High Court dismissed Writ Petition (Civil) No.4542 of 2012 on two grounds. The learned Single Judge held that under the Notification No. SO 67/E dated 27th August, 1981, the entire Indian Penal Code had been extended to the Exclusive Economic Zone and the territorial jurisdiction of the State of Kerala was not limited to 12 nautical miles only. The learned Single Judge also held that under the provisions of the SUA Act, the State of Kerala has jurisdiction upto 200 nautical miles from the Indian coast, falling within the Exclusive Economic Zone of India.

10. Aggrieved by the aforesaid judgment of the Kerala High Court, the Petitioners filed Special Leave Petition (Civil) No.20370 of 2012, challenging the order of dismissal of their Writ Petition by the Kerala High Court.

11. As will be evident from what has been narrated hereinabove, the subject matter and the reliefs prayed for in Writ Petition (Civil)No.4542 of 2012 before the Kerala High Court and S.L.P.(C) No.20370 of 2012 are the same as those sought in Writ Petition (Civil) No.135 of 2012.

12. Accordingly, the Special Leave Petition and the Writ Petition have been heard together.

13. Simply stated, the case of the Petitioners is, that the Petitioner Nos.2 and 3, had been discharging their duties as members of the Italian Armed Forces, in accordance with the principles of Public International Law and an Italian National Law requiring the presence of armed personnel on board commercial vessels to protect them from attacks of piracy. It is also the Petitioners' case that the determination of international disputes and responsibilities as well as proceedings connected therewith, must necessarily be between the Sovereign Governments of the two countries and not constituent elements of a Federal Structure. In other words, in cases of international disputes, the State units/governments

within a federal structure, could not be regarded as entities entitled to maintain or participate in proceedings relating to the sovereign acts of one nation against another, nor could such status be conferred upon them by the Federal/Central Government. It is also the case of the writ petitioners that the proceedings, if any, in such cases, could only be initiated by the Union at its discretion. Consequently, the arrest and continued detention of the Petitioner Nos.2 and 3 by the State of Kerala is unlawful and based on a misconception of the law relating to disputes between two sovereign nations.

14. Appearing for the writ petitioners, Mr. Harish N. Salve, learned Senior Advocate, contended that the acquiescence of the Union of India to the unlawful arrest and detention of the Petitioner Nos.2 and 3 by the State of Kerala was in violation of the long standing Customary International Law, Principles of International Comity and Sovereign Equality Amongst States, as contained in the United Nations General Assembly Resolution titled "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation between States in accordance with the Charter of the United Nations". Mr. Salve contended that these aforesaid principles require that any proceeding, whether diplomatic or judicial, where the conduct of a foreign nation in the exercise of its sovereign functions is questioned, has to be conducted only at the level of the Federal or Central Government and could not be the subject matter of a proceeding initiated by a Provincial/State Government.

15. Mr. Salve submitted that the incident which occurred on 15th February, 2012, was an incident between two nation States and any dispute arising therefrom would be governed by the principles of International Legal Responsibility under which the rights and obligations of the parties will be those existing between the Republic of India and the Republic of Italy. Mr. Salve submitted that no legal relationship exists between the Republic of Italy and the State of Kerala and by continued detention of the members of the Armed Forces of the Republic

of Italy, acting in discharge of their official duties, the State of Kerala had acted in a manner contrary to Public International Law, as well as the provisions of the Constitution of India.

16. Learned counsel submitted that the Scheme of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, hereinafter referred to as "the Maritime Zones Act, 1976", contemplates limited jurisdiction of the Central Government over each of the Maritime Zones divided into the "Territorial Waters", the "Contiguous Zones" and the "Exclusive Economic Zones". Learned counsel also submitted that Sections 3, 5, 7 and 15 of the Act contemplate the existence of such division of zones as a direct consequence of rights guaranteed under Public International Law, including the United Nations Convention on the Law of the Sea, hereinafter referred to as, "the UNCLOS".

17. Mr. Salve submitted that the extent of jurisdiction of a State beyond its coastline is provided in Section 3 of the Maritime Zones Act, 1976. Sub-section (2) of Section 3 indicates that the limit of the Territorial Waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline. Section 5 of the aforesaid Act provides that the Contiguous Zone of India is an area beyond and adjacent to the Territorial Waters and the limit of the Contiguous Zone is the line every point of which is at a distance of twenty-four nautical miles from the nearest point of the baseline referred to in Sub-section (2) of Section 3. Section 7 of the Act defines Exclusive Economic Zone as an area beyond and adjacent to the Territorial Waters, and the limit of such zone is two hundred nautical miles from the baseline referred to in sub-section (2) of Section 3. In respect of each of the three above-mentioned zones, the Central Government has been empowered whenever it considers necessary so to do, having regard to International Law and State practice, alter, by notification in the Official Gazette, the limit of the said zones.

18. Mr. Salve pointed out that Section 4 of the Maritime

Zones Act, 1976, specially provides for use of Territorial Waters by foreign ships and in terms of Sub-section (1), all foreign ships (other than warships including sub-marines and other underwater vehicles) are entitled to a right of innocent passage through the Territorial Waters, so long as such passage was innocent and not prejudicial to the peace, good order or security of India.

19. Apart from the above, Mr. Salve also pointed out that Section 6 of the aforesaid Act provides that the Continental Shelf of India comprises the seabed and subsoil of the submarine areas that extend beyond the limit of its territorial waters throughout the natural prolongation of its land territory to the outer edge of the continental margin or to a distance of two hundred nautical miles from the baseline referred to in Sub-section (2) of Section 3, where the outer edge of the continental margin does not extend up to that distance. Sub-section (2) provides that India has and always had full and exclusive sovereign rights in respect of its Continental Shelf.

20. According to Mr. Salve, the incident having occurred at a place which was 20.5 nautical miles from the coast of India, it was outside the territorial waters though within the Contiguous Zone and the Exclusive Economic Zone, as indicated hereinabove. Accordingly, by no means could it be said that the incident occurred within the jurisdiction of one of the federal units of the Union of India. Mr. Salve urged that the incident, therefore, occurred in a zone in which the Central Government is entitled under the Maritime Zones Act, 1976, as well as UNCLOS, to exercise sovereign rights, not amounting to sovereignty. Mr. Salve submitted that the Act nowhere contemplates conferral of jurisdiction on any coastal unit forming part of any Maritime Zone adjacent to its coast. Accordingly, the arrest and detention of the Petitioner Nos.2 and 3 by the police authorities in the State of Kerala was unlawful and was liable to be quashed. Mr. Salve also went on to urge that notwithstanding the provisions of the Maritime Zones Act, 1976, India, as a signatory of the UNCLOS, is also bound by the

provisions thereof. Submitting that since the provisions of the 1976 Act and also UNCLOS recognise the primacy of Flag State jurisdiction, the Petitioner No.1 i.e. the Republic of Italy, has the preemptive right to try the Petitioner Nos.2 and 3 under its local laws.

21. Mr. Salve submitted that provisions, similar to those in the Maritime Zones Act, 1976, relating to the extent of territorial waters and internal waters and the right of "innocent passage", are provided in Articles 8, 17 and 18 of the Convention. Mr. Salve submitted that Article 17 sets down in clear terms that subject to the Convention, ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea. "Innocent passage" has been defined in Article 18 to mean navigation through the territorial sea for the purpose of:

(a) traversing that sea without entering internal waters or calling at a roadstead or part facility outside internal waters; or

(b) proceeding to or from internal waters or a call at such roadstead or part facility.

22. The said definition has been qualified to indicate that such passage would be continuous and expeditious, but would include stopping and anchoring, only in so far as the same are incidental to ordinary navigation or are rendered necessary for force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress. Mr. Salve pointed out that Article 19 describes innocent passage to be such so long as it is not prejudicial to the peace, good order or security of the coastal State and takes place in conformity with the Convention and other rules of International law.

Learned counsel pointed out that Article 24 of the Convention contained an assurance that the coastal States

would not hamper the innocent passage of foreign ships through the territorial sea, except in accordance with the Convention.

23. As to criminal jurisdiction on board a foreign ship, Mr. Salve referred to Article 27 of UNCLOS, which provides that the criminal jurisdiction of the coastal State should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during its passage, save only in cases where the consequences of the crime extend to the coastal State; if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea; if the assistance of the local authorities has been requested by the Master of the ship or by a diplomatic agent or consular officer of the flag State, or if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances. Mr. Salve, however, urged that none of the aforesaid conditions were attracted in the facts of this case so as to attract the criminal jurisdiction of a State within the federal structure of the Union of India.

24. Another Article of some significance is Article 33 of the Convention under Section 4, which deals with Contiguous Zones. Mr. Salve submitted that Article 33 provides that in a zone contiguous to its territorial sea, a coastal State may exercise the control necessary to:

(i) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

(ii) punish infringement of the above laws and regulations committed within its territory or territorial sea.

However, the Contiguous Zone may not extend beyond 24 nautical miles from the baseline from which the breadth of the

territorial sea is measured. Accordingly, since the incident occurred outside the territorial waters, the State of Kerala exceeded its jurisdiction and authority in acting on the basis of the FIR lodged against the Petitioner Nos.2 and 3 at Neendakara, Kollam, and in keeping them in continued detention.

25. Referring to Part V of the Convention, which deals with Exclusive Economic Zones, Mr. Salve pointed out that Article 56 under the said Part indicates the rights, jurisdiction and duties of the coastal State in the Exclusive Economic Zone so as to include the State's sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds. The said Article also indicates that the State has jurisdiction in regard to:

(i) the establishment and use of artificial islands, installations and structures;

(ii) marine scientific research;

(iii) the protection and preservation of the marine environment;

and other rights and duties provided for in the Convention. In regard to artificial islands, Mr. Salve pointed out that under Clause 8 of Article 59, artificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own and their presence does not affect the delimitation of the territorial sea, the Exclusive Economic Zone or the Continental Shelf.

26. Dealing with the concept of High Seas, contained in Part VII of the Convention, Mr. Salve submitted that Articles 88 and 89 of the Convention provide that the High Seas have to

be reserved for peaceful purposes and that no State may validly purport to subject any part of the same to its sovereignty. Mr. Salve submitted that under Articles 91, 92 and 94 of the Convention, every State was entitled to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Article 91 provides that ships have the nationality of the State whose flag they are entitled to fly and there must exist a genuine link between the State and the ship. Mr. Salve pointed out that Article 94 casts several duties on the flag State and one of the most significant clauses of Article 94 is clause 7 which provides that each State shall cause an inquiry to be held by or before a suitably qualified person or persons into every marine casualty or incident of navigation (emphasis supplied) on the High Seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State or serious damage to ships or installations of another State or to the marine environment. The flag State and the other State shall cooperate in the conduct of any inquiry held by the concerned State into any such marine casualty or incident of navigation. The same provisions are also reflected in Article 97 of the Convention, in which it has been indicated that in the event of a collision or any other incident of navigation concerning a ship on the High Seas, involving the penal or disciplinary responsibility of the Master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

27. Lastly, Mr. Salve referred to Article 100, which may be of relevance to the facts of this case, as it requires all States to cooperate to the fullest extent in the repression of piracy on the High Seas or in any other place outside the jurisdiction of any State.

28. Mr. Salve submitted that the publication of a Notification by the Ministry of Home Affairs on 27th August, 1981, under

Sub-section (7) of Section 7 of the Maritime Zones Act, 1976, extending the application of Section 188 of the Code of Criminal Procedure, 1973, to the Exclusive Economic Zone, created various difficulties, since the said Notification was a departure from the provisions of Part V of UNCLOS which provides that a coastal State enjoys only sovereign rights and not sovereignty over the Exclusive Economic Zone.

29. Referring to the interim report of the Ministry of Shipping, Government of India, in respect of the incident, Mr. Salve pointed out that the fishing boat, MFB St. Antony, about 12 meters long, was owned by one Mr. Freidy, who was also working as the Sarang of the boat, which is registered at Colachel, Kanyakumari District, Tamil Nadu, by the Assistant Director of Fisheries. The crew of the boat were issued Identity Cards by the Trivandrum Matsyathozhilali Forum, but the fishing boat is not registered under the Indian Merchant Shipping Act, 1958, and was not flying the Indian Flag at the time of the incident. Furthermore, at the time of the incident, the ship was at a minimum distance of about 20 nautical miles from the Indian coast. The ship was coasting in Indian territorial waters in order to avoid any encounter with pirate boats as the area was declared to be a High Risk Area of Piracy. Mr. Salve urged that in the report it was also indicated that the area comes under the high alert zone for piracy attacks, as declared by the UKMTO, and the Watch Officers were maintaining their normal pirate watch. Apart from the normal navigational Watch Keepers, the ship also had NMP Marines on the bridge on anti-pirate watch as stated by the Second Mate and Master. The NMP Marines were keeping their own watch as per their schedule and it was not the responsibility of the Master to keep track of their regimen. The NMP Marines were supposed to take independent decisions as per Article 5 of the agreement between the Italian Defence Ministry and the Italian ship Owners Association. The report also indicated that the fishing boat came within a distance of 100 meters of the Italian Ship, causing the crew of the ship to believe that they were under

pirate attack and in the circumstances of the moment the marines, who are independent of the orders of the Master, opened fire, killing the two Indian fishermen.

Subsequently, while the Ship was moving away, it received a phone call from the MRCC, Mumbai Duty Controller, instructing the ship to proceed towards Kochi Anchorage to give a statement and witness with regard to the incident. Mr. Salve submitted that pursuant thereto the Italian vessel, instead of proceeding further into the high seas, returned to Cochin Port and was, thereafter, detained by the Kerala police authorities.

Mr. Salve submitted that it was necessary to construe the provisions of the Maritime Zones Act, 1976, in the light of the UNCLOS, which gives rise to the question as to which of the provisions would have primacy in case of conflict.

30. Referring to the decision of this Court in *Aban Loyd Chiles Offshore Limited vs. Union of India & Anr.* [(2008) 11 SCC 439], Mr. Salve submitted that in the said decision, this Court had held that from a reading of Sections 6 and 7 of the Maritime Zones Act, 1976, it is clear that India has been given only certain limited sovereign rights in respect of its Continental Shelf and Exclusive Economic Zone, which cannot be equated to extending the sovereignty of India over its Continental Shelf and Exclusive Economic Zone, as in the case of Territorial Waters. However, Sections 6(6) and 7(7) of the Maritime Zones Act, 1976, empower the Central Government, by notification, to extend the enactment in force in India, with such restrictions and modifications which it thinks fit, to its Continental Shelf and Exclusive Economic Zone and also provides that an enactment so extended shall have effect as if the Continental Shelf or the Exclusive Economic Zone, to which the Act has been extended, is a part of the territory of India. Sections 6(6) and 7(7) create a fiction by which the Continental Shelf and the Exclusive Economic Zone are deemed to be a part of India for the purposes of such enactments which are extended to those areas by the Central Government by issuing a notification.

31. Mr. Salve submitted that it was also held that the coastal State has no sovereignty in the territorial sense of dominion over Contiguous Zones, but it exercises sovereign rights for the purpose of exploring the Continental Shelf and exploiting its natural resources. It has jurisdiction to enforce its fiscal, revenue and penal laws by intercepting vessels engaged in suspected smuggling or other illegal activities attributable to a violation of the existing laws. The waters which extend beyond the Contiguous Zone are traditionally the domain of high seas or open sea which juristically speaking, enjoy the status of International waters where all States enjoy traditional high seas freedoms, including freedom of navigation. The coastal States can exercise their right of search, seizure or confiscation of vessels for violation of its customs or fiscal or penal laws in the Contiguous Zone, but it cannot exercise these rights once the vessel in question enters the high seas, since it has no right of hot pursuit, except where the vessel is engaged in piratical acts, which make it liable for arrest and condemnation within the seas. Accordingly, although, the coastal States do not exercise sovereignty over the Contiguous Zone, they are entitled to exercise sovereign rights and take appropriate steps to protect its revenues and like matters.

32. Relying on the aforesaid observations made by this Court in the aforesaid case, Mr. Salve submitted that the provisions of the Maritime Zones Act, 1976, would have to be read in harmony with the provisions of UNCLOS. Mr. Salve submitted that the reference made in paragraphs 77 and 99 of the judgment dealt with policing powers in the designated areas of the Contiguous Zone for the application of the Customs Act and not as a reference to general policing powers exercised by the State police within the Union of India. Mr. Salve submitted that it would thus be clear, that if an offence was committed beyond the Contiguous Zone, the State concerned could not proceed beyond 24 nautical miles from the baseline in pursuit of the vessel alleged to have committed the offence. Mr. Salve submitted that it was not contemplated

under the Maritime Zones Act, 1976, that the policing powers of a coastal State would proceed beyond the Contiguous Zone and into the Exclusive Economic Zone or High Seas, though certain provisions of the Customs Act and the Customs Tariff Act had been extended to areas declared as "designated areas" under the said Act.

33. Mr. Salve contended that the stand of the Union of India has been that the provisions of UNCLOS cannot be applied in the facts of the case, since the Maritime Zones Act, 1976, which is a domestic Act, is a departure from UNCLOS, and Article 27 of UNCLOS was not a part of the Indian domestic law. Further, in anticipation of the submissions on behalf of the Respondents, Mr. Salve urged that the judgment of the Permanent Court of International Justice in the Case of *S.S. Lotus (Fr. v. Turk.)* [(1927) P.C.I.J.] which involved claims between France and Turkey continued to be good law, save and except to the extent it had been overridden, but only in relation to collisions under Article 97 of the UNCLOS.

34. Mr. Salve submitted that the aforesaid contentions made on behalf of the Union of India were misconceived, because they were not taken earlier and were not to be found in the affidavit affirmed by the Union of India. Mr. Salve submitted that the Maritime Zones Act, 1976, far from being a departure, is in complete conformity with the principles of UNCLOS. The Act is limited to spelling out the geographical boundaries of the various zones, namely, the Territorial Waters, the Contiguous Zone, the Exclusive Economic Zone, and the Continental Shelf, etc. and the nature of rights available to India in respect of each of the zones is spelled out in the Act in a manner which is in complete conformity with the UNCLOS. Mr. Salve urged that India was not only a signatory to but had also ratified the Convention. The learned counsel submitted that the Maritime Zones Act, 1976, was based, to a large extent, on the draft of UNCLOS which had been prepared before 1976, but it is settled law in India that once a Convention of this kind is

ratified, the municipal law on similar issues should be construed in harmony with the Convention, unless there were express provisions to the contrary.

35. Simply stated, Mr. Salve's submissions boil down to the question as to whether the sovereignty of India would extend to the Exclusive Economic Zone, which extends to 200 nautical miles from the baseline of the coast of the State of Kerala.

36. Mr. Salve then urged that if Sub-section (2) of Section 4 I.P.C. was to be invoked by the Union of India for exercising jurisdiction over a person present on a vessel flying the Indian flag, it must respect a similar right asserted by other jurisdictions indicating that Article 21 of the Convention recognises the right of innocent passage which is to be respected by all nations, who are signatories to UNCLOS. As a result, if a vessel is in innocent passage and an incident occurs between two foreign citizens which has no consequences upon the coastal State, it is obvious that no jurisdiction could be asserted over such an act on the ground that it amounts to violation of the Indian Penal Code or that the Indian Courts would have jurisdiction to try such criminal offences. Mr. Salve submitted that the acceptance of such an assertion would negate the rights of innocent passage.

37. Mr. Salve submitted that once it is accepted that it must be Parliament's intention to recognise the Exclusive Economic Zone and to create a legal regime for exercise of the sovereign rights in respect of the said zone, then, it must necessarily follow that a Parliamentary intent has to be read in conjunction with Article 55 of the UNCLOS. It must then follow that the sovereign rights in the said zone must be read subject to the specific legal regime established in Part V of UNCLOS.

38. As far as the Lotus decision is concerned, Mr. Salve contended that such decision had been rendered in the facts involving the collision of a French vessel with a Turkish vessel, which ultimately led to the 1952 Geneva Convention for the

unification of certain rules relating to penal jurisdiction in matters of collisions, which overruled the application of the principles of concurrent jurisdiction over marine collisions. Mr. Salve urged that a reading of Articles 91, 92, 94 and 97 of UNCLOS clearly establishes that any principle of concurrent jurisdiction that may have been recognised as a principle of Public International Law stands displaced by the express provisions of UNCLOS. Learned counsel pointed out that it was not in dispute that the St. Antony, the Indian vessel involved in the incident, was registered under the Tamil Nadu Fishing laws and not under the Indian Merchant Shipping Act, 1958, which would allow it to travel beyond the territorial waters of the respective State of the Indian Union, where the vessel was registered.

39. Mr. Salve lastly contended that the stand of the Union of India that since no specific law had been enacted in India in terms of UNCLOS, the said Convention was not binding on India, was wholly misconceived. Mr. Salve urged that in earlier matters, this Court had ruled that although Conventions, such as these, have not been adopted by legislation, the principles incorporated therein, are themselves derived from the common law of nations as embodying the felt necessities of international trade and are, therefore, a part of the common law of India and applicable for the enforcement of maritime claims against foreign ships.

40. Mr. Salve also relied on the Constitution Bench decision of this Court in *Maganbhai Ishwarbhai Patel vs. Union of India and Another* [(1970) 3 SCC 400], in which this Court had inter alia held that unless there be a law in conflict with the Treaty, the Treaty must stand. Also citing the decision of this Court in *Vishaka and Others vs. State of Rajasthan and Others* [(1997) 6 SCC 241], this Court held that international conventions and norms are to be read into constitutional rights which are absent in domestic law, so long as there is no inconsistency with such domestic law.

41. Mr. Salve urged that Section 3 of the Maritime Zones Act, 1976, recognises the notion of sovereignty, but, limits it to 12 nautical miles from the nearest point of the appropriate baseline.

42. The essence of Mr. Salve's submissions is focussed on the question as to whether the sovereignty of India and consequently the penal jurisdiction of Indian Courts, extends to the Exclusive Economic Zone or whether India has only sovereign rights over the Continental Shelf and the area covered by the Exclusive Economic Zone. A reading of Sections 6 and 7 of the Maritime Zones Act, 1976, makes it clear that India's sovereignty extends over its territorial waters, but the position is different in the case of the Continental Shelf and Exclusive Economic Zone of the country. The Continental Shelf of India comprises the seabed beyond the territorial waters to a distance of 200 nautical miles. The Exclusive Economic Zone represents the sea or waters over the Continental Shelf. Mr. Salve submitted that the language of the various enactments and the manner in which the same have been interpreted, has given rise to the larger question of sovereign immunity.

Mr. Salve submitted that while Italy signed the UNCLOS in 1973 and ratified it in January, 1995, India signed the Convention in 1982 and ratified the same on 29th June, 1995. Referring to Sections 2 and 4 of the Indian Penal Code read with Section 179 of the Code of Criminal Procedure, Mr. Salve urged that the same would stand excluded in their operation to the domestic Courts on the ground of sovereign immunity.

43. Mr. Salve lastly urged that in order to understand the presence of the Italian marines on board the M.V. Enrica Lexie, it would be necessary to refer to the Protocol Agreement entered into between the Ministry of Defence - Naval Staff and Italian Shipowners' Confederation (Confitarma) on 11th October, 2011. Mr. Salve pointed out that the said Agreement was entered into pursuant to various legislative and presidential decrees which were issued on the premise that piracy and

armed plundering were serious threats to safety in navigation for crew and carried merchandise, with significant after-effects on freights and marine insurance, the commercial costs of which may affect the national community. Accordingly, it was decided to sign the Protocol Agreement, in order that the parties may look for and find all or any measure suitable to facilitate that the embarkation and disembarkation of Military Protection Squads, hereinafter referred to as "NMPs", on to and from ships in the traffic areas within the area defined by the Ministry of Defence by Ministerial Decree of 1st September, 2011. Mr. Salve pointed out that the said Agreement provides for the presence of Italian marines, belonging to the Italian Navy, to provide protection to private commercial ships against the surge of piracy. Mr. Salve submitted that, in fact, the navy was of the view that the activity covered by the Agreement/Protocol could also be offered to national shipowners other than Confitarma and other class associations, following acceptance of the Convention.

44. Mr. Salve pointed out that Article 3 of the Convention provided for the supply of the protection service, in which on an application for embarkation of the military protection squads, the Ministry of Defence would consider several aspects, including the stipulation that the ship's Master would remain responsible only for choices concerning safety of navigation and manoeuvre, including escape manoeuvres, but would not be responsible for the choices relating to operations involved in countering a piracy attack. Mr. Salve submitted that, in other words, in case of piracy attacks, the Master of the ship would have no control over the actions of the NMPs provided by the Italian Government. Mr. Salve submitted that the deployment order of the team of marines, including the Writ Petitioner Nos.2 and 3, is contained in OP 06145Z FEB 12 ZDS from the Italian Navy General Staff to the Italian Defence Attache in New Delhi, India, and several other Italian Defence Attaches in different countries, which has been made Annexure P-3 to the Special Leave Petition. In this regard, Mr. Salve referred to a Note

Verbale No.95/553 issued by the Embassy of Italy in New Delhi to the Ministry of External Affairs, Government of India, referring to the case involving the vessel in question. Since the same encapsulates in a short compass the case of the Petitioners, the same in its entirety is extracted hereinbelow:

"EMBASSY OF ITALY
NEW DELHI

NOTE VERBALE

95/553

The Embassy of Italy presents its compliments to the Ministry of External Affairs, Government of India and has the honour to refer to the case of the ship Enrica Lexie as per Note Verbale n.71 dated February 18th 2012.

The Embassy of Italy would like to recall that according to principles of customary international law, recognized by several decisions of International Courts. State organs enjoy jurisdictional immunity for acts committed in the exercise of their official functions. The Italian Navy Military Department that operated in international waters on board of the ship Enrica Lexie must be considered as an organ of the Italian State.

Their conduct has been carried out in the fulfillment of their official duties in accordance with national regulations (Italian Act nr.107/2011), directives, instructions and orders, as well as the pertinent rules on piracy contained in the 1982 UN Convention on the Law of the Sea and in the relevant UN Security Council Resolutions on the Piracy off the Horn of Africa.

The Embassy of Italy welcomes the steps taken by the Chief Judicial Magistrate in Kollam in order to protect the life and honour of the Italian Military Navy Personnel currently held in judicial custody on remand. The Embassy

of Italy also welcomes the cooperative approach on the issue of the examination of the weapons taken by the Magistrate.

The Embassy of Italy nevertheless reasserts the Italian exclusive jurisdiction in respect of the said military personnel. It wishes to inform that investigations by both the Italian ordinary and military judicial authorities have already been initiated. Therefore, it urges for the release of the Italian Navy Military Personnel and the unimpeded departure from the Indian Territory. They have entered Indian territorial waters and harbor simply as a Military Force Detachment officially embarked on the Italian vessel Enrica Lexie in order to cooperate with Indian authorities in the investigation of an alleged piracy episode. The entry in Indian territorial waters was upon initial invitation and then under direction of Indian Authorities.

The Embassy of Italy, while reiterating the sovereign right of a State to employ its military personnel in ongoing antipiracy military protection of national flagged merchant ship in international waters, underlines that the same right is not impaired by the ongoing national investigations involving Italian Navy Military Personnel.

The Italian Navy Military Personnel, currently held in judicial custody on remand, was carrying out official functions for the protection of the vessel from piracy and armed robbery in the extraterritorial maritime zones which at the relevant time were considered as "risk area", taking also in consideration information provided by IMO and other relevant multinational organization. Thus, while acknowledging the obligations of Italy under international law, including the obligation to cooperate with Indian authorities for the most comprehensive and mutually satisfactory investigation of the event, the Embassy of Italy recalls that the conduct of Italian Navy Military Personnel officially acting in the performance of their duties should

not be open to judgment scrutiny in front of any court other than the Italian ones.

The Embassy of Italy, New Delhi, avails itself of this opportunity to renew to the Ministry of External Affairs, Government of India, the assurances of its highest consideration.

New Delhi, 29th February, 2012.

Consulate General of Italy, Mumbai."

45. In fact, shorn of all legalese, the aforesaid note emphasises the stand of the Italian Government that the conduct of the Petitioner Nos.2 and 3 was in fulfilment of their official duties in accordance with national regulations, directives, instructions and orders, as well as the rules of piracy contained in UNCLOS and the relevant UN Security Council Resolutions on Piracy off the Horn of Africa.

46. Mr. Salve submitted that in the special facts of the case, the Petitioners were entitled to the reliefs prayed for in the Writ Petition and the Special Leave Petition.

47. Mr. Gourab Banerji, Additional Solicitor General, who appeared for the Union of India, focussed his submissions on two issues raised by the Petitioners, namely,:-

(i) Whether Indian Courts have territorial jurisdiction to try Petitioner Nos.2 and 3 under the provisions of the Indian Penal Code, 1860?

(ii) If so, whether the Writ Petitioners are entitled to claim sovereign immunity?

48. Mr. Banerji submitted that stripped of all embellishments, the bare facts of the incident reveal that on 15th February, 2012, FIR No.2 of 2012 was registered with the Coastal Police Station, Neendakara, Kollam, under Section 302 read with Section 34 I.P.C. alleging that a fishing vessel,

"St. Antony", was fired at by persons on board a passing ship, as a result of which, out of the 11 fishermen on board, two were killed instantaneously. It was alleged that the ship in question was M.V. Enrica Lexie. The detailed facts pertaining to the incident could be found in the statement dated 28th February, 2012, filed by the Coast Guard before the Kerala High Court and the Charge-sheet filed on 18th May, 2012.

49. The defence of the Petitioners is that the Petitioner Nos.2 and 3 were members of the Military Protection Detachment deployed on the Italian vessel and had taken action to protect the vessel against a pirate attack.

50. Mr. Banerji submitted that it had been urged on behalf of the Petitioners that the Union of India had departed from its pleadings in urging that the Maritime Zones Act, 1976, was a departure from and inconsistent with UNCLOS. Mr. Banerji submitted that the legal position in this regard had already been clarified in paragraphs 100 to 102 of the decision in *Aban Loyd's* case (supra) wherein this Court had re-emphasised the position that the Court could look into the provisions of international treaties, and that such an issue is no longer res integra. In *Gramophone Co. of India vs. Birendra Bahadur Pandey* [(1984) 2 SCC 534], this Court had held that even in the absence of municipal law, the treaties/conventions could not only be looked into, but could also be used to interpret municipal laws so as to bring them in consonance with international law.

51. Mr. Banerji urged that as far as the Union of India was concerned, an attempt must necessarily be made in the first instance, to harmonise the Maritime Zones Act, 1976 with the UNCLOS. If this was not possible and there was no alternative but a conflict between municipal law and the international convention, then the provisions of the 1976 Act would prevail. Mr. Banerji urged that primacy in interpretation by a domestic Court, must, in the first instance, be given to the Maritime Zones Act, 1976 rather than the UNCLOS. Questioning the approach of the Petitioners in relying firstly on the UNCLOS and only,

thereafter, on the provisions of the Maritime Zones Act, 1976, Mr. Banerji submitted that such approach was misconceived and was contrary to the precepts of Public International Law.

52. Mr. Banerji submitted that the case of the Petitioners that the Indian Courts had no jurisdiction to take cognizance of the offence which is alleged to have taken place in the Contiguous Zone, which was beyond the territorial waters of India, as far as India was concerned, was misconceived. The Contiguous Zone would also be deemed to be a part of the territory of India, inasmuch as, the Indian Penal Code and the Code of Criminal Procedure had been extended to the Contiguous Zone/Exclusive Economic Zone by virtue of the Notification dated 27th August, 1981, issued under Section 7(7) of the Maritime Zones Act, 1976. Mr. Banerji submitted that according to the Union of India, the domestic law is not inconsistent with the International law and in fact even as a matter of international law, the Indian Courts have jurisdiction to try the present offence. The learned Additional Solicitor General submitted that in order to determine the issue of territorial jurisdiction, it would be necessary to conjointly read the provisions of Section 2 I.P.C., the Maritime Zones Act, 1976 and the 27th August, 1981 Notification and all attempts had to be made to harmonise the said provisions with the UNCLOS. However, if a conflict was inevitable, the domestic laws must prevail over the International Conventions and Agreements.

53. In this regard, Mr. Banerji first referred to the provisions of Section 2 of the Indian Penal Code which deals with punishment of offences committed within India. In this context, Mr. Banerji also referred to the Maritime Zones Act, 1976, and more particularly, Section 7(7) thereof, under which the notification dated 27th August, 1981, had been published by the Ministry of Home Affairs, extending the provisions of Section 188-A of the Code of Criminal Procedure, 1973, to the Exclusive Economic Zone.

54. Mr. Banerji urged that it appears to have slipped the

notice of all concerned that the Notifications which had been applied in the *Aban Loyd's* case (supra) were under Section 7(6) of the 1976 Act and there appeared to be some confusion on the part of the Petitioners in regard to the scope of Sub-sections (6) and (7) of Section 7 thereof. Mr. Banerji urged that the judgment in Aban Loyd's case (supra) has to be understood in the light of the facts of that case where the issue was whether oil rigs situated in the Exclusive Economic Zone were foreign going vessels and, therefore, entitled to consume imported stores without payment of customs duty. In the said set of facts it was held by this Court that the territory of India for the purpose of customs duty was not confined to the land and territorial waters alone, but also notionally extended to the "designated areas" outside the territorial waters. Mr. Banerji urged that the notification dated 27th August, 1981, issued by the Ministry of Home Affairs which had been relied upon by the Union of India, has not been issued for designated areas alone, but for the entire Exclusive Economic Zone to enable it to exercise and protect Indian sovereign rights of exploitation of living natural resources, and more specifically its fishing rights, therein.

55. Mr. Banerji submitted that the Notification of 27th August, 1981, had been promulgated in exercise of powers conferred by Section 7(7) of the Maritime Zones Act, 1976. Mr. Banerji also submitted that the Indian Penal Code and the Code of Criminal Procedure had been extended by the Central Government to the Exclusive Economic Zone. The Schedule to the Notification is in two parts. Part I provides the list of enactments extended, whereas Part II provides the provision for facilitating the enforcement of the said Acts. Accordingly, while Part I of the Schedule to the Notification is relatable to Section 7(7)(a) of the Act, Part II of the Schedule is relatable to Section 7(7)(b) thereof.

56. The learned Additional Solicitor General submitted that the case of the Union of India rests on two alternative planks. According to one interpretation, the bare reading of Section

7(7) and the Notification suggests that once the I.P.C. has been extended to the Exclusive Economic Zone, which includes the Contiguous Zone, the Indian Courts have territorial jurisdiction to try offences committed within the Contiguous Zone. Another plank of the case of the Union of India, involves a contextual interpretation of Section 7(7) and the 1981 Notification. Mr. Banerji submitted that presuming that the Notification provides for the extension of Indian law relating to only those matters specified in Section 7(4) of the Act, the Indian Courts would also have territorial jurisdiction in respect of the present case. Mr. Banerji submitted that notwithstanding the submission made on behalf of the Petitioners that such an interpretation would be contrary to the provisions of UNCLOS, particularly, Article 56 thereof, the same failed to notice Article 59 which permits States to assert rights or jurisdiction beyond those specifically provided in the Convention. Alternatively, even in terms of the contextual interpretation of Section 7(7) of the Act, the same would also establish the territorial jurisdiction of the Indian Courts. Mr. Banerji submitted that even on a reading of Section 7(4) of the Maritime Zones Act, 1976, the Petitioners had laid emphasis on Sub-Clause (b), although, various other rights and privileges had also been reserved to the Indian Union. It was urged that the importance of the other Sub-Clauses, and, in particular, (a) and (e) would fully establish the territorial jurisdiction of the Indian Courts to try the offence involving the unlawful killing of two Indian citizens on board an Indian vessel. Mr. Banerji also urged that reading Section 7(4) of the Act, in harmony with Section 7(7) thereof, would include within its ambit the power to extend enactments for the purposes of protecting exploration, exploitation, conservation and management of natural resources which include fishing rights. Accordingly, if the provisions of I.P.C. and the Cr.P.C. have been extended throughout the Exclusive Economic Zone, inter alia, for the purpose of protecting fishing rights under Section 7(4)(a), the same would include extending legislation for the safety and security of the Indian fishermen. By opening fire on the Indian fishing vessel and killing two of the fishermen

on board the said vessel within the Contiguous Zone, the Petitioner Nos.2 and 3 made themselves liable to be tried by the Indian Courts under the domestic laws.

57. On the question as to whether the State of Kerala had jurisdiction to try the offence, since the incident had taken place in the zone contiguous to the territorial waters off the coast of Kerala, Mr. Banerji submitted that the Kerala Courts derived jurisdiction in the matter from Section 183 of the Code of Criminal Procedure, which has also been extended to the Exclusive Economic Zone by the 1981 Notification and relates to offences committed on journeys or voyages. Mr. Banerji submitted that when such an offence is committed, it could be inquired into or tried by a court through or into whose local jurisdiction the person or thing passed in the course of that journey or voyage. Mr. Banerji submitted that the voyage contemplated under the said provision is not the voyage of the Enrica Lexie, but the voyage of St. Antony.

58. Apart from the above, the main case of the Union of India is that on a plain reading of the language of Section 7(7) or on a contextual interpretation thereof, the Republic of India has jurisdiction to try the Petitioner Nos.2 and 3 in its domestic courts. Even the 1981 Notification could be read down and related to Section 5 of the 1976 Act. Referring to the decision of this court in *Hukumchand Mills Vs. State of Madhya Pradesh* [AIR 1964 SC 1329] and *N. Mani Vs. Sangeetha Theatre & Ors.* [(2004) 12 SCC 278], Mr. Banerji urged that if the executive authority had the requisite power under the law, and if the action taken by the executive could be justified under some other power, mere reference to a wrong provision of law would not vitiate the exercise of power by the executive, so long as the said power exists.

59. Regarding the applicability of Section 4 of the Indian Penal Code to the facts of the case, Mr. Banerji urged that the provisions of the I.P.C. would, in any event, apply to any citizen of India in any place without and beyond India or to any person

on any ship or aircraft registered in India, wherever it may be. Mr. Banerji submitted that the Explanation to the Section makes it clear that the word "offence" includes every act committed outside India which, if committed in India, would be punishable under the said Code.

60. Mr. Banerji submitted that although the learned Advocate General of the State of Kerala had conceded before the learned Single Judge of the Kerala High Court that Section 4 of the I.P.C. would not apply to the facts of the case, the Union of India was not a party to such concession, which, in any event, amounted to a concession in law. Mr. Banerji urged that the words "aboard" or "on board" are not used in Section 4(2) I.P.C. and an unduly restrictive interpretation of the said Section would require both the victim and the perpetrator to be aboard the same ship or aircraft, which could lead to consequences where pirate, hijacker or terrorist, who fires upon an innocent Indian citizen within an Indian ship or aircraft, would escape prosecution in India. Mr. Banerji contended that the provisions of Section 4(2) I.P.C. has to be read with Section 188 Cr.P.C., which subsequently stipulates that where an offence is committed outside India by a citizen of India, whether on the high seas or elsewhere, or by a person not being such citizen, on any ship or aircraft registered in India, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found. Mr. Banerji submitted that in view of the concession made on behalf of the State of Kerala, the question of the scope of Section 4 I.P.C. could be left open to be decided in an appropriate case.

61. Mr. Banerji submitted that, although a good deal of emphasis had been laid by the Petitioners on the observation contained in the Shipping Ministry's Interim Report that the fishing vessel was not registered under the Merchant Shipping Act, 1958, but under a local law pertaining to the State of Tamil Nadu, the same was only a red herring, as the Kerala State Fishing Laws do not permit fishing vessels to sail beyond the territorial waters of their respective States.

Mr. Banerji urged that such a submission may have been relevant in the context of Section 4(2) I.P.C., wherein the expression "registered in India" had been used, but the same would have no significance to the facts of this case, since the said provisions were not being invoked for the purposes of this case. The learned ASG contended that even if the fishing vessel had sailed beyond its permitted area of fishing, the same was a matter of evidence, which stage had yet to arrive. Mr. Banerji contended that, on the other hand, what was more important were the provisions of the Maritime Zones of India (Regulation of Fishing by Foreign Vessels) Act, 1981, wherein in the Statement of Objects and Reasons of the Act it has been indicated that the Act was in the nature of umbrella legislation and it was envisaged that separate legislation for dealing in greater detail with the regulation, exploration and exploitation of particular resources in the country's Maritime Zones and to prevent poaching activities of foreign fishing vessel to protect the fishermen who were citizens of India, should be undertaken in due course. In this context, Mr. Banerji further urged that the provisions of the Merchant Shipping Act dealing with the registration of Indian ships, do not include fishing vessels, which are treated as an entirely distinct and separate category in Chapter XV-A of the said Act.

62. Mr. Banerji urged that the right of passage through territorial waters is not the subject matter of dispute involved in the facts of this case. On the other hand, Article 56 of UNCLOS, which has been relied upon by the Petitioners indicate that the rights given to the coastal States are exhaustive. However, while the Petitioners have laid emphasis on Article 56(1)(b), the Union of India has laid emphasis on Article 56(1)(a) read with Article 73 of UNCLOS to justify the action taken against the accused. Mr. Banerji urged that even if Article 16 of UNCLOS is given a restrictive meaning, the action of the Indian Courts would be justified, inasmuch as, and action seeks to protect the country's fishermen.

63. Mr. Banerji contended that Article 59 of the UNCLOS,

which deals with the basis for the resolution of conflicts regarding the attribution of rights and jurisdiction in the Exclusive Economic Zone, contemplates rights beyond those which are attributable under the Convention. However, even if it could be assumed that the rights asserted by India are beyond those indicated in Article 56 of UNCLOS, such conflict would have to be resolved on the basis of equity and in the light of all circumstances. Accordingly, even if both the Republic of Italy and India had the power to prosecute the accused, it would be much more convenient and appropriate for the trial to be conducted in India, having regard to the location of the incident and the nature of the evidence and witnesses to be used against the accused.

64. Responding to the invocation of Article 97 of UNCLOS by the Petitioners, Mr. Banerji urged that whether under International law Italy has exclusive jurisdiction to prosecute the Petitioner Nos.2 and 3 is a question which would be relevant in the event the Court found it necessary to invoke Section Section 7(4)(e) of the Maritime Zones Act, 1976. Mr. Banerji urged that in order to claim exclusive jurisdiction, the Republic of Italy had relied upon Article 97 of UNCLOS which, however, dealt with the collision of shipping vessels and was unconnected with any crime involving homicide. The learned Additional Solicitor General pointed out that the title of Article 97 reads that it provides for **Penal jurisdiction in matters of collision or any other incident of navigation** and that, as had been pointed out by Mr. Harish Salve, appearing for the Petitioners, Article 97(1), inter alia, provides that in the event of collision or any other incident of navigation concerning the ship on the high seas, involving the penal or disciplinary responsibility of the Master or of any other person in the service of the ship, no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national. Mr. Banerji urged that the expression "incident of navigation" used in Article 97, did not

contemplate a situation where a homicide takes place and, accordingly, the provisions of Article 97 of the UNCLOS would not have any application to the facts of the present case.

65. On Article 11 of the Geneva Convention on the Law of the Seas, 1958, Mr. Banerji submitted that the killing of an Indian national on board an Indian vessel could not be said to be an incident of navigation, as understood under the said Article which deals mainly with collision on the high seas. Referring to Oppenheim on International Law [9th Edn. Vol.1], Mr. Banerji submitted that the phrase "accident of navigation" has been used synonymously with "incident of navigation". Consequently, the meaning of the expression "accident of navigation" provided in the dictionary defines the same to mean mishaps that are peculiar to travel by sea or to normal navigation; accidents caused at sea by the action of the elements, rather than by a failure to exercise good handling, working or navigation or a ship. Furthermore, if Article 97 of UNCLOS is to include a homicide incident, Article 92 thereof would be rendered otiose. Mr. Banerji submitted that the decision in the *Lotus* case (supra) continued to be good law in cases such as the present one. It was urged that under the Passive Personality principle, States may claim jurisdiction to try an individual where actions might have affected nationals of the State. Mr. Banerji submitted that various Articles of UNCLOS do not support the case attempted to be made out by the Republic of Italy, either on merits, or on the question of exclusive jurisdiction.

66. On the claim of sovereign immunity from criminal prosecution, Mr. Banerji submitted that the Petitioner Nos.2 and 3 were not entitled to the same. Mr. Banerji submitted that while the International law was quite clear on the doctrine of sovereign immunity, the important question to be considered in this case is the extent of such sovereign immunity which could be applied to the facts of this case. In support of his submissions, Mr. Benerji referred to certain observations made by Lord Denning

M.R. in *Trendtex Trading Corporation vs. Bank of Nigeria* [(1997) 1 Q.B. 529], wherein it was observed as follows:-

> "The doctrine of sovereign immunity is based on international law. It is one of the rules of international law that a sovereign state should not be impleaded in the courts of another sovereign state against its will. Like all rules of international law, this rule is said to arise out of the consensus of the civilized nations of the world. All nations agree upon it. So it is part of the law of nations."

Lord Denning, however, went on to observe that notion of a consensus was merely fictional and there was no agreed doctrine of sovereign immunity. However, this did not mean that there was no rule of International law on the subject. It only meant that there is difference of opinion as to what that rule is. Each country delimits for itself the bounds of sovereign immunity. Each creates for itself the exceptions from it.

67. In this line of reasoning, Mr. Banerji submitted that the provisions of Section 2 I.P.C. and its impact would have to be considered before the impact of Customary International Law could be considered. Mr. Banerji pointed out that Section 2 I.P.C. begins with the words - "every person" which makes all offenders, irrespective of nationality, punishable under the Code and not otherwise, for every act or omission contrary to the provisions thereof, of which he is found to be guilty within India. Reference was made by Mr. Banerji to the decision of this Court in *Mobarik Ali Ahmad Vs. State of Bombay* [AIR 1957 SC 857], wherein this Court had held that the exercise of criminal jurisdiction depends on the location of the offence, and not on the nationality of the alleged offender or his corporeal presence in India. This Court pointed out that the plain meaning of the phrase "every person" is that it embraces all persons without limitation and irrespective of nationality, allegiance, rank, status, caste, colour or creed, except such as may be specially exempted from criminal proceedings or punishment by virtue of specific provisions of the Constitution or any statutory

provisions or some well-recognised principle of international law, such as foreign sovereigns, ambassadors, diplomatic agents and so forth, accepted in the municipal law.

68. Going a step further, Mr. Banerji also referred to the United Nations Privileges and Immunities Act, 1947, and the Diplomatic Relations (Vienna Convention) Act, 1972, which gave certain diplomats, missions and their members diplomatic immunity even from criminal jurisdiction. Mr. Banerji submitted that the 1972 Act had been enacted to give effect to the Vienna Convention on Diplomatic Relations, 1961. The effect of Section 2 of the Act is to give the force of law in India to certain provisions set out in the Schedule to the Act. Mr. Banerji specifically referred to Article 31 of the Convention, which is extracted hereinbelow:-

"ARTICLE 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of :

(a) A real action relating to private immovable property situated in the territory of the receiving State, unless he holds it on behalf of the sending State for the purposes of the mission;

(b) An action relating to succession in which the diplomatic agent is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;

(c) An action relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.

2. A diplomatic agent is not obliged to give evidence as a witness.

3. No measure of execution may be taken in respect of a diplomatic agent except in the cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.

4. The immunity of a diplomatic agent from the jurisdiction of the receiving State does not exempt him from the jurisdiction of the sending State."

69. Mr. Banerji urged that as per the Policy of the Government of India, no foreign arms or foreign private armed guards or foreign armed forces personnel, accompanying merchant vessels, are allowed diplomatic clearance. Nor is it the policy of the Government of India to enter into any Status of Forces Agreement (SOFA) by which foreign armed forces are given immunity from criminal prosecution. Mr. Banerji sought to emphasise the fact that the United Convention or Jurisdictional Immunities of States and their Property, 2004, had not come into force. Accordingly, the Petitioners' case that the said Convention reflects the Customary International Law, cannot be accepted.

70. Also referring to the decision in *Pinochet's case No.3* [(2000) 1 AC 147], Mr. Banerji submitted that the said case concerned the immunity of a former Head of State from the criminal jurisdiction of another State, not the immunity of the State itself in proceedings designed to establish its liability to damages. The learned ASG submitted that even though the Republic of Italy may claim sovereign immunity when sued in an Indian Court for damages for the unlawful acts of its citizens, it was clear that even if it is assumed that the Petitioner Nos.2 and 3 were acting under orders of the Italian Navy, there is no basis for any claim of immunity from criminal jurisdiction in the

face of Section 2 I.P.C. Mr. Banerji submitted that the action of the Petitioner Nos.2 and 3 was not acta jure imperii but acta res gestionis and hence the scope of the various Italian laws would have to be established by way of evidence. Mr. Banerji submitted that since the claim of functional immunity from criminal jurisdiction was not maintainable, the Special Leave Petition was liable to be dismissed.

71. On the filing of the Writ Petition before this Court, being Writ Petition (Civil) No.135 of 2012, Mr. Banerji urged that Writ Petition (Civil) No.4542 of 2012, for the self-same reliefs had been filed by the same Petitioners before the Kerala High Court and the same being dismissed, was now pending consideration in the Special Leave Petition. Mr. Banerji submitted that the Writ Petition was wholly misconceived since the Petitioners were not entitled to pursue two parallel proceedings for the self-same reliefs. It was submitted that the Writ Petition under Article 32 was, therefore, liable to be rejected.

72. Appearing for the State of Kerala and the Investigating Officer of the case, Mr. V. Giri, learned Senior Advocate, submitted that on account of the death of Valentine alias Jelastine and Ajeesh Pink, two of the crew members on board the Indian fishing vessel, St. Antony, Crime No.2 of 2012, was registered by the Neendakara Coastal Police Station for offences alleged to have been committed under Sections 302, 307 and 427 read with Section 34 I.P.C. and Section 3 of the Suppression of Unlawful Activities Act (SUA Act). On the return of the Italian vessel to Kochi, the Petitioner Nos.2 and 3 were placed under arrest by the Kerala Police on 19th February, 2012, in connection with the said incident and are now in judicial custody.

73. Mr. Giri submitted that the Maritime Zones Act, 1976, was enacted by Parliament after the amendment of Article 297 of the Constitution by the 40th Constitution (Amendment) Act of 1976, which provides for the vesting in the Union of all things of value within territorial waters or the Continental Shelf and

resources of the Exclusive Economic Zone. Mr. Giri urged that the concept of territorial waters or Continental Shelf and Exclusive Economic Zone originated in Article 297 and the 1976 Act in relation to the municipal laws of India.

74. Mr. Giri submitted that the Maritime Zones Act, 1976, and the Notification dated 27th August, 1981, extending the provisions of Section 188-A Cr.P.C. to the Exclusive Economic Zone, were prior in point of time to UNCLOS 1982 and the date on which India ratified the said convention. Mr. Giri submitted that despite the legislative competence of Parliament under Article 253, read with Entry 14 of List I of the Seventh Schedule, conferring on Parliament the power to enact laws to give effect to the provisions of a Treaty, Agreement or Convention, to which India is a party, the provisions of UNCLOS have not as yet been made part of the Municipal Law of India. Mr. Giri urged that several International Conventions have been ratified by the Indian Republic to give effect to provisions of Conventions to which India is a signatory, such as the Diplomatic Relations (Vienna Convention) Act, 1972, to give effect to the provisions of the Vienna Convention on Diplomatic Relations, as also the Carriage by Air Act, 1972, to give effect to the provisions of the Warsaw Convention. In the instant case, however, the Indian Parliament has not enacted any law to give effect to the provisions of UNCLOS 1982.

75. Mr. Giri, however, conceded that International Conventions could not be ignored while enforcing the municipal law dealing with the same subject matter and in any given case, attempts were required to be made to harmonise the provisions of the international law with the municipal law. However, in the case of conflict between the two, it is the municipal law which would prevail. In this regard, reference was made to the decision of this Court in what is commonly referred to as the "Berubari case" [AIR 1960 SC 845], which was, in fact, a Presidential Reference under Article 143(1) of the Constitution of India on the implementation of the India-Pakistan Agreement

relating to Berubari Union and Exchange of Enclaves. In the said Reference, the issue involved was with regard to an Agreement entered into between India and Pakistan on 10th September, 1958, to remove certain border disputes which included the division of Berubari Union No.12 and another. In the said Reference, this Court was, inter alia, called upon to consider the question as to how a foreign Treaty and Agreement could be given effect to. The said Reference was answered by this Court by indicating that foreign Agreements and Conventions could be made applicable to the municipal laws in India, upon suitable legislation by Parliament in this regard.

76. Reference was also made to the decision of this Court in *Maganbhai Ishwarbhai Patel Vs. Union of India* [(1970) 3 SCC 400], where the subject matter was the claim to a disputed territory in the Rann of Kutch, which the Petitioners claimed was a part of India. It was noted that the Petitioners' claim had originated from the very creation of the two dominions. It was also the Petitioners' claim that India had all along exercised effective administrative control over the territory and that giving up a claim to it involved cession of Indian Territory which could only be effected by a constitutional amendment and not by an executive order.

77. Other judgments were also referred to, to which we may refer if the need arises. Mr. Giri submitted that if a Treaty or an Agreement or even a Convention does not infringe the rights of the citizens or does not in the wake of its implementation modify any law, then it is open to the Executive to come to such Treaty or Agreement and the Executive was quite competent to issue orders, but if in consequence of the exercise of the executive power, rights of the citizens or others are restricted or infringed or laws are modified, the exercise of power must be supported by legislation.

78. It was also submitted that in the event the provisions of UNCLOS were implemented without the sanction of

Parliament, it would amount to modification of a municipal law covered by the Maritime Zones Act, 1976. Mr. Giri contended that the 1976 Act, which was enacted under Article 297 of the Constitution, is a law which applies to the Territorial Waters, Contiguous Zone, Continental Shelf and the Exclusive Economic Zone over the seas in which the incident had taken place. If, therefore, the provisions of the Convention were to be accepted as having conferred jurisdiction on the Indian judiciary, such a situation would be contrary to the provisions of the Maritime Zones Act, 1976, which contemplates the extension of domestic penal laws to the Exclusive Economic Zone in such a manner that once extended, it would, for all applicable purposes, include such zone to be a part of the territory of India. Mr. Giri submitted that adoption or implementation of the provisions of UNCLOS would not only affect the rights of the citizens of this country, but also give rise to a legal regime, which would be inconsistent with the working of the Maritime Zones Act, 1976, read with the notifications issued thereunder. Consequently, neither the Indian Penal Code nor the Code of Criminal Procedure or the notifications issued, making them applicable to the Exclusive Economic Zone, as if they were part of the territory of India, could be kept inoperative by UNCLOS, 1982.

79. On the question of conflict between the provisions of the Maritime Zones Act and UNCLOS, Mr. Giri reiterated the submissions made by Mr. Gaurav Banerji, on behalf of the Union of India, and contended that even if there are similarities between some of the clauses of the 1976 Act and of the UNCLOS, Article 97 of UNCLOS restricts the operation, otherwise contemplated under the Territorial Waters Act, 1976. Mr. Giri also reiterated that in case of conflict between a Treaty or a Convention and a municipal law, the latter shall always prevail, except in certain given circumstances.

80. Regarding the jurisdiction of the State of Kerala to prosecute the accused, Mr. Giri submitted that the State of Kerala and its officers were exercising jurisdiction as provided

in the Indian Penal Code and the Code of Criminal Procedure. Mr. Giri submitted that the jurisdiction of the Neendakara Police Station, situated in the District of Kollam in the State of Kerala, and the concerned courts, is reserved under Sections 179 and 183 Cr.P.C. It was urged that at this stage the jurisdiction of the Indian Courts would have to be ascertained on the premise that the version pleaded by the prosecution is correct and that the fishing boat, St. Antony, which was berthed at Neendakara, had commenced its voyage from within the jurisdiction of Neendakara Police Station and had come back and berthed at the same place after the incident of 15th February, 2012, and that the said facts brought the entire matter within the jurisdiction of the Neendakara Police Station and, in consequence, the Kerala State Police.

81. Mr. Giri lastly contended that the fact that "St. Antony" is not registered under the Merchant Shipping Act, 1958, and is only a fishing boat, is of little consequence, since a fishing boat is separately registered under Section 435C, Part XV-A of the aforesaid Act. In this case, the fishing boat was registered at Colachel in the State of Tamil Nadu under Registration No. TN/15/MFB/2008. According to Mr. Giri, the question as to whether the fishing vessel was registered under the Merchant Shipping Act or not was irrelevant for the purpose of this case and, since the incident had taken place within 20.5 nautical miles from the Indian coastline, falling within the Contiguous Zone/Exclusive Economic Zone of India, it must be deemed to be a part of the Indian territory for the purpose of application of the Indian Penal Code and the Cr.P.C. by virtue of Section 7(7) of the Maritime Zones Act read with Notification S.O.671(E) dated 27th August, 1981. Mr. Giri submitted that the case made out in the Special Leave Petition did not merit any interference with the judgment of the learned Single Judge of the Kerala High Court, nor was any interference called for in the Writ Petition filed by the Petitioners in this Court. Learned counsel submitted that both the petitions were liable to be dismissed with appropriate cost.

82. Two issues, both relating to jurisdiction, fall for determination in this case. While the first issue concerns the jurisdiction of the Kerala State Police to investigate the incident of shooting of the two Indian fishermen on board their fishing vessel, the second issue, which is wider in its import, in view of the Public International Law, involves the question as to whether the Courts of the Republic of Italy or the Indian Courts have jurisdiction to try the accused.

83. We propose to deal with the jurisdiction of the Kerala State Police to investigate the matter before dealing with the second and larger issue, the decision whereof depends on various factors. One such factor is the location of the incident.

84. Admittedly, the incident took place at a distance of about 20.5 nautical miles from the coastline of the State of Kerala, a unit within the Indian Union. The incident, therefore, occurred not within the territorial waters of the coastline of the State of Kerala, but within the Contiguous Zone, over which the State Police of the State of Kerala ordinarily has no jurisdiction. The submission made on behalf of the Union of India and the State of Kerala to the effect that with the extension of Section 188A of the Indian Penal Code to the Exclusive Economic Zone, the provisions of the said Code, as also the Code of Criminal Procedure, stood extended to the Contiguous Zone also, thereby vesting the Kerala Police with the jurisdiction to investigate into the incident under the provisions thereof, is not tenable. The State of Kerala had no jurisdiction over the Contiguous Zone and even if the provisions of the Indian Penal Code and the Code of Criminal Procedure Code were extended to the Contiguous Zone, it did not vest the State of Kerala with the powers to investigate and, thereafter, to try the offence. What, in effect, is the result of such extension is that the Union of India extended the application of the Indian Penal Code and the Code of Criminal Procedure to the Contiguous Zone, which entitled the Union of India to take cognizance of, investigate and prosecute persons who commit any infraction

of the domestic laws within the Contiguous Zone. However, such a power is not vested with the State of Kerala.

85. The submissions advanced on behalf of the Union of India as well as the State of Kerala that since the Indian fishing vessel, the St. Antony, had proceeded on its fishing expedition from Neendakara in Kollam District and had returned thereto after the incident of firing, the State of Kerala was entitled to inquire into the incident, is equally untenable, since the cause of action for the filing of the F.I.R. occurred outside the jurisdiction of the Kerala Police under Section 154 of the Cr.P.C. The F.I.R. could have been lodged at Neendakara Police station, but that did not vest the Kerala Police with jurisdiction to investigate into the complaint. It is the Union of India which was entitled in law to take up the investigation and to take further steps in the matter.

86. Furthermore, in this case, one has to take into account another angle which is an adjunct of Public International Law, since the two accused in the case are marines belonging to the Royal Italian Navy, who had been deputed on M.V. Enrica Lexie, purportedly in pursuance of an Italian Decree of Parliament, pursuant to which an Agreement was entered into between the Republic of Italy on the one hand and the Italian Shipowners' Confederation (Confitarma) on the other. This takes the dispute to a different level where the Governments of the two countries become involved. The Republic of Italy has, in fact, from the very beginning, asserted its right to try the two marines and has already commenced proceedings against them in Italy under penal provisions which could result in a sentence of 21 years of imprisonment if the said accused are convicted. In such a scenario, the State of Kerala, as one of the units of a federal unit, would not have any authority to try the accused who were outside the jurisdiction of the State unit. As mentioned hereinbefore, the extension of Section 188A I.P.C. to the Exclusive Maritime Zone, of which the Contiguous Zone is also a part, did not also extend the authority of the

Kerala State Police beyond the territorial waters, which is the limit of its area of operations.

87. What then makes this case different from any other case that may involve similar facts, so as to merit exclusion from the operation of Section 2 of the Indian Penal Code, as urged by Mr. Salve? For the sake of reference, Section 2 of Indian Penal Code, is extracted hereinbelow :-

> "**2. Punishment of offences committed within India -** Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India."

88. The answer to the said question is the intervention of the UNCLOS 1982, which sets out the legal framework applicable to combating piracy and armed robbery at sea, as well as other ocean activities. The said Convention which was signed by India in 1982 and ratified on 29th June, 1995, encapsulates the law of the sea and is supplemented by several subsequent resolutions adopted by the Security Council of the United Nations.

89. Before UNCLOS came into existence, the law relating to the seas which was in operation in India, was the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976, which spelt out the jurisdiction of the Central Government over the Territorial Waters, the Contiguous Zones and the Exclusive Economic Zone.

90. In addition to the above was the presence of Article 11 of the Geneva Convention or the Law of the Seas, 1958, and the interpretation of the expression "incident of navigation" used therein, in its application to the firing resorted to by the Petitioner Nos.2 and 3 from on board the M.V. Enrica Lexie.

91. What is also of some relevance in the facts of this case is Resolution 1897 of 2009, adopted by the Security Council of the United Nations on 30th November, 2009, wherein while

recognizing the menace of piracy, particularly off the coast of Somalia, the United Nations renewed its call upon States and regional organizations that had the capacity to do so, to take part in the fight against piracy and armed robbery off the Sea of Somalia in particular.

92. The provisions of the Maritime Zones Act, 1976, take note of the Territorial Waters, the Contiguous Zone, the Continental Shelf and the Exclusive Economic Zone. Section 7 of the said enactment deals with the Exclusive Economic Zone of India and stipulates the same to be an area beyond and adjacent to the Territorial Waters extending upto 200 nautical miles from the nearest point of the baseline of the Kerala coast. It is quite clear that the Contiguous Zone is, therefore, within the Exclusive Economic Zone of India and the laws governing the Exclusive Economic Zone would also govern the incident which occurred within the Contiguous Zone, as defined under Section 5 of the aforesaid Act. The provisions of the UNCLOS is in harmony with and not in conflict with the provisions of the Maritime Zones Act, 1976, in this regard. Article 33 of the Convention recognises and describes the Contiguous Zone of a nation to extend to 24 nautical miles from the baseline from which the breadth of the territorial sea is measured. This is in complete harmony with the provisions of the 1976 Act. Similarly, Articles 56 and 57 describe the rights, jurisdiction and duties of the coastal State in the Exclusive Economic Zone and the breadth thereof extending to 20 nautical miles from the baseline from which the breadth of the territorial sea is measured. This provision is also in consonance with the provisions of the 1976 Act. The area of difference between the provisions of the Maritime Zones Act, 1976, and the Convention occurs in Article 97 of the Convention which relates to the penal jurisdiction in matters of collision or any other **incident of navigation** (emphasis added).

93. The present case does not involve any collision between the Italian Vessel and the Indian Fishing Vessel.

However, it has to be seen whether the firing incident could be said to be covered by the expression "incident of navigation". Furthermore, in the facts of the case, as asserted on behalf of the Petitioners, the incident also comes within Article 100 of the Convention which provides that all States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State. If Article 97 of the Convention applies to the facts of this case, then in such case, no penal or disciplinary proceeding can be instituted against the Master or any other person in service of the ship, except before the judicial or administrative authorities either of the Flag State or of the State of which such person is a national. Article 97(3) stipulates in clear terms that no arrest or detention of the ship, even as a measure of investigation, shall be ordered by any authorities other than those of the Flag State. In this case, the Italian Vessel, M.V. Enrica Lexie, was flying the Italian flag. It may be recalled that the St. Antony was not flying an Indian flag at the time when the incident took place. In my view, the above fact is not very relevant at this stage, and may be of some consequence if the provisions of Article 100 of UNCLOS, 1982, are invoked.

94. The next question which arises is whether the incident of firing could be said to be an incident of navigation. The context in which the expression has been used in Article 97 of the Convention seems to indicate that the same refers to an accident occurring in the course of navigation, of which collision between two vessels is the principal incident. An incident of navigation as intended in the aforesaid Article, cannot, in my view, involve a criminal act in whatever circumstances. In what circumstances the incident occurred may be set up as a defence in a criminal action that may be taken, which legal position is accepted by both the countries which have initiated criminal proceedings against the two marines. Even the provisions of Article 100 of UNCLOS may be used for the same purpose. Whether the accused acted on the misunderstanding that the Indian fishing vessel was a pirate vessel which caused

the accused to fire, is a matter of evidence which can only be established during a trial. If the defence advanced on behalf of the Petitioner Nos. 2 and 3 is accepted, then only will the provisions of Article 100 of the Convention become applicable to the facts of the case.

95. The decision in the *Lotus* Case (supra) relied upon by the learned Additional Solicitor General would accordingly be dependent on whether the provisions of Article 97 of the Convention are attracted in the facts of this case. As already indicated hereinbefore, the expression "incident of navigation" in Article 97 cannot be extended to a criminal act, involving the killing of two Indian fishermen on board an Indian fishing vessel, although, the same was not flying the Indian flag. If at all, Article 100 of the Convention may stand attracted if and when the defence version of apprehension of a pirate attack is accepted by the Trial Court. In the Lotus case, the question relating to the extent of the criminal jurisdiction of a State was brought to the Permanent Court of International Justice in 1927. The said case related to a collision between the French Steamship 'Lotus' and the Turkish Steamship 'Boz-Kourt', which resulted in the sinking of the latter ship and the death of eight Turkish subjects. Once the Lotus arrived at Constantinople, the Turkish Government commenced criminal proceedings both against the Captain of the Turkish vessel and the French Officer of the Watch on board the Lotus. On both being sentenced to imprisonment, the French Government questioned the judgment on the ground that Turkey had no jurisdiction over an act committed on the open seas by a foreigner on board a foreign vessel, whose flag gave it exclusive jurisdiction in the matter. On being referred to the Permanent Court of International Justice, it was decided that Turkey had not acted in a manner which was contrary to International Law since the act committed on board the Lotus had effect on the Boz-Kourt flying the Turkish flag. In the ninth edition of Oppenheim's International Law, which has been referred to in the judgment under consideration, the nationality of ships in the high seas has been referred to in paragraph 287,

wherein it has been observed by the learned author that the legal order on the high seas is based primarily on the rule of International Law which requires every vessel sailing the high seas to possess the nationality of, and to fly the flag of, one State, whereby a vessel and persons on board the vessel are subjected to the law of the State of the flag and in general subject to its exclusive jurisdiction. In paragraph 291 of the aforesaid discourse, the learned author has defined the scope of flag jurisdiction to mean that jurisdiction in the high seas is dependent upon the Maritime Flag under which vessels sail, because, no State can extend its territorial jurisdiction to the high seas. Of course, the aforesaid principle is subject to the right of "hot pursuit", which is an exception to the exclusiveness of the flag jurisdiction over ships on the high seas in certain special cases.

96. This takes us to another dimension involving the concept of sovereignty of a nation in the realm of Public International Law. The exercise of sovereignty amounts to the exercise of all rights that a sovereign exercises over its subjects and territories, of which the exercise of penal jurisdiction under the criminal law is an important part. In an area in which a country exercises sovereignty, its laws will prevail over other laws in case of a conflict between the two. On the other hand, a State may have sovereign rights over an area, which stops short of complete sovereignty as in the instant case where in view of the provisions both of the Maritime Zones Act, 1976, and UNCLOS 1982, the Exclusive Economic Zone is extended to 200 nautical miles from the baseline for measurement of Territorial Waters. Although, the provisions of Section 188A I.P.C. have been extended to the Exclusive Economic Zone, the same are extended to areas declared as "designated areas" under the Act which are confined to installations and artificial islands, created for the purpose of exploring and exploiting the natural resources in and under the sea to the extent of 200 nautical miles, which also includes the area comprising the Continental Shelf of a country. However, the Exclusive

Economic Zone continues to be part of the High Seas over which sovereignty cannot be exercised by any nation.

97. In my view, since India is a signatory, she is obligated to respect the provisions of UNCLOS 1982, and to apply the same if there is no conflict with the domestic law. In this context, both the countries may have to subject themselves to the provisions of Article 94 of the Convention which deals with the duties of the Flag State and, in particular, sub-Article (7) which provides that each State shall cause an inquiry to be held into every marine casualty or incident of navigation on the high seas involving a ship flying its flag and causing loss of life or serious injury to nationals of another State. It is also stipulated that the Flag State and the other State shall cooperate in the conduct of any inquiry held by that other State into any such marine casualty or incident of navigation.

98. The principles enunciated in the *Lotus* case (supra) have, to some extent, been watered down by Article 97 of UNCLOS 1982. Moreover, as observed in Starke's International Law, referred to by Mr. Salve, the territorial criminal jurisdiction is founded on various principles which provide that, as a matter of convenience, crimes should be dealt with by the States whose social order is most closely affected. However, it has also been observed that some public ships and armed forces of foreign States may enjoy a degree of immunity from the territorial jurisdiction of a nation.

99. This brings me to the question of applicability of the provisions of the Indian Penal Code to the case in hand, in view of Sections 2 and 4 thereof. Of course, the applicability of Section 4 is no longer in question in this case on account of the concession made on behalf of the State of Kerala in the writ proceedings before the Kerala High Court. However, Section 2 of the Indian Penal Code as extracted hereinbefore provides otherwise. Undoubtedly, the incident took place within the Contiguous Zone over which, both under the provisions of the Maritime Zones Act, 1976, and UNCLOS 1982, India is

entitled to exercise rights of sovereignty. However, as decided by this Court in the *Aban Loyd Chiles Offshore Ltd.* case (supra), referred to by Mr. Salve, Sub-section (4) of Section 7 only provides for the Union of India to have sovereign rights limited to exploration, exploitation, conservation and management of the natural resources, both living and non-living, as well as for producing energy from tides, winds and currents, which cannot be equated with rights of sovereignty over the said areas, in the Exclusive Economic Zone. It also provides for the Union of India to exercise other ancillary rights which only clothes the Union of India with sovereign rights and not rights of sovereignty in the Exclusive Economic Zone. The said position is reinforced under Sections 6 and 7 of the Maritime Zones Act, 1976, which also provides that India's sovereignty extends over its Territorial Waters while, the position is different in respect of the Exclusive Economic Zone. I am unable to accept Mr. Banerji's submissions to the contrary to the effect that Article 59 of the Convention permits States to assert rights or jurisdiction beyond those specifically provided in the Convention.

100. What, therefore, transpires from the aforesaid discussion is that while India is entitled both under its Domestic Law and the Public International Law to exercise rights of sovereignty upto 24 nautical miles from the baseline on the basis of which the width of Territorial Waters is measured, it can exercise only sovereign rights within the Exclusive Economic Zone for certain purposes. The incident of firing from the Italian vessel on the Indian shipping vessel having occurred within the Contiguous Zone, the Union of India is entitled to prosecute the two Italian marines under the criminal justice system prevalent in the country. However, the same is subject to the provisions of Article 100 of UNCLOS 1982. I agree with Mr. Salve that the "Declaration on Principles of International Law Concerning Family Relations and Cooperation between States in accordance with the Charter of the United Nations" has to be conducted only at the level of the Federal or Central

Government and cannot be the subject matter of a proceeding initiated by a Provincial/State Government.

101. While, therefore, holding that the State of Kerala has no jurisdiction to investigate into the incident, I am also of the view that till such time as it is proved that the provisions of Article 100 of the UNCLOS 1982 apply to the facts of this case, it is the Union of India which has jurisdiction to proceed with the investigation and trial of the Petitioner Nos.2 and 3 in the Writ Petition. The Union of India is, therefore, directed, in consultation with the Chief Justice of India, to set up a Special Court to try this case and to dispose of the same in accordance with the provisions of the Maritime Zones Act, 1976, the Indian Penal Code, the Code of Criminal Procedure and most importantly, the provisions of UNCLOS 1982, where there is no conflict between the domestic law and UNCLOS 1982. The pending proceedings before the Chief Judicial Magistrate, Kollam, shall stand transferred to the Special Court to be constituted in terms of this judgment and it is expected that the same shall be disposed of expeditiously. This will not prevent the Petitioners herein in the two matters from invoking the provisions of Article 100 of UNCLOS 1982, upon adducing evidence in support thereof, whereupon the question of jurisdiction of the Union of India to investigate into the incident and for the Courts in India to try the accused may be reconsidered. If it is found that both the Republic of Italy and the Republic of India have concurrent jurisdiction over the matter, then these directions will continue to hold good.

102. It is made clear that the observations made in this judgment relate only to the question of jurisdiction prior to the adducing of evidence and once the evidence has been recorded, it will be open to the Petitioners to re-agitate the question of jurisdiction before the Trial Court which will be at liberty to reconsider the matter in the light of the evidence which may be adduced by the parties and in accordance with law. It is also made clear that nothing in this judgment should come in the way of such reconsideration, if such an application is made.

103. The Special Leave Petition and the Writ Petition, along with all connected applications, are disposed of in the aforesaid terms.

CHELAMESWAR, J. 1. I agree with the conclusions recorded in the Judgment of the Hon'ble Chief Justice. But, I wish to supplement the following.

2. The substance of the submission made by Shri Harish Salve, learned senior counsel for the petitioners is;

(1) The incident in question occurred beyond the territory of India to which location the sovereignty of the country does not extend; and Parliament cannot extend the application of the laws made by it beyond the territory of India. Consequentially, the two marines are not amenable to the jurisdiction of India;

Alternatively it is argued; (2) that the incident, which resulted in the death of two Indians is an "incident of navigation" within the meaning of Article 97[1] of the United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS) and therefore, no penal proceedings may be instituted against the two marines except before the Judicial authorities of the 'Flag State' or the State of which the marines are nationals.

3. The authority of the Sovereign to make laws and enforce

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1. Article 97. Penal jurisdiction in matters of collision or any other incident navigation.

1. In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national.

2. In disciplinary matters, the State which has issued a master's certificate or a certificate of competence or licenece shall alone be competent after due legal process, to pronounce the withdrawal of such certificates, even if the holder is not a national of the State whcih issued them.

3. No arrest or detention of the ship, even as a measure or investigation, shall be ordered by any authorities other than of the flag State.

them against its subjects is undoubted in constitutional theory. Though written Constitutions prescribe limitations, either express or implied on such authority, under our Constitution, such limitations are with respect to territory [Article 245(1)] or subject matter [Article 246] or time span of the operation of the laws [Articles 249 & 250] or the inviolable rights of the subjects [fundamental rights] etc. For the purpose of the present case, we are concerned only with the limitation based on territory.

4. That leads me to the question as to what is the territory of the Sovereign Democratic Republic of India ?

5. The territory of India is defined under Article 1;

"1. Name and territory of the Union.-

(1) India, that is Bharat, shall be a Union of States.

(2) The States and the territories thereof shall be as specified in the First Schedule.

(3) The territory of India shall comprise--

(a) The territories of the States;

(b) The Union territories specified in the First Schedule; and

(c) such other territories as may be acquired."

But that deals only with geographical territory. Article 297 deals with 'maritime territory'.[2]

2. As early as 1927, Philip C. Jessup, who subsequently became a judge of the International Court of Justice, state that the territorial waters are "as much a part of the territory of a nation as is the land itself'. Hans Kelsen declared that "the territorial waters form part of the territory of the littoral State". In the Grisbadarna Case (1909), between Norway and Sweden, the Permanent Court of Arbitration referred to the territorial waters as "the maritime territory" which is an essential appurtenance of the adjacent land territory. In the Corfu Channel (Merits) case (1949), the International Court of Justice clearly recognised that, under international law, the territorial sea was the "territory" of the coastal state over which it enjoyed "exclusive territorial control" and "sovereignty". Lord Mc Nair, who subscribed to the majority view of the Court in the above case, observed in the Anglo-Norwegian Fisheries case:

To every State whose land territory is at any place washed by the sea, international law attaches a corresponding portion of maritime territory....... Internationla law does not say to a State: "You are entitled to claim territorial waters if you want them". No maritime State can refuse them. International law impose upon a maritime State certain obligations and confers upon it certain rights arising out of the sovereignty which it exercised over its maritime territory. The possession of this territory is not optional, not dependent upon the will of the State, but compulsory.

Sir Gerald Fitzmaurice, writing before he became a judge of the Intenational Court of Justice, quoted Mc Nair's observation with approval, and considered that it was also implict in the decision of the Word Court in the Anglo-Norwegian Fisheries case. It follows, therefore, that the territorial waters are not only "territory" but also a compulsory appurtenance to the coastal state. Hence the observation by L.F.E. Goldie that "it has long been accepted that territorial waters, their suprea=-mbient air, their sea-bed and subsoil, vest in the coastal State ipso jure (i.e., without any proclamation or effective occupation being necessary)" -----**from The New Law of Maritime Zones by P.C. Rao (Page 22).**

6. Article 297(3) authorises the Parliament to specify from time to time the limits of various maritime zones such as, territorial waters, continental shelf, etc. Clauses (1) and (2) of the said article make a declaration that all lands, minerals and other things of value and all other resources shall vest in the Union of India.

"**Article 297:** Things of value within territorial waters or continental shelf and resources of the exclusive economic zone to vest in the Union.-

(1) All lands, minerals and other things of value underlying the ocean within the territorial waters, or the continental shelf, or the exclusive economic zone, of India shall vest in the Union and be held for the purposes of the Union.

(2) All other resources of the exclusive economic zone of India shall also vest in the Union and be held for the purposes of the Union.

(3) The limits of the territorial waters, the continental shelf, the exclusive economic zone, and other maritime zones, of India shall be such as may be specified, from time to time, by or under any law made by Parliament.

7. Two things follow from the above declaration under Article 297. Firstly, India asserts its authority not only on the land mass of the territory of India specified under Article 1, but also over the areas specified under Article 297. It authorises the Parliament to specify the limits of such areas (maritime zones). The nature of the said authority may not be the same for the various maritime zones indicated in Article 297. However, the preponderance of judicial authority appears to be that the sovereignty of the coastal state extends to the territorial waters.[3]

8. The sovereignty of a Nation / State over the landmass comprised within the territorial boundaries of the State, is an established principle of both constitutional theory and International Law. The authority of the Sovereign to make and enforce laws within the territory over which the sovereignty extends is unquestionable in constitutional theory. That the sovereignty of a 'coastal State' extends to its territorial waters, is also a well accepted principle of International Law[4] though there is no uniformly shared legal norm establishing the limit of the territorial waters - "maritime territory". Whether the maritime territory is also a part of the national territory of the State is a question on which difference of opinion exists. Insofar as this Court is concerned, a Constitution Bench in *B.K.Wadeyar v. M/s. Daulatram Rameshwarlal* (AIR 1961 SC 311) held at para 8 as follows:

"......... These territorial limits would include the territorial waters of India..............."

9. Insofar the Republic of India is concerned, the limit of the territorial waters was initially understood to be three nautical miles. It had been extended subsequently, up to six nautical miles by a Presidential proclamation dated 22.3.52 and to twelve nautical miles by another proclamation dated 30.9.67. By Act 80 of 1976 of the Parliament, it was statutorily fixed at 12 nautical miles. The Act also authorizes the Parliament to alter such limit of the territorial waters.

10. The Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 80 of 1976 (hereinafter referred to as 'the Maritime Zones Act'), was made by the Parliament in exercise of the authority conferred under Article 297. Except Sections 5 and 7, rest of the Sections of the Act, came into force on 26-08-1976. Sections 5 and 7 came into force, subsequently, on 15-01-1977, by virtue of a notification contemplated under Section 1(2). Section 3(1) declares that the sovereignty of India extends, and has always extended, to the territorial waters of India:

"The sovereignty of India extends and has always extended to the territorial waters of India (hereinafter referred to as

3. The territorial sea appertains to the territorial soverignty of the coastal state and thus belongs to it automatically. For example, all newly independent state (with a coast) come to independence with an entitlement to a territorial sea. There have been a number of theroies as to the precise legal character of the territorial sea of the coastal state, ranging from treating the territorial sea as part of the res communis, but subject to certain rights exercisable by the coastal state, to regarding the territorial sea as part of the coastal state's territorial domain subject to a right of innocent passage by foreign vessels..........

Articles 1 and 2 of the Convention on the Territorial Sea, 1958 provide that the coastal state's sovereignty over its territorial sea and to the airspace and seabed and the subsoil thereof, subject to the provisions of the Convention and of international law.....----from International Law by Malcolm N. Shaw **[sixth edition] (page 569-570)**

4. It is well established that the coastal state has sovereignty over its territorial waters, the sea-bed and subsoil underlying such waters, and the air space above them, subject to the obligations imposed by international law. Recently, in the North Sea Continental Shelf cases, the International Court of Justice declared that a coastal has "full sovereignty" over its territorial sea. This principle of customary international law has also been enshrined in article 1 of the Geneva Convention, and remains unaffected in the draft convention.----**from The New Law of Maritime Zones by P.C. Rao (Page 22)**

the territorial waters) and to the seabed and subsoil underlying, and the air space over, such waters."

Under sub-section (2), the limit of the territorial waters is specified to be twelve nautical miles from the nearest point of the appropriate baseline:

"The limit of the territorial waters is the line every point of which is at a distance of twelve nautical miles from the nearest point of the appropriate baseline."

Sub-section (3) authorises the Government of India to alter the limit of the territorial waters by a notification approved by both the Houses of Parliament, with due regard to the International Law and State practice:

"Notwithstanding anything contained in sub-section (2), the Central Government may, whenever it considers necessary so to do having regard to International Law and State practice, alter, by notification in the Official Gazette, the limit of the territorial waters."

11. Section 5 defines contiguous zone to be an area beyond and adjacent to the territorial waters extending up to twenty-four nautical miles from the nearest point of the appropriate baseline:

"Section 5(1): The contiguous zone of India (hereinafter referred to as the contiguous zone) is and area beyond and adjacent to the territorial waters and the limit of the contiguous zone is the line every point of which is at a distance of twenty-four nautical miles from the nearest point of the baseline referred to in sub-section (2) of section 3."

This limit also can be altered by the Government of India, in the same manner as the limit of the territorial waters. Section 6 describes the continental shelf, whereas Section 7 defines the exclusive economic zone. While the Parliament authorizes the Government of India[5] under Sections 3(3), 5(2) and 7(2) respectively to alter the limits of territorial waters, contiguous zone and exclusive economic zone with the approval of both the Houses of the Parliament, the law does not authorise the alteration of the limit of the continental shelf.

5. Central Government may whenever it considers necessary so to do having regard to the International Law and State practice alter by notification in the Official Gazette the limit of........"

12. While Section 3 declares that "the sovereignty of India extends, and has always extended, to the territorial waters", no such declaration is to be found in the context of contiguous zone. On the other hand, with reference to continental shelf, it is declared under Section 6(2) that "India has, and always had, full and exclusive sovereign rights in respect of its continental shelf". With reference to exclusive economic zone, Section 7(4)(a) declares that "in the exclusive economic zone, the Union has sovereign rights for the purpose of exploration, exploitation, conservation and management of the natural resources, both living and non-living as well as for producing energy from tides, winds and currents."

13. Whatever may be the implications flowing from the language of the Maritime Zones Act and the meaning of the expression "sovereign rights" employed in Sections 6(2), 6(3)(a)[6] and 7(4)(a), (Whether or not the sovereignty of India extends beyond its territorial waters and to the contiguous zone or not)[7], in view of the scheme of the Act, as apparent from

6. **Section 6(3)(a)** : sovereign rights for the purpose of exploration, exploitation, conservation and management of all resources.

7.....the jurisdiction of the coastal state has been extended into areas of high seas contiguous to the territorial sea, albeit for defined purposes only. Such restricted jurisdiction zones have been established or asserted for a number of reasons....

....without having to extend the boundaries of its territorial sea further into the high seas.....

......such contiguous zones were clearly differentitated from claims to full sovereignty as parts of the territorial sea, by being referred to as part of the high seas over which is automatically attached to the land territory of the state........-----from International Law by Malcolm N. Shaw (sixth edition] (page 578-579)

Section 5(5)(a)[8] and Section 7(7)(a)[9], the application of "any enactment for the time being in force in India" (like the Indian Penal Code and the Code of Criminal Procedure), is not automatic either to the contiguous zone or exclusive economic zone. It requires a notification in the official gazette of India to extend the application of such enactments to such maritime zone. The Maritime Zones Act further declares that once such a notification is issued, the enactment whose application is so extended "shall have effect as if" the contiguous zone or exclusive economic zone, as the case may be, "is part of the territory of India". Creation of such a legal fiction is certainly within the authority of the Sovereign Legislative Body.

14. In exercise of the power conferred by Section 7(7) of the Maritime Zones Act, the Government of India extended the application of both the Indian Penal Code and the Code of Criminal Procedure to the exclusive economic zone by a notification dated 27-08-1981. By the said notification, the Code of Criminal Procedure also stood modified. A new provision - Section 188A - came to be inserted in the Code of Criminal Procedure, which reads as follows:

> "**188A. Offence committed in exclusive economic zone:** When an offence is committed by any person in the exclusive economic zone described in sub-section(1) of Section 7 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and Other Maritime Zones Act, 1976 (80 of 1976) or as altered by notification, if any, issued under sub-section (2) thereof, such person may be dealt with in respect of such offence as if it had been committed in any place in which he may be found or in

8. **Section 5(5)(a) :** extend with such restriction and modifications as it thinks fit any enactment, relating to any matter referred to in clause (a) or clause (b) of sub-section (4), for the time being in force in India or any part thereof of the contiguous zone.

9. **Section 7(7)(a) :** extend, with such restrictions, and modification as it thinks, fit, any enactment for the time being in force in India or any part thereof in the exclusive economic zone or any part thereof.

> such other place as the Central Government may direct under Section 13 of the Said Act."

15. Under the Constitution, the legislative authority is distributed between the Parliament and the State Legislatures. While the State legislature's authority to make laws is limited to the territory of the State, Parliament's authority has no such limitation.

16. Though Article 245[10] speaks of the authority of the Parliament to make laws for the territory of India, Article 245(2) expressly declares - "No law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation". In my view the declaration is a fetter on the jurisdiction of the Municipal Courts including Constitutional Courts to either declare a law to be unconstitutional or decline to give effect to such a law on the ground of extra territoriality. The first submission of Shri Salve must, therefore, fail.

17. Even otherwise, territorial sovereignty and the ability of the sovereign to make, apply and enforce its laws to persons (even if not citizens), who are not corporeally present within the sovereign's territory, are not necessarily co-extensive.

18. No doubt that with respect to Criminal Law, it is the principle of 19th century English jurisprudence that;

> "all crime is local. The jurisdiction over the crime belongs to the country where the crime is committed".[11]

10. **Article 245 : Extent of laws made by Parliament and by the Legislatures of State:-**

    (1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legisalture of a State may make laws for the whole or any part of the State.

    (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra-territorial operation.

11. See: **Macleod v. Attorney Gen of New South Wales** (1891) AC 455, 451-58 and **Huntington v. Attrill** (1893) AC 150

But that principle is not accepted as an absolute principle any more. The increased complexity of modern life emanating from the advanced technology and travel facilities and the large cross border commerce made it possible to commit crimes whose effects are felt in territories beyond the residential borders of the offenders. Therefore, States claim jurisdiction over; (1) offenders who are not physically present within; and (2) offences committed beyond-the-territory of the State whose "legitimate interests" are affected. This is done on the basis of various principles known to international law, such as, "the objective territorial claim, the nationality claim, the passive personality claim, the security claim, the universality claim and the like".[12]

19. The protection of Articles 14 and 21 of the Constitution is available even to an alien when sought to be subjected to the legal process of this country. This court on more than one occasion held so on the ground that the rights emanating from those two Articles are not confined only to or dependent upon the citizenship of this country[13]. As a necessary concomitant, this country ought to have the authority to apply and enforce the laws of this country against the persons and things beyond its territory when its legitimate interests are affected. In assertion of such a principle, various laws of this country are made applicable beyond its territory.

20. Section 2 read with 4 of the Indian Penal Code[14] makes the provisions of the Code applicable to the offences committed "in any place without and beyond" the territory of India; (1) by a citizen of India or (2) on any ship or aircraft registered in India, irrespective of its location, by any person not necessarily a citizen[15]. Such a declaration was made as long back as in 1898. By an amendment in 2009 to the said Section, the Code is extended to any person in any place "without and beyond the territory of India", committing an offence targeting a computer resource located in India.

21. Similarly, Parliament enacted the Suppression of Unlawful Acts Against Safety of Maritime Navigation And Fixed Platforms on Continental Shelf Act, 2002 (Act No.69 of 2002), under Section 1(2), it is declared as follows:

> "It extends to the whole of India **including** the limit of the territorial waters, **the continental shelf, the exclusive economic zone** or any other maritime zone of India within the meaning of section 2 of the Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act, 1976 (80 of 1976)."

(emphasis supplied)

Thereby expressly extending the application of the said Act beyond the limits of the territorial waters of India.

22. Section 3 of the said Act, insofar it is relevant for our purpose is as follows:

> "(1) Whoever unlawfully and intentionally-
>
> (a) commits **an act of violence against a person on**

12. P C Rao--"Indian Contitution and International Law", page 42.

13. See AIR 1955 SC 367 = Hans Muller of Nuremberg v. Superintendent, Presidency Jail Calcutta para 34.

also (2002) 2 SCC 465 = Chariman, Railway Board &l; Others vs. Mrs. Chandrima Das and Others para 28 to 32.

14. **Section 2: Punishment of offences committed within India.-** Every person shall be liable to punishment under this Code and not othwerise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.

Section. 4: Extension of Code to extra-territorial offences.—The Provisions of this Code apply also to any offence committed by-

(1) any citizen of India in any place **without and beyond India;**

(2) any person on any ship or aircraft registered in India **wherever it may be;**

(3) any person in any place without and beyond India committing offence targeting a computers resource located in India.

15. **Mobarik Ali Ahmed v. State of Bombay (AIR 1957 SC 857, 870)**

"on a plain reading of section 2 of the Penal Code, the Code does apply to a foreigner who has committed an offence within India notwithstanding that he was corporeally present outside".

board a fixed platform or a ship which is **likely to endanger the** safety of the fixed platform or, as the case may be, **safe navigation of the ship** shall be punished with imprisonment for a term which may extend to ten year and shall also be liable to fine;"

(emphasis supplied)

23. The expression "ship" for the purpose of the said Act is defined under Section 2(h):

"(h) "ship" means a vessel of any type whatsoever not permanently attached to the seabed and includes dynamically supported craft submersibles, or any other floating craft."

24. Parliament asserted its authority to apply the penal provisions against persons, who "hijack" (described under Section 3[16] of the Anti-Hijacking Act, 1982) an aircraft. The Act does not take into account the nationality of the hijacker. The Act expressly recognises the possibility of the commission of the act of hijacking outside India and provides under Section 6 that the person committing such offence may be dealt with in respect thereof as if such offence had been committed in any place within India at which he may be found. Similarly, Section

16. **3. Hijacking.-** (1) whoever on board an aircarft in flight, unlawfully, by force or threat of force or by an other form of intimidation, seizes or exercises control of that aricarft, commits the offence of hijacking of such aricraft.

(2) Whoever attempt to commit any of the acts referred to in sub-section(1) in relation to any aircraft, or abets the commission of any such act, shall also be deemed to have committed the offence of hijacking of such aircraft.

(3) For the purposes of this section, an aircraft shall be deemed to be in flight at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation, and in the case of a forced landing, the flight shall be deemed to continue until the competent authorities of the country in which such forced landing takes place take over the responsibility for the aircraft and for persons and property on board.

3 of the Geneva Conventions Act, 1960, provides that "any person commits or attempts to commit, or abets or procures the commission by any other person of a grave breach of any of the Conventions", either "within or without India", shall be punished.

25. Thus, it is amply clear that Parliament always asserted its authority to make laws, which are applicable to persons, who are not corporeally present within the territory of India (whether are not they are citizens) when such persons commit acts which affect the legitimate interests of this country.

26. In furtherance of such assertion and in order to facilitate the prosecution of the offenders contemplated under Section 4(1) & (2) of the Indian Penal Code, Section 188 of the Code of Criminal Procedure[17] prescribes the jurisdiction to deal with such offences. Each one of the above referred enactments also contains a provision parallel to Section 188.

27. Such assertion is not peculiar to India, but is also made by various other countries. For example, the issue arose in a case reported in *R v. Baster* [1971] 2 All ER 359 (C.A.). The accused posted letters in Northern Ireland to football pool promoters in England falsely claiming that he had correctly forecast the results of football matches and was entitled to winnings. He was charged with attempting to obtain property by deception contrary to Section 15 of the Theft Act 1968. The

17. **Section 188. Offence committed outside India.**

When an offence is committed outside India

(a) By a citizen of India, whether on the high seas or elsewhere; or

(b) By a person, not being such citizen, on any ship or aircraft registered in India.

He may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found.

Provided that, notwithstanding anything in any of the preceding sections of this Chapter, no such offence shall be inquired into or tried in India except with the previous sanction of the Central Government.

accused contended that when the letters were posted in Northern Ireland the attempt was complete and as he had never left Northern Ireland during the relevant period, the attempt had not been committed within the jurisdiction of the English Courts. It was held:

> "The attempt was committed within the jurisdiction because an offence could be said to be committing an attempt at every moment of the period between the commission of the proximate act necessary to constitute the attempt and the moment when the attempt failed; accordingly the accused was attempting to commit the offence of obtaining by deception when the letter reached its destination within England and thus the offence was committed within the jurisdiction of the English courts; alternatively it could be said that the accused made arrangements for the transport and delivery of the letter, essential parts of the attempt, within the jurisdiction; the presence of the accused within the jurisdiction was not an essential element of offences committed in England."

(emphasis supplied)

28. The United States of America made such assertions:

> "……….. the provision extending the special maritime and territorial jurisdiction of the US to include any place outside the jurisdiction of any nation with respect to an offence by or against a national of the United States. In 1986, following the Achille Lauro incident, the US adopted the Omnibus Diplomatic Security and Anti-Terrorism Act, inserting into the criminal code a new section which provided for US jurisdiction over homicide and physical violence outside the US where a national of the US is the victim. ……."

(International Law by Malcolm N. Shaw page 665 [sixth Edition])

29. Therefore, I am of the opinion that the Parliament, undoubtedly, has the power to make and apply the law to persons, who are not citizens of India, committing acts, which constitute offences prescribed by the law of this country, irrespective of the fact whether such acts are committed within the territory of India or irrespective of the fact that the offender is corporeally present or not within the Indian territory at the time of the commission of the offence. At any rate, it is not open for any Municipal Court including this Court to decline to apply the law on the ground that the law is extra-territorial in operation when the language of the enactment clearly extends the application of the law.

30. Before parting with the topic, one submission of Shri Salve is required to be dealt with:

Shri Salve relied heavily upon the decision reported in *Aban Loyd Chilies Offshore Ltd. v. Union of India and Ors.* [(2008) 11 SCC 439], for the purpose of establishing that the sovereignty of this country does not extend beyond the territorial waters of India and therefore, the extension of the Indian Penal Code beyond the territorial waters of India is impermissible.

31. No doubt, this Court did make certain observations to the effect that under the Maritime Zones Act;

> "……., India has been given only certain limited sovereign rights and such limited sovereign rights conferred on India in respect of continental shelf and exclusive economic zone cannot be equated to extending the sovereignty of India over the continental shelf and exclusive economic zone as in the case of territorial waters………"

32. With great respect to the learned Judges, I am of the opinion that sovereignty is not "given", but it is only asserted. No doubt, under the Maritime Zones Act, the Parliament expressly asserted sovereignty of this country over the territorial

waters but, simultaneously, asserted its authority to determine / alter the limit of the territorial waters.

33. At any rate, the issue is not whether India can and, in fact, has asserted its sovereignty over areas beyond the territorial waters. The issue in the instant case is the authority of the Parliament to extend the laws beyond its territorial waters and the jurisdiction of this Court to examine the legality of such exercise. Even on the facts of Aban Loyd case, it can be noticed that the operation of the Customs Act was extended beyond the territorial waters of India and this Court found it clearly permissible although on the authority conferred by the Maritime Zones Act. The implications of Article 245(2) did not fall for consideration of this Court in that Judgment.

34. Coming to the second issue; whether the incident in issue is an "incident of navigation" in order to exclude the jurisdiction of India on the ground that with respect to an "incident of navigation", penal proceedings could be instituted only before the Judicial Authorities of the "Flag State" or of the State of which the accused is a national.

35. The expression "incident of navigation" occurring under Article 97 of the UNCLOS is not a defined expression. Therefore, necessarily the meaning of the expression must be ascertained from the context and scheme of the relevant provisions of the UNCLOS. Article 97 occurs in Part-VII of the UNCLOS, which deals with "HIGH SEAS". Article 86 stipulates the application of Part-VII. It reads as follows:

> "The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed by all States in the exclusive economic zone in accordance with article 58."

Further, Article 89 makes an express declaration that:

> "No State may validly purport to subject any part of the high seas to its sovereignty."

36. From the language of Article 86 it is made very clear that Part-VII applies only to that part of the sea which is not included in the exclusive economic zone, territorial waters, etc. Exclusive economic zone is defined under Article 55 as follows:

> **"Article 55: Specific legal regime of the exclusive economic zone:** The exclusive economic zone is an area beyond and adjacent to the territorial sea, subject to the specific legal regime established in this Part, under which the rights and jurisdiction of the coastal State and the rights and freedoms of other States are governed by the relevant provisions of this Convention."

That being the case, I am of the opinion that irrespective of the meaning of the expression "incident of navigation", Article 97 has no application to the exclusive economic zone. Even under UNCLOS, Article 57 stipulates that "the exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured". It follows from a combined reading of Articles 55 and 57 that within the limit of 200 nautical miles, measured as indicated under Article 57, the authority of each coastal State to prescribe the limits of exclusive economic zone is internationally recognised. The declaration under Section 7(1) of the Maritime Zones Act, which stipulates the limit of the exclusive economic zone, is perfectly in tune with the terms of UNCLOS. Therefore, Article 97 of UNCLOS has no application to the exclusive economic zone, of which the contiguous zone is a part and that is the area relevant, in the context of the incident in question. For that reason, the second submission of Shri Salve should also fail.

K.K.T. Writ Petition & SLP disposed of.

INDIAN SOAPS & TOILETRIES MAKERS ASSOCIATION
v.
OZAIR HUSAIN AND OTHERS
(Civil Appeal No. 5644 of 2003)

MARCH 7, 2013

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

Drugs and Cosmetics Rules, 1945 - Drugs and Cosmetics Act, 1940 - Drugs - Ingredients of - Disclosure - Vegetarian / non-vegetarian - High Court in exercise of jurisdiction u/Art. 226 of the Constitution directing the drug manufacturers to display a particular symbol in the packages of drugs other than life saving drugs to identify the ingredients of 'non-vegetarian'/ 'vegetarian' origin - Justification - Held: In a given circumstance, the condition of a patient may be such that a drug ordinarily not treated as a life saving drug may be essential to save the life - In such a case when drug becomes a life saving drug, it may not be desirable for the patient or his attendant to know the origin of the ingredients of the drug i.e. whether 'vegetarian' or 'non-vegetarian' - Also, in individual cases, the Central Government may feel difficulty in specifying the origin of a 'vegetarian' or 'non-vegetarian' ingredient, if a person wants to know the definite origin of such 'vegetarian' or 'non-vegetarian' ingredient on the basis of his food habit - Under the Drugs and Cosmetic Rules, the Central Government in consultation with the Drug Technical Advisory Board is empowered to decide whether any amendment is to be made in the relevant Rules showing the ingredients of vegetarian or non-vegetarian origin or to provide a symbol - Without fruitful consultation with the Advisory Board, no amendment can be made or suggested to change the label of the drugs and cosmetics - On an earlier reference, the Advisory Board had already opined that the labelling of drugs

as 'vegetarian' or 'non-vegetarian' or 'from animal sources' is not desirable - High Court u/Art. 226 had no jurisdiction to direct the Executive to exercise power by way of subordinate Legislation pursuant to power delegated by the Legislature to enact a law in a particular manner, as was done in the present case - For the same reason, it was also not open to the High Court to suggest any interim arrangement as was given by the impugned judgment - Constitution of India, 1950 - Art. 226.

Constitution of India, 1950 - Art.19(1)(a) and 19(2) - Freedom of speech and expression - Right to receive information - Held: The freedom of speech and expression includes the right to receive information - But such right can be limited by reasonable restrictions under the law made for the purpose mentioned in Art.19(2) - It is imperative for the State to ensure the availability of the right to the citizens to receive information - But such information can be given to the extent it is available and possible, without affecting the fundamental right of others.

The respondent filed writ petition (Public Interest Litigation) claiming the right of a consumer of cosmetics, drugs and articles of food to the full disclosure of ingredients of such product whereby a clear indication as to its origin (vegetarian/non-vegetarian) is made.

The High Court by the impugned judgment held that the consumer has the fundamental right to know whether the drugs other than life saving drugs are of non-vegetarian or vegetarian origin and gave a finding to provide certain mark on the labelling of such drugs based on vegetarian or non-vegetarian origin.

The questions involved in the instant appeals were:

(i) Whether under Article 226 of the Constitution of India, the High Court had jurisdiction to direct the manufacturers of drugs and cosmetics to display a

particular symbol in their packages to identify the ingredients of ' non- vegetarian' or ' vegetarian' origin; (ii) Whether it was practicable and desirable to display any identification as to the origin of the non-vegetarian ingredients in the packages of drugs and cosmetics and iii) Whether the High Court was justified in issuing a writ of mandamus calling upon the Central Government to discharge its duty by amending the rules.

Allowing the appeals, the Court

HELD: 1.1. The Drugs and Cosmetics Act, 1940 or the rules framed thereunder do not mandate mentioning or displaying symbol of ingredients of non-vegetarian or vegetarian origin. The manufacturer or others are not required to mention 'vegetarian' or 'non-vegetarian' on the label of drugs or cosmetics. The Central Government is vested with the power under the Drugs and Cosmetics Rules, 1945 to amend the 'label of the drugs and cosmetics' in consultation with the Drugs Technical Advisory Board. Without fruitful consultation with the Drugs Technical Advisory Board, no amendment can be made or suggested to change the label of the drugs and cosmetics. [Para 16] [695-E-G]

1.2. Earlier a proposal was made by certain persons to amend 'the Drugs and Cosmetics Rules, 1945' so as to mention the words "vegetarian" and "non-vegetarian" on the labels of the drugs and cosmetics. After fruitful deliberations, the Drugs Technical Advisory Board in its 48th Meeting held on 8th July, 1999 rejected the proposal. [Para 17] [695-H; 696-A-B]

2. A citizen has the right to expression and receive information under Article 19(1)(a) of the Constitution. That right is derived from freedom of speech and expression comprised in the Article. The freedom of speech and expression includes the right to receive information. But

such right can be limited by reasonable restrictions under the law made for the purpose mentioned in the Article 19(2) of the Constitution. It is imperative for the State to ensure the availability of the right to the citizens to receive information. But such information can be given to the extent it is available and possible, without affecting the fundamental right of others. [Paras 18, 19] [698-G; 699-A-B]

The State of U.P. vs. Raj Narain and Others **(1975) 4 SCC 428: 1975 (3) SCR 333;** *Secretary, Ministry of Information & Broadcasting, Govt. of India and Others vs. Cricket Association of Bengal and Others* **(1995) 2 SCC 161: 1995 (1) SCR 1036 and** *P.V. Narasimha Rao vs. State (CBI/SPE)* **(1998) 4 SCC 626: 1998 (2) SCR 870 - referred to.**

3.1. In the given circumstances the condition of a patient may be such that a drug which is ordinarily not treated as a life saving drug may be essential to save the life. In such a case when drug becomes a life saving drug, it may not be desirable for the patient or his attendant to know the origin of the ingredients of the drug i.e. whether 'vegetarian' or 'non-vegetarian'. Such option cannot be left on the patient or his attendant if required to save the life or eradicate a disease. [Para 21] [699-D-E]

3.2. The information about the origin of the ingredients of a drug or cosmetic, if claimed as a matter of right, a vegetarian can also claim information about the origin of a vegetarian ingredient, depending upon his food habit. Food habit in India varies from person to person and place to place. Religion also plays a vital role in making such habit. In individual case, the Central Government may feel difficulty in specifying the origin of a 'vegetarian' or 'non-vegetarian' ingredient, if a person wants to know the definite origin of such 'vegetarian' or 'non-vegetarian' ingredient on the basis of his food habit. [Paras 22, 23] [699-F-G; 700-C-D]

4.1. 'The Drugs and Cosmetics Rules' can be amended by the Central Government after taking into consideration any suggestion which the Drugs Technical Advisory Board may make in relation to the amendments of the said Rules. Earlier on a reference the Drugs Technical Advisory Board has already opined that the labelling of drugs as 'vegetarian' or 'non-vegetarian' or 'from animal sources' is not desirable and such proposal was not accepted. [Para 24] [700-D-E]

4.2. The plea of the respondent that the field has remained unoccupied and thus this Court can issue direction under Article 32 of the Constitution cannot be accepted as under the Drugs and Cosmetics Rules it is the Central Government which in consultation with the Drug Technical Advisory Board is empowered to decide whether any amendment is to be made in the relevant Rules showing the ingredients of vegetarian or non-vegetarian origin or to provide a symbol. [Para 28] [702-G-H; 703-A-B]

A.K. Roy v. Union of India and Others **(1982) 1 SCC 271: 1982 (2) SCR 272;** *Supreme Court Employees' Welfare Association v. Union of India and Another* **(1989) 4 SCC 187: 1989 (3) SCR 488;** *Bal Ram Bali and Another vs. Union of India* **(2007) 6 SCC 805 and** *Union of India vs. Association for Democratic Reforms and Another* **(2002) 5 SCC 294: 2002 (3) SCR 696 - referred to.**

5. The High Court under Article 226 of the Constitution of India has no jurisdiction to direct the Executive to exercise power by way of subordinate Legislation pursuant to power delegated by the Legislature to enact a law in a particular manner, as has been done in the present case. For the same reason, it was also not open to the High Court to suggest any interim arrangement as has been given by the impugned judgment. The writ petition filed by Respondent being not maintainable for issuance of such direction, the High Court ought to have dismissed the writ petition in limine. The order and directions issued by the High Court are set aside. [Paras 29, 30]. [703-C-F]

Case Law Reference:

1975 (3) SCR 333	**referred to**	**Para 18**
1995 (1) SCR 1036	**referred to**	**Para 18**
1998 (2) SCR 870	**referred to**	**Para 18**
1982 (2) SCR 272	**referred to**	**Para 25**
1989 (3) SCR 488	**referred to**	**Para 26**
(2007) 6 SCC 805	**referred to**	**Para 27**
2002 (3) SCR 696	**referred to**	**Para 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5644 of 2003.

From the Judgment & Order dated 13.11.2002 of the High Court of Delhi at New Delhi in Civil Writ Petition No. 837 of 2001.

WITH

Civil Appeal No. 5645 of 2003.

T.S. Doabia, Raj Panjwani, Amar Dave, Radhika Gautam, Gaurav Goel (for E.C. Agrawala), R.K. Rathore, Sunita Sharma, Shalinder Saini, D.S. Mahra, Aditya Shamlal, Vijay Panjwani, B.V. Balaram Das for the appearing parties.

The Judgment of the Court was delivered by

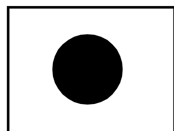
SUDHANSU JYOTI MUKHOPADHAYA, J. 1. These appeals have been preferred by the appellants against the judgment dated 13th November, 2002 passed by the Division

Bench of the Delhi High Court in a Public Interest Litigation (Civil Writ Petition No.837 of 2001) whereby the High Court held that the consumer has the fundamental right to know whether the food products, cosmetics and drugs available for human consumption are of non-vegetarian or vegetarian origin and ordered as follows:

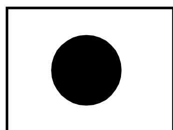
"In so far as cosmetics are concerned, the same must be treated at par with articles/packages of food for the purpose of disclosure of their ingredients.

Till such time the requisite amendments are carried out, we direct as under:-

(1) Where a cosmetic or a drug other than life saving drug, as the case may be, contains ingredients of non- vegetarian origin, the package shall carry label bearing the following symbol in red colour on the principal display panel just close a proximity to name or brand name of the drug or cosmetic:-



(2) Where a cosmetic or a drug other than life saving drug, as the case may be, contains ingredients wholly of vegetarian origin, the package shall bear the following symbol in green colour on the principal display panel just close in proximity to name or brand name of the drug or cosmetic:-



(3) Where a cosmetic or a drug other than life saving drug has ingredients of vegetarian of non- vegetarian origin, a declaration shall be made in writing on the package indicating the nature of the origin of the product.

(4) The Director General of Health Services/Drugs Controller General, Government of India, shall issue a list of Life Saving Drugs within a period of two months."

2. The Public Interest Litigation was filed by the respondent claiming the right of a consumer of cosmetics, drugs and articles of food to the full disclosure of ingredients of such product whereby a clear indication as to its origin (vegetarian/ non-vegetarian) is made.

The High Court referring to the constitutional rights guaranteed under Articles 19(1)(a), Articles 21 and 25 of the Constitution of India held:

".............It seems to us that to enable a person to practise the beliefs and opinions which he holds, in a meaningful manner, it is essential for him to receive the relevant information, otherwise he maybe prevented from acting in consonance with his beliefs and opinions. In case a vegetarian consumer does not know the ingredients of cosmetics, drugs or food products which he/she wishes to buy, it will be difficult for him or her to practise vegetarianism. In the aforesaid context, freedom of expression enshrined in Article 19(1)(a) can serve two broad purposes - (1) it can help the consumer to discover the truth about the composition of the products, whether made of animals including birds and fresh water or marine animals or eggs, and (2) it can held him to fulfil his belief or opinion in vegetarianism."

".....In this view of the matter, we have no hesitation in holding that Article 21 grants freedom to an individual to follow and to stick to his opinions, and for pursuing

such a course he had right to receive information and also a right to know the ingredients or the constituents of cosmetics, drugs and food products."

"……In view of the aforesaid discussion, we are of the view that it is the fundamental right of the consumers to know whether the food products, cosmetics and drugs are of non- vegetarian or vegetarian origin, as otherwise it will violate their fundamental rights under Articles 19(1)(a), 21 and 25 of the Constitution. Accordingly, we answer the main question in the affirmative. Since there is a constitutionally guaranteed right of the consumers to the full disclosure of the ingredients of cosmetics, drugs and articles of food, answers to remaining questions (ii) and (iii) necessarily are required to be answered in the affirmative. We, accordingly, answer the questions (ii) and (iii) also in the affirmative……"

"……In so far as food products are concerned, adequate provisions have been made for informing the consumers as to whether or not the article of food is vegetarian or non- vegetarian. As regards drugs and cosmetics, necessary amendments have not been made in the relevant statutes. In so far as life saving drug is concerned, there is a view point that the information: whether or not it is derived or manufactured, wholly or partly, from an animal, should not be disclosed since it is meant to fight disease and save life. In other words, a patient, who is suffering from serious ailment, which can be fatal if a life saving drug is not administered to him, need not be informed in his own interest as to whether or not the drug contains part of any animal as it is conductive to preservation of life and, therefore, in tune with Article 21 of the Constitution, this also means that he should not have a choice in the matter of administering life saving drug to him. In many cases patients are unconscious and they have to be put on life

saving drugs. In any event they cannot exercise an informed choice in the matter of selection of drugs. In the circumstances, therefore, the aforesaid view must prevail in case of life saving drugs. This limited exception will apply only to life saving drugs. It needs to be clarified that all drugs do not qualify for being treated as life saving drugs. Drugs which are not life saving drugs must stand at part with the food products and must disclose whether or not they are made of animal, whether in whole or in part.

"In so far as cosmetics are concerned, the same must be treated at par with articles/packages of food for the purpose of disclosure of their ingredients."

3. The appellant Union of India is afraid of serious paradox in so far as drugs are concerned. According to the learned senior counsel, it is not possible to distinguish as to which drug is a 'Life Saving Drug' or otherwise; under a given circumstance and condition of patient, a drug which ordinarily may not be treated as a 'Life Saving Drug', can be used as a Life Saving Drug. In some other case it may be general. Thus, it is not possible to demarcate the drugs as life saving or otherwise. Therefore, the direction issued by the High Court to the extent it requires Union of India to prepare a list of Life Saving Drugs would neither be appropriate nor proper, particularly when there is no definition of 'Life Saving Drug' in pharmacology of the modern system of medicines.

4. It was further contended that every drug is considered to be useful in either saving or prolong the life by curing, mitigating or preventing diseases. Given that every disease has the eventuality of taking life if not properly treated in time, the identification of 'Life Saving Drug' will depend upon identification of different situations when they are required.

5. Further, according to the learned counsel for the Union of India, the direction of the High Court for affixing Red Label

which is symbolic of danger on drugs and cosmetics is inappropriate particularly when a Cosmetics Sectional Committee had recommended the use of 'Brown' colour for labelling certain cosmetic products. He also placed reliance on the report submitted by the 'Drug Technical Advisory Committee' constituted under Section 5 of the Drugs and Cosmetics Act wherein the reason was shown for not providing any identification as to 'ingredient of non-vegetarian origin'.

6. Learned counsel appearing on behalf of the appellant-Indian Soaps & Toiletries Makers Association (hereinafter referred to as the 'Association') submitted that it is neither practicable nor desirable to give any identification as to ingredients of 'vegetarian' or 'non-vegetarian' origin. It has no relevancy as the use of cosmetics has nothing to do with the vegetarian or non- vegetarian origin ingredients; they are not 'food products' and are not meant for ingestion. It was submitted that it is difficult to identify the origin of non-vegetarian ingredients, as it is very difficult to know the basic source from which such ingredient is derived.

7. The following arguments were also advanced on behalf of the Association:

(a) *Unlike food items, generally cosmetic items are not ingestible. Every single dictionary definition of words "vegetarian" "non-vegetarian" relate to food or the act of eating. Therefore, the sentimental feeling that is brought upon by the consumers for any edible items are not applicable to cosmetic items. The rationale, i.e. emotional, religious, cultural, sentimental, health values which necessitate different treatment in terms of vegetarian and non-vegetarian for food items coming from animal and non-animal sources respectively does not hold good for cosmetic items (i) on account of its external application and (ii) on account of long held and general awareness amongst consumers about cosmetic composition.*

(b) *Unlike the food industry where the processing of food takes place near to the primary produce or a step away from the primary produce center and not many intermediary stages are involved before the final food item is packed for consumption, cosmetic industry is far removed from the stage of raw material sources. Cosmetics are manufactured from a significantly large number of raw materials which in turn contain composite ingredients while food items are manufactured generally from 4 to 5 basic raw materials.*

(c) *Unlike food items where the analysis mechanism is reasonably established through PFA Act ad Rules, the analysis of cosmetic products by its sheer complexity is difficult, which difficulty gets compounded on account of non-availability of technology, large number of ingredients coming in from different sources. In the absence of such technology being available the requirement of indicating symbols on labels would be impractical and would lead to chaos and confusion in as much as cosmetics with animal origin ingredients would carry vegetarian symbol or vice versa, and thus it will defeat the very purpose for which such requirement is intended.*

(d) *Unlike food products which are normally manufactured and consumed in India, barring a few exceptions, the cosmetic industry competes with international products both in terms of import as well as exports and consequently, requiring the industry to put such a label without any technology being available for making such distinction would not only add enormous cost on the industry but also place the Petitioners members at*

disadvantage in competing with international cosmetic products. Such labelling without any technology for analysis is also likely to be challenged against the Petitioner's members who instead of promoting and encouraging exports from India would be left with fighting legal battles at enormous cost and at the cost of foreign exchange.

8. According to the appellant-Association, the High Court failed to appreciate that cosmetic formulation is complex in nature as compared to drugs or the food products. The appellant-Association relied on following facts to justify their finding:

(1) *There are as many as 66 dosage forms in cosmetic formulations as listed in one of the standard reference books- The Chemistry & Manufacture of Cosmetics by Maison deNavaree, Allured Publishing.*

(2) *Schedule S of Drugs & Cosmetics Act recognizes 29 of such types of cosmetics.*

(3) *Each type of formulation has wide choice of 12,000 ingredients approved by CTFA or INCI directory of ingredients and are safe for use in cosmetic products. Ref.: CTFA on-line web site.*

(4) *In fact, some of the INCI ingredients are mixture of ingredients in various proportions of similar compounds. For example, commonly used CARBOMER is a homopolymer of acrylic acid cross linked with allyl ether of pentaerythritol, allyl ether of sucrose or allyl ether of propylene. It has 7 different technical names based on different grades, 32 trade names and 7 trade name mixtures.*

(5) *Mostly a perfume is component of cosmetic preparation. The perfumes are proprietary formula by itself and are mixture of several ingredients. Each ingredient of perfume could be synthetic, natural or animal in origin. Example - Musk perfume is trade secret composition. It may contain any number of ingredients coming from any source as synthetic, natural or animal origin. Generally perfume contains 10-100 different ingredients.*

(6) *All of these ingredients are purified several times to reach the acceptable form as required by INCI requirements. At this stage it is at least 4th or 10th step of purification, wherein original starting material can not be traced back to even ppb level. Example - Fatty acid based surfactants from plant origin or purely synthetic or animal origin.*

(7) *In case of food and drug related formulae, there is list of limited excipients or additives. In case of drug formulae, mostly the excipients are only a few and are published monographs in official pharmacopoeia. In case of food, the formulae are simple and contain very few ingredients being declared on the pack. So the origin is very easy to verify.*

(8) *Cosmetic formulae are far more complex to drug formulae. The source of thousands of ingredients being used in multiples of combination in the cosmetic formulae, make the task extremely difficult to check and certify the origin of ingredients used.*

9. It was also contended that the power of determination of labelling requirements including their contents is vested with the Union of India's authorities such as the Drug Technical

Advisory Board. In such case the High court ought not to have given a finding to provide certain mark on the labelling of the drugs and cosmetics based on vegetarian or non-vegetarian origin.

10. Learned counsel appearing on behalf of the respondent submitted that almost 60% of the population in India is vegetarian, over 50% of it is illiterate and over 90% public cannot read English. The Public Interest Litigation for disclosure of the ingredients of the products was filed to safeguard the interest of such innocent consumers and to ensure that such products bear an easily recognizable symbol to know whether it has any animal ingredient. The consumers have a right of informed choice between the products made or derived from vegetarian and those made or derived from non-vegetarian ingredients.

11. The questions involved in this case are:

(i) *Whether under Article 226 of the Constitution of India the High Court has jurisdiction to direct the manufacturers of drugs and cosmetics to display a particular symbol in their packages to identify the ingredients of ' non- vegetarian' or ' vegetarian' origin; and*

(ii) *Whether it is practicable and desirable to display any identification as to the origin of the non-vegetarian ingredients in the packages of drugs and cosmetics.*

12. Before discussing the relevant provisions of the Drugs and Cosmetics Act, 1940 and the Rules framed thereunder, it is relevant to notice that with a view to prevent adulteration of food stuff and bringing uniformity of laws in the country, the Prevention of Food Adulteration Act, 1954 was enacted. Later on when it was felt that the "consumer of food products" should know whether any article of food contains whole or any part of

animal including birds, fresh water or marine animals or eggs or product of any animal origin, the Government of India by notification dated 4th April, 2001 enacted the Prevention of Food Adulteration (Fourth Amendment) Rules, 2001 amending Rule 32 and Rule 42 of the Prevention of Food Adulteration Rules, 1955 and introduced symbol and colour code of vegetarian and non-vegetarian food products. Under clause (b) of amended Rule 32 of the Prevention of Food Adulteration Rules, 1955, it was made compulsory to make declaration whether article of food contains any non-vegetarian ingredients by a symbol and colour code so stipulated for the said purpose, to indicate that the product is a non-vegetarian food. The symbol of non-vegetarian food on every food product package was introduced by inserting clause (16) of sub-rule (ZZZ) of Rule 42 of the Prevention of Food Adulteration (Fourth Amendment) Rules, 2001. The amendment came into effect from 7th March, 2001.

But no such provision has been made to indicate whether any ingredient of any drug or cosmetics is of non-vegetarian origin.

13. "The Drugs and Cosmetics Act, 1940" was introduced to regulate the import, manufacture, distribution and sale of drugs and cosmetics including its package. "Drug" as defined in Section 3(b) of the Drugs and Cosmetics Act, 1940 reads as follows:

"3(b) "drug" includes-

(i) *all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals, including preparations applied on human body for the purpose of repelling insects like mosquitoes;*

(ii) such substances (other than food) intended to affect the structure or any function of human body or intended to be used for the destruction of 6(vermin) or insects which cause disease in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette;

(iii) all substances intended for use as components of a drug including empty gelatine capsules; and

(iv) such devices intended for internal or external use in the diagnosis, treatment, mitigation or prevention of disease or disorder in human beings or animals, as may be specified from time to time by the Central Government by notification in the Official Gazette, after consultation with the Board;

'Cosmetic' is defined in Section 3(aaa):

"3(aaa) *"cosmetic" means any article intended to be rubbed, poured, sprinkled or sprayed on, or introduced into, or otherwise applied to, the human body or any part thereof for cleansing, beautifying, promoting attractiveness, or altering the appearance, and includes any article intended for use as a component of cosmetic."*

14. Under Section 5 of the Drugs and Cosmetics Act, 1940 a "Drugs Technical Advisory Board" is to be constituted to advise the Central Government and the State Governments on technical matters arising out of the administration of the Act and to carry out other functions assigned to it by the Act. The Board consists of the Director General of Health Services; the Drugs Controller of India; the Director of the Central Drugs Laboratory; the Director of Central Research Institute; the Director of Indian Veterinary Research Institute, the President of the Medical Council of India; the President of Pharmacy

Council of India; etc.

The Central Government is also required to establish a 'Central Drugs Laboratory' under the control of a Director under Section 6 'for analysis and test of samples of drugs'. Under Section 7, the Drugs Consultative Committee is constituted to advise the Central Government, the State Governments and the Drugs Advisory Board on any matter tending to secure uniformity throughout India in the administration of the Act.

Under Section 8 standards of quality in relation to drugs and cosmetics have been prescribed. Chapter III deals with the definition of 'misbranded drugs'; 'adulterated drugs'; 'spurious drugs'; 'misbranded cosmetics'; 'spurious cosmetics' etc.

Under Section 16, it is mandated that the quality of a drug should comply with the standard as set out in the Second Schedule. Similarly, the quality of a cosmetic should comply with such standard as may be prescribed by the Central Government.

The Act deals with disclosure of the name of the manufacturer of a drug, cosmetic and its agent under Section 18A. The Central Government is also empowered under Section 26A to prohibit manufacture, etc., of drug and cosmetic in public interest. The conditions to be observed in the packing in bottles, packages, and other containers of drugs or cosmetics including regulating the mode of labelling of packed drugs or cosmetics prescribed by the Central Government by framing a Rule under Section 33 which reads as follows:

"33.Power of Central Government to make rules. -*(1) The Central Government may after consultation with, or on the recommendation of, the Board and after previous publication by notification in the Official Gazette, make rules for the purposes of giving effect to the provisions of this chapter:*

Provided that consultation with the Board may be

dispensed with if the Central Government is of opinion that circumstances have arisen which render it necessary to make rules without such consultation, but in such a case the Board shall be consulted within six months of making of the rules and the Central Government shall take into consideration any suggestions which the Board may make in relation to the amendment of the said rules.

(2) Without prejudice to the generality of the foregoing power, such rules may-

xxx xxx xxx

xxx xxx xxx

(i) prescribe the conditions to be observed in the packing in bottles, packages, and other containers of drugs or cosmetics, including the use of packing material which comes into direct contact with the drugs] and prohibit the sale, stocking or exhibition for sale, or distribution of drugs or cosmetics packed in contravention of such conditions;

(j) regulate the mode of labelling packed drugs or cosmetics, and prescribe the matter which shall or shall not be included in such labels;"

15. Part XV of the Drugs and Cosmetics Rules, 1945 relates to labelling, packing and standards of cosmetics. The list of ingredients, present in concentration of more than one per cent is required to be listed in the descending order of weight or volume under sub-rule (7) of Rule 148.

Rule 149A is a special provision relating to toothpaste containing fluoride whereunder it is mandatory to mention the content of fluoride on the tube and the carton apart from the date of expiry.

Rule 97 relates to 'labelling of medicines':

"97. Labelling of medicines--- *(1) The container of a medicine for internal use shall-*

(a) if it contains a substance specified in Schedule G, be labelled with the words 'Caution: it is dangerous to take this preparation except under medical supervision' - conspicuously printed and surrounded by a line within which there shall be no other words;

(b) if it contains a substance specified in Schedule H be labelled with the symbol Rx and conspicuously displayed on the left top corner of the label and be also labelled with the following words:-

Schedule H drug-Warning: To be sold by retail on the prescription of a Registered Medical Practitioner only';

(c) if it contains a substance specified in Schedule H, and comes within the purview of the [Narcotic Drugs and Psychotropic Substances Act, 1985 (61 of 1985)] be labelled with the symbol NRx which shall be in red and conspicuously displayed on the left top corner of the label, and be also labelled with the following words:-

Schedule H drug -"Warning:-- To be sold by retail on the prescription of a Registered Medical Practitioner only';

(d) if it contains a substance specified in Schedule X, be labelled with the symbol XRx which shall be in red conspicuously displayed on the left top corner of the label and be also labelled with the words : -

Schedule X drug -"Warning:-- To be sold by retail on the prescription of a Registered Medical Practitioner only';

(2) The container of a embrocation, liniment, lotion, ointment, antiseptic cream, liquid antiseptic or other liquid medicine for external application shall be labelled with the word in capital 'For External use only'.

(3)The container of a medicine made up ready only for treatment of an animal shall be labelled conspicuously with the words 'Not for human use; for animal treatment only' and shall bear a symbol depicting the head of a domestic animal.

(4) The container of a medicine prepared for treatment of human ailments shall if the medicine contains industrial methyllated spirit, indicate this fact on the label and be labelled with the words:-

"For External Use only".

(5) Substances specified in Schedule X in bulk form shall bear a label wherein they symbol as specified in sub-rule (1) shall be given conspicuously in red letters."

Whereas Rule 105 relates to packing of drugs, including sizes meant for retail sale as prescribed in 'Schedule P'. For other drugs, a separate packing has been prescribed under Rule 105A read with 'Schedule X'.

16. The Drugs and Cosmetics Act, 1940 or the rules framed thereunder do not mandate mentioning or displaying symbol of ingredients of non-vegetarian or vegetarian origin. The manufacturer or others are not required to mention 'vegetarian' or 'non-vegetarian' on the label of drugs or cosmetics.

The Central Government is vested with the power under the Drugs and Cosmetics Rules, 1945 to amend the 'label of the drugs and cosmetics' in consultation with the Drugs Technical Advisory Board. Without fruitful consultation with the Drugs Technical Advisory Board, no amendment can be made or suggested to change the label of the drugs and cosmetics.

17. Earlier a proposal was made by certain persons to

amend 'the Drugs and Cosmetics Rules, 1945' so as to mention the words "vegetarian" and "non-vegetarian" on the labels of the drugs and cosmetics. After fruitful deliberations, the Drugs Technical Advisory Board in its 48th Meeting held on 8th July, 1999 rejected the proposal as quoted hereunder:

"AGENDA ITEM NO.3
PROPOSAL TO AMEND DRUG & COSMETIC RULE 1945 TO REQUIRE MENTION OF WORDS V(VEGITAIAN) AND NV(NON VEGITARIAN) ON LABELS OF DRUGS/COSMETICS

Ministry of Social Justice and Empowerment nominated Shri Devdas Chhotray, Joint Secretary, Ministry of Food Processing and Shri S.R. Khanna, representative from an NGO, VOICE for acquainting the Board Members with their views on this subject. Sh. Chhotray, explained regarding his Ministry's concern about the killing of animals and consumer's right for information. He stated that some consumers may like to avoid use of any product containing material from animal source if they have recourse to such information and this need of consumer requires to be respected. It was, therefore, proposed that the provision for labelling V and NV on every food/drug product depending on its vegetarian or non vegetarian aspects may be introduced in the Drugs & Cosmetics Rules.

Dr. S.R. Khanna, also, in detail stressed upon consumers rights to such information and desired a mandatory provision to indicate the source of drug in terms of V and NV.

The Chairman explained that while respecting the consumers rights to information the issue of V & NV markings need to be examined in wider perspectives of medical treatment an critical importance of certain drugs

products like vaccines, harmones, Biotech products etc. which are of life saving nature and could be traced to animal origin. (Unlike food, drugs are not taken by choice or for the purpose of gratification). He, however, suggested that in the context of general understanding of vegetarianism such drugs where macroscopic portion of animal tissues like animal blood, liver extract etc. are present in oral preparations may be considered by the Board for marking NV on the label of such drugs.

1. Prof. Jindal opined that the drugs may be labelled to indicate their source i.e. synthetic source, Bio Source and animal source. This suggestion was, however, not found practicable.

2. Prof. Kokato and Mrs. Muthuswamy representatives of ICMR felt that what may be appropriate in case of food may not necessarily be appropriate in case of drugs which are prescribed for relief from disease conditions and many a times in life threatening situation. To introduce the concept of Vegetarian and Non Vegetarian by marking V or NV in drugs may not be in the overall interest of the consumers.

3. Sh. Praful Seth agreed with the views of Chairman about the possibility of considering the proposal for a limited number of non critical drugs that is oral tonics etc. having obvious animal tissues. He also explained that alternate formulations are also available and the physician may advice/educate consumers about it.

4. Prof. S.D. Seth, and Sh. R.Anand Raj Sekhar, opined that if at all proposals to mark NV has to be considered it may be discussed only for non-essential drugs.

5. Dr. Prem Agarwal, representative of IMA opposed any move to bring in the concept of V/NV in the field of

medicines and also stated that it would not be rational to further classify drugs essential or non-essential for the purpose of marking NV on the labels.

6. The Drugs Controller, Karnataka, was in agreement to the extent of marking NV on non-essential drugs taken orally and containing obvious animal tissues but did not favour the concept of making V or NV in the field of drugs.

7. The president MCI, Dr Ketan Desai was of opinion that marking products as NV is not relevant for medicines and no attempt should be made to differentiate them as essential and non-essential once. The proposal may be considered for food products and not for drugs.

8. Dr. Bhargava, representatives of Medical Council of Indian, Dr. Gupta, Director, CDR Lucknow and Mr. M.V. Kumar, expressed strong views against, introducing the requirement for marking drugs products with NV.

9. The mailer was discussed in great details and the other members did not favour any labelling of NV or V on the medicines.

In view of the above labelling of drugs "V/NV" or "from animal source" as proposed in the Agenda, was not accepted."

(Emphasis supplied)

18. A citizen has the right to expression and receive information under Article 19(1)(a) of the Constitution. That right is derived from freedom of speech and expression comprised in the Article. The freedom of speech and expression includes the right to receive information. [Refer : *The State of U.P. vs. Raj Narain and Others*, (1975) 4 SCC 428; *Secretary, Ministry of Information & Broadcasting, Govt. of India and others vs. Cricket Association of Bengal and Others,* (1995) 2 SCC 161;

P.V. Narasimha Rao vs. State (CBI/SPE), (1998) 4 SCC 626)]. But such right can be limited by reasonable restrictions under the law made for the purpose mentioned in the Article 19(2) of the Constitution.

19. It is imperative for the State to ensure the availability of the right to the citizens to receive information. But such information can be given to the extent it is available and possible, without affecting the fundamental right of others.

20. In the present case the appellant-Union of India had taken a plea that information relating to the ingredients of drug particularly those ingredients of non-vegetarian origin should not be given "in the interest of general public". A specific plea has been taken that it is not possible to distinguish the drugs whether these are life saving or otherwise.

21. In the given circumstances the condition of a patient may be such that a drug which is ordinarily not treated as a life saving drug may be essential to save the life. In such a case when drug becomes a life saving drug, it may not be desirable for the patient or his attendant to know the origin of the ingredients of the drug i.e. whether 'vegetarian' or 'non-vegetarian'. Such option cannot be left on the patient or his attendant if required to save the life or eradicate a disease.

22. The information about the origin of the ingredients of a drug or cosmetic, if claimed as a matter of right, a vegetarian can also claim information about the origin of a vegetarian ingredient, depending upon his food habit.

23. Food habit in India varies from person to person and place to place. Religion also plays a vital role in making such habit. Those who follow 'Jainism' are vegetarian but many of them do not eat some of the vegetarian food such as potato, carrot, onion, garlic etc. which are grown below the earth. Majority of Indians treat 'honey' and 'lactose' (milk derived sugar) as vegetarian but scientists treat them as 'non-vegetarian'

products.

Amongst the non-vegetarians a number of persons are 'eggetarian' i.e. those who only take one non-vegetarian product-egg. They do not eat other non-vegetarian food like animal, fish or birds. There are number of persons who treat egg as vegetarian food. Even amongst non-vegetarians, a large number of persons do not take beef or ham/pork because of religious belief. Many of the non-vegetarians do not eat snakes, insects, frog or bird.

In individual case, the Central Government may feel difficulty in specifying the origin of a 'vegetarian' or 'non-vegetarian' ingredient, if a person wants to know the definite origin of such 'vegetarian' or 'non-vegetarian' ingredient on the basis of his food habit.

24. 'The Drugs and Cosmetics Rules' can be amended by the Central Government after taking into consideration any suggestion which the Drugs Technical Advisory Board may make in relation to the amendments of the said Rules. Earlier on a reference the Drugs Technical Advisory Board has already opined that the labelling of drugs as 'vegetarian' or 'non-vegetarian' or 'from animal sources' is not desirable and such proposal was not accepted.

25. The question arises as to whether in facts and circumstances noted above, the High Court was justified in issuing a writ of mandamus calling upon the Central Government to discharge its duty by amending rules.

In *A.K. Roy v. Union of India and Others,* (1982) 1 SCC 271, this Court considered the question whether the Court should issue a mandamus calling upon the Central Government to discharge its duty without any further delay and held:

> *"The Parliament having left to the unfettered judgment of the Central Government the question as*

regards the time for bringing the provisions of the 44th Amendment into force, it is not for the court to compel the government to do that which, according to the mandate of the Parliament, lies in its discretion to do when it considers it opportune to do it. The executive is responsible to the Parliament and if the Parliament considers that the executive has betrayed its trust by not bringing any provision of the Amendment into force, it can censure the executive,….."

26. The aforesaid decision was noticed and reiterated by this Court in *Supreme Court Employees' Welfare Association v. Union of India and Another,* (1989) 4 SCC 187, and held:

"51. There can be no doubt that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which he has been empowered to do under the delegated legislative authority."

27. In *Bal Ram Bali and Another vs. Union of India,* (2007) 6 SCC 805, this Court discussed the separation of powers while dealing with the question of total ban on slaughter of cows, horses, buffaloes and chameleon. This Court held that it is a matter of policy on which decision can be taken by the appropriate Government and the Court cannot issue any direction to Parliament or to the State Legislature to enact a particular kind of law. The writ petition was held to be not maintainable with the following observation:

"3. It is not within the domain of the Court to issue a direction for ban on slaughter of cows, buffaloes and horses as it is a matter of policy on which decision has to be taken by the Government. That apart, a complete ban on slaughter of cows, buffaloes and horses, as sought in the present petition, can only be imposed by legislation

enacted by the appropriate legislature. Courts cannot issue any direction to the Parliament or to the State legislature to enact a particular kind of law. This question has been considered in *Union of India v. Prakash P. Hinduja and Anr.,* (2003) 6 SCC 195, wherein in para 30 of the reports it was held as under:

"30. Under our constitutional scheme Parliament exercises sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In Supreme Court Employees' Welfare Assn. v. Union of India, (1989) 4 SCC 187, it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in State of J and K v. A.R. Zakki, (1992) Supp.1 SCC 548. In A.K. Roy v. Union of India (1982) 1 SCC 271, it has been held that no mandamus can be issued to enforce an Act which has been passed by the legislature...."

4. In view of the aforesaid legal position, we are of the opinion that this Court cannot grant any relief to the petitioners, as prayed for, in the writ petition. The writ petition is accordingly dismissed."

28. Learned counsel for the respondent-writ petitioner relied on the decision of this Court *in Union of India vs. Association for Democratic Reforms and Another,* (2002) 5 SCC 294, and submitted that the "field has remained unoccupied this Court can issue such direction under Article 32 of the Constitution of India", but such submission cannot be

accepted as it cannot be said that field has remained unoccupied as under the Drugs and Cosmetic Rules it is the Central Government which in consultation with the Drug Technical Advisory Board is empowered to decide whether any amendment is to be made in the relevant Rules showing the ingredients of vegetarian or non-vegetarian origin or to provide a symbol. In fact the issue in question was deliberated by the Central Government when such matter was referred to the Drug Technical Advisory Board which in its 48th Meeting on 8th July, 1999 rejected such suggestion.

29. In view of the discussions above, we hold that the High Court under Article 226 of the Constitution of India has no jurisdiction to direct the Executive to exercise power by way of subordinate Legislation pursuant to power delegated by the Legislature to enact a law in a particular manner, as has been done in the present case. For the same reason, it was also not open to the High Court to suggest any interim arrangement as has been given by the impugned judgment. The writ petition filed by Respondent being not maintainable for issuance of such direction, the High Court ought to have dismissed the writ petition in limine.

30. In the result, both the appeals are allowed and the order and directions issued by the High Court are set aside but there shall be no orders as to costs.

B.B.B. Appeals allowed.

STATE OF RAJASTHAN & ORS.
v.
HINDUSTAN ZINC LTD. & ANR.
(Civil Appeal No. 1494 of 2008)

MARCH 11, 2013

[R.M. LODHA AND ANIL R. DAVE, JJ.]

Mines and Minerals (Development and Regulation) Act, 1957 - s.9 - Mineral Concession Rules, 1960 - rr. 64A, 64B, 64C & 64D - Mining lease for extracting lead and zinc - Recovery of royalty in respect of minerals extracted by the lessee - Methodology for calculation of royalty -Notifications issued by the Central Government from time to time - Notification dated 11th April, 1997 substituted by Notification dated 12th September, 2000 - High Court held that lessee-company was not liable to pay royalty on the tailings as they had not been taken out of the leased area and that as per r.64C, unless dumped tailings or rejects are consumed by the lessee, no royalty can be collected on such tailings or rejects - Held: Conclusion arrived at by the High Court is correct - Negligible contents of metal remaining in the mining area by way of tailings, slimes or rejects, which are returned to the mother earth cannot be said to be the part of metal content in the ore produced - By virtue of Notification dated 12th September, 2000 read with the relevant Rules, lessee-company supposed to pay royalty only on the contents of metal in the ore produced and not on the metal contained in the tailings, rejects or slimes which had not been taken out of the leased area and which had been dumped into dumping ground of the leased area.

Mines and Minerals (Development and Regulation) Act, 1957 - s.9 - Mineral Concession Rules, 1960 - rr. 64A, 64B, 64C & 64D - Mining lease for extracting lead and zinc - Recovery of royalty in respect of the minerals extracted by the

lessee - Dispute over methodology for calculation of royalty - Direction issued by High Court remitting the matter to the mining engineer for re-computing the royalty payable on lead and zinc contained in the ore produced - Held: As the metal concentrate taken out from the leased area was known to the parties, it was not necessary to have any further details regarding the ore produced by the lessee-company - Direction accordingly quashed.

M/s Hindustan Zinc Limited had been leased land by the State of Rajasthan for the purpose of extracting lead and zinc therefrom under the provisions of Mines and Minerals (Development and Regulation) Act, 1957. Section 9 of the Act enables the State to recover royalty in respect of the minerals extracted by the holder of a mining lease. Rules 64A, 64B, 64C & 64D of the Mineral Concession Rules, 1960 pertain to calculation of the amount of royalty payable.

Under Notification dated 11th April, 1997, royalty in respect of lead and zinc was to be charged on the basis of mineral concentrate produced. But thereafter, by virtue of another Notification dated 12th September, 2000, substituting the Notification dated 11th April, 1997, royalty in respect of the afore-stated two minerals became payable on ad valorem basis on the contents of metal found in the ore produced.

Accordingly notices were issued to the lessee company (M/s Hindustan Zinc Limited) for recovery of additional royalty in respect of lead and zinc extracted by the company. The company raised contention that unless the ores are taken out of the leased premises, royalty would not be leviable and that negligible contents of lead and zinc contained in tailings, which is not taken out of the leased area and which is dumped within the leased area, can never be taken into account for the purpose of calculating royalty.

The additional demand for royalty was quashed by the High Court. The High Court held that the lessee-company was not liable to pay royalty on the tailings as they had not been taken out of the leased area and further that as per Rule 64C of the Rules, unless dumped tailings or rejects are consumed by the lessee, no royalty can be collected on such tailings or rejects. The High Court also directed that the royalty payable on lead and zinc contained in the ore produced be re-calculated by the mining engineer.

Against the judgment delivered by the High Court, the instant two appeals were filed- one by the State of Rajasthan whereas the other by M/s Hindustan Zinc Limited.

The appeal filed by the State of Rajasthan, viz. Civil Appeal No. 1494 of 2008 mainly challenged the impugned judgment on the ground that by virtue of methodology directed to be employed in the said judgment, the State would suffer substantial loss as the lessee company, viz. Hindustan Zinc Limited would be paying much less royalty than what it is supposed to pay. On the other hand, appeal filed by Hindustan Zinc Limited i.e. Civil Appeal no. 1526 of 2008 challenged the direction issued by the High Court, whereby the amount of royalty was directed to be re-calculated by the mining engineer.

Disposing of the appeals, the Court

HELD:

CIVIL APPEAL NO. 1494 OF 2008

1.1. The conclusion arrived at by the High Court is correct. Upon perusal of the provisions of Rule 64C of the Mineral Concession Rules, 1960, it is very clear that unless the tailings or rejects are used for sale or for consumption, such tailings or rejects would not be liable

for payment of royalty. Moreover, Rule 64B of the Rules also make it clear that in case of processing of run-of-mine, royalty shall be charged only on the processed mineral removed from the leased area. [Paras 23, 27, 28] [714-F; 715-H; 716-A-B]

1.2. The Notification dated 12th September, 2000 clearly denote intention of the Government with regard to the calculation of royalty on the contents of metal in the ore produced and not on tailings or rejects, which are not taken out of the leased area. The negligible contents of metal which remains in the mining area by way of tailings, slimes or rejects, which are returned to the mother earth cannot be said to be the part of metal content in the ore produced. [Para 29] [716-B-D]

1.3. Once a portion of the metal is returned back to the mother earth, it cannot be said to have been extracted or cannot be said to have been taken out of the leased area and when the metal which has not been taken out from the leased area or which is not contained in the ore produced, it cannot be made subject to payment of royalty because the lease holder never took out that portion of the metal from the earth and therefore, that cannot be said to be the part of metal contained in the ore produced. [Para 31] [716-E-G]

1.4. The courts below did not commit any mistake in arriving at the conclusion that the holder of the lease was not liable to pay the amount demanded under the impugned notices because, by virtue of Notification dated 12th September, 2000 read with the relevant Rules, the lease holder is supposed to pay royalty only on the contents of metal in the ore produced and not on the metal contained in the tailings, rejects or slimes which had not been taken out of the leased area and which had been dumped into dumping ground of the leased area. [Para 35] [717-D-F]

National Mineral Development Corporation Limited v. State of Madhya Pradesh & Anr. **(2004) 6 SCC 281: 2004 (2) Suppl. SCR 1 - relied on.**

State of Orissa & Ors. v. M/s. Steel Authority of India Ltd. **(1998) 6 SCC 476: 1998 (3) SCR 1074 - referred to.**

CIVIL APPEAL NO. 1526 OF 2008

2. The Hindustan Zinc Limited has been aggrieved by the directions whereby the matter has been ordered to be remitted to the mining engineer for re-computing the royalty payable on lead and zinc contained in the ore produced. The submission on behalf of the said lessee company was to the effect that as the entire concentrate has been taken out of the leased area and as the quantity of concentrate of lead and zinc was very much known, it was not necessary to give such a direction because there is no question with regard to re-computation of royalty on the basis of metal contained in ore produced. There is substance in what has been submitted because the metal concentrate which had been taken out from the leased area is known to the parties and therefore, it is not necessary to have any further details regarding the ore produced by the appellant-company. Therefore, the afore-stated direction is quashed. [Paras 36, 38, 39 and 40] [717-G-H; 718-A, B-D]

Case Law Reference:

1998 (3) SCR 1074	**referred to**	**Para 19**
2004 (2) Suppl. SCR 1	**relied on**	**Para 20, 30**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1494 of 2008

From the Judgment & Order dated 06.07.2007 of the High Court of Judicature for Rajasthan at Jodhpur in D B Civil Special Appeal No. 43 of 2006 in S B Civil Writ Petition No. 4785 of 2003.

WITH

Civil Appeal No. 1526 of 2008.

Basava Prabhu S. Patil, K.K. Venugopal, Dushyant A. Dave, Pragati Neekhra, Suryanarayana Singh, Yashode Sharma, Milind Kumar, Anirudh Singaneria, Dhirandra Negi, Chetan Chopra, Dheeraj Nair, Pooja Dhar, Vibha Datta Makhija for the Appearing Parties.

The Judgment of the Court was delivered by

ANIL R. DAVE, J. 1. Being aggrieved by the judgment dated 6th July, 2007 delivered by the High Court of Rajasthan in D.B. Civil Special Appeal No.43 of 2006, the afore-stated two appeals have been filed. One appeal has been filed by the State of Rajasthan whereas the other appeal has been filed by Hindustan Zinc Limited, who had been leased land situated in districts Bhilwara, Rajsamand and Udaipur by the State of Rajasthan for extraction of lead and zinc therefrom.

2. As both the appeals arise from a common judgment, at the request of the learned counsel, both the appeals were heard together. So far as the appeal filed by the State of Rajasthan, viz. Civil Appeal No. 1494 of 2008 is concerned, it mainly challenges the impugned judgment on the ground that by virtue of methodology directed to be employed in the said judgment, the State would suffer substantial loss as the lessee company, viz. Hindustan Zinc Limited would be paying much less royalty than what it is supposed to pay.

3. On the other hand, an appeal has also been filed by Hindustan Zinc Limited as it has been aggrieved by the direction issued by the High Court, whereby the amount of royalty has been directed to be re-calculated.

4. As Civil Appeal No. 1494 of 2008 filed by the State of Rajasthan is the main appeal, we would like to deal with the said appeal at the first instance and, thereafter we would deal

with the appeal filed by Hindustan Zinc Limited i.e. Civil Appeal No. 1526 of 2008.

Civil Appeal No. 1494 of 2008

5. The appellant-State and the State Authorities have been aggrieved by the impugned order whereby the additional demand raised under notice dated 24th December, 2001 and subsequent notices issued by the State for recovery of royalty in respect of the lead and zinc extracted by the respondent-company had been quashed by the learned Single Judge of the Rajasthan High Court and the order of the learned Single Judge was confirmed by the Division Bench in the appeal filed before it. After hearing the concerned learned advocates appearing for the State and the respondent-company, the learned Single Judge had come to the conclusion that the impugned notices, whereby additional amount was demanded, were bad in law and therefore, the petition was allowed and the impugned notices dated 22nd December, 2001, 24th December, 2001 and 4th January, 2002 had been quashed. It may also be stated here that the afore-stated notices had been challenged by the respondent-company initially before the revisional authority under the Mineral Concession Rules, 1960, which had confirmed the validity of the said notices and therefore, the order passed by the revisional authority dated 2nd July, 2003, whereby the validity of the impugned notices had been upheld, was also quashed and set aside.

6. The facts giving rise to the issue in question, in a nutshell, are as under:

7. The respondent-company had been leased land in the areas of District Bhilwara, Rajsamand and Udaipur for the purpose of extracting lead and zinc therefrom under the provisions of Mines and Minerals (Development and Regulation) Act, 1957 (hereinafter referred to as 'the Act'). Section 9 of the Act is the charging section, which enables the State to recover royalty in respect of the minerals extracted by

the holder of a mining lease. The Mineral Concession Rules, 1960 (hereinafter referred to as 'the Rules') have been framed in exercise of the powers conferred under Section 13 of the Act. Rules 64A, 64B, 64C & 64D of the Rules are relevant Rules, which pertain to calculation of the amount of royalty payable by the holder of the lease in respect of the minerals extracted from the land leased to the holder of the mining lease.

8. From time to time, the Government had issued Notifications determining the rate at which royalty was to be paid by the holder of the lease in respect of the minerals extracted. In the instant case, we are concerned with two minerals: lead and zinc. Two Notifications are relevant for the purpose of determining the issue involved in these appeals. Under Notification dated 11th April, 1997, by virtue of item nos. 22 and 41 incorporated in the said Notification, royalty in respect of the afore-stated two minerals was to be paid as under:

Item No. 22 Lead concentrate	4% of London metal exchange metal price on ad valorem basis Chargeable per tonne of concentrate produced.
Item No. 41 Zinc concentrate	3.5% of London metal exchange metal price on ad valorem basis Chargeable per tonne of concentrate produced.

9. Thereafter, by virtue of another Notification dated 12th September, 2000, substituting the Notification dated 11th April, 1997, royalty in respect of the afore-stated two minerals was payable as under:

Item No. 25 Lead	5% of London metal exchange lead metal price chargeable on the contained lead metal in ore produced.
Item No. 50 Zinc	6.6% of London metal exchange Zinc metal price on ad valorem basis chargeable on contained zinc metal in ore produced.

10. By virtue of the afore-stated Notification dated 12th September, 2000, the manner in which the royalty was to be calculated had been changed.

11. Formerly the royalty was to be charged on the basis of mineral concentrate produced but by virtue of the Notification dated 12th September, 2000, royalty is now to be charged on ad valorem basis on the contents of metal found in the ore produced.

12. According to the appellant-State, the respondent-lease holder was supposed to pay the royalty on the entire mineral extracted from the earth and accordingly the impugned notices were issued to the respondent for recovery of difference of royalty.

13. On the other hand, the case of the respondent-company was that the royalty was chargeable only on the contents of lead and zinc metal in the ore produced because, by virtue of the Notification issued in 2000, the respondent-company was supposed to pay royalty only on the contents of lead or zinc, as the case may be, contained in the ore produced.

14. As stated hereinabove, the demand made by the appellant-State under the impugned notices had been upheld by the revisional authority but the same had been quashed by the High Court when the order of the revisional authority was challenged before the learned Single Judge of the High Court and the view of the learned Single Judge had been upheld by virtue of the impugned order passed by the Division Bench.

15. The learned counsel appearing for the appellant-State submitted that the High Court committed an error in interpreting

provisions of the Rule 64A, 64B and 64C of the Rules read with the Notification dated 12th September, 2000 issued by the Central Government.

16. The sum and substance of the submissions made by the learned senior counsel appearing for the appellant was that the royalty ought to have been charged on the basis of the metal contained in the ore produced so as to give effect to the provisions of Section 9 and the Second Schedule to the Act read with Rules 64B, 64C and 64D of the Rules.

17. According to the learned counsel, the contention of the respondent, that unless the ores are taken out of the leased premises, the royalty would not be leviable, is not correct because processing the ore would also amount to consumption of the ores and therefore, even if the said ores are not physically taken out of the leased area, the royalty will have to be paid on the contents of lead and zinc contained in the ore.

18. He further submitted that the methodology approved by the High Court would amount to re-writing the provisions with regard to computation and calculation of royalty.

19. He further submitted that the amount of royalty demanded by the appellant-State from the respondent-company was just and proper and therefore, the order passed by the High Court be quashed and set aside. So as to substantiate his submissions, he relied upon the judgment delivered by this Court in *State of Orissa & Ors. v. M/s. Steel Authority of India Ltd.* [(1998) 6 SCC 476].

20. On the other hand, the learned senior counsel appearing for the respondent-company vehemently supported the reasons given by the High Court whereby the High Court has held that the respondent-company was not liable to pay royalty on the tailings as they had not been taken out of the leased area. Relying upon the judgment delivered in *National Mineral Development Corporation Limited v. State of Madhya Pradesh & Anr.* [(2004) 6 SCC 281], the High Court had further held that as per the provisions of Rule 64C of the Rules, unless dumped tailings or rejects are consumed by the lessee, no royalty can be collected on such tailings or rejects.

21. The learned senior counsel appearing for the respondent-company mainly submitted that the negligible contents of lead and zinc contained in tailings, which is not taken out of the leased area and which is dumped within the leased area, can never be taken into account for the purpose of calculating royalty for the reason that according to the Notification dated 12th September, 2000, royalty is to be paid in respect of the metal contained in the ore produced and the metal which has been left out by way of tailings within the leased area would never be treated as metal in the ore produced.

22. According to him, the negligible metal contained in the tailings, slimes or the rejects can never be the subject matter of calculation of royalty as that portion of metal was returned to the mother earth by dumping the same in the leased area without being taken out of the leased area and that can not be included in the contents of the metal produced.

23. Upon hearing the learned counsel at length and upon perusal of the relevant material and the impugned judgment and the judgments referred to by the learned counsel, we are of the view that the conclusion arrived at by the High Court is correct.

24. It is pertinent to note that Section 9 of the Act enables the appellant-authority to charge royalty on the minerals extracted by the lease holder from the land given on lease for the purpose of mining. The methodology for calculating the amount of royalty is determined by the Rules and by the Notifications issued by the Central Government from time to time.

25. It is also pertinent to note that prior to issuance of Notification dated 12th September, 2000, by virtue of Notification dated 11th April, 1997, royalty was to be calculated

on the basis of metal concentrate produced by the lease holder whereas in pursuance of Notification dated 12th September, 2000, the method of calculating the royalty has been substantially changed and in pursuance of the said Notification, royalty is to be calculated on the contents of lead and zinc metal in the ore produced.

26. Immediately after the aforestated Notification dated 12th September, 2000 was issued by the Central Government, provisions of Rule 64 of the Rules had also been amended. By virtue of the said amendment, Rule 64B and Rule 64C had been inserted with effect from 25th September, 2000, which read as follows:

> "**64B. Charging of royalty in case of minerals subjected to processing.-** (1) In case processing of run-of-mine is carried out within the leased area, then, royalty shall be chargeable on the processed mineral removed from the leased area.
>
> (2) In case run-of-mine mineral is removed from the leased area to a processing plant which is located outside the leased area, then, royalty shall be chargeable on the unprocessed run-of-mine mineral and not on the processed product.
>
> **64C. Royalty on tailings or rejects -** On removal of tailings or rejects from the leased area for dumping and not for sale or consumption, outside leased area such tailings or rejects shall not be liable for payment of royalty;
>
> Provided that in case so dumped tailings or rejects are used for sale or consumption on any later date after the date of such dumping, then, such tailings or rejects shall be liable for payment of royalty."

27. In the instant case, we are more concerned with the provisions of Rule 64C of the Rules. Upon perusal of the said Rule, it is very clear that unless the tailings or rejects are used for sale or for consumption, such tailings or rejects would not be liable for payment of royalty.

28. Moreover, provisions of Rule 64B of the Rules also make it clear that in case of processing of run-of-mine, royalty shall be charged only on the processed mineral removed from the leased area.

29. The aforestated amendment and Notification dated 12th September, 2000 clearly denote intention of the Government with regard to the calculation of royalty on the contents of metal in the ore produced and not on tailings or rejects, which are not taken out of the leased area. The negligible contents of metal which remains in the mining area by way of tailings, slimes or rejects, which are returned to the mother earth cannot be said to be the part of metal content in the ore produced.

30. This court in the case of *National Mineral Development Corporation Limited* (supra) has clearly observed as under:

> "Dumped tailings or rejects may be liable to payment of royalty if only they are sold or consumed".

31. From the contents of what has been stated hereinabove by this Court, it is very clear that once a portion of the metal is returned back to the mother earth, it cannot be said to have been extracted or cannot be said to have been taken out of the leased area and when the metal which has not been taken out from the leased area or which is not contained in the ore produced, it cannot be made subject to payment of royalty because the lease holder never took out that portion of the metal from the earth and therefore, that cannot be said to be the part of metal contained in the ore produced.

32. Though the learned counsel for the State referred to the forms in which information with regard to ore received from the mines and treated ore was required to be filled up and

supplied to the concerned Government Authorities by the holder of the mining lease, in our opinion the said information and the averments are not much relevant because each and every information required by the Government may not be necessary for the purpose of calculating royalty. Possibly the information received from the holders of the mining lease would be for some other incidental purpose or for the purpose of cross checking the information given by the holder of the mining lease so as to find out whether the details given by the lease holder on the basis of which royalty is calculated is correct.

33. For the afore-stated reasons, in our opinion, we need not refer to the submissions made in relation to the forms referred to in the Rules.

34. Upon carefully going through the impugned judgment and the judgment delivered by the learned Single Judge of the High Court, we find that the courts below did not commit any mistake in arriving at the conclusion that the holder of the lease was not liable to pay the amount demanded under the impugned notices because, by virtue of Notification dated 12th September, 2000 read with the relevant Rules, the lease holder is supposed to pay royalty only on the contents of metal in ore produced and not on the metal contained in the tailings, rejects or slimes which had not been taken out of the leased area and which had been dumped into dumping ground of the leased area.

35. For the afore-stated reasons, we do not find any substance in the appeal and therefore, the appeal is dismissed with no order as to costs.

CIVIL APPEAL NO. 1526 OF 2008

36. So far as the present appeal is concerned, it has been filed by Hindustan Zinc Limited as it has been aggrieved by the directions whereby the matter has been ordered to be remitted to the mining engineer for re-computing the royalty payable on

lead and zinc contained in the ore produced.

37. The appellant-company is aggrieved by the afore-stated direction because it was never prayed by the State that the matter be remitted back to the mining engineer for re-computation of the royalty.

38. The submission on behalf of the appellant-company was to the effect that as the entire concentrate has been taken out of the leased area and as the quantity of concentrate of lead and zinc was very much known, it was not necessary to give such a direction because there is no question with regard to re-computation of royalty on the basis of metal contained in ore produced.

39. We find substance in what has been submitted because the metal concentrate which had been taken out from the leased area is known to the parties and therefore, it is not necessary to have any further details regarding the ore produced by the appellant- company.

40. We, therefore, quash the afore-stated direction and the appeal filed by the appellant-company is allowed to the above effect with no order as to costs.

B.B.B. Appeals disposed of.

GAMBHIRSINH R. DEKARE
v.
FALGUNBHAI CHIMANBHAI PATEL AND ANR.
(Criminal Appeal No. 433 of 2013)

MARCH 11, 2013

[CHANDRAMAULI KR. PRASAD AND V. GOPALA GOWDA, JJ.]

Code of Criminal Procedure, 1973 - s.482 - Defamatory news item - In local edition of a newspaper - Complaint against Editor and Resident Editor alleging defamation - Magistrate took cognizance of the offence and issued process against both the accused - Editor sought quashing of the complaint on the ground that he was not aware of offending news item as he was stationed at different place - High Court quashed the complaint against the Editor - Held: High Court quashed the prosecution on erroneous assumption of fact - In view of the scheme of Press and Registration of Books Act and in view of presumption provided u/s. 7 thereof, Editor is responsible for publication of a news item - Press and Registration of Books Act, 1867 - s.7.

A news item was published in a newspaper alleging illicit rlation of the appellant with a lady. Appellant filed a complaint against Accused Nos.1 and 2 who were Resident Editor and Editor of the Newspaper respectively. Chief Judicial Magistrate took cognizance of the offence u/ss. 500, 501, 502, 506, 507 and 114 IPC and issued process against both the accused.

Accused-respondent No.1 (the Editor) filed application seeking quashing of the complaint on the ground that he was the Editor of the Newspaper and stationed at Ahmedabad and the offending news item was published in the Vadodara Edition of the newspaper of which accused No.1 was the resident Editor. Thus he was not aware of the publication of the offending news item. High Court quashed the complaint and process against the accused-respondent No.1. Hence the instant appeal by the complainant.

Allowing the appeal, the Court

HELD: 1. Complainant had specifically averred in the complaint that the news item was printed in the newspaper as per the instructions and directions of the accused persons. The complainant had specifically alleged that accused nos. 1 and 2 deliberately published the offending news and it was within their knowledge. At this stage, it is impermissible to go into the truthfulness or otherwise of the allegation and one has to proceed on a footing that the allegation made is true. Hence, the conclusion reached by the High Court that "there is nothing in the complaint to suggest that the petitioner herein was aware of the offending news item being published or that he had any role to play in the selection of such item for publication" is palpably wrong. Hence, the High Court has quashed the prosecution on an erroneous assumption of fact which renders its order illegal. [Para 12] [725-F-H; 726-A-B]

2. A news item has the potentiality of bringing doom's day for an individual. The Editor controls the selection of the matter that is published. Therefore, he has to keep a careful eye on the selection. Blue-penciling of news articles by any one other than the Editor is not welcome in a democratic polity. Editors have to take responsibility of everything they publish and to maintain the integrity of published record. The scheme and scope of Press and Registration of Books Act, 1867 also brings forward the same conclusion. From the scheme of the Act, it is evident that it is the Editor who controls the selection of the matter that is published in a newspaper.

Further, every copy of the newspaper is required to contain the names of the owner and the Editor and once the name of the Editor is shown, he shall be held responsible in any civil and criminal proceeding. Further, in view of the interpretation clause, the presumption would be that he was the person who controlled the selection of the matter that was published in the newspaper. However, this presumption u/s.7 of the Act is a rebuttable presumption and it would be deemed a sufficient evidence unless the contrary is proved. [Paras 14, 15 and 18] [726-E-F, H; 728-D-F]

K.M. Mathew v. K.A. Abraham **(2002) 6 SCC 670: 2002 (1) Suppl. SCR 662 - relied on.**

K.M. Mathew v. State of Kerala **(1992) 1 SCC 217: 1991 (2) Suppl. SCR 364;** *Adalat Prasad v. Rooplal Jindal* **(2004) 7 SCC 338 - referred to.**

Case Law Reference:

2002 (1) Suppl. SCR 662	**relied on**	**Para 18**
1991 (2) Suppl. SCR 364	**referred to**	**Para 19**
(2004) 7 SCC 338	**referred to**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 433 of 2013.

From the Judgment & Order dated 12.10.2007 of the High Court of Gujarat at Ahmedabad in Criminal Misc. Application No. 5605 of 2001.

Huzefa Ahmadi, Ejaz Maqbool, Tanima Kishore for the Applellant.

Dushyant A. Dave, Suk Sagar, Bina Madhavan, Sanjiv Dave, Anindita Pujari (For Lawyer's Knit & Co.), Hemantika

Wahi, Kamal Deep, Shubhada Deshpande, Nandini Gupta for the Respondents.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. The petitioner Gambhirsinh R. Dekare, at the relevant point of time was serving as Taluka Mamlatdar and an Executive Magistrate in Vadodara Taluka in the State of Gujarat. A Gujarati daily newspaper "Sandesh" is published from different places i.e., Surat, Valsad, Bharuch, Vadodara and other cities of India. Navinbhai Chauhan is the Resident Editor of Vadodara edition of "Sandesh" whereas Falgunbhai Chimanbhai Patel is the Editor of "Sandesh". The newspaper published a news item in its Vadodara issue dated 28.09.1999 that the petitioner "is in love and keeping illicit relations with the wife of a doctor at Ajwa Road with the following headlines:

> "Mamlatdar Shri Gambhirsinh Dhakre is caught red handed by the youngsters- Mamlatdar is indulged in illicit relations with the wife of Doctor who is residing at Ajwa Road- attempts to conceal the matter- why the Government is not taking any action against the Mamlatdar?"

2. According to the petitioner (hereinafter referred to as "the complainant"), the allegation published in the newspaper is false and defamatory. Accordingly, he filed complaint in the Court of Chief Judicial Magistrate, Vadodara. The complainant alleged that the news items are printed in the newspaper "as per the instructions and directions of the accused persons". In paragraph 3 of the complaint the complainant alleged as under:

> "3. The Accused No. 1 and 2 of this case have deliberately published the news in the Page No. 12 of their daily newspaper 'Sandesh' dated 28/9/99 which is quite defaming and offending to us. The accused persons were in the knowledge that we the complainant shall be defamed in the Society due to publishing of such news and with a

view to vilify us as the person having bad character, the accused persons, in collusion with each other, have published the following news in the newspaper deliberately."

3. The complainant termed those allegations to be false and stated that the Editor and the Resident Editor have tried to prove him a characterless person in the society and because of that he had faced shameful and disgraceful situation amongst the family members and friends. The news item further brought him in disrepute in the Department and the public. It has been alleged that the accused persons have published the news item without any evidence or proof. The complainant denied to have any illicit relation with the doctor's wife. The complainant was examined on solemn affirmation in which he reiterated the allegation.

4. The Chief Judicial Magistrate, taking into account the allegation made in the petition of complaint and the statement of the complainant on solemn affirmation, took cognizance of the offence under Section 500, 501, 502, 506, 507 and 114 of the Indian Penal Code and issued process against both the accused.

5. Accused no. 2, Falgunbhai Chimanbhai Patel, the Editor of "Sandesh", aggrieved by the order taking cognizance and issuing process, filed an application before the High Court seeking quashing of the complaint filed before the Chief Judicial Magistrate, Vadodara on 08.10.1999. He sought quashing of the complaint on the ground that he is the Editor of the newspaper, stationed at Ahmedabad and the offending news item was published in the Vadodara Edition of the newspaper, of which Navinbhai Chauhan, accused no. 1, is the Resident Editor. It was further contended that he was not aware of the offending news item being published in the newspaper or for that matter he had any role to play in selection of such item for publication. The High Court by the impugned order allowed the application and while doing so observed as follows:

"6. In the complaint itself, the petitioner is described as editor of the newspaper and his address is shown at Ahmedabad. Original accused No. 1 is described as a resident editor of Baroda of the same newspaper. It is not in dispute that the newspaper in question has its registered office at Ahmedabad and Baroda edition of the newspaper is being separately published from Baroda. It is also not in dispute that offending news item was carried in Baroda edition of the newspaper only."

6. The High Court further went on to observe as under:

"10. In the present case also, I find that there is nothing in the complaint to suggest that the petitioner herein was aware about the offending news item being published or that he had any role to play in selection of such item for publication. In absence of any material disclosed in the complaint and in view of the admitted fact that the petitioner is an editor of the newspaper stationed at Ahmedabad and the news item was carried in its Baroda edition alone where the newspaper has a separate resident editor, the petitioner cannot be proceeded against for the offence of defamation of the complaint."

7. The High Court came to the conclusion that prosecution of accused no. 2 would amount to miscarriage of justice and, accordingly, quashed the complaint and the process issued against him.

8. It is against this order that the complainant has preferred this special leave petition.

9. Leave granted.

10. Mr. Huzefa Ahmadi, Senior Advocate appears on behalf of the complainant (appellant herein) whereas accused no. 2 (Respondent no. 1 herein) is represented by Mr. Dushyant Dave, Senior Advocate.

11. Mr. Ahmadi, submits that according to the complainant, accused no. 2 was the Editor stationed at Ahmedabad and there is specific allegation against him that the news items are published in the newspaper "as per the instructions and directions of the accused persons". The complainant has further alleged in the complaint that both the accused i.e. the Editor (accused no. 2) and the Resident Editor (accused no. 1) had deliberately published the news in their Gujarati daily newspaper "Sandesh" which is defamatory. The complainant went on to say that the "accused persons were in the knowledge that the complainant shall be defamed in the society due to publication of such news". In the face of the aforesaid allegation, Mr. Ahmadi points out that the High Court committed a serious error by observing that "there is nothing in the complaint to suggest that" accused no. 2 "was aware about the offending news item being published or that he had any role to play in selection of such item for publication". Mr. Dave, however, submits that, according to the complainant's own showing, accused no. 2 was the Editor of the newspaper stationed at Ahmedabad and the offending news item having been published at Vadodara for which there is admittedly a separate Resident Editor, it has to be assumed that the accused no. 2 was not aware of the same and had no role to play in the selection of such item for publication.

12. We have bestowed our consideration to the rival submission and we do not find any substance in the submission of Mr. Dave. Complainant has specifically averred in the complaint that the news item was printed in the newspaper as per the instructions and directions of the accused persons. The complainant had specifically alleged that accused nos. 1 and 2 have deliberately published the offending news and it was within their knowledge. At this stage, it is impermissible to go into the truthfulness or otherwise of the allegation and one has to proceed on a footing that the allegation made is true. Hence, the conclusion reached by the High Court that "there is nothing in the complaint to suggest that the petitioner herein was aware

of the offending news item being published or that he had any role to play in the selection of such item for publication" is palpably wrong. Hence, in our opinion, the High Court has quashed the prosecution on an erroneous assumption of fact which renders its order illegal.

13. Mr. Ahmadi, further submits that the impugned order is vulnerable on another count. He points out that according to the complainant, the present accused was the Editor and his name has been printed as such in the publication and, therefore, he is responsible for the publication of the news item. Mr. Dave, however, submits that there being Resident Editor for the Vadodara Edition of the newspaper, the present accused, who is the Editor and stationed at Ahmedabad, cannot be held responsible for the publication. He emphasizes that it would be the Resident Editor who shall be responsible for the contents of the Vadodara Edition. In support of the submission he has placed reliance on a decision of this Court in the case of *K.M. Mathew v. State of Kerala,* (1992) 1 SCC 217.

14. A news item has the potentiality of bringing doom's day for an individual. The Editor controls the selection of the matter that is published. Therefore, he has to keep a careful eye on the selection. Blue-penciling of news articles by any one other than the Editor is not welcome in a democratic polity. Editors have to take responsibility of everything they publish and to maintain the integrity of published record. It is apt to remind ourselves the answer of the Editor of the Scotsman, a Scottish newspaper. When asked what it was like to run a national newspaper, the Editor answered "run a newspaper! I run a country". It may be an exaggeration but it does reflect the well known fact that it can cause far reaching consequences in an individual and country's life.

15. The scheme and scope of Press and Registration of Books Act, 1867 (hereinafter referred to as "the Act") also brings forward the same conclusion. Section 1 of the Act is the

interpretation clause and the expression "Editor" has been defined as follows:

"**1. Interpretation-clause.-**(1)In this Act, unless there shall be something repugnant in the subject or context,-

xxx xxx xxx

"editor" means the person who controls the selection of the matter that is published in a newspaper;"

16. Section 5 of the Act provides for rules as to publication of newspapers and prohibits its publication in India except in conformity with the rules laid down. Section 5 (1) of the Act which is relevant for the purpose reads as follows:

"5. Rules as to publication of newspapers.-No newspaper shall be published in India, except in conformity with the rules hereinafter laid down:

(1)Without prejudice to the provisions of section 3, every copy of every such newspaper shall contain the names of the owner and editor thereof printed clearly on such copy and also the date of its publication.

xxx xxx xxx"

17. From a plain reading of the aforesaid provision, it is evident that every copy of every newspaper published in India is mandated to contain the names of the owner and Editor thereof. It is in the light of the aforesaid obligation that the name of the accused no. 2 has been printed as Editor. Section 7 of the Act makes the declaration to be prima facie evidence for fastening the liability in any civil or criminal proceeding on the Editor. Section 7 of the Act reads as follows:

"**7. Office copy of declaration to be prima facie evidence.-** In any legal proceeding whatever, as well civil as criminal, the production of a copy of such declaration as is aforesaid, attested by the seal of some Court empowered by this Act to have the custody of such declarations, or, in the case of the editor, a copy of the newspaper containing his name printed on it as that of the editor shall be held (unless the contrary be proved) to be sufficient evidence, as against the person whose name shall be subscribed to such declaration, or printed on such newspaper, as the case may be that the said person was printer or publisher, or printer and publisher(according as the words of the said declaration may be) of every portion of every newspaper whereof the title shall correspond with the title of the newspaper mentioned in the declaration, or the editor of every portion of that issue of the newspaper of which a copy is produced."

18. Therefore, from the scheme of the Act it is evident that it is the Editor who controls the selection of the matter that is published in a newspaper. Further, every copy of the newspaper is required to contain the names of the owner and the Editor and once the name of the Editor is shown, he shall be held responsible in any civil and criminal proceeding. Further, in view of the interpretation clause, the presumption would be that he was the person who controlled the selection of the matter that was published in the newspaper. However, we hasten to add that this presumption under Section 7 of the Act is a rebuttable presumption and it would be deemed a sufficient evidence unless the contrary is proved. The view which we have taken finds support from the judgment of this Court in the case of *K.M. Mathew v. K.A. Abraham,* (2002) 6 SCC 670, in which it has been held as follows:

"20. The provisions contained in the Act clearly go to show that there could be a presumption against the Editor whose name is printed in the newspaper to the effect that he is the Editor of such publication and that he is responsible for selecting the matter for publication. Though, a similar presumption cannot be drawn against the Chief Editor,

Resident Editor or Managing Editor, nevertheless, the complainant can still allege and prove that they had knowledge and they were responsible for the publication of the defamatory news item. Even the presumption under Section 7 is a rebuttable presumption and the same could be proved otherwise. That by itself indicates that somebody other than editor can also be held responsible for selecting the matter for publication in a newspaper."

19. Now reverting to the authority of this Court in the case of *K.M. Mathew v. State of Kerala,* (1992) 1 SCC 217, relied on by Mr. Dave, in our opinion, same instead of supporting his contention, goes against him. In the said case it has been observed as follows:

"9. In the instant case there is no averment against the Chief Editor except the motive attributed to him. Even the motive alleged is general and vague. The complainant seems to rely upon the presumption under Section 7 of the Press and Registration of Books Act, 1867 ('the Act').But Section 7 of the Act has no applicability for a person who is simply named as 'Chief Editor'. The presumption under Section 7 is only against the person whose name is printed as 'Editor' as required under Section 5(1). There is a mandatory (though rebuttable) presumption that the person whose name is printed as 'Editor' is the Editor of every portion of that issue of the newspaper of which a copy is produced. Section 1(1) of the Act defines 'Editor' to mean 'the person who controls the selection of the matter that is published in a newspaper'. Section 7 raises the presumption in respect of a person who is named as the Editor and printed as such on every copy of the newspaper. The Act does not recognise any other legal entity for raising the presumption. Even if the name of the Chief Editor is printed in the newspaper, there is no presumption against him under Section 7 of the Act."

20. In this case the accused was the Chief Editor of Malyalam Manorama and there was no allegation against him in the complaint regarding knowledge of the objectionable character of the matter published. In the absence of such allegation, the Magistrate decided to proceed against the Chief Editor. On an application by the Chief Editor, the process issued against him was recalled. The High Court, however, set aside the order of the Magistrate and when the matter travelled to this Court, it set aside the order of the High Court. This Court made distinction between 'Editor' and 'Chief Editor'. In no uncertain terms the Court observed that the Press and Registration of Books Act recognizes 'Editor' and presumption is only against him. The Act does not recognize any other legal entity viz., Chief Editor, Managing Editor etc. for raising the presumption. They can be proceeded against only when there is specific allegation.

21. We may here observe that in this case, this Court has held that the Magistrate has the power to drop proceeding against an accused against whom he had issued process in the following words:

"8. It is open to the accused to plead before the Magistrate that the process against him ought not to have been issued. The Magistrate may drop the proceedings if he is satisfied on reconsideration of the complaint that there is no offence for which the accused could be tried. It is his judicial discretion. No specific provision is required for the Magistrate to drop the proceedings or rescind the process. The order issuing the process is an interim order and not a judgment. It can be varied or recalled. The fact that the process has already been issued is no bar to drop the proceedings if the complaint on the very face of it does not disclose any offence against the accused."

22. However, this Court in *Adalat Prasad v. Rooplal Jindal* (2004) 7 SCC 338, has specifically overruled *K.M. Mathew* (Supra) in regard to the power of the Magistrate to recall its order issuing process. It has been observed as follows:

"15. It is true that if a Magistrate takes cognizance of an

offence, issues process without there being any allegation against the accused or any material implicating the accused or in contravention of provision of Sections 200 and 202, the order of the Magistrate may be vitiated, but then the relief an aggrieved accused can obtain at that stage is not by invoking Section 203 of the Code because the Criminal Procedure Code does not contemplate a review of an order. Hence in the absence of any review power or inherent power with the subordinate criminal courts, the remedy lies in invoking Section 482 of the Code.

16. Therefore, in our opinion the observation of this court in the case of *K.M. Mathew v. State of Kerala,* 1992 (1) SCC 217, that for recalling an erroneous order of issuance of process, no specific provision of law is required, would run counter to the scheme of the Code which has not provided for review and prohibits interference at interlocutory stages. Therefore, we are of the opinion, that the view of this Court in *Mathew's* case (supra) that no specific provision is required for recalling an erroneous order, amounting to one without jurisdiction, does not lay down the correct law."

23. Thus our reference to *K.M. Mathew* (supra) may not be construed to mean that we are in any way endorsing the opinion, which has already been overruled in *Adalat Prasad* (supra).

24. Thus the impugned judgment of the High Court is indefensible both on facts and law. Any observation made by us in this judgment is for the decision in this case. It does not reflect on the merit of the allegation, which obviously is a matter of trial.

25. In the result, the appeal is allowed, the impugned judgment of the High Court is set aside and the court in seisin of the case shall now proceed with the trial in accordance with law.

K.K.T. Appeal allowed.

BAKSHISH RAM & ANOTHER
v.
STATE OF PUNJAB
(Criminal Appeal No. 969 of 2009)

MARCH 12, 2013

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

Penal Code, 1860 - s.304B - Dowry death - Conviction by courts below - On appeal, held: Prosecution failed to establish its case beyond reasonable doubt - Courts below committed an error in convicting the accused - Evidence Act, 1872 - s.113 B.

Evidence Act, 1872 - s.60 - Oral evidence - Based on hearsay evidence - Admissibility - Held: Such oral evidence is not admissible.

Appeal - Appellate jurisdiction of High Court - In criminal appeal - Held: As a first court of appeal, High Court should record its own findings after independent assessment of evidence.

Appellants-accused Nos.1 and 2 alongwith accused No.3 were prosecuted u/ss. 304B and 498A IPC. Trial court convicted all the three accused and sentenced them to RI for 7 years. During pendency of the appeal before High Court, the appeal abated so far as A-3 is concerned due to his death. High Court confirmed the conviction and sentence of A-1 and A-2. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. The prosecution failed to establish its guilt beyond reasonable doubt and the trial Court and the High Court committed an error in convicting the

appellants and the same are liable to be set aside. [Para 15] [[744-A-B]

2. The High Court, as a first Court of appeal, on facts must apply its independent mind and record its own findings on the basis of its own assessment of evidence. Mere reproduction of the assessment of trial court may not be sufficient and in the absence of independent assessment by the High Court, its ultimate decision cannot be sustained. [Para 10] [741-E]

Sakatar Singh and Ors. vs. State of Haryana **(2004) 11 SCC 291;** *Arun Kumar Sharma vs. State of Bihar* **(2010) 1 SCC 108: 2009 (14) SCR 1023 - relied on.**

3. PW-2, i.e. the mother of the deceased has not stated anything in her evidence with regard to harassment or mal-treatment of the deceased by the appellants on the basis of her personal knowledge rather admittedly her knowledge is hearsay since her whole narration in this regard in the court was based on whatsoever was stated to her by her husband. Under Section 60 of the Evidence Act hearsay evidence was not admissible as husband of PW2 was not examined before the court and no other witness was produced by the prosecution to prove about mal-treatment and harassment of the deceased by the appellants. Therefore, the ingredients of Section 304B IPC were not met by the prosecution for holding the appellants guilty under the said offence. Even otherwise, since the demands made by the appellants were met by the parents of the deceased, there was no reason for the appellants to set the deceased on fire. Even the other witness, i.e. PW-3 who was a resident of the village nowhere stated in his deposition before the Court with regard to any mal-treatment to the deceased or being aware of any such incident. Hence, his evidence is not helpful insofar as the allegation of harassment and mal-treatment is concerned.

The prosecution has not pressed into service any other witness to prove the demand of dowry, harassment and mal-treatment. [Para 9] [740-G-H; 741-A-D]

4. A perusal of Section 113B of the Evidence Act and Section 304B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. In other words, the prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the "death occurring otherwise than in normal circumstances". The prosecution is obliged to show that soon before the occurrence, there was cruelty or harassment and only in that case presumption operates. If the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence. In the instant case, the prosecution heavily relied on the only evidence of PW-2- mother of the deceased which is a hearsay, in any event, a very general and vague statement which is not sufficient to attract the above provisions. In such circumstances, accidental death cannot be ruled out. It is also relevant that it was appellant No.1-husband of the deceased who took the deceased to the hospital and it was he who informed the police as well as parents of the deceased. He also did not make any attempt to run away from the place of occurrence. [Paras 13 and 14] [743-C-H]

Srinivasulu vs. State of A.P. **(2007) 12 SCC 443: 2007 (9) SCR 842 - relied on.**

Case Law Reference:

(2004) 11 SCC 291	**relied on**	**Para 10**
2009 (14) SCR 1023	**relied on**	**Para 11**
2007 (9) SCR 842	**relied on**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 969 of 2009

From the Judgment & Order dated 26.03.2008 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 487-SB of 1994.

Satinder Singh Gulati, Kamaldeep Gulati for the Appellants.

V. Madhukar, AAG, Srajita Mathur, Kuldip Singh 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 26.03.2008 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 487-SB of 1994 whereby the learned Single Judge of the High Court dismissed the appeal filed by the appellants herein and confirmed the judgment and order dated 21.09.1994 passed by the Additional Sessions Judge, Jalandhar convicting the appellants herein under Sections 304B and 498A of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") and sentencing them to undergo rigorous imprisonment for seven years.

2. **Brief facts:**

(a) The marriage between Surinder Kaur (deceased) and Bakshish Ram - appellant No.1 (A-1), was solemnized 1½ years prior to the date of occurrence. Appellant No.2 (A-3) is the mother-in-law of the deceased and mother of A-1. Khushia Ram (A-2), is the father-in-law of the deceased and father of A-1, who died during the pendency of the appeal in the High Court.

(b) As per the prosecution case, on 06.07.1992, Bikkar Ram (since deceased) - the father of Surinder Kaur (deceased) went to meet her daughter at her matrimonial home where she informed him about the harassment and mal-treatment meted out by her huband - Bakshish Ram (Appellant No.1 herein), her father-in-law, Khushia Ram (since deceased) and her mother-in-law Dalip Kaur (Appellant No.2 herein). She also informed him that her in-laws were pressurizing her to bring more money from her parents as they wanted to purchase a Cooler. It was alleged by Bikkar Ram that about four months before the incident, the deceased was sent to her parents house to bring money for purchasing a Cooler and he gave her Rs.800/- for the same, which he borrowed from one Sarwan Singh, who was a resident of his village. Again, on being asked by her, he gave two electronic Harmoniums, which were brought by the brother of the deceased from abroad.

(c) On the next day, i.e.,on 07.07.1992, at about 10.30 p.m., one Parminder Singh informed Bikkar Ram that his daughter has been set on fire by her in-laws and she has been admitted to Civil Hospital, Nawanshahar. On hearing this, he along with his wife Sibo (PW-2) rushed to the Civil Hospital where they found that their daughter was completely burnt. On being enquired, he was informed by the villagers that her daughter was set on fire by her in-laws by pouring kerosene oil. He gave a statement before the police narrating the incident. Based on his statement, a case under Section 304-B read with Section 34 of IPC was registered against Bakshish Ram - the husband, Khushia Ram - father-in-law and Dalip Kaur - mother-in-law of the deceased at Police Station, Banga. After the investigation, the case was committed to the Court of Additional Sessions Judge, Jalandhar.

(d) The Additional Sessions Judge, by order dated 21.09.1994, by amending the charges convicted all the three accused persons for having committed an offence punishable under Sections 304B and 498-A IPC and sentenced them to undergo rigorous imprisonment for 7 years.

(e) Aggrieved by the said judgment, all the three accused

filed an appeal being Criminal Appeal No. 487-SB of 1994 before the High Court of Punjab and Haryana. During the pendency of the appeal, Khushia Ram (A-2), died on 21.07.2006 and therefore, the proceedings against him were dropped. By impugned order dated 26.03.2008, the High Court dismissed the appeal filed by the present appellants.

(f) Challenging the said judgment and order, the appellants have preferred this appeal by way of special leave.

3. Heard Mr. Satinder Singh Gulati, learned counsel for the appellants-accused and Mr. V. Madhukar, learned Additional Advocate General for the respondent-State.

4. The only point for consideration in this appeal is whether the prosecution has established its case against the appellants-accused beyond reasonable doubt and the Courts below are justified in convicting them under Sections 304B and 498A IPC and sentencing them to undergo rigorous imprisonment for seven years?

Discussion:

5. Admittedly the marriage between Surinder Kaur (deceased) and Bakshish Ram (appellant No.1-accused) was solemnized 1½ years prior to the date of occurrence. The evidence of Sibo (PW-2), the mother of the deceased and Jeet Ram (PW-3), resident of village Soutran show that in these 1 ½ years no incident of cruelty, mal-treatment and harassment relating to the dowry was alleged against the appellants except the incident of just one day prior to the date of occurrence. The star witness relied on by the prosecution is Sibo (PW-2), who is none else than the mother of the deceased. In her evidence, she stated that her daughter Surinder Kaur (deceased) was married to Bakshish Ram (appellant No.1) about 1 ½ years prior to her death. She further explained that one day prior to the occurrence, her husband - Bikkar Ram had gone to the house of her daughter. Actual statement of Sibo (PW-2) with

reference to cruelty, mal-treatment and harassment is as follows:

> ".......he told me that our daughter Surinder Kaur was being harassed and mal-treated by the accused for bringing less dowry. About 15 days before her death my daughter Surinder Kaur with her husband Bakshish Ram had come to our house and she was asking for the harmonium which her brother had brought from the foreign country. Both these harmoniums were given to her on her asking. My daughter had also asked me to supply a cooler to her. She was making these demands on the asking of her husband and mother-in-law and father-in-law accused. We did not deliver the cooler but we borrowed a sum of Rs.800/- from Sarwan Singh of our village and gave that amount to my daughter."

6. Mr. Satinder Singh Gulati, learned counsel for the appellants has pointed out that the first part of the evidence of PW-2 relates to hearsay, namely, that she deposed what her husband - Bikkar Ram informed her and the rest of the portion is a general and vague statement. It is true that first part of her statement clearly shows that she had no personal knowledge, information or appraisal from her daughter but she heard the alleged harassment and mal-treatment for bringing less dowry from her husband - Bikkar Ram. Admittedly on the date of the evidence, Bikkar Ram was not available since he died before recording of the evidence. As per Section 60 of the Indian Evidence Act, 1872 (in short "Evidence Act"), oral evidence must be direct if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it. We have already extracted the actual statement of Sibo (PW-2) in which she admitted that she heard the above allegation from her husband and the same could not be corroborated. At the most her statement is only hearsay and in the absence of any other material in the form of corroboration, conviction cannot be sustained solely on this evidence.

7. It is but natural that being the mother of the deceased if she had come across any such harassment or ill-treatment, she could have explained the same in her evidence. Admittedly, she had neither asserted nor narrated any complaint from her daughter about harassment or ill-treatment by the appellants. In the later part of her statement, Sibo (PW-2) has stated that the deceased with her husband came to their house 15 days prior to the date of incident and when she asked for the Harmoniums which her brother had brought from abroad, she gave both the Harmoniums to her which shows that the demand made by her daughter had been complied with. It is further seen from the evidence of PW-2 that her daughter had also asked for money for purchasing cooler on being pressurized by her in-laws. For meeting this demand, PW-2 had stated that she borrowed a sum of Rs.800/- from Sarwan Singh of their village and gave the same to her daughter. By this, as rightly pointed out by learned counsel for the appellants, the demands made by the appellants were met by the parents of the deceased, therefore, there was no reason for them to set the deceased on fire.

8. In order to appreciate the only evidence of Sibo (PW-2), it is useful to refer the definition of "Dowry death" under Section 304B of IPC which reads as under:

> **"304B Dowry death -** (1) 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 for, 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.
>
> Explanation - For the purpose of this sub-section, "dowry" shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).

> (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

A perusal of Section 304B clearly shows that if a married woman dies 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 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 the death. The conditions precedent for establishing an offence under this section are:

(a) that a married woman had died otherwise than under normal circumstances;

(b) such death was within seven years of her marriage; and

(c) the prosecution has established that there was cruelty and harassment in connection with demand for dowry soon before her death.

This section will apply whenever the occurrence of death is preceded by cruelty or harassment by husband or in-laws for dowry and death occurs in unnatural circumstances. The intention behind the section is to fasten guilt on the husband or in-laws though they did not in fact caused the death.

9. We have already extracted and analyzed the statement of Sibo (PW-2), the mother of the deceased and we are satisfied that she has not stated anything in her evidence with regard to harassment or mal-treatment of the deceased by the appellants on the basis of her personal knowledge rather admittedly her knowledge is hearsay since her whole narration in this regard in the Court is based on whatsoever was stated to her by her husband - Bikkar Ram. We have already stated that under Section 60 of the Evidence Act hearsay evidence

is not admissible as Bikkar Ram was not examined before the Court and no other witness was produced by the prosecution to prove about mal-treatment and harassment of the deceased by the appellants. Therefore, the ingredients of Section 304B IPC were not met by the prosecution for holding the appellants guilty under the said offence. Even otherwise, since the demands made by the appellants were met by the parents of the deceased, there was no reason for the appellants to set the deceased on fire. Even the other witness, namely, Jeet Ram (PW-3), a resident of Soutran has nowhere stated in his deposition before the Court with regard to any mal-treatment to the deceased or being aware of any such incident. Hence, his evidence is not helpful insofar as the allegation of harassment and mal-treatment is concerned. Admittedly, except the abovementioned witnesses, the prosecution has not pressed into service any other witness to prove the demand of dowry, harassment and mal-treatment.

10. The High Court, as a first Court of appeal, on facts must apply its independent mind and record its own findings on the basis of its own assessment of evidence. Mere reproduction of the assessment of trial Court may not be sufficient and in the absence of independent assessment by the High Court, its ultimate decision cannot be sustained. The same view has been reiterated by this Court in *Sakatar Singh & Ors. vs. State of Haryana*, (2004) 11 SCC 291.

11. In *Arun Kumar Sharma vs. State of Bihar,* (2010) 1 SCC 108, while reiterating the above view, this Court held that in its appellate jurisdiction all the facts were open to the High Court and, therefore, the High Court was expected to go deep into the evidence and, more particularly, the record as also the proved documents. Contrary to the above principle, we are satisfied that in the case on hand, the High Court failed to delve deep into the record of the case and the evidence of the witnesses. The role of the appellate Court in a criminal appeal is extremely important and all the questions of fact are open before the appellate Court. The said recourse has not been

adopted by the High Court while confirming the judgment of the trial Court.

12. We have already noted Section 304B IPC and its essential ingredients. Section 113B of the Evidence Act is also relevant for the case in hand. Both Sections 304B and 113B of the Evidence Act were inserted by Dowry Prohibition (Amendment) Act 43 of 1986 with a view to compact the increasing menace of dowry deaths. Section 113B of the Evidence Act reads as under:

> **"113B. Presumption as to dowry death.-** When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death."
>
> *Explanation.-* For the purposes of this section, "dowry death" shall have the same meaning as in section 304B of the Indian Penal Code (45 of 1860)"

As per the definition of "dowry death" in Section 304B IPC and the wording in the presumptive Section 113B of the Evidence Act, one of the essential ingredients amongst others, in both the provisions is that the woman concerned must have been 'soon before her death' subjected to cruelty or harassment "for or in connection with the demand for dowry". While considering these provisions, this Court in *M. Srinivasulu vs. State of A.P.,* (2007) 12 SCC 443 has observed thus:

> "… The presumption shall be raised only on proof of the following essentials:
>
> (1) The question before the court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the

accused is being tried for the offence under Section 304-B IPC.)

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for, or in connection with any demand for dowry.

(4) Such cruelty or harassment was soon before her death."

13. As discussed above, a perusal of Section 113B of the Evidence Act and Section 304B IPC shows that there must be material to show that soon before her death the victim was subjected to cruelty or harassment. In other words, the prosecution has to rule out the possibility of a natural or accidental death so as to bring it within the purview of the "death occurring otherwise than in normal circumstances". The prosecution is obliged to show that soon before the occurrence, there was cruelty or harassment and only in that case presumption operates. As observed earlier, if the alleged incident of cruelty is remote in time and has become stale enough not to disturb the mental equilibrium of the woman concerned, it would be of no consequence. In the case on hand, admittedly, the prosecution heavily relied on the only evidence of Sibo (PW-2) - mother of the deceased which, according to us, is a hearsay, in any event, a very general and vague statement which is not sufficient to attract the above provisions. In such circumstances, as argued by the learned counsel for the appellants, accidental death cannot be ruled out.

14. Another relevant aspect to be noted is that it was appellant No.1-husband of the deceased who took the deceased to the hospital and it was he who informed the police as well as parents of the deceased. It is also brought to our notice that he did not make any attempt to run away from the place of occurrence.

15. In view of the above discussion, we are satisfied that the prosecution failed to establish its guilt beyond reasonable doubt and the trial Court and the High Court committed an error in convicting the appellants and the same are liable to be set aside. Since appellant No.1 has already served out the period of sentence of 7 years, no further direction is required. However, since appellant No.2 is on bail, her bail bonds shall stand discharged. The appeal is allowed.

K.K.T. Appeal allowed.

SATYA PAL
v.
STATE OF HARYANA & ANR.
(Criminal Appeal Nos. 1447-1448 of 2007)

MARCH 13, 2013

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

Penal Code, 1860 - ss.304B and 498A - Prosecution u/ss. 302/34 and 304B - Acquittal by trial Court - Conviction by High Court u/ss. 304B and 498A - Held: Conviction justified - In view of the prosecution evidence, High Court rightly held that the deceased was subjected to demand of dowry as well as cruelty and harassment in connection with such demand, soon before her death - High Court also rightly drew presumption u/s.113 B of Evidence Act that the appellant-accused caused dowry death - Evidence Act, 1872 - s.113B.

Code of Criminal Procedure, 1973 - Explanation to s.161 - Police statement - Omission of a fact or circumstance - The question whether the omission amounts to contradiction is a question of fact which is to be determined by the Court.

Appellant-accused, alongwith his other relatives was prosecuted u/ss. 302/34, 304B IPC, for killing his wife. Trial court acquitted all the accused of all the charges. High Court reversed the acquittal order and convicted the appellant u/ss.304B and 498A IPC. Hence the present appeal by the appellant-accused.

Dismissing the appeal, the Court

HELD: 1. The High Court was right in reversing the judgment of acquittal against the appellant so far as the offences u/ss. 304B and 498A IPC are concerned. [Para 10] [752-B]

2. The High Court was right in coming to the conclusion on the basis of the evidence of P.Ws 1 and 2 that there was in fact a demand of television, fridge and cooler about two months after the earlier demand of dowry was met and this subsequent demand was also followed by beatings and harassment so much so that a visit had to be made by P.W. 1 to the matrimonial house of the deceased to persuade the appellants and his family members not to make the demands and soon thereafter the deceased died. [Para 7] [750-D-F]

3. The explanation to Section 161 Cr.P.C. states that an omission to state a fact or circumstance in the statement made to the police may amount to contradiction, if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact. It was, therefore, for the Court to decide whether the omission in the statement of P.W 2 about the beatings given to the deceased before the police was significant enough for the Court to disbelieve that the deceased was beaten in connection with the demand for dowry. Considering the evidence of P.W. 1 and P.W. 2 in its entirety, the High Court was right in coming to the finding that the deceased was not only subjected to a subsequent demand of dowry but also subjected to cruelty and harassment in connection with such demand for dowry soon before her death and that the trial court had not taken a correct view on the evidence of P.W. 1 and PW 2. [Para 8] [751-A-D]

4. The High Court had also rightly drawn the presumption u/s. 113B of the Evidence Act that appellant had caused the dowry death of the deceased within the meaning of Section 304B IPC and the appellant was required to rebut this presumption that he had caused

the dowry death. The appellant did make an attempt to rebut this presumption in his statement under Section 313 Cr.P.C. but he failed to rebut the presumption that it is he who had caused dowry death of the deceased within the meaning of Section 304B IPC. [Para 9] [751-E-F, H; 752-A]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1447-1448 of 2007

From the Judgment & Order dated 16.03.2007 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 334-DBA of 1997 and Crl. Revision No. 246 of 1997.

Shantanu Singh, Niraj Jha, Rakesh Dahiya for the Appellant.

Rajesh Gaur Naseem, Sudhir Bisla, Kamal Mohan Gupta for the Respondents.

The Judgment of the Court was delivered by

A.K. PATNAIK J. 1. These are appeals against the judgment dated 16th March, 2007 of the Division Bench of the High Court of Punjab and Haryana in Criminal Appeal No. 334-DB/1997 and Criminal Appeal No.246 of 1997.

2. The facts very briefly are that a First Information Report was lodged by Sombir (the complainant) on 14th July, 1992 alleging therein, inter alia, that his sister Rajwanti was married to the appellant and after one or two months of the marriage she came home and told her mother that her in-laws were demanding dowry in the shape of a flour machine, electric motor with equipment to chop the fodder and these articles were given in December 1991, when his sister Rajwanti gave birth to male child and the in-laws of Rajwanti became happy. But thereafter Rajwanti came after sometime and told that her mother-in-law, sister-in-law and brother-in-law and husband(appellant) were demanding a fridge, cooler and TV,

but the mother and father of Rajwanti said that if this demand is met the demands will go on increasing and Rajwanti left for her in-laws' house on 19th June, 1992. Thereafter on 12th July, 1992 at about 9:00a.m. the complainant had been to the house of Rajwanti and he saw that the appellant and Subhash pushed Rajwanti into a well and as a result Rajwanti died. A case was registered and investigation was conducted by the police and a charge sheet was filed against the appellant and his other family members under Sections 302/34 IPC and under Section 304B IPC.

3. At the trial, amongst others, the complainant was examined as P.W. 1 and the mother of Rajwanti(deceased) was examined as P.W. 2. The trial court, however, held in its judgment dated 9th October, 2006 that there was no satisfactory explanation about the inordinate delay of 51 hours in lodging the FIR with the police and it appears that the aforesaid time was utilised for implicating certain persons after consultations and deliberations. The trial court was thus of the opinion that the offence under Section 302/34 IPC framed against the accused persons has not been proved by the prosecution beyond reasonable doubt. On the charge under Section 304B IPC, the trial court found that there were improvements in the evidence of PWs. 1 and 2 over their statements made before the police under Section 161 Cr.P.C. and accordingly, disbelieved Pws 1 and 2 and held that the demand of dowry as well as harassment and cruelty by the appellant or any of his relatives in connection with the demand for dowry had not been proved and hence the presumption under Section 113B of the Indian Evidence Act was not attracted and the appellant and his family member could not be held guilty under Section 304B IPC.

4. The State as well as the complainant went in appeal to the High Court in separate Criminal Appeal No. 334 -DB of 1997 and Criminal Appeal No. 246 of 1997 respectively and the High Court in the impugned judgment dated 16th March,

2007 found on the basis of the evidence of Pws. 1 and 2 that after about two months from November, 1991 when the earlier demand of dowry was fulfilled on the occasion of Chuchak ceremony, the appellant and his family members made a fresh demand of television, fridge, cooler and the deceased was subjected to beatings for this fresh demand and this led P.W. 1 to make a visit to the matrimonial house of the deceased in the month of June, 1992 and he persuaded the appellant and his family members not to make such demands but on 12th July, 1992, within one month of such visit, the death of the deceased took place in the matrimonial house. The High Court, further, held that since the prosecution has been able to prove both the fact of demand of dowry in the shape of television, fridge and cooler and the fact of harassment or cruelty meted out to the deceased soon before her death, the presumption under Section 113B of the Evidence Act was attracted and the appellant has not been able to rebut the presumption and was thus guilty of the offences under Section 304B as well as under Section 498A IPC.

5. At the hearing before us, learned counsel for the appellant, vehemently submitted that the view taken by the High court on the evidence of P.Ws. 1 and 2 was not a correct view inasmuch as there were substantial improvements made by P.Ws. 1 and 2 in Court over their statements made to the police under Section 161 CrP.C. He submitted that the findings of the High Court on the basis of the evidence of P.Ws. 1 and 2 that the deceased was subjected to a subsequent demand of television, fridge and cooler and also was subjected to cruelty soon before her death were not at all correct. He submitted that the trial court was right in taking a view that the delay of 51 hours in lodging the FIR by P.W. 1 was not properly explained and, therefore, the prosecution story could not be believed.

6. We find on a reading of the judgment of the trial court that the trial court has held that the delay of 51 hours in lodging the FIR with the police by P.W. 1 was a good ground for

rejecting the case of the prosecution that the accused persons were guilty of the offence under Section 302/34 IPC saying that this time of 51 hours could have been utilised for implicating some innocent persons after consultations and deliberations to make out a false story. The High Court has not held the accused persons guilty of the offence under Section 302/34 IPC presumably for the very same reason although an appeal was filed by the State as well as the complainant challenging the findings of the trial court in this regard.

7. So far as the charges under Section 304B and 498A IPC are concerned, we find that the trial court has disbelieved the evidence of Pws 1 and 2 on the ground that there have been improvements in their evidence over what they had been stated before the police under Section 161 CrPC and on the ground that there were discrepancies in their evidence. We have gone through the evidence of P.Ws 1 and 2 and we find that the High Court was right in coming to the conclusion on the basis of the evidence of P.Ws 1 and 2 that there was in fact a demand of television, fridge and cooler about two months after the earlier demand of dowry was met in November, 1991 on the occasion of the chuchak ceremony when the male child was born to the deceased and this subsequent demand was also followed by beatings and harassment so much so that a visit had to be made by P.W. 1 to the matrimonial house of the deceased to persuade the appellants and his family members not to make the demands and soon thereafter the deceased died on 12th July, 1992.

8. We, however, find that P.W. 2 had not stated in her Statement [Exhibit DA] before the Police that P.W. 1 had not told her that the deceased was beaten by the appellant and his family members and that the deceased was closed in a room, but we find on a reading of the evidence of P.W. 1 that the deceased was subjected to beatings twice or thrice for demands of dowry. Moreover, P.W 2 when asked whether she has told the Police about the aforesaid beatings given to

deceased, she has said that she in fact, told the police about such beatings. The explanation to Section 161 Cr.P.C. states that an omission to state a fact or circumstance in the statement made to the police may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact. It was, therefore, for the Court to decide whether the omission in the statement of P.W 2 about the beatings given to the deceased before the police was significant enough for the Court to disbelieve that the deceased was beaten in connection with the demand for dowry. Considering the evidence of P.W. 1 and P.W. 2 in its entirety, we think that the High Court is right in coming to the finding that the deceased was not only subjected to a subsequent demand of dowry but also subjected to cruelty and harassment in connection with such demand for dowry soon before her death and that the trial court had not taken a correct view on the evidence of P.W. 1 and PW 2.

9. The High Court had also rightly drawn the presumption under Section 113B of the Evidence Act that appellant had caused the dowry death of the deceased within the meaning of Section 304B IPC and the appellant was required to rebut this presumption that he had caused the dowry death. The appellant did make an attempt to rebut this presumption in his statement under Section 313 Cr.P.C. while answering question No. 16. The appellant stated that the deceased had died a natural death because she was suffering from rheumatic pain (heart disease) and at that time she was being treated by Dr. Roop Chand at Satnali and she was also attended by Dr. Roop Chand on the day of her death. If this was the defence of the appellant in his statement under Section 313 Cr.P.C. it was incumbent upon him to have produced Dr. Roop Chand as a defence witness, but he has not done so. The result is that the appellant has failed to rebut the presumption under Section 113B of the Indian Evidence Act that it is he who had caused

dowry death of the deceased within the meaning of Section 304B of the IPC.

10. We are therefore of the opinion that the High Court was right in reversing the judgment of acquittal against the appellant so far as the offences under Sections 304B and 498A are concerned and accordingly we dismiss the appeal. Since the appellant is on bail, we direct that his bail bond be cancelled and he be taken into custody forthwith to serve out the remaining sentence.

K.K.T. Appeal dismissed.

RAJESH KUMAR & ORS. ETC.
v.
STATE OF BIHAR & ORS. ETC.
(Civil Appeal Nos. 2515-2516 of 2013 etc.)

MARCH 13, 2013

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

Service Law:

Selection/Appointment - On the basis of competitive examination - Evaluation of answer scripts challenged - Defect found in 'Model Answer Key' to one of the papers - High Court directed to conduct fresh examination in the paper having defective 'Model Answer Key' - Held: The entire selection process was vitiated by use of defective 'Model Answer Key' and appointments made on the basis of such examination would also be rendered unsustainable - However, in the facts of the case, instead of directing fresh examination, correcting the defect by evaluation of answer scripts with correct key was better option - The re-evaluation would affect only inter-se seniority among the candidates - The already appointed candidates, after re-evaluation, if did not make the grade, would not be ousted from service, but would figure at the bottom of the select list.

Respondent Nos. 6 to 18, who were unsuccessful candidates in the written objective type examination, conducted by State Staff Selection Commission for appointment to the post of Junior Engineer, filed writ petition in the High Court challenging the evaluation of the answer scripts. The successful candidates i.e. the appellants were not impleaded as parties. During pendency of the petition, the successful candidates were appointed in the different Departments of the State. Single Judge of the High Court referred the "Model

Answer Key" to experts. The experts gave their report that in Civil Engineering paper, answer to 45 questions were wrong, two questions were repeated and one question was defective. Single judge of the High Court cancelled the entire examination as well as the appointments made on its basis. Division Bench of the High Court partly allowed the writ appeal, holding that entire examination was not required to be cancelled as there was no allegation of any corrupt motive or malpractice with regard to other question papers. The Court directed to rectify the defect by conducting fresh examination in Civil Engineering paper only.

During pendency of the writ appeal fresh selection process was initiated, wherein 6 of the respondents were appointed while the rest opted not to join.

In appeal to this Court, the appellants contended that High Court committed an error in quashing the entire selection process, even when the petitioners-respondents had not prayed to that effect; and that even if the result of the first selection process was vitiated by the use of erroneous 'Model Answer Key', the court could have rectified the defect by directing re-evaluation of answer scripts. The appellants also prayed for a suitable direction that after re-evaluation, if they fell below the cut-off line, they should not be ousted from service and the re-evaluation would determine only inter-se seniority.

Allowing the appeals, the Court

HELD: 1. The Division Bench of the High Court was justified in holding that the result of the examination in so far as the same pertained to 'A' series question paper was vitiated. This was bound to affect the result of the entire examination *qua* every candidate whether or not he was a party to the proceedings. If the result was vitiated by the application of a wrong key, any appointment made

on the basis thereof would also be rendered unsustainable. The High Court was, in that view, entitled to mould the relief prayed for in the writ petition and issue directions considered necessary not only to maintain the purity of the selection process but also to ensure that no candidate earned an undeserved advantage over others by application of an erroneous key. [Para 12] [762-A-D]

Bharat Amritlal Kothari v. Dosukhan **(2010) 1 SCC 234: 2009 (15) SCR 662;** *State of Orissa and Anr. v. Mamata Mohanty* **(2011) 3 SCC 436: 2011 (2) SCR 704 - distinguished.**

2. Given the nature of the defect in the answer key, the most natural and logical way of correcting the evaluation of the scripts was to correct the key and get the answer scripts re-evaluated on the basis thereof. There was no compelling reason for directing a fresh examination to be held by the Commission especially when there was no allegation about any malpractice, fraud or corrupt motives that could possibly vitiate the earlier examination to call for a fresh attempt by all concerned. The process of re-evaluation of the answer scripts with reference to the correct key will, in addition, be less expensive apart from being quicker. The process would also not give any unfair advantage to anyone of the candidates on account of the time lag between the examination earlier held and the one that may have been held pursuant to the direction of the High Court. The re-evaluation, thus was and is a better option, in the facts and circumstances of the case. [Para 16] [763-E-H]

3. The appellants were innocent parties who have not, in any manner, contributed to the preparation of the erroneous key or the distorted result. There is no mention of any fraud or malpractice against the appellants who have served the State for nearly seven years now. In the circumstances, while inter-se merit position may be

relevant for the appellants, the ouster of the latter need not be an inevitable and inexorable consequence of such a re-evaluation. Such of those candidates as may be ultimately found to be entitled to issue of appointment letters on the basis of their merit shall benefit by such re-evaluation and shall pick up their appointments on that basis according to their inter-se position on the merit list. Such candidates would earn their seniority from the date the appellants were first appointed in accordance with their merit position but without any back wages or other benefit whatsoever. Such of the appellants as do not make the grade after re-evaluation shall not be ousted from service, but shall figure at the bottom of the list of selected candidates based on the first selection and the second selection. [Paras 18 and 19(2),(4)] [764-H; 765-A-C, F; 766-A-B]

Case Law Reference:

2009 (15) SCR 662	**distinguished**	**Para 13**
2011 (2) SCR 704	**distinguished**	**Para 13**

CIVIL APPELLATE JURISDICTION : CIVIL APPEAL Nos. 2515-2516 of 2013.

From the Judgment & Order dated 01.02.2008 of the High Court of Judicature at Patna in L.P.A. Nos. 70 and 72 of 2008.

P.P. Rao, Rajeev Kumar, Dr. Kailash Chand, Ashutosh Kumar, Sanjay Kumar Mishra, Manish Kumar Choudhary, S.K. Verma for the Appellants.

Nagendra Rai, Gopal Singh, Anshuman Sinha, Ajay Vikram Singh. Vijay Kumar Pandey, Priyanka, Naresh Kumar, Smarhar Singh, Shantanu Sagar, Abhishek Kr. Singh, Aabhas Parimal, Gaurav Agrawal, Susmita Lal, Malabika Sarkar, Ashesh Lal, Amit Pawan, Vivek Singh, Prashant Kumar, T. Mahipal for the Respondents.

The Judgment of the Court was delivered by

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

2. Application of an erroneous "Model Answer Key" for evaluation of answer scripts of candidates appearing in a competitive examination is bound to lead to erroneous results and an equally erroneous inter-se merit list of such candidates. That is precisely what appears to have happened in the present appeals which arise out of a common judgment delivered by the High Court of Judicature at Patna whereby the High Court has directed the Bihar Staff Selection Commission to conduct a fresh examination and re-draw the merit list on that basis. For those who have already been appointed on the basis of the earlier examination, a fresh examination has been directed by the High Court before they are finally ousted from the posts held by them. The appellants who happen to be the beneficiaries of the erroneous evaluation of the answer scripts have assailed the order passed by the High Court in these appeals which arise in the following backdrop:

3. By an advertisement dated 14th August 2006, applications were invited by the Bihar State Staff Selection Commission from eligible candidates for appointment against 2268 posts of Junior Engineer (Civil) out of which 1057 posts were in the open merit category. The selection process, it appears, comprised a written objective type examination, held by the Staff Selection Commission who drew up a Select List of 210 successful candidates including 143 appellants in these appeals based on the performance of the candidates in the examination. The evaluation of the answer scripts was, however, assailed by 13 unsuccessful candidates, respondents 6 to 18 in these appeals, in CWJC No.885 of 2007. The writ petitioners did not implead the selected candidates as party respondents ostensibly because the petitioners prayed for a limited relief of a writ of mandamus to the Staff Selection Commission to produce the answer-sheets in the Court and to get the same re-evaluated manually by an independent body.

4. While the above writ petition was still pending, 35 candidates were appointed as Junior Engineers in Road Construction Department of the Government of Bihar while 144 others were appointed in Water Resources Department. Nine of the selected candidates were appointed in the Public Health Engineering Department taking the total number of those appointed to 188 out of 210 candidates included in the merit list. Posting orders were also issued to all those appointed. Needless to say that since only 210 candidates had qualified for appointment in terms of the relevant Rules, the selection process left nearly 2080 posts of Junior Engineers unfilled in the State.

5. In the writ petition filed by the aggrieved candidates, a Single Judge of the High Court referred the "Model Answer Key" to experts. The model answers were examined by two experts, Dr. (Prof.) C.N. Sinha, and Prof. KSP Singh, associated with NIT, Patna, who found several such answers to be wrong. In addition, two questions were also found to be wrong while two others were found to have been repeated. Question No.100 was also found to be defective as the choices in the answer key were printed but only partially.

6. Based on the report of the said two experts, a Single Judge of the High Court held that 41 model answers out of 100 were wrong. It was also held that two questions were wrong while two others were repeated. The Single Judge on that basis held that the entire examination was liable to be cancelled and so also the appointments made on the basis thereof. Certain further and consequential directions were also issued by the Single Judge asking the Commission to identify and proceed against persons responsible for the errors in the question paper and the "Model Answer Key".

7. Aggrieved by the order of the Single Judge, the appellants filed LPA No.70 of 2008 before the Division Bench of that High Court. By the order impugned in these appeals, the High Court has partly allowed the appeal holding that model

answers in respect of 45 questions out of 100 were wrong. The Division Bench modified the order passed by the learned Single Judge and declared that the entire examination need not be cancelled as there was no allegation of any corrupt motive or malpractice in regard to the other question papers. A fresh examination in Civil Engineering Paper only was, according to the Division Bench, sufficient to rectify the defect and prevent injustice to any candidate. The Division Bench further held that while those appointed on the basis of the impugned selection shall be allowed to continue until publication of the fresh result, anyone of them who failed to make the grade on the basis of the fresh examination shall be given a chance to appear in another examination to be conducted by the Staff Selection Commission. The present appeals assail the correctness of the said judgment and order of the High Court as already noticed earlier.

8. It is noteworthy that while the challenge to the selection process referred to above was still pending before the High Court, a fresh selection process was initiated to fill up the available vacancies in which those eligible appeared for a written test on 29th July 2007. This test was held pursuant to advertisement No.1906 of 2006 issued on 29th November 2006. The result of the examination was, however, stayed by the High Court while disposing of the appeal filed before it with a direction to the effect that the same shall be declared only after selection in pursuance of the first examination was completed. With the filing of the present appeals the restraint order against the declaration of the result pursuant to the second advertisement was vacated by this Court by an order dated 30th August 2011 with a direction that those qualified shall be given appointments without prejudice to the rights of the appellants and subject to the outcome of these appeals.

9. It is common ground that pursuant to the above direction, a list of 392 selected candidates was sent to the State Government by the Staff Selection Commission for issuing

appointment orders in their favour. What is significant is that the writ petitioners, respondents 6 to 18 in these appeals were also declared successful in the second selection and included in the list of 392 successful candidates. That six out of the said respondents have been appointed while the remaining have not chosen to join is also admitted. They have apparently found better avenues of employment.

10. When the matter came up before us on 2nd July 2012, it was argued on behalf of the writ petitioners - respondents 6 to 18 by Mr. Gaurav Agrawal that they have no objection to the continuance in office of the appellants in these appeals subject to the condition that the answer scripts of the writ petitioners are re-evaluated with the help of a correct answer key and if they are found to have made the grade, the benefit of appointment earned by them in terms of the 2nd selection process related back to the date when the appellants in these appeals were first appointed, and their seniority determined according to their placement in the merit list. It was in that background that we directed an affidavit to be filed by the Government of Bihar whether it was agreeable to the re-evaluation of the answer scripts of respondents 6 to 18 on the basis of a correct key and their placement in the merit list depending upon the inter-se merit of the candidates. The Staff Selection Commission was also similarly directed to respond to the proposal made by the writ petitioners - respondents 6 to 18 and file an affidavit.

11. An affidavit has, pursuant to the above directions, been filed by the Commission as also by the Chief Secretary of the Government of Bihar in which the Staff Selection Commission as also the Government appear to be opposing the prayer made by the writ petitioners for re-evaluation of their answer scripts for the purpose of re-casting of the merit list which will eventually be the basis for their inter-se seniority also. The affidavits primarily do so on the premise that any re-evaluation limited to the answer scripts of respondents 6 to 18, writ

petitioners before the High Court would lead to multiplicity of legal proceedings as similar requests for re-evaluation are bound to be made by other candidates who may also have been similarly prejudiced on account of the use of erroneous "Model Answer Key".

12. We have in the above backdrop heard learned counsel for the parties at some length who have taken us through the impugned orders and other material placed on record. Appearing for the appellants, Mr. P.P. Rao, learned senior counsel, argued that the High Court had committed an error in quashing the entire selection process even when the petitioners had not made any prayer to that effect. Mr. Rao was at pains to argue that a relief which was not even prayed for by the writ petitioners could not be granted by the Court whatever may have been the compulsion of equity, justice and good conscience. Reliance in support of that proposition was placed by him upon *Bharat Amritlal Kothari v. Dosukhan* (2010) 1 SCC 234 and *State of Orissa & Anr. v. Mamata Mohanty* (2011) 3 SCC 436. There is, in our view, no merit in that contention. The reasons are not far to seek. It is true that the writ petitioners had not impleaded the selected candidates as party respondents to the case. But it is wholly incorrect to say that the relief prayed for by the petitioners could not be granted to them simply because there was no prayer for the same. The writ petitioners, it is evident, on a plain reading of the writ petition questioned not only the process of evaluation of the answer scripts by the Commission but specifically averred that the "Model Answer Key" which formed the basis for such evaluation was erroneous. One of the questions that, therefore, fell for consideration by the High Court directly was whether the "Model Answer Key" was correct. The High Court had aptly referred that question to experts in the field who, as already noticed above, found the "Model Answer Key" to be erroneous in regard to as many as 45 questions out of a total of 100 questions contained in 'A' series question paper. Other errors were also found to which we have referred earlier. If the key

which was used for evaluating the answer sheets was itself defective the result prepared on the basis of the same could be no different. The Division Bench of the High Court was, therefore, perfectly justified in holding that the result of the examination in so far as the same pertained to 'A' series question paper was vitiated. This was bound to affect the result of the entire examination qua every candidate whether or not he was a party to the proceedings. It also goes without saying that if the result was vitiated by the application of a wrong key, any appointment made on the basis thereof would also be rendered unsustainable. The High Court was, in that view, entitled to mould the relief prayed for in the writ petition and issue directions considered necessary not only to maintain the purity of the selection process but also to ensure that no candidate earned an undeserved advantage over others by application of an erroneous key.

13. The decisions of this Court in *Bharat Amritlal Kothari v. Dosukhan* (2010) 1 SCC 234 and *State of Orissa & anr. v. Mamata Mohanty* (2011) 3 SCC 436, relied upon by Mr. Rao are clearly distinguishable. The power of the Court to mould the relief, according to the demands of the situation, was never the subject matter of dispute in those cases. That power is well-recognised and is available to a writ Court to do complete justice between the parties. The first limb of the argument advanced by Mr. Rao fails and is accordingly rejected.

14. Mr. Rao next argued that even if the result of the first selection process was vitiated by the use of erroneous "Model Answer Key" the Court had the option of either directing re-evaluation of the answer scripts on the basis of a correct key or a fresh examination. Out of the two options the former was, according to Mr. Rao, better and ought to have served the purpose by not only saving considerable time but money and effort also. He urged that the Court could have removed the traces of any injustice or distortions in the selection process by directing re-evaluation of the answer scripts which would not

only present the true picture of the merit of the candidates concerned but prevent any further litigation or prejudice to candidates on account of long lapse of time.

15. Appearing for respondents 6 to 18 Mr. Agrawal submitted that he had no objection to the order of the High Court being modified so as to replace "a fresh examination" by "revaluation of the answer scripts" on the basis of a correct key. Counsel for the Staff Selection Commission also submitted, on instructions, that the answer scripts had been preserved and could be subjected to a fresh evaluation. Learned counsel for the parties were further agreeable to the key as proposed by Dr. (Prof.) C.N. Sinha and Prof. KSP Singh of NIT, Patna forming the basis of any such re-evaluation by a suitable modification and deletion of question Nos.6 and 46 which were found to be absurd and question No.34 and 63 which were repeated as Nos.74 and 93. They further agreed to the deletion of question No.100 the answer to which was not correctly printed.

16. The submissions made by Mr. Rao are not without merit. Given the nature of the defect in the answer key the most natural and logical way of correcting the evaluation of the scripts was to correct the key and get the answer scripts re-evaluated on the basis thereof. There was, in the circumstances, no compelling reason for directing a fresh examination to be held by the Commission especially when there was no allegation about any malpractice, fraud or corrupt motives that could possibly vitiate the earlier examination to call for a fresh attempt by all concerned. The process of re-evaluation of the answer scripts with reference to the correct key will in addition be less expensive apart from being quicker. The process would also not give any unfair advantage to anyone of the candidates on account of the time lag between the examination earlier held and the one that may have been held pursuant to the direction of the High Court. Suffice it to say that the re-evaluation was and is a better option, in the facts and circumstances of the case.

17. That brings us to the submission by Mr. Rao that while re-evaluation is a good option not only to do justice to those who may have suffered on account of an erroneous key being applied to the process but also to writ petitioners-respondents 6 to 18 in the matter of allocating to them their rightful place in the merit list. Such evaluation need not necessarily result in the ouster of the appellants should they be found to fall below the 'cut off' mark in the merit list. Mr. Rao gave two reasons in support of that submission. Firstly, he contended that the appellants are not responsible for the error committed by the parties in the matter of evaluation of the answer scripts. The position may have been different if the appellants were guilty of any fraud, misrepresentation or malpractice that would have deprived them of any sympathy from the Court or justified their ouster. Secondly, he contended that the appellants have served the State efficiently and without any complaint for nearly seven years now and most of them, if not all, may have become overage for fresh recruitment within the State or outside the State. They have also lost the opportunity to appear in the subsequent examination held in the year 2007. Their ouster from service after their employment on the basis of a properly conducted competitive examination not itself affected by any malpractice or other extraneous consideration or misrepresentation will cause hardship to them and ruin their careers and lives. The experience gained by these appellants over the years would also, according to Mr. Rao, go waste as the State will not have the advantage of using valuable human resource which was found useful in the service of the people of the State of Bihar for a long time. Mr. Rao, therefore, prayed for a suitable direction that while re-evaluation can determine the inter-se position of the writ petitioners and the appellants in these appeals, the result of such re-evaluation may not lead to their ouster from service, if they fell below the cut off line.

18. There is considerable merit in the submission of Mr. Rao. It goes without saying that the appellants were innocent parties who have not, in any manner, contributed to the

preparation of the erroneous key or the distorted result. There is no mention of any fraud or malpractice against the appellants who have served the State for nearly seven years now. In the circumstances, while inter-se merit position may be relevant for the appellants, the ouster of the latter need not be an inevitable and inexorable consequence of such a re-evaluation. The re-evaluation process may additionally benefit those who have lost the hope of an appointment on the basis of a wrong key applied for evaluating the answer scripts. Such of those candidates as may be ultimately found to be entitled to issue of appointment letters on the basis of their merit shall benefit by such re-evaluation and shall pick up their appointments on that basis according to their inter se position on the merit list.

19. In the result, we allow these appeals, set aside the order passed by the High Court and direct that -

(1) answer scripts of candidates appearing in a series of competition examination held pursuant to advertisement No. 1406 of 2006 shall be got re-evaluated on the basis of a correct key prepared on the basis of the report of Dr. (Prof.) CN Sinha and Prof. KSP Singh and the observations made in the body of this order and a fresh merit list drawn up on that basis.

(2) Candidates who figure in the merit list but have not been appointed shall be offered appointments in their favour. Such candidates would earn their seniority from the date the appellants were first appointed in accordance with their merit position but without any back wages or other benefit whatsoever.

(3) In case writ petitioners-respondent nos. 6 to 18 also figure in the merit list after re-evaluation of the answer scripts, their appointments shall relate back to the date when the appellants were first appointed with continuity of service to them for purpose of seniority but without any back wages or other incidental benefits.

(4) Such of the appellants as do not make the grade after re-evaluation shall not be ousted from service, but shall figure at the bottom of the list of selected candidates based on the first selection in terms of advertisement No.1406 of 2006 and the second selection held pursuant to advertisement No.1906 of 2006.

(5) Needful shall be done by the respondents - State and the Staff Selection Commission expeditiously but not later than three months from the date a copy of this order is made available to them.

20. Parties are directed to bear their own costs.

K.K.T. Appeals allowed.

NIRANJAN HEMCHANDRA SASHITTAL AND ANOTHER
v.
STATE OF MAHARASHTRA
(Writ Petition (Crl.) No. 50 of 2012)

MARCH 15, 2013

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

Constitution of India, 1950 - Article 32 - Powers under - Exercise of -Scope - Accused, a public servant, allegedly acquired disproportionate assets - Trial under the Prevention of Corruption Act - Prayer for quashing of the trial on the ground of delay - Held: No time limit can be stipulated for disposal of criminal trial - The delay caused has to be weighed on the factual score, regard being had to the nature of the offence and the concept of social justice and the cry of the collective - In the case at hand, the gravity of the offence is not to be adjudged on the bedrock of the quantum of bribe - An attitude to abuse the official position to extend favour in lieu of benefit is a crime against the collective and an anathema to the basic tenet of democracy - Also, on facts, the delay occurred due to dilatory tactics adopted by the accused, laxity on the part of the prosecution and faults on the part of the system, i.e., to keep the court vacant - Accused precluded from advancing a plea that the delay in trial caused him colossal hardship and agony warranting quashment of the entire criminal proceedings - The accused, as alleged, had acquired assets worth Rs. 33.44 lacs - The value of the said amount at the time of launching of the prosecution has to be kept in mind - The balance to continue the proceeding against the accused tilts in favour of the prosecution - Jurisdiction under Article 32 of the Constitution accordingly not exercised to quash the proceedings - Prevention of Corruption Act, 1988 - s.13(2) r/w s.13(1)(e).

The Anti Corruption Bureau (ACB) filed an FIR

against a public servant. Charge-sheet was lodged against him alongwith two old ladies before the Special Court. The offence alleged against the public servant was under Section 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act, 1988. Allegations against the ladies were abetment for the main offences. As there was delay in conducting the investigation and filing of charge-sheet and disposal of certain interlocutory applications, the High Court was moved for quashing of the criminal proceedings. The High Court declined to interfere and, hence, all the accused persons approached this Court in appeal, wherein the criminal case in respect of the old ladies was delinked and quashed, but the appeals preferred by the petitioner-public servant and his wife stood dismissed.

It is asserted in the instant petition preferred by the public servant and his wife under Article 32 of the Constitution that after this Court disposed of the earlier criminal appeals, charges were framed nearly after expiry of seven years; that nearly after four years of framing of charges, the Investigating Officer, was partly examined by the prosecution and, thereafter, the matter was adjourned on many an occasion; that despite the last opportunity being granted by the Special Judge, the Investigating Officer was not produced for examination; that the examination-in-chief of PW-1 has not yet been completed and the other witnesses have not been produced for examination by the prosecution; that despite prayer made by the petitioner that the prosecution case ought to be closed because of its inability to produce the witnesses, the Special Judge has not closed the evidence; and that more than ten years have elapsed since the earlier judgment of this Court was rendered and, therefore, the whole proceeding deserved to be quashed.

The gravamen of grievance of the petitioners pertained to procrastination in trial, gradual corrosion of

their social reputation, deprivation of respectable livelihood because of order of suspension passed against the petitioner No. 1 during which he was getting a meagre subsistence allowance and reached the age of superannuation without being considered for promotion, extreme suffering of emotional and mental stress and strain, and denial of speedy trial that impaired their Fundamental Right enshrined under Article 21 of the Constitution.

The question which therefore arose for consideration was whether in the instant petition, this Court, in exercise of powers under Article 32 of the Constitution, should quash the criminal trial on the ground of delay.

Disposing of the writ petition, the Court

HELD: 1.1. On one hand, the right of the accused is to have a speedy trial and on the other, the quashment of the indictment or the acquittal or refusal for sending the matter for re-trial has to be weighed, regard being had to the impact of the crime on the society and the confidence of the people in the judicial system. There cannot be a mechanical approach. No time limit can be stipulated for disposal of the criminal trial. The delay caused has to be weighed on the factual score, regard being had to the nature of the offence and the concept of social justice and the cry of the collective. In the case at hand, the accused has been charge-sheeted under the Prevention of Corruption Act, 1988 for disproportionate assets. The said Act has a purpose to serve. The Parliament intended to eradicate corruption and provide deterrent punishment when criminal culpability is proven. The intendment of the legislature has an immense social relevance. In the present day scenario, corruption has been treated to have the potentiality of corroding the marrows of the economy. There are cases where the amount is small and in certain cases, it is extremely high.

The gravity of the offence in such a case is not to be adjudged on the bedrock of the quantum of bribe. An attitude to abuse the official position to extend favour in lieu of benefit is a crime against the collective and an anathema to the basic tenet of democracy, for it erodes the faith of the people in the system. It creates an incurable concavity in the Rule of Law. The system of good governance is founded on collective faith in the institutions. If corrosions are allowed to continue by giving allowance to quash the proceedings in corruption cases solely because of delay without scrutinizing other relevant factors, a time may come when the unscrupulous people would foster and garner the tendency to pave the path of anarchism. [Para 19] [785-A-G]

1.2. It can be stated without any fear of contradiction that corruption is not to be judged by degree, for corruption mothers disorder, destroys societal will to progress, accelerates undeserved ambitions, kills the conscience, jettisons the glory of the institutions, paralyses the economic health of a country, corrodes the sense of civility and mars the marrows of governance. Immoral acquisition of wealth destroys the energy of the people believing in honesty, and history records with agony how they have suffered. The only redeeming fact is that collective sensibility respects such suffering as it is in consonance with the constitutional morality. Therefore, the relief for quashing of a trial under the 1988 Act has to be considered in the above backdrop. [Para 20] [785-H; 786-A-C]

1.3. It is perceivable that delay has occurred due to dilatory tactics adopted by the accused, laxity on the part of the prosecution and faults on the part of the system, i.e., to keep the court vacant. Though there was no order directing stay of the proceedings before the trial court, yet at the instance of the accused, adjournments were sought. After the High Court clarified the position, the

accused, by exhibition of inherent proclivity, sought adjournment and filed miscellaneous applications for prolonging the trial, possibly harbouring the notion that asking for adjournment is a right of the accused and filing applications is his unexceptional legal right. It cannot be said that the accused is debarred in law to file applications, but when delay is caused on the said score, he cannot advance a plea that the delay in trial has caused colossal hardship and agony warranting quashment of the entire criminal proceeding. In the present case, the accused, as alleged, had acquired assets worth Rs. 33.44 lacs. The value of the said amount at the time of launching of the prosecution has to be kept in mind. The tendency to abuse the official position has spread like an epidemic and has shown its propensity making the collective to believe that unless bribe is given, the work may not be done. Some citizens do protest but the said protest may not inspire others to follow the path of sacredness of boldness and sacrosanctity of courage. Many may try to deviate. This deviation is against the social and national interest. Thus, the balance to continue the proceeding against the accused tilts in favour of the prosecution and, hence, this Court is not inclined to exercise the jurisdiction under Article 32 of the Constitution to quash the proceedings. However, the Special Judge is directed to dispose of the trial by the end of December, 2013 positively. [Para 21] [786-D-H; 787-A-C]

Rajdeo Sharma v. State of Bihar **(1998) 7 SCC 507: 1998 (2) Suppl. SCR 130;** *Abdul Rehman Antulay and Others v. R.S. Nayak and Another* **(1992) 1 SCC 225: 1991 (3) Suppl. SCR 325;** *Kartar Singh v. State of Punjab* **(1994) 3 SCC 569: 1994 (2) SCR 375;** *"Common Cause", A Registered Society through its director v. Union of India and Others* **(1996) 4 SCC 33: 1996 (2) Suppl. SCR 196;** *"Common Cause", A Registered Society through its director v. Union of India and Others* **(1996) 6 SCC 775: 1996 (9)**

Suppl. SCR 296; *Raj Deo Sharma (II) v. State of Bihar* **(1999) 7 SCC 604: 1999 (3) Suppl. SCR 124;** *P. Ramchandra Rao v. State of Karnataka* **(2002) 4 SCC 578;** *Vakil Prasad Singh v. State of Bihar* **(2009) 3 SCC 355: 2009 (1) SCR 517;** *Sudarshanacharya v. Purushottamacharya and Another* **(2012) 9 SCC 241;** *Mohd. Hussain alias Julfikar Ali v. State (Government of NCT of Delhi)* **(2012) 9 SCC 408; Zahira** *Habibulla H. Shekh and Another v. State of Gujarat and Others* **(2004) 4 SCC 158: 2004 (3) SCR 1050 and** *Satyajit Banerjee and Others v. State of West Bengal and Others* **(2005) 1 SCC 115: 2004 (6) Suppl. SCR 294 - referred to.**

Case Law Reference:

1998 (2) Suppl. SCR 130	**referred to**	**Para 3, 15**
1991 (3) Suppl. SCR 325	**referred to**	**Para 12, 16**
1994 (2) SCR 375	**referred to**	**Para 14, 15**
1996 (2) Suppl. SCR 196	**referred to**	**Para 15**
1996 (9) Suppl. SCR 296	**referred to**	**Para 15**
1999 (3) Suppl. SCR 124	**referred to**	**Para 15**
(2002) 4 SCC 578	**referred to**	**Para 15, 16, 17**
2009 (1) SCR 517	**referred to**	**Para 17**
(2012) 9 SCC 241	**referred to**	**Para 17**
(2012) 9 SCC 408	**referred to**	**Para 18**
2004 (3) SCR 1050	**referred to**	**Para 18**
2004 (6) Suppl. SCR 294	**referred to**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Writ Petition (Criminal) No. 50 of 2012

Under Article 32 of the Constitution of India.

Dr. Rajeev Dhawan, Braj Kishore Mishra, Vijay Kumar, Aparna Jha, Abhishek Yadav, Aditya S., for the Petitioners.

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

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The gravamen of grievance of the petitioners in this petition preferred under Article 32 of the Constitution of India pertains to procrastination in trial, gradual corrosion of their social reputation, deprivation of respectable livelihood because of order of suspension passed against the petitioner No. 1 during which he was getting a meagre subsistence allowance and has reached the age of superannuation without being considered for promotion, extreme suffering of emotional and mental stress and strain, and denial of speedy trial that has impaired their Fundamental Right enshrined under Article 21 of the Constitution. The asseverations pertaining to long delay in trial have been made on the constitutional backdrop leading to the prayer for quashment of the proceedings of Special Case No. 4 of 1993 pending in the court of learned Special Judge, Greater Bombay.

2. Before we proceed to state the factual score, it is necessary to mention that this is not the first time that the petitioners have approached this Court. They, along with others, had assailed the order of the High Court of Bombay declining to quash the criminal proceedings against the petitioners and others on the ground of delay in investigation and filing of charge sheet in three special leave petitions which were converted to three criminal appeals, namely, Criminal Appeal Nos. 176 of 2001, 177 of 2001 and 178 of 2001. This Court adverted to the facts and expressed the view that there was no justification to quash the criminal prosecution on the ground of delay highlighted by the appellants in all the appeals. However, this Court took note of the allegations against two senescent ladies who were octogenarians relating to their

abetment in the commission of the crime and opined that the materials were insufficient to prove that the old ladies intentionally abetted the public servant in acquiring assets which were disproportionate to his known sources of income and further it would be unfair and unreasonable to compel them, who by advancement of old age, would possibly have already crossed into geriatric stage, to stand the long trial having no reasonable prospect of ultimate conviction against them and, accordingly, on those two grounds, allowed the appeals preferred by them and quashed the criminal prosecution as far as they were concerned. The other appeals, preferred by the public servant and his wife, stood dismissed.

3. Be it noted, in the said judgment, while quashing the proceedings against the two ladies, this Court referred to the decision in *Rajdeo Sharma v. State of Bihar*[1] and observed that the trial was not likely to end within one or two years, even if the special court would strictly adhere to the directions issued by this Court in *Rajdeo Sharma's* case.

4. The facts as uncurtained are that the Anti Corruption Bureau (ACB), after conducting a preliminary enquiry, filed an FIR on 26.6.1986 against the petitioner No. 1 who was a Deputy Commissioner in the Department of Prohibition and Excise, Maharashtra Government, for offence punishable under Section 5(2) of the Prevention of Corruption Act, 1947. The lodgement of the FIR led to conducting of raids at various places and, eventually, it was found that the petitioner, a public servant, had acquired assets worth Rs.33.44 lakhs which were in excess of his known sources of income. After the investigation, the Government of Maharashtra was moved for grant of sanction which was accorded on 22.1.1993 and thereupon, the charge-sheet was lodged against the petitioners along with two old ladies on 4.3.1993 before the Special Court. The offence alleged against the petitioner, the public servant, was under Section 13(2) read with Section 13(1)(e) of the Prevention of

1. (1998) 7 SCC 507.

Corruption Act, 1988. Allegations against the ladies were abetment for the main offences. As there was delay in conducting the investigation and filing of charge-sheet and disposal of certain interlocutory applications, the High Court of Bombay was moved on 15.4.1997 for quashing of the criminal proceedings. As has been stated earlier, the High Court declined to interfere and, hence, all the accused persons approached this Court in appeal, wherein the criminal case in respect of the old ladies was delinked and quashed.

5. It is asserted in this petition that after this Court disposed of the earlier criminal appeals, charges were framed only on 15.12.2007 nearly after expiry of seven years. It is put forth that during the pendency of the trial, the wife of the petitioner No. 1 has breathed her last on 23.5.2008. It is averred that nearly after four years of framing of charges, on 1.2.2011, Shri Vasant S. Shete, the Investigating Officer, was partly examined by the prosecution and, thereafter, the matter was adjourned on many an occasion. Despite the last opportunity being granted by the learned Special Judge, the Investigating Officer was not produced for examination. As pleaded, the Investigating Officer appeared before the Special Judge on 20.7.2011 and sought further time instead of getting himself examined. Thereafter, the matter was adjourned on 25.8.2011, 21.9.2011 and 18.10.2011 and the examination of the Investigating Officer could not take place. On 15.11.2011, the Investigating Officer submitted a letter to the Assistant Commissioner of Police, ACB, stating that he had already taken voluntary retirement and due to bad health was unable to attend the court and follow up the case. He made a request to the ACP to appoint some other officer for prosecuting the case. Thereafter, the Investigating Officer absented himself before the learned trial judge to give his evidence. It is contended that because of the said situation, the examination-in-chief of PW-1 has not yet been completed and the other witnesses have not been produced for examination by the prosecution. It is urged that despite prayer made by the petitioner that the

prosecution case ought to be closed because of its inability to produce the witnesses, the learned Special Judge has not closed the evidence. It is urged that more than ten years have elapsed since the earlier judgment of this Court was rendered and, therefore, the whole proceeding deserved to be quashed. Emphasis has been laid on the loss of reputation, mental suffering, stress and anxiety and the gross violation of the concept of speedy trial as enshrined under Article 21 of the Constitution.

6. The stand of the State of Maharashtra, respondent No. 1, is that after delivery of the judgment in the earlier appeals, the accused on 29.3.2001 moved numerous miscellaneous applications seeking various reliefs and made a prayer that framing of charges should be deferred till all the miscellaneous applications were decided. He moved the High Court in its revisional jurisdiction and writ jurisdiction and though the High Court did not grant stay, yet the case was adjourned at the instance of the accused. On number of occasions, the accused himself moved applications for adjournment and some times sought adjournment to go out of the country to Bangkok, Thailand and Singapore.

7. Even after the trial commenced, the accused did not cooperate and remained non-responsive. A chart has been filed showing the manner in which adjournments were taken by the accused at the stage of framing of charge on the ground that the matter was pending before the High Court. A reference has been made to the order dated 30.1.2003 directing all the accused to remain present on the next date of hearing, i.e., 07.2.2003, for framing of charge. Reference has been made to the orders passed wherefrom it is clear that the accused persons had sought adjournment on the ground that writ petitions were pending before the High Court. It is also put forth that certain applications were filed by the accused persons seeking longer date by giving personal reasons and sometimes on the ground of non-availability of the counsel. It is the case

of the prosecution that because of adjournments, the charges could not be framed within a reasonable time but ultimately, on 15.12.2007, the charges were framed. The factual narration would further reveal that certain miscellaneous applications were filed and they were ultimately dismissed on 20.2.2008. On 04.4.2009, an order was passed requiring the counsel for the accused to submit admission and denial of the documents as per the description mentioned in the application under Section 294 of the Code of Criminal Procedure. Some time was consumed to carry out the said exercise. The matter was also adjourned as PW.1 had undergone an operation. On 26.8.2012, the trial Court recorded that the witness, Shetye, was unable to attend the Court and on the next date, i.e., 13.7.2012, the Prosecution Witness No. 1 stated that he was suffering from mental imbalance and was not in a position to depose and in view of the said situation, the Court directed the prosecution to lead evidence of other witnesses on the next date. Relying on the documents annexed to the counter affidavit, it is contended that on most of the dates, the accused has taken adjournment on some pretext or the other.

8. In the body of the counter affidavit, various dates have been referred to and, computing the same, it has been stated that delay attributable to the accused is 15.5 years and the delay in bringing the matter in queue in the trial Court is one year. The rest of the delay is caused as the prosecution has taken time on certain occasions and on some dates, the learned trial Judge was on leave. In this backdrop, it has been contended that it is not a fit case, where this Court should quash the proceedings in exercise of powers under Article 32 of the Constitution of India.

9. An affidavit-in-rejoinder has been filed stating, inter alia, that applications were filed for release which were within the legal rights and hence, the delay cannot be attributed to the accused persons. It is urged that though number of orders have been passed, yet not a single witness has been examined. The

allegation that the accused had gone on vacation has been seriously disputed. Emphasis has been laid on the order dated 18.3.2005 passed by the High Court clarifying the position that it had not granted stay and the pendency of the matter should not be a ground to adjourn the case. It is contended that the Investigating Officer is neither serious nor interested to see the progress of the trial but is desirous of delaying as he is aware that the case of the prosecution is totally devoid of merit. It is further stated that there has been gross and unexplained delay at each stage of the proceedings and hence, the same deserves to be quashed.

10. We have heard Dr. Rajeev Dhavan, learned senior counsel for the petitioner, and Mr. Sanjay V. Kharde, learned counsel for the respondent-State.

11. To appreciate the centripodal issue whether in such a case this Court, in exercise of powers under Article 32 of the Constitution, should quash the criminal trial on the ground of delay, it is requisite to state that in the present petition, we are only concerned with the time spent after 02.3.2001, i.e., the date of pronouncement of the judgment in the earlier criminal appeals, and further the factual matrix as already exposited shows how the delay has occurred. The factum of delay and its resultant effect are to be tested on the basis of the exposition of law by this Court.

12. In *Abdul Rehman Antulay and Others v. R.S. Nayak and Another*[2], a proponement was advanced that unless a time limit is fixed for the conclusion of the criminal proceedings, the right to speedy trial would be illusory. The Constitution Bench, after referring to the factual matrix and various submissions, opined that there is a constitutional guarantee of speedy trial emanating from Article 21 which is also reflected in the Code of Criminal Procedure. Thereafter, the Court proceeded to state as follows:-

2. (1992) 1 SCC 225.

"83. But then speedy trial or other expressions conveying the said concept - are necessarily relative in nature. One may ask - speedy means, how speedy? How long a delay is too long? We do not think it is possible to lay down any time schedules for conclusion of criminal proceedings. The nature of offence, the number of accused, the number of witnesses, the workload in the particular court, means of communication and several other circumstances have to be kept in mind."

After so stating, the Court gave certain examples relating to a murder trial where less number of witnesses are examined and certain trials which involve large number of witnesses. It also referred to certain offences which, by their very nature, e.g., conspiracy cases, cases of misappropriation, embezzlement, fraud, forgery, sedition, acquisition of disproportionate assets by public servants, cases of corruption against high public officials, take longer time for investigation and trial. The Court also took note of the workload in each court, district, regional and State-wise and the strikes by the members of the Bar which interfere with the work schedules. The Bench further proceeded to observe that in the very nature of things, it is difficult to draw a time limit beyond which a criminal proceeding will not be allowed to go, and if it is a minor offence, not an economic offence and the delay is too long, not caused by the accused, different considerations may arise but each case must be left to be decided on its own facts and the right to speedy trial does not become illusory when a time limit is not fixed.

13. In the said case, in paragraph 86, the Court culled out 11 propositions which are meant to sub-serve as guidelines. The Constitution Bench observed that the said propositions are not exhaustive as it is difficult to foresee all situations and further, it is not possible to lay down any hard and fast rules. The propositions which are relevant for the present purpose are reproduced below:-

"(5) While determining whether undue delay has occurred

(resulting in violation of Right to Speedy Trial) one must have regard to all the attendant circumstances, including nature of offence, number of accused and witnesses, the workload of the court concerned, prevailing local conditions and so on - what is called, the systemic delays. It is true that it is the obligation of the State to ensure a speedy trial and State includes judiciary as well, but a realistic and practical approach should be adopted in such matters instead of a pedantic one.

xxx xxx xxx

(8) Ultimately, the Court has to balance and weigh the several relevant factors - 'balancing test' or 'balancing process' - and determine in each case whether the right to speedy trial has been denied in a given case.

(9) Ordinarily speaking, where the court comes to the conclusion that right to speedy trial of an accused has been infringed the charges or the conviction, as the case may be, shall be quashed. But this is not the only course open. The nature of the offence and other circumstances in a given case may be such that quashing of proceedings may not be in the interest of justice. In such a case, it is open to the court to make such other appropriate order - including an order to conclude the trial within a fixed time where the trial is not concluded or reducing the sentence where the trial has concluded - as may be deemed just and equitable in the circumstances of the case.

It has been laid down therein that it is neither advisable nor practicable to fix any time-limit for trial of offences inasmuch as any such rule is bound to be qualified one.

14. In *Kartar Singh v. State of Punjab*[3], another Constitution Bench, while accepting the principle that denial of the right to speedy trial to the accused may eventually result in

3. (1994) 3 SCC 569.

a decision to dismiss the indictment or a reversal of conviction, further went on to state as follows:-

"92. Of course, no length of time is per se too long to pass scrutiny under this principle nor the accused is called upon to show the actual prejudice by delay of disposal of cases. On the other hand, the court has to adopt a balancing approach by taking note of the possible prejudices and disadvantages to be suffered by the accused by avoidable delay and to determine whether the accused in a criminal proceeding has been deprived of his right of having speedy trial with unreasonable delay which could be identified by the factors - (1) length of delay, (2) the justification for the delay, (3) the accused's assertion of his right to speedy trial, and (4) prejudice caused to the accused by such delay."

15. However, thereafter, certain pronouncements, namely, *"Common Cause", A Registered Society through its director v. Union of India and Others*[4], *"Common Cause", A Registered Society through its director v. Union of India and Others*[5], *Raj Deo Sharma* (supra) and *Raj Deo Sharma (II) v. State of Bihar*[6], came to the field relating to prescription of outer limit for the conclusion of the criminal trial and the consequences of such delay, being either discharge or acquittal of the accused. The controversy required to be addressed and, accordingly, the matter was referred to a Seven-Judge Bench in *P. Ramchandra Rao v. State of Karnataka*[7] and the larger Bench by the majority opinion, analyzing the dictum of *A.R. Antulay's* case and *Kartar Singh's* case and other legal principles relating to the power of the Legislature, the power of the Court and spectrums of jurisdiction, recorded certain conclusions. The conclusion Nos. 3 and 4, which are pertinent for the present case, are as under:-

4. (1996) 4 SCC 33.

5. (1996) 6 SCC 775.

6. (1999) 7 SCC 604.

7. (2002) 4 SCC 578.

"(3) The guidelines laid down in *A.R. Antulay* case are not exhaustive but only illustrative. They are not intended to operate as hard-and-fast rules or to be applied like a straitjacket formula. Their applicability would depend on the fact situation of each case. It is difficult to foresee all situations and no generalization can be made.

(4) It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in the several directions made in *Common Cause (I), Raj Deo Sharma (I) and Raj Deo Sharma (II)* could not have been so prescribed or drawn and are not good law. The criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made in Common Cause Case (I), Raj Deo Sharma Case (I) and (II). At the most the periods of time prescribed in those decisions can be taken by the courts seized of the trial or proceedings to act as reminders when they may be persuaded to apply their judicial mind to the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as pointed out in A.R. Antulay case and decide whether the trial or proceedings have become so inordinately delayed as to be called oppressive and unwarranted. Such time-limits cannot and will not by themselves be treated by any Court as a bar to further continuance of the trial or proceedings and as mandatorily obliging the court of terminate the same and acquit or discharge the accused."

[Emphasis added]

16. At this juncture, we may notice few decisions to show how the principles laid down in *Abdul Rehman Antulay* (supra) and *P. Ramachandra Rao* (supra) have been applied by this Court either for the purpose of quashing of the prosecution or refusal to accede to the prayer in that regard. In *Vakil Prasad*

Singh v. State of Bihar[8], the two-Judge Bench took note of factual scenario that the investigation was conducted by an officer who had no jurisdiction to do so; that the accused-appellant therein could not be accused of causing delay in the trial because he had successfully exercised his right to challenge an illegal investigation; that despite direction by the High Court to complete the investigation within a period of three months on 7.9.1990, nothing had happened till 27.2.2007 and the charge-sheet could only be filed on 1.5.2007 and, accordingly, opined that it was not a case where there was any exceptional circumstance which could be possibly taken into consideration for condoning the inordinate delay of more than two decades in investigation and, accordingly, quashed the proceedings before the trial court.

17. In *Sudarshanacharya v. Purushottamacharya and Another*[9], a criminal prosecution was launched for commission of an offence for misappropriation and criminal breach of trust. On an application being filed for quashing of the proceedings, the High Court declined to quash the proceedings taking note of the fact that the accused had also played a role in the procrastination of the proceeding and directed that the case be heard on day-to-day basis. The matter travelled to this Court and a contention was advanced that it would be unfair to submit the accused-appellant to the agony of a trial after a lapse of long time. The Division Bench referred to the principles laid down in *P. Ramachandra Rao* (supra) and, further taking note of the conduct of the accused, declined to quash the proceedings.

18. At this stage, we think it apposite to advert to another aspect which is some times highlighted. It is quite common that a contention is canvassed in certain cases that unless there is a speedy trial, the concept of fair trial is totally crucified. Recently, in *Mohd. Hussain alias Julfikar Ali v. State*

8. (2009) 3 SCC 355.

9. (2012) 9 SCC 241.

(Government of NCT of Delhi)[10], a three-Judge Bench, after referring to the pronouncements in *P. Ramchandra Rao's* case, *Zahira Habibulla H. Shekh and Another v. State of Gujarat and Others*[11], *Satyajit Banerjee and Others v. State of West Bengal and Others*[12], pointed out the subtle distinction between the two in the following manner:-

> "40 "Speedy trial" and "fair trial" to a person accused of a crime are integral part of Article 21. There is, however, qualitative difference between the right to speedy trial and the accused's right of fair trial. Unlike the accused's right of fair trial, deprivation of the right to speedy trial does not per se prejudice the accused in defending himself. The right to speedy trial is in its very nature relative. It depends upon diverse circumstances. Each case of delay in conclusion of a criminal trial has to be seen in the facts and circumstances of such case. Mere lapse of several years since the commencement of prosecution by itself may not justify the discontinuance of prosecution or dismissal of indictment. The factors concerning the accused's right to speedy trial have to be weighed vis-à-vis the impact of the crime on society and the confidence of the people in judicial system. Speedy trial secures rights to an accused but it does not preclude the rights of public justice. The nature and gravity of crime, persons involved, social impact and societal needs must be weighed along with the right of the accused to speedy trial and if the balance tilts in favour of the former the long delay in conclusion of criminal trial should not operate against the continuation of prosecution and if the right of the accused in the facts and circumstances of the case and exigencies of situation tilts the balance in his favour, the prosecution may be brought to an end."

[Emphasis added]

10. (2012) 9 SCC 408.

11. (2004) 4 SCC 158.

12. (2005) 1 SCC 115.

19. It is to be kept in mind that on one hand, the right of the accused is to have a speedy trial and on the other, the quashment of the indictment or the acquittal or refusal for sending the matter for re-trial has to be weighed, regard being had to the impact of the crime on the society and the confidence of the people in the judicial system. There cannot be a mechanical approach. From the principles laid down in many an authority of this Court, it is clear as crystal that no time limit can be stipulated for disposal of the criminal trial. The delay caused has to be weighed on the factual score, regard being had to the nature of the offence and the concept of social justice and the cry of the collective. In the case at hand, the appellant has been charge-sheeted under the Prevention of Corruption Act, 1988 for disproportionate assets. The said Act has a purpose to serve. The Parliament intended to eradicate corruption and provide deterrent punishment when criminal culpability is proven. The intendment of the legislature has an immense social relevance. In the present day scenario, corruption has been treated to have the potentiality of corroding the marrows of the economy. There are cases where the amount is small and in certain cases, it is extremely high. The gravity of the offence in such a case, in our considered opinion, is not to be adjudged on the bedrock of the quantum of bribe. An attitude to abuse the official position to extend favour in lieu of benefit is a crime against the collective and an anathema to the basic tenet of democracy, for it erodes the faith of the people in the system. It creates an incurable concavity in the Rule of Law. Be it noted, system of good governance is founded on collective faith in the institutions. If corrosions are allowed to continue by giving allowance to quash the proceedings in corruption cases solely because of delay without scrutinizing other relevant factors, a time may come when the unscrupulous people would foster and garner the tendency to pave the path of anarchism.

20. It can be stated without any fear of contradiction that corruption is not to be judged by degree, for corruption mothers

disorder, destroys societal will to progress, accelerates undeserved ambitions, kills the conscience, jettisons the glory of the institutions, paralyses the economic health of a country, corrodes the sense of civility and mars the marrows of governance. It is worth noting that immoral acquisition of wealth destroys the energy of the people believing in honesty, and history records with agony how they have suffered. The only redeeming fact is that collective sensibility respects such suffering as it is in consonance with the constitutional morality. Therefore, the relief for quashing of a trial under the 1988 Act has to be considered in the above backdrop.

21. It is perceivable that delay has occurred due to dilatory tactics adopted by the accused, laxity on the part of the prosecution and faults on the part of the system, i.e., to keep the court vacant. It is also interesting to note that though there was no order directing stay of the proceedings before the trial court, yet at the instance of the accused, adjournments were sought. After the High Court clarified the position, the accused, by exhibition of inherent proclivity, sought adjournment and filed miscellaneous applications for prolonging the trial, possibly harbouring the notion that asking for adjournment is a right of the accused and filing applications is his unexceptional legal right. When we say so, we may not be understood to have said that the accused is debarred in law to file applications, but when delay is caused on the said score, he cannot advance a plea that the delay in trial has caused colossal hardship and agony warranting quashment of the entire criminal proceeding. In the present case, as has been stated earlier, the accused, as alleged, had acquired assets worth Rs. 33.44 lacs. The value of the said amount at the time of launching of the prosecution has to be kept in mind. It can be stated with absolute assurance that the tendency to abuse the official position has spread like an epidemic and has shown its propensity making the collective to believe that unless bribe is given, the work may not be done. To put it differently, giving bribe, whether in cash or in kind, may become the "mantra" of the people. We may

hasten to add, some citizens do protest but the said protest may not inspire others to follow the path of sacredness of boldness and sacrosanctity of courage. Many may try to deviate. This deviation is against the social and national interest. Thus, we are disposed to think that the balance to continue the proceeding against the accused-appellants tilts in favour of the prosecution and, hence, we are not inclined to exercise the jurisdiction under Article 32 of the Constitution to quash the proceedings. However, the learned Special Judge is directed to dispose of the trial by the end of December, 2013 positively.

22. The writ petition is accordingly disposed of.

B.B.B. Writ Petition disposed of.

SECRETARY TO GOVERNMENT OF INDIA
v.
SAWINDER KAUR AND ANOTHER
(Civil Appeal No. 2649 of 2013)

MARCH 21, 2013

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

Swatantrata Sainik Samman Pension Scheme, 1980 - Pension sought under - High Court granted the same, from the year 1973 - Held: The direction relating to entitlement of the claimant to the benefit of pension from 1973 is erroneous - He could be covered under the Scheme only after the circular dated 31.1.1983 whereby he was made entitled to the pension - Circular No.8/4/83-FF(P) dated 31.1.1983 issued by Ministry of Home Affairs.

Husband of respondent No.1 sought freedom fighter pension under Swatantrata Sainik Samman Pension Scheme, 1980 claiming to have participated in freedom struggle by joining Indian National Army. As per 1980 Scheme, the ex-INA personnel who had not suffered formal punishment were not eligible for getting pension, but by Circular No.8/4/83-FF(P) dated 31.1.1983, such personnel were also admitted to the 1980 Scheme. After intervention of the Court, Government accepted his claim and directed that he would be entitled to the pension w.e.f. 9.6.1994. The claimant approached High Court claiming the pension from the year 1980 i.e. the date of the scheme. Single Judge of High Court granted him the pension from the year 1973 i.e. the date of his original claim. The order of Single Judge was upheld in writ appeal.

In the present appeal by the State the question for

consideration was as to which date the claimant was entitled to get the pension.

Allowing the appeal, the Court

HELD: 1. Initially the benefit was not extended to the husband of respondent No.1 who was the petitioner as he belonged to a different category. After relaxation, the same was extended on certain conditions to certain categories but her husband was found to be ineligible and, hence, the claim was rejected. After direction of the High Court to consider his case, the authorities, after considering all the facts including the certificate, extended the benefit on the basis of secondary evidence as there was no clinching material on record that he was covered under the scheme as relaxed vide Circular dated 31.01.1983. On a perusal of the scheme, it is manifest that under no circumstances the respondent would have got the benefit from 1973, that is, the date of application, as he could only be covered under the scheme after the circular dated 31.01.1983. Thus, the direction relating to his entitlement from the date of the application is erroneous. [Para 9] [794-C-E]

2. In the instant case, the claim was not allowed on the basis of the jail certificate produced by the claimant but on the basis of the oral statement of some other detenu. The competent authority was not satisfied as regards the fulfilment of the conditions. There was no primary evidence available in the official records as required under the scheme to establish the claim that the claimant was an Ex- INA member and suffered in New Guinea/New Britain Islands to prove his eligibility for pension under the scheme. However, regard being had to the totality of the circumstances, he was extended the benefit under the scheme as it was a case of benefit of doubt. As is evident from the orders passed by the Single Judge as well as the Division Bench, there is no

discussion in that regard but pension has been granted from the date of the application in an extremely mechanical manner. Such approach is erroneous and it has resultantly led to an unsustainable order. [Para 15] [796-D-G]

Mukund Lal Bhandari and Ors. vs. Union of India and Ors. **(1993) Supp (3) SCC 2:1993 (3) SCR 891;** *State of Orissa vs. Choudhuri Nayak (Dead) through LRs. and Ors.* **(2010) 8 SCC 796: 2010 (10) SCR 615;** *Gurdial Singh vs. Union of India* **(2001) 8 SCC 8: 2001 (3) Suppl. SCR 323;** *State of M.P. vs. Devkinandan Maheshwari* **(2003) 3 SCC 183;** *Union of India vs. Avtar Singh* **(2006) 6 SCC 493: 2006 (3) Suppl. SCR 666** *Union of India vs. Surjit Kaur and Anr.* **(2007) 15 SCC 627;** *Union of India and Anr. vs. Kaushalya Devi* **(2007) 9 SCC 525: 2007 (2) SCR 745;** *Government of India vs. K.V. Swaminathan* **(1997) 10 SCC 190: 1996 (8) Suppl. SCR 737;** *Union of India and Ors. vs. Kashiswar Jana* **(2008) 11 SCC 309: 2008 (5) SCR 927- referred to.**

Case Law Reference:

1993 (3) SCR 891	**referred to**	**Para 6**
2010 (10) SCR 615	**referred to**	**Para 10**
2001 (3) Suppl. SCR 323	**referred to**	**Para 10**
(2003) 3 SCC 183	**referred to**	**Para 10**
2006 (3) Suppl. SCR 666	**referred to**	**Para 11**
(2007) 15 SCC 627	**referred to**	**Para 12**
2007 (2) SCR 745	**referred to**	**Para 13**
1996 (8) Suppl. SCR 737	**referred to**	**Para 13**
2008 (5) SCR 927	**referred to**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2649 of 2013.

From the Judgment & Order dated 26.04.2012 of the High Court of Punjab & Haryana at Chandigarh in Letters Patent Appeal No. 578 of 2012 (O & M).

Paras Kuhad, ASG Arijit Prasad, Vikas Garg, Jitin Chaturvedi, Prateek Jalan, B. Krishna Prasad for the Appellant.

Himanshu Gupta, Anil Kumar Tandale for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The husband of the respondent No. 1, late Gurnam Singh Dhillon, had applied for grant of freedom fighter pension on the basis that he had participated in the freedom struggle and had joined the Indian National Army or Azad Hind Fauj (for short "the INA") during 1941-42 in Singapore. His claim for pension was based on the scheme, namely, Swatantrata Sainik Samman Pension Scheme, 1980 (for brevity "the 1980 Scheme"). Prior to the said Scheme, the Freedom Fighters Pension Scheme, 1972 (for short "the 1972 Scheme) was in vogue from 15.8.1972. The benefit of the 1972 Scheme was extended to certain categories of freedom fighters and their family members and the said Scheme was liberalized in the year 1980. Under the said liberalized scheme, anyone who had participated in the INA and in the Indian Independence League (IIL) was also treated to have participated in the National Liberation Movement. Under the said Scheme, a person, claiming pension on the grounds of being in custody in connection with the freedom movement, could be considered for grant of pension on production of imprisonment/ detention certificate from the concerned jail authorities, District Magistrate or the State Government indicating the period of sentence awarded, date of admission, date of release and various other factors. It also provided that in case official records of the relevant period were not available, secondary evidence in the form of certificates from co-prisoners from central freedom

fighter pensioners who had proven jail suffering of minimum one year and who were with the applicant in the same jail could be considered provided their genuineness could be verified and found to be true by the competent authorities. In case of persons belonging to INA category, a certificate from a co-prisoner from the central freedom fighters pensioner was required. As per the 1980 Scheme, the ex-INA personnel who had not suffered formal punishment were not eligible for getting pension but later on, regard being had to their hardships and their patriotism, they were admitted to the Scheme from the year 1980 in terms of the relaxation provided in the Ministry of Home Affairs circular No. 8/4/83-FF(P) dated 31.1.1983.

3. As is demonstrable from the factual score, when the husband of the respondent No. 1 submitted the application for grant of freedom fighters pension, the army record showed that he was enrolled in the army on 13.6.1939 and released from service on 14.2.1946 due to reduction of the Indian Army, but not due to association with the INA and was also paid service gratuity. His application was initially rejected on 16.8.1980. After expiry of nine years, in 1989, he claimed that he, being an ex-INA, was sent to New Guinea/New British Islands and had suffered immense hardships and, accordingly, sought pension in terms of the Ministry of Home Affairs circular No. 8/4/83-FF(P) dated 31.1.1983. The claim was put forth in accord with clause (v) of para 1 of the said circular which stipulated that the persons of ex-INA who had been sent to New Guinea and adjoining islands and had undergone extreme hardships, starvation, although they did not suffer any formal imprisonment, would be admitted to the 1980 Scheme. His application was not entertained and the prayer was not accepted.

4. Being grieved by the order of rejection, late Gurnam Singh approached the High Court of Punjab and Haryana in CWP No. 11049 of 1992 which was disposed of with the direction to the respondent therein to pass a speaking order in relation to his grievance within a period of six months. As

his prayer was not accepted, he invoked the jurisdiction of the High Court again in CWP No. 6393 of 1993 assailing the order of rejection and the High Court issued a direction to determine the issue afresh. Thereafter, the competent authority of the Union of India, after due enquiry, accepted the prayer and directed that he would be entitled to the freedom fighters pension with effect from 9.6.1994.

5. Being dissatisfied with the determination of the date of grant, he visited the High Court in CWP No. 15724 of 1994 claiming that the benefit should be extended to him from the date when the Scheme was made applicable, i.e., from 1.8.1980.

6. The High Court, vide its order dated 13.10.2011, referred to the decision in *Mukund Lal Bhandari and Others v. Union of India and Others*[1] and earlier decision of the same Court in LPA No. 305 of 2008 and directed that the petitioner therein was entitled to get the benefit of Freedom Fighters Pension Scheme from the date from which the original claim was filed i.e. 22.03.1973 along with interest @ 9 % per annum. It was also observed that as during the pendency, the original claimant had expired and the wife was more than ninety years old, the amount should be paid within the period of six months from the date of the order. It is worth noting that the learned Single Judge took note that though the original petitioner had claimed the benefit w.e.f 1980, yet there was no reason to deprive the benefit of the scheme from the date when the original application was submitted for the reason that the scheme was brought to honour the forgotten heroes of the freedom struggle.

7. The aforesaid order was assailed by the Government in L.P.A. No. 578 of 2012 and the Division Bench, vide order dated 26.04.2012, after narrating the history of the litigation, concurred with the view expressed by the learned Single Judge

1. (1993) Supp (3) SCC 2.

as a result of which the appeal stood dismissed. Hence, the present appeal by special leave.

8. The question that emerges for consideration in this appeal by special leave under Article 136 of the Constitution is from which date the wife of the freedom fighter would be entitled to get the pension under the 1980 Scheme.

9. From the exposition of facts, it is quite clear that initially the benefit was not extended to the husband who was the petitioner as he belonged to a different category. After relaxation, the same was extended on certain conditions to certain categories but the husband was found to be ineligible and, hence, the claim was rejected. After direction of the High Court to consider his case, the authorities, after considering all the facts including the certificate, extended the benefit on the basis of secondary evidence as there was no clinching material on record that he was covered under the scheme as relaxed vide Circular dated 31.01.1983. On a perusal of the scheme, it is manifest under no circumstances the respondent would have got the benefit from 1973, that is, the date of application as he could only be covered under the scheme after the circular dated 31.01.1983. Thus, the direction relating to his entitlement from the date of the application is absolutely erroneous.

10. The heart of the matter is whether the respondent would be entitled even from the date, i.e., 1.08.1980 when the scheme came into existence. To appreciate the said issue, we may usefully refer to certain authorities in the field. In *State of Orissa v. Choudhuri Nayak (Dead) through LRs and Others*[2], a two-Judge Bench referred to the decisions in *Mukund Lal Bhandari* (supra), *Gurdial Singh v. Union of India*[3] and *State of M.P. v. Devkinandan Maheshwari*[4] wherein the object of the Freedom Fighters' Pension and what should be the approach

2. (2010) 8 SCC 796.

3. (2001) 8 SCC 8.

4. (2003) 3 SCC 183.

of the authorities in dealing with the applications for pension under the Scheme was stated, summarized the principles laid down therein and thereafter proceeded to state that the Government should weed out false and fabricated claims and cancel the grant when bogus nature of the claim comes to light.

11. In *Union of India v. Avtar Singh*[5], it has been observed that the genuine freedom fighters deserve to be treated with reverence, respect and honour, but at the same time, it cannot be lost sight of the fact that the people who had no role to play in the freedom struggle should be permitted to benefit from the liberal approach to be adopted in the case of freedom fighters. Be it noted, all this was said in respect of availing the claim by producing false and fabricated documents as genuine to avail the pension.

12. In *Union of India v. Surjit Kaur and Another*[6], this Court was dealing with a situation where the husband's application was rejected for grant of freedom fighters' pension and the respondent-husband did not challenge for two decades and the wife, two years after his death, filed a suit claiming the pension. This Court observed that the claim was barred under the Limitation Act, 1963.

13. In *Union of India and another v. Kaushalya Devi*[7], the Court referred to the decision in *Government of India v. K.V. Swaminathan*[8] where the claim was allowed on the basis of benefit of doubt and, therefore, pension was granted not from the date of the application but from the date of the order. Further analyzing, this Court opined as follows:-

> "In the present case, we have perused the record and found that it is stated therein that the claim was allowed on the basis of secondary nature of evidence. In other words, the claim was not allowed on the basis of jail certificate produced by the claimant but on the basis of oral statement of some other detenu. Hence, we are of the opinion that the pension should be granted from the date of the order and not from the date of the application."

5. (2006) 6 SCC 493.
6. (2007) 15 SCC 627.
7. (2007) 9 SCC 525.
8. (1997) 10 SCC 190.

14. In *Union of India & Others v. Kashiswar Jana*[9], the issue arose from which date the respondent therein was entitled to pension. In the said case, the pension was released w.e.f 4.8.1993. The claim of the respondent was that he was entitled to the pension from the date of the application which was allowed by the High Court directing that pension should be awarded from the date of application, i.e., 28.7.1981. This Court, relying on the decision in *Kaushalaya Devi* (supra), ruled that pension is to be granted from the date of the order passed by the High Court, i.e., 4.8.1993.

15. In the case at hand, as is evincible, the claim was not allowed on the basis of the jail certificate produced by the claimant but on the basis of the oral statement of some other detenu. The competent authority was not satisfied as regards the fulfilment of the conditions. There was no primary evidence available in the official records as required under the scheme to establish the claim of the respondent-husband that he was an Ex- INA member and suffered in New Guinea/New Britain Islands to prove his eligibility for pension under the scheme. However, regard being had to the totality of the circumstances, he was extended the benefit under the scheme as it was a case of benefit of doubt. As is evident from the orders passed by the learned Single Judge as well as the Division Bench, there is no discussion in that regard but pension has been granted from the date of the application in an extremely mechanical manner. In our considered opinion, the approach is erroneous and it has resultantly led to an unsustainable order.

16. Consequently, the appeal is allowed, the orders passed in the Writ Petition and affirmed in the Letters Patent Appeal are set aside. There shall be no order as to costs.

K.K.T. Appeal allowed.

9. (2008) 11 SCC 309.

UMESH SINGH
v.
STATE OF BIHAR
(Criminal Appeal No. 43 of 2010)

MARCH 22, 2013

[CHANDRAMAULI KR. PRASAD AND V. GOPALA GOWDA, JJ.]

Penal Code, 1860 - s. 302 r/w s. 34 - Murder - Deceased was shot at with revolver and rifle - Several accused - Conviction of accused-appellant - Justification - Held: Justified - Statement of related eye-witness (PW2) was rightly treated as FIR - Evidence of PW2 supported by other witnesses (PW3, PW5 and PW7) - Claim of appellant that he was falsely implicated not tenable - His conviction based on legal evidence on record and on proper appreciation of the same - Arms Act - s.27.

Evidence - Rigor mortis - Time of death - Opinion of doctor regarding complete vanishing of rigor mortis from the dead body after 36 hours - Correctness of - Held: Not correct - The medical officer deposed contrary to the rule of medical jurisprudence - On facts, the same could not be the basis for acquittal of the accused.

Evidence - Discrepancy between medical and ocular evidence - Effect -Held: Between medical and ocular evidence, the ocular evidence must be preferred.

The prosecution case was that while the deceased was going alongwith his cousin brother (PW2) to catch a bus, the accused-appellant and the other accused persons, namely, Awadhesh Singh, Sudhir Singh, Jaddu Singh, Nawal Singh, Binda Singh surrounded the deceased and thereafter murdered him by shooting him

with a revolver and rifle. The trial court (Additional Sessions Judge) convicted the accused persons under Section 302 read with Section 34, IPC and under Section 27 of the Arms Act and awarded sentence of imprisonment for life under Section 302 read with Section 34, IPC. The High Court set aside the conviction and sentence insofar as Awadhesh Singh, Jaddu Singh and Nawal Singh is concerned who were held not guilty under Section 302 read with section 34, IPC but affirmed the conviction and sentence in relation to the appellant.

In the instant appeal, the appellant challenged his conviction and sentence.

Dismissing the appeal, the Court

HELD: 1.1. PW2, the cousin brother of the deceased, accompanied him on the date of occurrence of the incident. At that point of time the appellant, along with other accused, surrounded them and it is stated that the appellant shot at the Kanpatti with revolver and other accused persons Binda Singh with the rifle in the stomach of the deceased and Sudhir Singh with rifle in the left thigh. PW7 has stated in his evidence that the aforesaid accused persons fled away at that time Ashok Singh, Damodar Singh, Balram Singh and Shyam Sunder Singh were going to the bazaar who have witnessed the incident. His evidence is supported by the evidence of the other witness namely PW3, who has stated that he has seen Moti Singh and Jaddu Singh catching both hands of the deceased and Moti Singh ordered him to fire and the said witness also spoken about the firings by Awadhesh Singh and Nawal Singh as stated by the PW2. Further, he has supported his evidence that Awadhesh Singh pushed the dead body in the Payeen and also stated that Moti Singh and Jaddu Singh had caught hold of the informant also. PW5 also claimed to have seen Jaddu Singh and Moti Singh catching hands of the

deceased and further he has stated that Umesh Singh, the appellant, had fired at the temple region of the deceased. Further, he has given categorical statement stating that Binda, Sudhir, Awadhesh and Nawal also had fired at the deceased with their rifles. Therefore, the evidence of PW2 has been supported by PW3, PW5 and PW7. In so far as PW6 is concerned he has given a general statement that he has seen the several persons surrounding the deceased and killing the deceased with rifle and revolver. Therefore, the trial court was right in recording the finding on the charge against the appellant on proper appraisal of the evidence of the eye-witness PW2 supported by PW3 and PW5. The said finding of fact on the charge of Sections 302 read with section 34, IPC against this appellant and others was seriously examined by the High Court and concurred with the same and in view of the evidence of PW2 and PW9 the informant who was eye-witness and the I.O.'s evidence regarding his evidence treating the statement of PW2 as FIR is perfectly legal and valid. [Para 14] [815-D-H; 816-A-E]

1.2. The doctor-PW8 opined that rigor mortis starts within 1 to 3 hours and vanishes after 36 hours. The said opinion of the medical officer PW8 regarding complete vanishing of rigor mortis from the dead body after 36 hours is medically not correct and this may be lack of his knowledge on the subject and he was liberal to the cross-examination by the defence lawyer. The Additional Sessions Judge has rightly held that PW8 the medical officer, has deposed contrary to the rule of medical jurisprudence, and therefore, the same cannot be the basis for the defence to acquit the accused. The Additional Sessions Judge has rightly referred to Medical Jurisprudence Digest written by B.L. Bansal, which clearly mentions that the rigor mortis persists from 12 to 24 hours and then passes off but it means that the faster the rigor mortis appears, the shorter time it persists.

Further, rightly the Additional Sessions Judge has referred to the Bolin Hulder case wherein it has been held that at the same climate of India, rigor mortis may commence in an hour to two and begin to disappear within 18 to 24 hours. The claim by the appellant that the deceased has been killed at an anterior point of time and the allegation that the accused has been falsely implicated in the case has been rightly rejected by the Additional Sessions Judge and the same has been concurred with by the High Court by assigning the valid and cogent reasons in the impugned judgment. The State counsel has rightly urged that if the medical and ocular evidence is contrary then the ocular evidence must prevail. Between medical and ocular evidence, the ocular evidence must be preferred. [Para 16] [819-B-E; 820-A-D]

Abdul Sayeed v. State of Madhya Pradesh **(2010) 10 SCC 259: 2010 (13) SCR 311 and** *Boolin Hulder v. State* **1996 Crl.L.J. 513 - relied on.**

State of A.P. v. Punati Ramulu **(1994) Suppl.1 SCC 590;** *Mussauddin Ahmed v. State of Assam* **(2009) 14 SCC 541;** *T.T. Antony v. State of Kerala* **(2001) 6 SCC 181: 2001 (3) SCR 942;** *Deo Pujan Thakur v. State of Bihar* **(2005) Crl.L.J. Patna 1263;** *Thangavelu v. State of TN* **(2002) 6 SCC 498;** *Moti v. State of U.P.* **(2003) 9 SCC 444;** *Kunju Mohd. v. State of Kerala* **(2004) 9 SCC 193;** *Virendra v. State of U.P.* **(2008) 16 SCC 582: 2008 (14) SCR 706;** *Baso Prasad v. State of Bihar* **(2006) 13 SCC 65: 2006 (9) Suppl. SCR 431;** *Binay Kumar v. State of Bihar* **(1997) 1 SCC 283: 1996 (8) Suppl. SCR 225 and** *Dinesh Kumar v. State of Rajasthan* **(2008) 8 SCC 270: 2008 (11) SCR 843 - cited.**

Medical Jurisprudence Digest by B.L. Bansal Advocate, **(1996 Edition at page 422) - referred to.**

2. The order of conviction and sentence imposed against the appellant is on the basis of legal evidence on

record and on proper appreciation of the same. The same is not erroneous in law as the finding is supported with valid and cogent reasons. [Para 17] [820-F-G]

Case Law Reference:

(1994) Suppl.1 SCC 590	**cited**	**Para 4**
(2009) 14 SCC 541	**cited**	**Para 5**
2001 (3) SCR 942	**cited**	**Para 6**
(2005) Crl.L.J. Patna 1263	**cited**	**Para 6**
(2002) 6 SCC 498	**cited**	**Para 8**
(2003) 9 SCC 444	**cited**	**Para 8**
(2004) 9 SCC 193	**cited**	**Para 8**
2008 (14) SCR 706	**cited**	**Para 8**
2006 (9) Suppl. SCR 431	**cited**	**Para 8**
1996 (8) Suppl. SCR 225	**cited**	**Para 10**
2008 (11) SCR 843	**cited**	**Para 11**
2010 (13) SCR 311	**relied on**	**Para 15**
1996 Crl.L.J. 513	**relied on**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 43 of 2010.

From the Judgment and Order dated 22.05.2003 of the High Court of Patna in Criminal Appeal No. 318 of 1998.

Amarendra Sharan, Samir Ali Khan, Dhruv Pal, Somesh Chandra Jha, Aparajita Mukherjee for the Appellant.

Chandan Kumar, Gopal Singh for the Respondent.

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. 1. This appeal is filed by the appellant aggrieved by the common judgment dated 22nd May, 2003 passed in Crl.A.Nos. 241, 247, 271 and 318 of 1998 in affirming the conviction and sentence of the appellant for the offence punishable under Section 302 read with Section 34 I.P.C. and Section 27 of the Arms Act urging various facts and legal contentions. The appellant herein was the appellant in Crl.A.No.318 of 1998 before the High Court. The impugned judgment passed in the said case is under challenge in this appeal.

2. The brief facts in relation to the prosecution case are stated hereunder to appreciate the rival legal contentions that are urged on behalf of the parties with a view to find out as to whether this Court is required to interfere with the concurrent finding of fact recorded in affirming the conviction and sentence imposed against the appellant.

3. The deceased Shailendra Kumar was murdered on 16.07.1996 at about 3.30 p.m. by the appellant Umesh Singh and other persons, namely, Awadhesh Singh, Sudhir Singh, Jaddu Singh, Nawal Singh, Binda Singh @ Bindeshwari Singh by shooting him with a revolver and rifle with a criminal intention for unlawful purpose in furtherance of common intention along with other accused and to have in their possession of fire arms with an intention to use it for an unlawful purpose to commit murder of Shailendra Kumar along with accused nos.5 & 6 and another accused Moti Singh who is dead. They were charged under Section 302 read with Section 34, IPC. The case of the prosecution is that the deceased along with his cousin brother Arvind Kumar-PW2 were going to Tungi for catching a bus for Kothar on 16.7.96 at about 3.30 p.m. When they proceeded at a distance ahead of Tungi High School near Latawar Payeen, the accused persons named above surrounded them. The deceased accused Moti Singh is alleged to have exhorted his other associates to shoot the deceased Shailendra Kumar upon which the appellant herein took out a country made

revolver and pumped its bullets in the temple of the deceased and accused no.2 who was having a rifle in his hand fired in the abdomen of the deceased. Accused no.4 also shot a fire causing injury in the leg of the deceased while accused no.3 also fired from his rifle. Accused no.5 was also having a rifle and he threw the dead body of the deceased in the Payeen. It is also the case of the prosecution that during the course of the occurrence of the incident the informant PW2 Arvind Kumar was kept over-powered by the deceased accused Moti Singh and Jaddu Singh and after accomplishing the target, they left. Further, the witnesses whose names were found in the fardbeyan claimed to have seen the occurrence of the incident. The fardbeyan was recorded by ASI RS Singh at about 7.00 p.m. on the same date at Tungi High School hostel, Latawar Payeen and the inquest report of the dead body was also prepared at the place of occurrence itself at 7.10 p.m. Seizure list of certain incriminating items including empty fired cartridges which were recovered from the spot was also prepared. Formal FIR was recorded and investigation was taken up by the police. On concluding the investigation, the police submitted the charge sheet before the learned Chief Judicial Magistrate on the basis of which cognizance was taken by him and the case was committed to the Court of Sessions. The learned Sessions Judge on his turn transferred the case to the file of Second Additional Sessions Judge, Nawadah and the charges were framed for the offence under Section 302 read with Section 34, IPC and Section 27 of the Arms Act. The accused pleaded not guilty. The case went for trial and the prosecution has examined the witnesses PW1 to PW9 and two witnesses were examined in support of the defence. The learned Additional Sessions Judge on appraisal of the evidence and record passed the judgment dated 04.04.1998 imposing the conviction and sentence against the accused persons under Section 302 read with Section 34, IPC and under Section 27 of the Arms Act and awarded sentence of imprisonment for life under Section 302 read with Section 34, IPC. The sentence awarded regarding the conviction under

different heads of charges ordered were to run concurrently. The conviction and sentence passed by the Additional Sessions Judge was challenged by the accused in the appeals referred to supra before the High Court of Patna. The High Court after hearing all the accused/appellants passed the common judgment affirming the conviction and sentence in relation to the present appellant and set aside the conviction and sentence in so far as Awadhesh Singh, Jaddu Singh and Nawal Singh who were held to be not found guilty of the charges under Section 302 read with section 34, IPC, i.e. in the appeal nos.241/98 and 247/98. However, as far as the present appellant and others are concerned, the judgment passed by the learned Additional Sessions Judge was affirmed. During pendency of the appeals the accused by name, Moti Singh died and his appeal got abated.

4. The appellant has questioned the correctness of the findings recorded in the impugned judgment by the High Court in affirming the conviction and sentence awarded against him along with others. Mr. Amarendra Sharan, learned senior counsel appearing for the appellant contends that the High Court has failed to notice the discrepancies in the evidence of the prosecution witnesses, it could have disbelieved the same but it has affirmed the conviction and sentence on this appellant. Further, even according to its own findings there were no eye-witnesses to the occurrence of the incident as the PWs arrived at the scene of occurrence 15-20 minutes after the incident and the informant who was present at the spot has given different version in the evidence and the FIR regarding the role of the appellant. The statement of PW2 Arvind Kumar who is the cousin brother of the deceased is the basis on which the FIR was registered and the Investigation of the case was made by the Investigating Officer. The PW2 was present at the time of occurrence and on the basis of his statement, the accused persons have been falsely implicated in treating his statement as FIR, the same is belated FIR which is not admissible in law and also hit by Section 162, Cr.P.C. In support of this contention

he has placed reliance upon the judgment of this Court in *State of A.P. v. Punati Ramulu*[1]. The relevant paragraphs read as under:

> "3. In our opinion, the reasons recorded by the High Court for recording acquittal of the respondents is based on proper appreciation of evidence. The findings are not only supported by proper appreciation of the evidence but are also reasonable and sound. Thanks to the tainted investigation, the murder of Krishna Rao goes unpunished. But we must hasten to add that since the defence has been able to successfully challenge the bona fides of the police investigation, it has detracted materially from the reliability of the other evidence led by the prosecution also.

5. Once we find that the investigating officer has deliberately failed to record the first information report on receipt of the information of a cognizable offence of the nature, as in this case, and had prepared the first information report after reaching the spot after due deliberations, consultations and discussion, the conclusion becomes inescapable that the investigation is tainted and it would, therefore, be unsafe to rely upon such a tainted investigation, as one would not know where the police officer would have stopped to fabricate evidence and create false clues. Though we agree that mere relationship of the witnesses PW 3 and PW 4, the children of the deceased or of PW 1 and PW 2 who are also related to the deceased, by itself is not enough to discard their testimony and that the relationship or the partisan nature of the evidence only puts the Court on its guard to scrutinise the evidence more carefully, we find that in this case when the bona fides of the investigation has been successfully assailed, it would not be safe to rely upon the testimony of these witnesses either in the absence of strong corroborative evidence of a clinching nature, which is found wanting in this case."

1. (1994) Suppl. 1 SCC 590

5. It was further contended by the learned senior counsel that the earlier information given by PW4 to the police was suppressed and by that time PW9- I.O. had reached the scene of occurrence, the other police officer and S.P. of the District were very much present there. They were not examined in the case to prove the prosecution case against the accused. Non-examination of the above persons as prosecution witnesses who are material witnesses to prove the prosecution case is fatal to the case as has been held by this Court in the case reported in *Mussauddin Ahmed v. State of Assam*[2]. The relevant paragraph of the abovementioned case reads as under:

> "11. It is the duty of the party to lead the best evidence in its possession which could throw light on the issue in controversy and in case such material evidence is withheld, the court may draw adverse inference under Section 114 Illustration (g) of the Evidence Act, 1872 notwithstanding that the onus of proof did not lie on such party and it was not called upon to produce the said evidence (vide *Gopal Krishnaji Ketkar v. Mohd. Haji Latif*)."

6. The learned senior counsel for the appellant further contended that not recording the information furnished by PW4 to the police as FIR but treating PW2 information as FIR in the case though it is hit by Section 162, Cr.P.C. creates doubt in the prosecution case and therefore benefit of doubt must be given to the accused by the trial court and the High Court. In support of the same, the learned senior counsel has placed reliance upon the judgment of this Court reported in *T.T. Antony v. State of Kerala*[3]. The relevant paragraphs are extracted hereunder:

> "18. An information given under sub-section (1) of Section 154 CrPC is commonly known as first information report

2. (2009) 14 SCC 541.
3. (2001) 6 SCC 181.

(FIR) though this term is not used in the Code. It is a very important document. And as its nickname suggests it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law in motion and marks the commencement of the investigation which ends up with the formation of opinion under Section 169 or 170 CrPC, as the case may be, and forwarding of a police report under Section 173 CrPC. It is quite possible and it happens not infrequently that more informations than one are given to a police officer in charge of a police station in respect of the same incident involving one or more than one cognizable offences. In such a case he need not enter every one of them in the station house diary and this is implied in Section 154 CrPC. Apart from a vague information by a phone call or a cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer in charge of a police station is the first information report - FIR postulated by Section 154 CrPC. All other informations made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the first information report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling under Section 162 CrPC. No such information/statement can properly be treated as an FIR and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of CrPC. Take a case where an FIR mentions cognizable offence under Section 307 or 326 IPC and the investigating agency learns during the investigation or receives fresh information that the victim died, no fresh FIR under Section 302 IPC need be registered which will be irregular; in such a case alteration of the provision of law in the first FIR is the proper course to adopt. Let us consider a different situation in which H

having killed W, his wife, informs the police that she is killed by an unknown person or knowing that W is killed by his mother or sister, H owns up the responsibility and during investigation the truth is detected; it does not require filing of fresh FIR against H - the real offender - who can be arraigned in the report under Section 173(2) or 173(8) CrPC, as the case may be. It is of course permissible for the investigating officer to send up a report to the Magistrate concerned even earlier that investigation is being directed against the person suspected to be the accused.

19. The scheme of CrPC is that an officer in charge of a police station has to commence investigation as provided in Section 156 or 157 CrPC on the basis of entry of the first information report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of the evidence collected, he has to form an opinion under Section 169 or 170 CrPC, as the case may be, and forward his report to the Magistrate concerned under Section 173(2) CrPC. However, even after filing such a report, if he comes into possession of further information or material, he need not register a fresh FIR; he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 CrPC.

20. From the above discussion it follows that under the scheme of the provisions of Sections 154, 155, 156, 157, 162, 169, 170 and 173 CrPC only the earliest or the first information in regard to the commission of a cognizable offence satisfies the requirements of Section 154 CrPC. Thus there can be no second FIR and consequently there can be no fresh investigation on receipt of every

> subsequent information in respect of the same cognizable offence or the same occurrence or incident giving rise to one or more cognizable offences. On receipt of information about a cognizable offence or an incident giving rise to a cognizable offence or offences and on entering the FIR in the station house diary, the officer in charge of a police station has to investigate not merely the cognizable offence reported in the FIR but also other connected offences found to have been committed in the course of the same transaction or the same occurrence and file one or more reports as provided in Section 173 CrPC."

Also, the Patna High Court, in the case of *Deo Pujan Thakur v. State of Bihar*[4], opined as hereunder:

> "18. Considering the entire evidence on record and the circumstances which has been brought by the defence in course of argument it transpires that the prosecution with held the first information and did not produce it before the Court for the reasons best known to it. It did not examined independent witness though some of these names have been mentioned in the evidence of the prosecution witnesses and some of them even then were charge- sheet witness only family members and interested witnesses who are inimical have been examined. The fardbeyan on the basis of which formal FIR was drawn is hit by Section 162, Cr PC. The post-mortem report as well as the evidence of PW 11 has corroborated the defence version of the case that the deceased was killed at a lonely place when he was coming after attending the call of nature. In the circumstances of the case the prosecution version is not reliable. The evidence which has been brought by the prosecution has failed to prove its case beyond all reasonable doubt. The judgment and order of conviction passed by the trial Court is not fit to be maintained."

4. (2005) Crl. L.J. Patna 1263.

7. It was further contended by the learned senior counsel that the other PWs who were highly interested were examined in the case. The independent witnesses were available but were not examined in the case by the prosecution. Therefore, the prosecution case is fatal for non examination of the independent witnesses to prove the charge against the accused. Hence, the concurrent finding recorded by the High Court on the charge under Section 302 read with Section 34 against the appellant is erroneous in law. The High Court has failed to take into consideration the evidence of PW2 who, according to the prosecution, is an informant. In his evidence he has stated that the dead body was recovered thereafter the statement of PW2 was recorded and he along with the other witnesses remained at the place of occurrence and none of them went to Police Station to inform the police. PW3 Damodar Singh in his evidence has stated that no body went to inform the police but PW4 Ashok Kumar has admitted in his evidence that his statement was recorded by a Judicial Magistrate where he had stated that he sent information to the police. PW9-I.O. has admitted in his evidence that on the information of Ashok Singh-PW4 he along with Officer-in-charge of the police station and several officers had gone to the place of occurrence before the fardbeyan was recorded and the case was registered. He has further stated that the fardbeyan was `sent to police station and then he was made as I.O. Further the High Court has failed to take into consideration the relevant aspect of the matter mentioned in the FIR under Column No.I fardbeyan was recorded at 7.00 p.m. and FIR was registered at 10.00 p.m. on 16.07.1996. The distance of the place of occurrence and the police station is about 16 kms. According to PW9, the I.O. on 16.07.1996 after 10 p.m. he was changed, therefore, learned senior counsel submits that on the basis of the evidence of PW4 Ashok Kumar and PW9 and in the light of the principles decided by this Court in the decisions referred to supra registering the FIR on the basis of statement of PW2 is not admissible in law as the same is hit by Section 162, Cr.P.C. In view of the aforesaid facts and legal evidence

regarding registration of the FIR by the police the learned Additional Sessions Judge and the High Court should have drawn judicial inference that registering the FIR on the basis of statement of PW2, which is hit by Section 162, Cr.P.C. is the result of manipulation of the case against the accused at the instance of the witnesses of this case and not registering the first information given by PW4 to the police station for the reason that it was hearsay. This vital important aspect of the matter has been omitted by the Additional Sessions Judge and the High Court. Therefore, the finding recorded in the impugned judgment on the charge leveled against the appellant and others is erroneous in law and the same is liable to be set aside. Further, the courts below have failed to appreciate the fact that there was no motive for the appellant to murder the deceased Shailendra Kumar but there is motive for false implication of the accused by the witnesses in this case. The learned senior counsel placed reliance upon PW4 Ashok Kumar's evidence wherein he has stated that Awadh Singh is the brother of accused Binda Singh who had brought a case against him and accused Umesh Singh and Bhuneshwar Singh, father of Nawal were witness and PW5 Balram Singh who is full brother of deceased Shailendra Kumar has admitted in his evidence that there was no enmity with accused and himself and also with his two brothers, including the deceased.

8. Further the learned senior counsel contended that the High Court has failed to consider the medical evidence, which does not support the prosecution case. According to the prosecution, the occurrence of incident is said to have taken place on 16.07.1996 at 3.30 p.m. when the deceased was going to join his duty from his village home. On the basis of the post mortem report on record, in Column Nos.21 to 23, PW8, the doctor clearly stated that not only stomach of the deceased but both bladders were empty and the time elapsed since death was 30 to 36 hours. Thereby the occurrence of the incident must have taken place in the early hours of 16.07.1996 as the deceased must have empty stomach.

Further, in the evidence of PW8, the description of the injuries in the post mortem report are also not in accordance with the allegations made by the witnesses. PW8 the doctor, has categorically admitted in his evidence that the deceased must have died before 30 hours from the time of the post mortem examination. It means that no occurrence of the incident took place at 3.30 p.m. on 16.07.1996 as alleged by the prosecution and the deceased was dead before the alleged time of occurrence. Therefore, the medical evidence is not in conformity with the prosecution case rather it supports the defence version making the entire prosecution case false. In this regard he has placed strong reliance upon the proposition of law laid by this Court to the effect that once the time of death as claimed by the prosecution is drastically different from the one as per the medical evidence, the case of the prosecution becomes doubtful and the benefit of doubt must be given to the appellant. He has placed reliance upon the following decisions of this Court, namely, *Thangavelu v. State of TN*[5], *Moti v. State of U.P.*[6], *Kunju Mohd. v. State of Kerala*[7], *Virendra v. State of U.P.*[8] and *Baso Prasad v. State of Bihar*[9].

9. Therefore, the learned senior counsel submits that the concurrent finding of fact on the charge recorded by the High Court against this appellant is erroneous and vitiated in law which is liable to be set aside and he may be acquitted of the charges leveled against him and he may be set at liberty by allowing this appeal.

10. On the other hand, Mr.Chandan Kumar, the learned counsel appearing on behalf of the State sought to justify the finding and reasons recorded in the impugned judgment, inter alia, contending that the High Court in exercise of its appellate

5. (2002) 6 SCC 498.
6. (2003) 9 SCC 444.
7. (2004) 9 SCC 193.
8. (2008) 16 SCC 582.
9. (2006) 13 SCC 65.

jurisdiction has examined the correctness of the findings and reasons recorded by the learned Sessions Judge on the charges framed against the appellant and on proper appraisal of the same, it has affirmed the conviction and sentence imposed against the appellant which is based on proper re-appreciation of evidence on record. The same is supported with valid and cogent reasons. Learned counsel further sought to justify registration of FIR on the basis of the information furnished by PW2 which is in conformity with the decision of this Court in *Binay Kumar v. State of Bihar*[10] relevant paragraph of which reads as under:

> "9. But we do not find any error on the part of the police in not treating Ext. 10/3 as the first information statement for the purpose of preparing the FIR in this case. It is evidently a cryptic information and is hardly sufficient for discerning the commission of any cognizable offence therefrom. Under Section 154 of the Code the information must unmistakably relate to the commission of a cognizable offence and it shall be reduced to writing (if given orally) and shall be signed by its maker. The next requirement is that the substance thereof shall be entered in a book kept in the police station in such form as the State Government has prescribed. First information report (FIR) has to be prepared and it shall be forwarded to the magistrate who is empowered to take cognizance of such offence upon such report. The officer in charge of a police station is not obliged to prepare FIR on any nebulous information received from somebody who does not disclose any authentic knowledge about commission of the cognizable offence. It is open to the officer-in-charge to collect more information containing details about the occurrence, if available, so that he can consider whether a cognizable offence has been committed warranting investigation."

11. Further, the correctness of the same is sought to be

10. (1997) 1 SCC 283.

justified by placing reliance upon the I.O.'s evidence. The counsel for the state has placed reliance upon the decision of this Court in *Dinesh Kumar v. State of Rajasthan*[11]. The relevant paragraphs are extracted hereunder:

> "11. It is to be noted that PWs 7 and 13 were the injured witnesses and PW 10 was another eyewitness and was the informant. Law is fairly well settled that even if acquittal is recorded in respect of the co-accused on the ground that there were exaggerations and embellishments, yet conviction can be recorded if the evidence is found cogent, credible and truthful in respect of another accused. The mere fact that the witnesses were related to the deceased cannot be a ground to discard their evidence.
>
> 12. In law, testimony of an injured witness is given importance. When the eyewitnesses are stated to be interested and inimically disposed towards the accused, it has to be noted that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has to be weighed pragmatically. The court would be required to analyse the evidence of related witnesses and those witnesses who are inimically disposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear, cogent and credible, there is no reason to discard the same. Conviction can be made on the basis of such evidence."

12. The learned counsel further submits that the dispute regarding the place of incident as contended by the learned counsel for the appellant is factually not correct. In view of the concurrent finding of the High Court regarding the place of occurrence is very much certain as it is said to be at Tungi. PW4 Ashok Kumar Singh in his evidence has categorically stated

11. (2008) 8 SCC 270.

that he is not an eye-witness but on the basis of hearsay he has informed the police. The I.O. has further stated in his evidence that PW4 is a hearsay witness and therefore his information could not have been treated as FIR. Hence he has requested this Court that there is no merit in this appeal, particularly, having regard to the concurrent finding on the charge by the High Court on proper appreciation of legal evidence and record and affirming the conviction and sentence for charge under Section 302 read with Section 34, IPC. Hence, the learned senior counsel has requested this Court not to interfere with the same in exercise of its jurisdiction.

13. In the backdrop of the rival legal contentions urged on behalf of the parties this Court has reasonably considered the same to answer the point which is formulated above in this judgment and answer the same against the appellant for the following reasons.

14. PW2 Arvind Kumar, who is the cousin brother of the deceased, accompanied him on the date of occurrence of the incident. At that point of time the appellant, along with other accused, surrounded them and it is stated that the appellant shot at the Kanpatti with revolver and other accused persons Binda Singh with the rifle in the stomach of the deceased and Sudhir Singh with rifle in the left thigh. PW7 has stated in his evidence that the aforesaid accused persons fled away at that time Ashok Singh, Damodar Singh, Balram Singh and Shyam Sunder Singh were going to the bazaar who have witnessed the incident. His evidence is supported by the evidence of the other witness namely PW3, who has stated that he has seen Moti Singh and Jaddu Singh catching both hands of the deceased and Moti Singh ordered him to fire and the said witness also spoken about the firings by Awadhesh Singh and Nawal Singh as stated by the PW2. Further, he has supported his evidence that Awadhesh Singh pushed the dead body in the Payeen and also stated that Moti Singh and Jaddu Singh had caught hold of the informant also. PW5 also claimed to

have seen Jaddu Singh and Moti Singh catching hands of the deceased and further he has stated that Umesh Singh, the appellant herein, had fired at the temple region of the deceased. Further, he has given categorical statement stating that Binda, Sudhir, Awadhesh and Nawal also had fired at the deceased with their rifles. Therefore, the evidence of PW2 has been supported by PW3, PW5 and PW7. In so far as PW6 is concerned he has given a general statement that he has seen the several persons surrounding the deceased and killing the deceased with rifle and revolver. Therefore, the trial court was right in recording the finding on the charge against the appellant on proper appraisal of the evidence of the eye-witness PW2 supported by PW3 and PW5. The said finding of fact on the charge of Sections 302 read with section 34, IPC against this appellant and others was seriously examined by the High Court and concurred with the same and in view of the evidence of PW2 and PW9 the informant who was eye-witness and the I.O.'s evidence regarding his evidence treating the statement of PW2 as FIR is perfectly legal and valid. Therefore, reliance placed upon the decisions of this Court referred to supra by the learned Senior Counsel in the course of his submission are not tenable in law as they are misplaced.

15. In so far as the medical evidence of the Doctor-PW8 read with the post mortem report upon which strong reliance is placed by the learned senior counsel for the appellant that death must have taken place prior to 30 to 36 hours as opined by the doctor that means it relates back to the early hours of 16.07.1996 but not at 3.30 p.m. as mentioned in the FIR. Once the time of death is drastically different from the one claimed by the prosecution its case is vitiated in law. In support of the above-said contention strong reliance placed upon the decisions of this Court on aforesaid cases are all misplaced as the same are contrary to the law laid down by this Court in *Abdul Sayeed v. State of Madhya Pradesh*[12]. The relevant paragraphs are extracted hereunder:

12. (2010) 10 SCC 259.

"33. In *State of Haryana v. Bhagirath* it was held as follows: (SCC p. 101, para 15)

> "15. *The opinion given by a medical witness need not be the last word on the subject.* Such an opinion shall be tested by the court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts *it is open to the Judge to adopt the view which is more objective or probable*. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course, due weight must be given to opinions given by persons who are experts in the particular subject."

34. Drawing on *Bhagirath* case, this Court has held that where the medical evidence is at variance with ocular evidence,

"it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the 'variable' keeping the medical evidence as the 'constant' ".

35. Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. The eyewitnesses' account requires a careful independent assessment and evaluation for its credibility, which should not be adversely prejudged on the basis of any other evidence, including medical evidence, as the sole touchstone for the test of such credibility.

> "21. … The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the 'credit' of the witnesses; their performance in the witness box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

36. In *Solanki Chimanbhai Ukabhai v. State of Gujarat* this Court observed: (SCC p. 180, para 13)

> "13. Ordinarily, the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eyewitnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eyewitnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence."

39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved."

16. The learned State counsel has rightly urged that if the medical and ocular evidence is contrary then the ocular evidence must prevail. This aspect of the matter has been elaborately discussed and the principle is laid down by this Court in the aforesaid decision. The findings and decision recorded and rendered by the learned Additional Sessions Judge after thorough discussion and on proper appreciation of evidence on record held that the doctor has opined that rigor mortis starts within 1 to 3 hours and vanishes after 36 hours. The said opinion of the medical officer PW8 regarding complete vanishing of rigor mortis from the dead body after 36 hours is medically not correct and this may be lack of his knowledge on the subject and he was liberal to the cross-examination by the defence lawyer. Further the learned Additional Sessions Judge has rightly referred to Medical Jurisprudence Digest written by B.L. Bansal Advocate, (1996 Edition at page 422), which clearly mentions that the rigor mortis persists from 12 to 24 hours and then passes off but it means that the faster the rigor mortis appears, the shorter time it persists. Further, rightly the learned Additional Sessions Judge has referred to the case decided by this Court in *Boolin Hulder v. State*[13] wherein it has been held that at the same climate of India, rigor mortis may commence in an hour to two and begin to disappear within 18 to 24 hours. Therefore, the learned Additional Sessions Judge has held that broadly speaking the faster the rigor mortis appears, the shorter the time it persists and further has rightly made observation that rigor mortis will be present in some parts of legs of the dead body. According to the medical officer PW8 there is no question of the time of death of the deceased. It must have preceded more than 24 hours which is the maximum limit for disappearance of rigor mortis. The said view of the medical officer PW8 was found fault with by the learned Additional Sessions Judge and held that he has not correctly deposed in his cross-examination regarding the time lapse of a dead person. He has extended the time for rigor mortis to be 30 to 36 hours and further rightly held that PW8 the medical officer, has deposed in his evidence contrary to the rule of medical jurisprudence. Therefore, the learned Additional Session Judge has rightly held in the impugned judgment the same cannot be the basis for the defence to acquit the accused. The claim by the appellant that the deceased has been killed in the early morning of 16.07.1996 and the allegation that the accused has been falsely implicated in the case has been rightly rejected by the learned Additional Sessions Judge and the same has been concurred with by the High Court by assigning the valid and cogent reasons in the impugned judgment. Rightly, the learned counsel appearing on behalf of the State has placed reliance upon the judgment of this Court referred to supra that between medical and ocular evidence the ocular evidence must be preferred to hold the charge proved. This is the correct legal position as held by both the learned Additional Sessions Judge as well as the High Court after placing reliance upon the statement of evidence of PW2, PW3, PW5 and PW7. Therefore, we do not find any erroneous reasoning on this aspect of the matter. There is no substance in submissions of the learned senior counsel on the above aspect of the matter with reference to judgments of this Court referred to supra which decisions have absolutely no application to the facts situation of the case on hand.

13. 1996 Crl. L.J. 513.

17. In view of the concurrent findings by the High Court as well as the learned Additional Sessions Judge and an order of conviction and sentence imposed against the appellant herein is on the basis of legal evidence on record and on proper appreciation of the same. Therefore, the same is not erroneous in law as the finding is supported with valid and cogent reasons. For the foregoing reasons the impugned judgment and order cannot be interfered with by this Court. Hence, the appeal is devoid of merit and accordingly it is dismissed.

B.B.B. Appeal dismissed.

DAYANAND ANGLO VEDIC (DAV) COLLEGE TRUST AND MANAGEMENT SOCIETY
v.
STATE OF MAHARASHTRA AND ANR.
(Civil Appeal No. 2678 of 2013)

MARCH 22, 2013

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

Constitution of India 1950 - Article 30 - Linguistic educational institution - Establishment and administration of - In a State - By a member of linguistic non-minority in another State - Held: In order to claim linguistic status for an institution in any State, the institution should have been established and should be administered by the persons who are minority in such State - A non-minority in another State cannot establish, administer and run such institution.

Words and Phrases: 'Establish' and 'Administer' - Meaning of, in the context of Article 30 of the Constitution of India, 1950.

Appellant-Society filed writ petition before High Court challenging the order of respondent No.2 withdrawing the linguistic minority status of the appellant-institution on the ground that since majority of the trustees were not residents of the State of Maharashtra, they could not be called linguistic minority. High Court dismissed the petition.

In appeal to this Court, the question for consideration was whether a member of linguistic non-minority in one State can establish a Trust or Society in another State and claim minority status in that State.

Dismissing the appeal, the Court

HELD: 1. The view taken by the High Court that the State Government had a right to correct the mistake if any certificate granting minority linguistic status is granted contrary to law; and that as admittedly the trustees of the appellant do not reside in the State of Maharashtra, where Hindi speaking people are linguistic minority, the appellant-Trust/Society cannot claim to be a minority institution, is justified. The rights conferred by Article 30 of the Constitution to the minority are in two parts. The first part is the right to establish the institution of minority's choice and the second part relates to the right to administration of such institution. [Paras 24 and 25] [844-F-H; 845-A]

2. Though Article 30 itself does not lay down any limitation upon the right of a minority to administer its educational institution but this right is not absolute. This is subject to reasonable regulations for the benefit of the institution. The State Government and Universities can issue directions from time to time for the maintenance of the standard and excellence of such institution which is necessary in the national interest. The Government Resolution dated 4.7.2008 prescribes a procedure for granting minority status. The Resolution, inter alia, permits the persons of the State of Maharashtra whose mother tongue is Indian language other than Marathi will be eligible to submit an application for recognition of their linguistic minority educational institution. The only rider put is that the minimum 2/3rd trustees of the Management Committee of the Society/Institution should be from the concerned minority community. [Paras 29 and 30] [849-A-D]

3. In order to claim minority/linguistic status for an institution in any State, the authorities must be satisfied firstly that the institution has been established by the persons who are minority in such State; and, secondly, the right of administration of the said minority linguistic

institution is also vested in those persons who are minority in such State. The right conferred by Article 30 of the Constitution cannot be interpreted as if irrespective of the persons who established the institution in the State for the benefit of persons who are minority, any person, be it non-minority in other place, can administer and run such institution. [Para 31] [849-E-G]

State of Kerala Etc. vs. Mother Provincial Etc. **AIR 1970 SC 2079: 1971 (1) SCR 734;** *S.P. Mittal Etc. vs. Union of India and Ors.* **AIR 1983 SC 1: 1983 (1) SCR 729;** *A.P. Christians Medical Educational Society vs. Government of Andhra Pradesh and Anr.* **AIR 1986 SC 1490: 1986 (2) SCR 749;** *S. Azeez Basha and Anr. Etc. vs. The Union of India Etc.* **AIR 1968 SC 662: 1968 SCR 833 - relied on.**

T.M.A. Pai Foundation and Ors. vs. State of Karnataka and Ors. **(2002) 8 SCC 481: 2002 (3) Suppl. SCR 587** *P.A. Inamdar and Ors. vs. State of aharashtra and Ors.* **(2005) 6 SCC 537: 2005 (2) Suppl. SCR 603;** *Kerala Educational Bill, 1957, In re.* **1959 SCR 995 - referred to.**

D.A.V. College Etc. Etc. vs. State of Punjab and Ors. **(1971) 2 SCC 269;** *Kanya Junior High School, Bal Vidya Mandir, Etah, U.P. vs. U.P. Basic Shiksha Parishad, Allahabad, U.P. and Ors.* **(2006) 11 SCC 92: 2006 (4) Suppl. SCR 813 - cited.**

Case Law Reference:

(1971) 2 SCC 269	**cited**	**Para 8**
2006 (4) Suppl. SCR 813	**cited**	**Para 8**
2002 (3) Suppl. SCR 587	**referred to**	**Para 13**
2005 (2) Suppl. SCR 603	**referred to**	**Para 14**
1959 SCR 995	**referred to**	**Para 15**
1971 (1) SCR 734	**relied on**	**Para 25**
1983 (1) SCR 729	**relied on**	**Para 26**
1986 (2) SCR 749	**relied on**	**Para 27**
1968 SCR 833	**relied on**	**Para 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2678 of 2013.

From the Judgment and Order dated 24.02.2010 of the High Court of Bombay in W.P. No. 1053 of 2010.

Ranjit Kumar, S.S. Ray, Rakhi Ray, Nikunj Dayal, Vaibhav Gulia, Payal Dayal, Pramod Dayal for the Appellant.

Shankar Chillarge, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

M.Y. EQBAL, J. 1. Leave granted.

2. The appellant - Dayanand Anglo Vedic (DAV) College Trust and Management Society has challenged the order dated 24.2.2010 passed by a Division Bench of the Bombay High Court in Writ Petition No.1053 of 2010. By the said order, the Division Bench dismissed the writ petition and refused to interfere with the order dated 26.10.2009 passed by respondent No.2 (The Principal Secretary and Competent Authority, Minority Development Department, Government of Maharashtra) withdrawing the linguistic minority status of the appellant institution which was earlier granted by order dated 11.7.2008.

3. The withdrawal of the recommendation for the appellant-Society as linguistic minority institution was on the ground that the earlier order granting recommendation was under the mistake that the trustees of the appellant were residing in the State of Maharashtra.

4. The brief facts leading to this appeal are thus: The appellant-Society was formed in the year 1885; and it was originally got registered under the Societies' Registration Act, 1860 at Lahore & subsequently in the year 1948 in the State of Punjab. Since then, the appellant is said to have established a large number of schools and colleges all over India and is running such institutions all over the country. The aims and objects of the appellant-Society as stated are to establish educational institutions to encourage the study of Hindi, classical Sanskrit and Vedas and also to provide instructions in English and other languages, Arts, science including Medicine, Engineering etc. The appellant's further case is that the Society started educational institutions at Solapur in the State of Maharashtra in 1940 and is having other schools and colleges at different places in the State of Maharashtra. The persons speaking Hindi language and the followers of Arya Samaj in the State of Maharashtra constituted less than 50% of its total population. Therefore, being formed by the persons belonging to Arya Samaj and speaking Hindi language, the appellant-Society claimed to be a linguistic minority within the meaning and purview of Article 30 of the Constitution of India. On these facts, the appellant-Society stated that it was earlier granted linguistic minority status in the State of Maharashtra by the Higher and Technical Educational Department of the respondents for the academic years 2004-05 and 2005-06. The said recognition was granted after full appreciation of the documents and hearing of the appellant. For the year 2006-07 also, the appellant-Society was declared a linguistic minority after appreciation of documents. However, in the year 2008, the Government of Maharashtra issued a new Resolution dated 04.07.2008 laying down the procedure for granting status of religious/linguistic minority to educational institutions run by the minorities in the State of Maharashtra. On the basis of said Resolution, the respondents issued a Certificate on 11.7.2008 recognizing the appellant-Society at Solapur as a linguistic minority institution for the academic year 2008-09 also.

5. The problem started after the appellant-Society made an application on 15.7.2008 requesting respondent No. 1 to issue certificate of recognition in the name of appellant New Delhi instead of Solapur. Instead of correcting the alleged mistake in the Certificate, respondent No.2 passed an order dated 2.8.2008 cancelling the Certificate dated 11.7.2008 issued to the appellant. The respondents by the aforesaid order cancelled the recognition of the appellant as a minority linguistic educational institution for the years 2004-05 and 2006-07 also. The main ground for cancellation of recognition of the linguistic minority status of the appellant was that though the appellant-Trust was registered under the Bombay Public Trust Act by the Charity Commissioner, Mumbai, a majority of the trustees were not residents of the State of Maharashtra and, therefore they cannot be called a linguistic minority.

6. Challenging the aforesaid order of the respondents cancelling the recognition, the appellant-Society moved the Bombay High Court by filing Writ Petition No.284 of 2009, which was finally disposed of with a direction to the respondents to pass a fresh order after giving opportunity of hearing and considering all the documents of the appellant. In compliance of that order, the appellant filed a fresh application on 20.08.2009 together with all the necessary documents requesting respondent No. 2 to restore the linguistic minority status of the appellant. The said respondent, after hearing the appellant-Society, finally rejected the application in terms of order dated 26.10.2009 refusing to restore the earlier recognition of linguistic minority status granted to the appellant. The appellant-Society then challenged the order dated 26.10.2009 by filing a writ petition being Writ Petition No.1053 of 2010 before the Bombay High Court. The said writ petition was finally heard and dismissed by the Division Bench of the Bombay High Court by impugned order dated 24.2.2010. For better appreciation, the aforesaid order dated 24.2.2010 is reproduced hereinbelow:-

"The Petitioner-institution was given initially recommendation as minority institution. But because that recommendation was given under a mistake that the trustees of the Petitioner reside in the State of Maharashtra. The trustees of the Petitioner are claiming to be belonging to linguistic minority because they are Hindi speaking people. But all the trustees of the Petitioner are residing in the area where majority language is Hindi. The authorities, therefore, have said that the Petitioner-trust cannot claim to be an institution belonging to linguistic minority in the State of Maharashtra. The learned counsel appearing for the Petitioner submitted that as a certificate was granted on 11.6.2008 (sic. 11.7.2008) it could not have been withdrawn by the impugned order.

The submission is not well founded. Because it is the case of the Government that certificate was issued under a mistake. In our opinion, therefore, the State Government had a right to correct that mistake. What is further pertinent to note is that the Petitioner itself returned the certificate which had been granted to the Petitioner.

Taking overall view of the matter, therefore, as admittedly the trustees of the petitioner do not reside in the State of Maharashtra, where Hindi speaking people are a linguistic minority, the petitioner trust cannot claim to be a minority institution. Petition is, therefore, rejected."

7. By filing the instant appeal by special leave, the appellant-Society has challenged the aforesaid order passed by the Division Bench refusing to interfere with the order dated 26.10.2009 passed by the respondents, thereby withdrawing the linguistic minority status of the appellant, which was earlier recognized by respondent No.2 by order dated 11.7.2008.

8. Assailing the impugned orders, Mr. Ranjit Kumar, learned senior counsel appearing for the appellant-Society firstly submitted that the High Court failed to appreciate that the

order impugned dated 26.10.2009 passed by the respondents adopted a mechanical procedure and in an arbitrary manner withdrew the recognition. According to the learned senior counsel, the order of withdrawal of recognition passed by the respondents is absolutely unconstitutional and illegal, inasmuch as the appellant is an institution established in the State of Maharashtra by the citizens speaking Hindi language and as such it is a linguistic minority institution in the State of Maharashtra. He submitted that the appellant is a linguistic minority in the State of Maharashtra as Marathi is the language spoken by majority of the people; and the place of residence of the trustees of appellant-Society is irrelevant and immaterial qua the establishment and administration of the educational institution by the appellant-Society in the State of Maharashtra. Learned counsel submitted that the order of withdrawal is erroneous and contrary to the provisions of Government Resolution dated 4.7.2008 which prescribes the procedure for granting a minority status and recognition certificate. He submitted that the Resolution nowhere prescribes that any institution or trust claiming the linguistic minority status should have such trustees who are residents of the said State. Learned senior counsel, however, submitted that the pre-condition for grant of minority status to an educational institution should be only that the institution is of the persons whose mother-tongue is any Indian language other than Marathi; and further, minimum 2/3rd trustees of the Managing Committee of the Society/ institution should be from the concerned minority community. According to the learned counsel, the appellant-Society fulfilled all the conditions specified in the Government Resolution dated 4.7.2008 and as such the appellant is eligible and qualified for grant of recognition as linguistic minority. Learned senior counsel put heavy reliance on the decisions of this Court in *D.A.V. College Etc. Etc. vs. State of Punjab & Ors.* (1971) 2 SCC 269, *T.M.A. Pai Foundation & Ors. vs. State of Karnataka & Ors.* (2002) 8 SCC 481 and *Kanya Junior High School, Bal Vidya Mandir, Etah, U.P. vs. U.P. Basic Shiksha Parishad, Allahabad, U.P. & Ors.* (2006) 11 SCC 92.

9. Finally, learned counsel submitted that the object of running the institution is important and not the persons running the institution. Article 30 of the Constitution protects the right of the minority to establish and administer the minority/linguistic institution in order to preserve the culture and language of the minorities.

10. The stand of the respondents as stated in the counter affidavit is that the appellant-Trust does not fulfill the required criteria for granting linguistic minority status in the State of Maharashtra. The respondents' case is that the appellant's institution was established in the State of Maharashtra by citizens residing outside the State of Maharashtra and speaking Hindi language and as such they are not a linguistic minority in the State of Maharashtra. The respondents' case is that in order to claim the protection by virtue of being a minority community as guaranteed by the Constitution, the obvious requirement should be that one must be a minority. It is stated that there is no bar or restriction for running educational institution in the State by the trusts which are registered outside the State of Maharashtra, but these institutions are not treated as minorities and they will definitely be subject to the Rules and Regulations of the State which are applicable to non-minority institutions.

11. Lastly, it is stated by the respondents that the constitutional protection under Article 30 of the Constitution of India is available only to those who are actually and physically in minority in the State. The appellant is an institution established in the State of Maharashtra by citizens residing outside the State of Maharashtra and speaking Hindi language and as such they are not linguistic minority in the State of Maharashtra. Hence, the status earlier granted by the respondents to the appellant-Society has been rightly withdrawn, especially when the appellant wanted such recognition in the name of the Trust registered in New Delhi consisting of the trustees residing in Delhi.

12. As noticed above, Mr. Ranjit Kumar has put heavy

reliance on *T.M.A. Pai Foundation* case (supra) in support of his contentions. In that case, the 11-Judge Bench of this Court has settled many issues related to Articles 29 and 30 of the Constitution of India. Their Lordships held that Article 30(1) makes it clear that religious and linguistic minorities have been put on par, insofar as that Article is concerned. Therefore, whatever be the unit - whether a State or the whole of India - for determining a linguistic minority, it would be the same in relation to a religious minority. India is divided into different linguistic States. The States have been carved out on the basis of the language of the majority of persons of that region. For example, Andhra Pradesh was established on the basis of the language of that region viz. Telugu. "Linguistic minority" can, therefore, logically only be in relation to a particular State. If the determination of "linguistic minority" for the purpose of Article 30 is to be in relation to the whole of India, then within the State of Andhra Pradesh, Telugu speaking people will have to be regarded as a "linguistic minority". This will clearly be contrary to the concept of linguistic States. Their Lordships further held that Article 30 gives the right to a linguistic or religious minority of a State to establish and administer educational institutions of their choice. It was observed that as a result of the insertion of Entry 25 in List III, Parliament can now legislate in relation to education, which was only a State subject previously. The jurisdiction of Parliament is to make laws for the whole or a part of India. It is well recognized that geographical classification is not violative of Article 14. It would, therefore, be possible that, with respect to a particular State or group of States, Parliament may legislate in relation to education. However, Article 30 gives the right to a linguistic or religious minority of a State to establish and administer educational institutions of their choice. The minority for the purpose of Article 30 cannot have different meanings depending upon as to who is legislating. Language being the basis for the establishment of different States, for the purpose of Article 30 a "linguistic minority" will have to be determined in relation to the State in which the educational institution is sought to be established. The position with regard

to the religious minority is similar, since both religious and linguistic minorities have been put on par in Article 30.

13. In the instant appeal, the sole question that arises for consideration is as to whether a member of a linguistic non-minority in one State can establish a Trust or Society in another State and claim minority status in that State. In T.M.A. Pai Foundation case, 11 questions were framed for being answered. One of those questions being Question No.7 was the same as that in the instant case, namely, whether the member of a linguistic non-minority in one State can establish a trust or society in another State and claim minority status in that State. Their Lordships held that this question need not be answered by that Bench and it would be dealt with by a regular Bench.

14. In the case of *P.A. Inamdar and Ors. vs. State of Maharashtra & Ors.* (2005) 6 SCC 537, a 7-Judge Bench of this Court has elaborately discussed *T.M.A. Pai Foundation* case and has clarified the issues further. For better appreciation, some of the relevant paragraphs are quoted hereinunder:

> "91. The right to establish an educational institution, for charity or for profit, being an occupation, is protected by Article 19(1)(g). Notwithstanding the fact that the right of a minority to establish and administer an educational institution would be protected by Article 19(1)(g) yet the founding fathers of the Constitution felt the need of enacting Article 30. The reasons are too obvious to require elaboration. Article 30(1) is intended to instil confidence in minorities against any executive or legislative encroachment on their right to establish and administer educational institution of their choice. Article 30(1) though styled as a right, is more in the nature of protection for minorities. But for Article 30, an educational institution, even though based on religion or language, could have been controlled or regulated by law enacted under clause

> (6) of Article 19, and so, Article 30 was enacted as a guarantee to the minorities that so far as the religious or linguistic minorities are concerned, educational institutions of their choice will enjoy protection from such legislation. However, such institutions cannot be discriminated against by the State solely on account of their being minority institutions. The minorities being numerically less qua non-minorities, may not be able to protect their religion or language and such cultural values and their educational institutions will be protected under Article 30, at the stage of law-making. However, merely because Article 30(1) has been enacted, minority educational institutions do not become immune from the operation of regulatory measures because the right to administer does not include the right to maladminister. To what extent the State regulation can go, is the issue. The real purpose sought to be achieved by Article 30 is to give minorities some additional protection. Once aided, the autonomy conferred by the protection of Article 30(1) on the minority educational institution is diluted as provisions of Article 29(2) will be attracted. Certain conditions in the nature of regulations can legitimately accompany the State aid."

> "95. The term "minority" is not defined in the Constitution. Chief Justice Kirpal, speaking for the majority in Pai Foundation took a clue from the provisions of the States Reorganisation Act and held that in view of India having been divided into different linguistic States, carved out on the basis of the language of the majority of persons of that region, it is the State, and not the whole of India, that shall have to be taken as the unit for determining a linguistic minority vis-à-vis Article 30. Inasmuch as Article 30(1) places on par religions and languages, he held that the minority status, whether by reference to language or by reference to religion, shall have to be determined by treating the State as a unit. The principle would remain the same whether it is a Central legislation or a State

legislation dealing with a linguistic or religious minority. Khare,J. (as His Lordship then was), Quadri, J. and Variava and Bhan, JJ. in their separate concurring opinions agreed with Kirpal, C.J. According to Khare, J., take the population of any State as a unit, find out its demography and calculate if the persons speaking a particular language or following a particular religion are less than 50% of the population, then give them the status of linguistic or religious minority. The population of the entire country is irrelevant for the purpose of determining such status. Quadri, J. opined that the word "minority" literally means "a non-dominant" group. Ruma Pal, J. defined the word "minority" to mean "numerically less". However, she refused to take the State as a unit for the purpose of determining minority status as, in her opinion, the question of minority status must be determined with reference to the country as a whole. She assigned reasons for the purpose. Needless to say, her opinion is a lone voice. Thus, with the dictum of Pai Foundation it cannot be doubted that a minority, whether linguistic or religious, is determinable only by reference to the demography of a State and not by taking into consideration the population of the country as a whole.

96. Such definition of minority resolves one issue but gives rise to many a questions when it comes to defining "minority educational institution". Whether a minority educational institution, though established by a minority, can cater to the needs of that minority only? Can there be an enquiry to identify the person or persons who have really established the institution? Can a minority institution provide cross-border or inter-State educational facilities and yet retain the character of minority educational institution?"

15. Their Lordships further observed referring the decision of this Court in Kerala Educational Bill, 1957, In re., 1959 SCR 995, as under:

"97. In *Kerala Education Bill* the scope and ambit of the right conferred by Article 30(1) came up for consideration. Article 30(1) does not require that minorities based on religion should establish educational institutions for teaching religion only or that a linguistic minority should establish educational institution for teaching its language only. The object underlying Article 30(1) is to see the desire of minorities being fulfilled that their children should be brought up properly and efficiently and acquire eligibility for higher university education and go out in the world fully equipped with such intellectual attainments as will make them fit for entering public services, educational institutions imparting higher instructions including general secular education. Thus, the twin objects sought to be achieved by Article 30(1) in the interest of minorities are: (i) to enable such minority to conserve its religion and language, and (ii) to give a thorough, good, general education to children belonging to such minority. So long as the institution retains its minority character by achieving and continuing to achieve the above-said two objectives, the institution would remain a minority institution.

98. The learned Judges in Kerala Education Bill were posed with the issue projected by Article 29(2). What will happen if the institution was receiving aid out of State funds? The apparent conflict was resolved by the Judges employing a beautiful expression. They said, Articles 29(2) and 30(1), read together, clearly contemplate a minority institution with a "sprinkling of outsiders" admitted in it. By admitting a member of non-minority into the minority institution, it does not shed its character and cease to be a minority institution. The learned Judges went on to observe that such "sprinkling" would enable the distinct language, script and culture of a minority being propagated amongst non-members of a particular minority community and that would indeed better serve the object of conserving the language, religion and culture of that minority."

Paras 101 and 102 are also worth to be quoted here which are as under:

"In this background arises the complex question of trans-border operation of Article 30(1). Pai Foundation has clearly ruled in favour of the State (or a province) being the unit for the purpose of deciding minority. By this declaration of law, certain consequences follow. First, every community in India becomes a minority because in one or the other State of the country it will be in minority - linguistic or religious. What would happen if a minority belonging to a particular State establishes an educational institution in that State and administers it but for the benefit of members belonging to that minority domiciled in the neighbouring State where the community is in majority? Would it not be a fraud on the Constitution? In *St. Stephen's,* (1992) 1 SCC 558, Their Lordships had ruled that Article 30(1) is a protective measure only for the benefit of religious and linguistic minorities and "no ill-fit or camouflaged institution should get away with the constitutional protection" (SCC p.587 para 28). The question need not detain us for long as it stands answered in no uncertain terms in Pai Foundation. Emphasising the need for preserving its minority character so as to enjoy the privilege of protection under Article 30(1), it is necessary that the objective of establishing the institution was not defeated.

" If so, such an institution is under an obligation to admit the bulk of the students fitting into the description of the minority community. Therefore, the students of that group residing in the State in which the institution is located have to be necessarily admitted in a large measure because they constitute the linguistic minority group as far as that State is concerned. In other words, the predominance of linguistic minority students hailing from the State in which the minority educational institution is established should be present. The management bodies of such institution cannot resort to the device of admitting the linguistic students of the adjoining State in which they are in a majority, under the façade of the protection given under Article 30(1)". (SCC p.585, para 153.)

The same principle applies to religious minority. If any other view was to be taken, the very objective of conferring the preferential right of admission by harmoniously constructing Articles 30(1) and 29(2), may be distorted.

It necessarily follows from the law laid down in Pai Foundation that to establish a minority institution the institution must primarily cater to the requirements of that minority of that State else its character of minority institution is lost. However, to borrow the words of Chief Justice S.R. Das in Kerala Education Bill a "sprinkling" of that minority from the other State on the same footing as a sprinkling of non-minority students, would be permissible and would not deprive the institution of its essential character of being a minority institution determined by reference to that State as a unit."

16. Mr. Ranjit Kumar, learned counsel submitted that in *P.A. Inamdar* case (supra), the question that arose for consideration before the 7-Judge Bench has been left untouched observing that the said questions have been dealt with by the regular Bench.

17. The main grievance of the appellant-Society is that the impugned order of withdrawal of recognition made by the State authorities is erroneous and contrary to the provisions of Government Resolution dated 4.7.2008 which prescribes the procedure for granting minority status. The appellant-Society alleged to have fulfilled all the conditions specified in the said

Resolution dated 4.7.2008 and thereby made itself eligible and qualified for grant of recognition as linguistic minority. As noticed above, the resolution dated 4.7.2008 issued by the Minority Development Department of the State of Maharashtra lays down the conditions and procedure for the grant of certificate of minority linguistic character of the institution. The relevant portion of the Resolution reads as under:

> "RESOLUTION: The issue of making existing procedure easy for granting the recognition as cadre as religious/ linguistic minority societies which are being conducted by the minorities was under the consideration of the State Government for some time. Accordingly, after consulting with the experts in this field interested persons and taking into consideration directions given by the Hon'ble Supreme Court in this connection from time to time after superseding the Central Administration Department, Resolution No.MS-2006/634/CR-63/2006/35, dt. 11.6.2007, the Government of Maharashtra is prescribing terms and conditions and procedure for providing recognition of religious/societies conducted/managed by the State as detailed hereunder:-
>
> (1) The Competent Authority for providing recognition of minority cadre:
>
> For providing recognition of religious linguistic minority cadre to the educational societies managed by minorities of the State, State Government has declared by the Principal Secretary/Secretary Minority Development Department, Government of Maharashtra as Competent Authority as per Government Notification No. MES-2008/CR-149/08/E-1: dt. 4.7.2008.
>
> (2) Touchstones for the eligibility of the recognition for religious linguistic minority:

> (1) Those educational societies to whom recognition has been granted prior to 11.6.2007 as per specific order or letter or in accordance with General Administration Department, Government Resolution No.MES-2006/634/CR-63/2006/35 dated 11.6.2007 as minority educational institutions/societies; such educational societies/institutions are not required to submit application again for the recognition of the minority cadre. However, conditions prescribed at para-5 hereunder will be applicable to all such societies.
>
> (2) It is necessary that applicant minority institution/society should have been registered under Societies Registration Act, 1860 or Bombay Public Trusts Act, 1950 or other concerned statute. The concerned minority society of the institution should have mentioned in its bye-laws of rules of which the religious/linguistic minority communities that society belong, it has been established to protect that the interest that minority community.
>
> (3) Institution/society of all religions which have been notified by the Central Government/ Maharashtra Government will be eligible to submit the application for obtaining the recognition for their educational institutions as religious minority educational institution.
>
> (4) Educational institution of such persons whose mother tongue is other Indian language than Marathi will be eligible to submit the application for the recognition of minority educational society of education.

(5) It is necessary that minimum 2/3rd trustees of the Management Committee of the Applicant Society/institution should be from concerned minority community."

(emphasis given)

18. From a perusal of the relevant provisions of the Resolution quoted hereinabove, it is manifest that one of the conditions, inter alia, is that the educational institutions of such persons whose mother tongue is other Indian language than Marathi will be eligible to submit their application for recognition and that minimum 2/3rd trustees of the Management Committee of the Society or institution should be from concerned minority community. In other words, as per the Resolution, 2/3rd of the trustees of the Management Committee of the Society should be from minority community.

19. On a perusal of the documents contained in the paperbook, the following facts emerged:

(i) By communication dated 28.06.2006 issued by the Urban Secretary, Higher and Technical Education Department, Government of Maharashtra, the Director, Higher Education, Maharashtra State, Pune, was informed that on the basis of the representation submitted by Dayanand Institutions at Solapur for providing minority cadre (Hindi linguistic), the Government has granted minority cadre (Hindi linguistic) to the higher colleges (degree colleges) managed by the Dayanand Institutions, Solapur for two educational years i.e. 2006-07 and 2007-2008.

(ii) In the application dated 6.7.2007 submitted by the appellant for obtaining sanction of religious/ linguistic minority, although in column No.1 of the form of application, name of the Society has been shown as Dayanand Anglo Vedic (DAV) College Trust and Management Society, New

Delhi, but other required information has been given in the manner hereinunder:-

Whether minimum 2/3rd persons or trustees/ members of Board of Directors who are looking after the business of the society are from minority/ linguistic group, if yes, their numbers.	All Trustees/Members of the Board of Directors of the Society who are looking after the business of the society are from Arya Community and their mother tongue is Hindi

20. It is, therefore, clear that the appellant has not correctly furnished the required information, inasmuch as it was not said that the Trustees/Members of the Board of Directors, who are looking after the business of the Society, are non-minority. Obviously, the reason is that the persons or trustees, who are managing the business of the Society are non-minority i.e. residing in New Delhi and not in the State of Maharashtra.

21. The Certificate of Recognition was granted for the year from 2004-2008 in the name of appellant's institution i.e. Educational Trust and Management Society, Solapur. For better appreciation, the last Certificate granted on 11.7.2008 for the academic year 2008-09 is reproduced hereinbelow:-

"GOVERNMENT OF MAHARASHTRA
Competent Authority and Principal Secretary Minority Development Department, Mantralaya, Mumbai-400032.

No.MES-2007/264/CR-145/2007/35/D-1 Date:11.7.2008

CERTIFICATE FOR THE RECOGNITION OF MINORITY CADRE

Educational Trust and Management Society, Solapur had submitted the Application on 9.7.2007 for obtaining certificate for the reorganization of their society in the cadre as Linguistic Minority Educational Institute. During the

hearing which was conducted of the said Institute before me on 11.7.2008, on the basis of submissions made by the Officials of the Institute, I have satisfied that, the said Institute is being established and conducted through persons from Linguistic (Hindi) Minority or Group of persons, declared by State Government as per touchstone prescribed under Minority Development Department, Government Resolution No.MES-2008/CR133/2008/D-1 dated 4.7.2008. as a result it is being declared that the said Institute is Linguistic (Hindi) Minority Educational Institute.

This certificate will be valid only for the State of Maharashtra. The Linguistic Minority Cadre which has been granted to the said society will be applicable to all educational benches conducted by the Institution.

The Linguistic Minority Cadre which has been granted to the above mentioned Educational Institution will be legally valid from the academic year 2008-2009. it will be binding to comply with the touchstones and conditions constantly and specifically which have been prescribed as per Government Resolution No. MES-2008/CR-133/2008/D-1 dated 4.7.2008.

Sd/-

(TF.Thekkekara)
Competent Authority Principal Secretary
Minority Development Department
Mantralaya,, Mumbai-400032."

22. It was for the first time that the appellant by letter/ representation dated 15.7.2008 addressed to the Competent Authority, Minority Development Department, Mumbai, stated that the recognition certificate for linguistic minority has been issued in the name of "Dayanand Anglo Vedic (DAV) College Trust and Management Society, Solapur". Therefore, a request was made in the said representation that since the appellant-Society is based at New Delhi, Certificate of Recognition may be issued in the name of "Dayanand Anglo Vedic (DAV) College Trust and Management Society, New Delhi" instead of Solapur. The said representation was rejected by the respondents mainly on the ground that only those Hindi speaking persons who are residing in Maharashtra, will be treated as minority in Maharashtra. Admittedly, in the instant case, the appellant-Trust/Society is registered at New Delhi and majority of the trustees reside at New Delhi and, therefore, these persons cannot be treated as minority in the State of Maharashtra and they cannot claim the protection of linguistic minority in the State of Maharashtra. The aforesaid order was impugned in the writ petition which ultimately resulted in a direction to the respondents to pass a fresh order after giving opportunity of hearing to the appellant.

23. In compliance of the said direction, the respondents passed the impugned order dated 26.10.2009. The Authority, while rejecting the application for the grant of minority status, recorded the following reasons:

A) On scrutiny of papers, it was seen that although the covering application cited the name of the institution as "Dayanand Institutions Solapur", the trust deed was registered in the name of "Dayanand Anglo Vedic College Trust and Management Society" and the majority of the trustees resided at New Delhi.

B) The certificate of registration submitted by the Dayanand Institutions Solapur in the name of `Dayanand Anglo Vedic College Trust and Management Society' issued by the Charity Commissioner Mumbai and their application dated 6.7.07 on the letterhead styled 'Dayanand Institutions Solapur' led the Competent Authority to believe that the trustees were located in Maharashtra, when in fact they were not residents of Maharashtra. It was on the basis of these documents that the certificate of recognition as a minority institution had been issued on the 11th July, 2008. the application of the

so-called `Dayanand Institutions Solapur' by its letter dated 15.07.08 for a certificate of recognition of linguistic minority status to the 'Dayanand Anglo Vedic College Trust and Management Society, New Delhi' was rejected in the light of the above facts.

C) It was noticed from the documents submitted by the organization, that although the trust had produced a deed of registration in the name and style `Dayanand Anglo Vedic College Trust and Management Society', registered at Mumbai by the Charity Commissioner, Greater Mumbai, the organization was also registered under the name and style `Dayanand Anglo Vedic College Trust and Management Society' under the Societies Registration Act, 1860 at Lahore on 30.6.1948. it is seen from the copy of the Schedule 1 of the list of trustees, issued by the Charity Commissioner Mumbai on 7.3.08, that of the 34 trustees of the `Dayanand Anglo Vedic College Trust and Management Society' recorded with the Charity Commissioner Greater Mumbai, 25 of the trustees reside in New Delhi, 4 in Haryana, 4 in Punjab and one at Ranchi. It is not denied by the applicant trust that in the case of both trusts viz. registered in 2003 under the Mumbai Public Trust Act, 1950 and uner the Societies Registration Act 1860 at Lahore in 30.6.1948, the majority of the trustees reside in New Delhi and that the majority of them reside outside Maharashtra.

D) There is no separate trust or society registered in the name of the `Dayanand Institutions Solapur'. This entity appears to exist only on the letterhead by which an application seeking minority status was submitted to the Government on 6th July, 2007.

E) The representative of the Dayanand Anglo Vedic College Trust And Management Society also stated that the Dayanand Institutions Solapur were working in Maharashtra for the poor students in Maharashtra in the best traditions of an academic institution wedded to the

cause of excellence in education. They also stated that they could not recruit teachers with an excellent academic qualification in order to make the institution an excellent institution, as they were hampered by the requirement of the reservation of ST and other reservations. There were no qualified excellent teachers available with an ST background. Hence they desired to avoid this requirement of reservations in recruitment of teachers by having a minority status.

F) In regard to the other contentions of the trust, it is clear that this application for a minority status is being made by the `Dayanand Anglo Vedic College Trust and Management Society' of Arya Samaj members only to avoid the implementation of the reservations in favour of Scheduled Castes and Scheduled Tribes and other backward communities, while recruiting teachers and staff in the school. This is against the constitutional provisions for the welfare and development of SCs and STs and cannot be accepted.

24. As noticed above, the aforesaid order of the respondents dated 26.10.2009 was challenged before the Bombay High Court in W.P. No.1053 of 2010. Dismissing the said writ petition, the High Court noticed the fact that though the appellant claimed linguistic minority status, but all the trustees of the appellant-Society are residing in the area where majority language is Hindi. The High Court took the view that the State Government had a right to correct the mistake if any certificate granting minority linguistic status is granted contrary to law. The High Court was further of the view that as admittedly the trustees of the appellant do not reside in the State of Maharashtra, where Hindi speaking people are linguistic minority, the appellant-Trust/Society cannot claim to be a minority institution.

25. We have no doubt that the view taken by the High Court is justified. The rights conferred by Article 30 of the Constitution to the minority are in two parts. The first part is the right to

establish the institution of minority's choice and the second part relates to the right to administration of such institution. The word establishment herein means bringing into being of an institution and it must be by minority community. The administration means management of the affairs of the institution. Reference may be made to be the decision of this Court in the case of *State of Kerala Etc. vs. Mother Provincial Etc.* AIR 1970 SC 2079.

26. Similarly, in the case of *S.P. Mittal Etc. vs. Union of India and Others,* AIR 1983 SC 1, this Court held that in order to claim the benefit of Article 30, the community must firstly show and prove that it is a religious or linguistic minority; and secondly, that the institution has been established by such linguistic minority.

27. In the case of *A.P. Christians Medical Educational Society vs. Government of Andhra Pradesh & Anr.* AIR 1986 SC 1490 (para 8), this Court elaborately discussed the rights guaranteed under Article 30 and held as under:-

> "It was seriously contended before us that any minority, even a single individual belonging to a minority, could found a minority institution and had the right so to do under the Constitution and neither the Government nor the University could deny the society's right to establish a minority institution, at the very threshold as it were, howsoever they may impose regulatory measures in the interests of uniformity, efficiency and excellence of education. The fallacy of the argument in so far as the instant case is concerned lies in thinking that neither the Government nor the University has the right to go behind the claim that the institution is a minority institution and to investigate and satisfy itself whether the claim is well founded or ill-founded. The Government, the University and ultimately the court have the undoubted right to pierce the `minority veil' with due apologies to the Corporate Lawyers and discover whether there is lurking behind it no minority at all and in any case, no minority institution. The object of

> Art. 30(1) is not to allow bogies to be raised by pretenders but to give the minorities `a sense of security and a feeling of confidence' not merely by guaranteeing the right to profess, practise and propagate religion to religious minorities and the right to conserve their language, script and culture to linguistic minorities, but also to enable all minorities, religious or linguistic, to establish and administer educational institutions of their choice. These institutions must be educational institutions of the minorities in truth and reality and not mere masked phantoms. They may be institutions intended to give the children of the minorities the best general and professional education, to make them complete men and women of the country and to enable them to go out into the world fully prepared and equipped. They may be institutions where special provision is made to the advantage and for the advancement of the minority children. They may be institutions where the parents of the children of the minority community may expect that education in accordance with the basic tenets of their religion would be imparted by or under the guidance of teachers, learned and steeped in the faith. They may be institutions where the parents expect their children to grow in a pervasive atmosphere which is in harmony with their religion or conducive to the pursuit of it. What is important and what is imperative is that there must exist some real positive index to enable the institution to be identified as an educational institution of the minorities. We have already said that in the present case apart from the half a dozen words `as a Christian minorities institution' occurring in one of the objects recited in the memorandum of association, there is nothing whatever, in the memorandum or the articles of association or in the actions of the society to indicate that the institution was intended to be a minority educational institution. As already found by us these half a dozen words were introduced merely to found a claim on Art. 30(1). They were a smoke-screen."

28. In the case of *S. Azeez Basha & Anr. Etc. vs. The Union of India Etc.* AIR 1968 SC 662 (para 19), this Court considered the constitutional provisions and held as under:

> "Under Article 30(1), "all minorities whether based on religion or language shall have the right to establish and administer educational institutions of their choice". We shall proceed on the assumption in the present petitions that Muslims are a minority based on religion. What then is the scope of Article 30(1) and what exactly is the right conferred therein on the religious minorities? It is to our mind quite clear that Article 30(1) postulates that the religious community will have the right to establish and administer educational institutions of their choice meaning thereby that where a religious minority establishes an educational institution, it will have the right to administer that. An argument has been raised to the effect that even though the religious minority may not have established the educational institution, it will have the right to administer it, if by some process it had been administering the same before the Constitution came into force. We are not prepared to accept this argument. The Article in our opinion clearly shows that the minority will have the right to administer educational institutions of their choice provided they have established them, but not otherwise. The Article cannot be read to mean that even if the educational institution has been established by somebody else, any religious minority would have the right to administer it because, for some reason or other, it might have been administering it before the Constitution came into force. The words "establish and administer" in the Article must be read conjunctively and so read it gives the right to the minority to administer an educational institution provided it has been established by it. In this connection our attention was drawn to In re: The Kerala Education Bill, 1957, 1959 SCR 995: (AIR 1950 SC 956) where, it is argued, this Court had held that the minority can administer an educational institution even though it might not have established it. In that case an argument was raised that under Article 30(1) protection was given only to educational institutions established after the Constitution came into force. That argument was turned down by this Court for the obvious reason that if that interpretation was given to Article 30(1) it would be robbed of much of its content. But that case in our opinion did not lay down that the words "establish and administer" in Article 30(1) should be read disjunctively, so that though a minority might not have established an educational institution it had the right to administer it. It is true that at p. 1062 of SCR; (at p. 992 of AIR) the Court spoke of Article 30(1) giving two rights to a minority i.e. (i) to establish and (ii) to administer. But that was said only in the context of meeting the argument that educational institutions established by minorities before the Constitution came into force did not have the protection of Article 30(1). We are of opinion that nothing in that case justifies the contention raised on behalf of the petitioners that the minorities would have the right to administer an educational institution even though the institution may not have been established by them. The two words in Article 30(1) must be read together and so read the Article gives the right to the minority to administer institutions established by it. If the educational institution has not been established by a minority it cannot claim the right to administer it under Article 30(1). We have therefore to consider whether the Aligarh University was established by the Muslim minority; and if it was so established, the minority would certainly have the right to administer it".
>
> (emphasis supplied)

29. In view of the opinion expressed by this Court in a catena of decisions, there cannot be any controversy that minorities in India have a right to establish and administer educational institutions of their choice and the State Government or the Universities cannot interfere with the day-

to-day management of such institutions by the members of minority community. At the same time, this Court pointed out that though Article 30 itself does not lay down any limitation upon the right of a minority to administer its educational institution but this right is not absolute. This is subject to reasonable regulations for the benefit of the institution. The State Government and Universities can issue directions from time to time for the maintenance of the standard and excellence of such institution which is necessary in the national interest.

30. So far as the Government Resolution dated 4.7.2008 is concerned, it prescribes a procedure for granting minority status. The Resolution, inter alia, permits the persons of the State of Maharashtra whose mother tongue is other Indian language than Marathi will be eligible to submit an application for recognition of their linguistic minority educational institution. The only rider put is that the minimum 2/3rd trustees of the Management Committee of the Society/Institution should be from the concerned minority community.

31. After giving our anxious consideration in the matter and in the light of the law settled by this Court, we have no hesitation in holding that in order to claim minority/linguistic status for an institution in any State, the authorities must be satisfied firstly that the institution has been established by the persons who are minority in such State; and, secondly, the right of administration of the said minority linguistic institution is also vested in those persons who are minority in such State. The right conferred by Article 30 of the Constitution cannot be interpreted as if irrespective of the persons who established the institution in the State for the benefit of persons who are minority, any person, be it non-minority in other place, can administer and run such institution. In our considered opinion, therefore, the order passed by the respondent-Authority and the impugned order passed by the Division Bench need no interference by this Court. We, therefore, do not find any merit in this appeal which is accordingly dismissed.

K.K.T. Appeal dismissed.

STATE OF HARYANA
v.
BASTI RAM
(Criminal Appeal No. 352 of 2006)

APRIL 02, 2013

[A.K. PATNAIK AND MADAN B. LOKUR, JJ.]

Penal Code, 1860 - ss.376(2)(g), 366, 342 and 506 - Gang rape of girl below 16 years of age - Conviction by trial court relying on evidence of prosecutrix - High Court acquitted the accused - On appeal, held: High Court committed error of law in ignoring the evidence of prosecutrix - Case remitted to High Court.

Respondent-accused alongwith another accused was prosecuted for having raped a girl below 16 years of age. In her police statement, the victim girl alleged that both the accused had committed rape on her for a period of six months and they had also confined her for a period of 10 days and raped her several times and thereafter sent her to her parents through two persons.

Trial Court concluded that the prosecutrix was aged below 16 years and relying on her testimony held that both the accused were guilty of gang rape and convicted them u/s.376(2)(g) and also found them guilty for offences u/ ss.366, 342 and 506 IPC. They were sentenced to 10 years RI and fine with default clause.

High Court reversed the conviction order and acquitted both the accused. Hence the present appeal by the State against the respondent- accused.

Disposing of the appeal and remitting the matter to the High Court, the Court

HELD: 1. The High Court erred in not taking into account the statement and testimony of the prosecutrix that the respondent had raped her on several occasions and thereby acquitting him. The High Court committed an error of law in not considering the evidence put forward by the prosecutrix (who was less than 16 years when she was raped) and ignoring the settled position in law that if the sole testimony of the prosecutrix is credible, a conviction can be based thereon without the need for any further corroboration. [Para 1] [852-E-G]

Vijay @ Chinee v. State of Madhya Pradesh **(2010) 8 SCC 191: 2010 (8) SCR 1150** *State of Rajasthan v. Babu Meena,* **2013 (2) SCALE 479 - relied on.**

2. The High Court had not discussed the statement of the prosecutrix under Section 164 of the Cr.P.C. before the Magistrate nor her testimony before the Trial Judge. Her statement was detailed and the High Court should have considered that statement. If it was found to be not credible, the High Court was entitled to reject it and also her testimony before the Trial Judge. But, to completely ignore what the prosecutrix had said, merely on the basis of a handful of letters which she had written (even though she had explained the circumstances in which she had written those letters) is a rather unsatisfactory way of dealing with the entire case. [Para 30] [860-H; 861-A-B]

3. Consideration of the case on its merits by this Court without the opinion of the High Court would amount to taking away the right of appeal available to the respondent. For a proper appreciation of the case, it is necessary for this Court to have the views of the High Court on record. This is important since the High Court has reversed a finding of conviction given by the Trial Judge. Therefore, the more appropriate course of action would be to set aside the impugned judgment and order passed by the High Court and remand the matter for

reconsideration on merits after taking into account the entire evidence on record, including the statement and testimony of the prosecutrix as well as the law on the subject. [Paras 31 and 32] [861-D-F]

Case Law Reference:

2010 (8) SCR 1150	**relied on**	**Para 29**
2013 (2) SCALE 479	**relied on**	**Para 29**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 352 of 2006.

From the Judgment and Order dated 10.12.2003 of the High Court of Punjab & Haryana at Chandigarh in Crl. A. No. 162-SB of 1988.

Vikas Sharma, Kamal Mohan Gupta for the Appellant.

Prakash Pandey, Rekha Pandey, Raghav Pandey, Dr. Sushil Balwada for the Respondent.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. The question for our consideration is whether the High Court erred in not taking into account the statement and testimony of H.L. that the respondent had raped her on several occasions and thereby acquitting him. In our opinion, the High Court committed an error of law in not considering the evidence put forward by the prosecutrix (who was less than 16 years when she was raped) and ignoring the settled position in law that if the sole testimony of the prosecutrix is credible, a conviction can be based thereon without the need for any further corroboration.

The facts:

2. On 12th March 1990, PW-3 Sardara Singh, a resident of Village Farmana, lodged a complaint with PW-1 ASI Mehar

Singh of Police Station Kharkhoda to the effect that his granddaughter H.L. aged about 14-15 years and staying with him had been missing since 8.00 p.m. on 27th February 1990. According to the complainant, H.L. had left the house for answering the call of nature but did not come back. Efforts were made to trace her out, including at the residence of relatives and at her parental home in Nainital but without success. The complaint of Sardara Singh further stated that he suspected that Mohinder Singh and Satte had enticed her away.

3. The complaint was registered as a First Information Report and investigations commenced to trace out H.L.

4. On 20th March 1990 the investigating officer examined Mohinder Singh and he stated that on 27th February 1990 he and Satte took H.L. from Village Farmana to the Interstate Bus Terminal in Delhi. Their intention was to sell her to somebody through Satte and then to equally divide the proceeds. As a consequence of this, Satte took H.L. to Bareilly and sold her to Jamaluddin.

5. It appears that Sardara Singh had wrongly (and perhaps deliberately) accused Mohinder Singh of enticing away H.L. and even Mohinder Singh had given a false statement.

6. Be that as it may on 6th April 1990, PW-22 ASI Jaidev Singh located H.L. and her father and on 7th April 1990 H.L. was produced before the Judicial Magistrate Ist Class, Sonepat where her statement was recorded under Section 164 of the Criminal Procedure Code (for short the Cr.P.C.).

7. In her statement given before the Judicial Magistrate, H.L. stated that her father worked in Nainital. Her maternal uncle Satish Prakash who got her admitted in a school at Bhainswal sometime in June 1989 had brought her to Village Farmana.

8. Satish Prakash used to take H.L. to her school every morning on his scooter. From sometime in August 1989 he started misbehaving with her. She complained about the misbehaviour to her grandmother and to her aunt (wife of Satish Prakash) but to no effect. In her statement H.L. stated that from September 1989 onwards Satish Prakash began to rape her and did so several times. He was subsequently transferred to Panipat but in the meanwhile Basti Ram (the Respondent before us) came to Bhainswal and joined a Veterinary Hospital. H.L. further stated that apart from Satish Prakash, she was also raped by Basti Ram and fed up with this unpleasant situation, she expressed a desire to go back to her parental home at Nainital.

9. H.L. then stated that on 27th February 1990 Satish Prakash and Basti Ram confined her in a quarter near the Veterinary hospital where they were working and they raped her several times. Eventually on 8th March 1990 she was taken by them to Delhi and handed over to two persons who were going to Nainital with the instructions that she should be dropped off at her parental home.

10. In her statement H.L. stated that when she went to her parental home she found that it was locked and therefore from 9th March 1990 to 20th March 1990 she lived with a neighbor, PW-19 Ram Singh who informed her father in Pant Nagar of her arrival in Nainital. On 21st March 1990 the lock of her parental home was broken and she lived there till 4th April 1990 and came to Delhi along with her father on 6th April 1990.

11. Upon completion of investigations, the police authorities filed a charge sheet and on 3rd August 1990 the case was committed to the Sessions Court and registered as Sessions Case No. 22 of 6.11.1990/Sessions Trial No. 30 of 1990 before the Additional Sessions Judge, Sonepat (Haryana).

Proceedings in the Trial Court:

12. The Additional Sessions Judge charged Satish Prakash and Basti Ram for offences punishable under Sections 366, 376, 363, 506 and 342 of the Indian Penal Code (for short the IPC) on 7th November 1990 to which they pleaded not guilty. It appears that the charge of raping H.L. prior to 27th February 1990 was inadvertently left out and therefore additional charges were framed against Satish Prakash and Basti Ram to include the commission of rape of H.L. prior to 27th February 1990. The two accused pleaded not guilty to the additional charges also.

The charges framed read as follows:

1. That you both on 27.2.90 in the area of Vill. Bhainswal Kalan kidnapped Kumari H.L. aged 15/16 years, a minor by taking her out of legal guardianship of her maternal grandfather Sh. Sardara Ram S/o Jai Pal R/o Farmana with intent that she may be forced or seduced to illicit intercourse and thereby committed an offence punishable u/s 366 IPC and within cognizance of this Court.

2. Secondly, you both, between 27.2.90 to 08.3.90, in the aforesaid area committed rape on the above named H.L. by committing sexual intercourse against her will or consent and thereby committed an offence punishable u/s 376 IPC and within cognizance of this Court.

3. Thirdly, you both on the aforesaid date kidnapped Kumari H.L. a minor under the age of 18 years from the lawful guardianship of her maternal grandfather Sardara Ram and thereby committed an offence punishable u/s 363 IPC and within cognizance of this Court.

4. Fourthly, you both on same date and place committed criminal intimidation by threatening H.L. to cause death and thereby committed offence punishable u/s 506 IPC and within cognizance of this Court.

5. Fifthly, you both on the same date and place wrongly confined H.L. in Govt. Quarter of Veterinary Hospital Bhainswal Kalan from 27.2.90 to 08.3.90 and thereby committed an offence punishable u/s 342 IPC and within cognizance of this Court.

6. Sixthly that you accused Satish Kumar committed rape on aforesaid H.L. by committing sexual intercourse against her will or consent several times from September, 1989 to February, 1990 at your house in the area of village Farmana and thereby committed an offence punishable under Section 376 I.P.C. and within cognizance of this Court.

7. Seventhly, that you accused Basti Ram committed rape on aforesaid H.L. against her consent or will several times between October, 1989 and February, 1990 in Veterinary Hospital quarter Bhainswal and thereby you committed an offence punishable under Section 376 I.P.C. and within cognizance of this Court.

13. The prosecution examined as many as 24 witnesses while the defence examined one witness.

14. The Trial Court first of all considered the issue regarding the age of H.L. It was noted that her birth certificate Exhibit PF gave her date of birth as 10th June 1974 but the school record as well as the evidence of one of the teachers in the school in Bhainswal indicated that her date of birth was 27th June 1975. The father of the prosecutrix gave her date of birth as 10th June 1974 while her mother gave the date of birth as 27th June 1975. However, on an appreciation of the

evidence and relying upon the birth certificate Exhibit PF the Trial Court concluded that the date of birth of H.L. was 10th June 1974. Therefore, when she was raped between September 1989 and March 1990 she was below 16 years of age.

15. The Trial Court then considered the issue of the improbability of H.L. having been raped by Satish Prakash and Basti Ram. The Trial Court was of the view that the statement of the prosecutrix was credible. She had complained to her grandmother and to her aunt about being raped by Satish Prakash and Basti Ram, but it had no effect on them. As such, she had little or no option but to submit to the demands of Satish Prakash and Basti Ram. The Trial Judge held that in any case since H.L. was below 16 years of age her consent to have sexual intercourse with Satish Prakash and Basti Ram was meaningless.

16. On the basis of these findings the Trial Judge concluded that Satish Prakash and Basti Ram had subjected H.L. to rape and gang rape.

17. On the issue whether Satish Prakash had kidnapped H.L., the Trial Judge concluded that H.L. was under the guardianship of her grandfather Sardara Singh and since Satish Prakash had taken her away from the lawful guardianship of her grandfather, he was guilty of kidnapping her. As such, it was held that Satish Prakash was guilty of an offence punishable under Sections 363 and 366 of the I.P.C. Basti Ram was, however, found not guilty of the charge of kidnapping H.L.

18. The Trial Judge considered the statement of PW-3 Sardara Singh and found that he was related to both Satish Prakash and Basti Ram. In fact Satish Prakash is his nephew (brother's son) while Basti Ram is the cousin of Satish Prakash. Under these circumstances, Sardara Singh tried to save Satish Prakash and Basti Ram from being involved in the kidnapping and rape of H.L. and he also went to the extent of cooking up a story to implicate Mohinder Singh and Satte. In these

circumstances, the Trial Judge did not give weightage to the evidence of Sardara Singh and relied primarily on the testimony of H.L. as well as the statement that she gave before the Magistrate under Section 164 of the Cr.P.C.

19. The Trial Judge also considered some letters said to have been written by H.L. to Mohinder Singh professing intimacy with him but the prosecution version was accepted that these letters were written at the instance of Satish Prakash so as to put the blame on Mohinder Singh.

20. The defence witness DW-1 Dr. S.S. Wadhwa was disbelieved by the Trial Judge on the question of the age of the prosecutrix. According to this witness, H.L. was between 16 and 17 years of age, but he did not have the original medical report on the basis of which he had come to this conclusion.

21. In their statement under Section 313 of the Cr.P.C. the accused stated that H.L. was a girl of 'bad character' and that they had been falsely implicated at the instance of the investigating agency.

22. After going through the evidence on record, the Additional Sessions Judge, Sonepat by a judgment and order dated 1st April 1992 convicted Satish Prakash and Basti Ram of having committed gang rape on H.L. from 27th February 1990 to 8th March 1990. Satish Prakash was also found guilty of having raped H.L. from September 1989 to February 1990. Basti Ram was found guilty of having raped H.L. from October 1989 to February 1990. Both the accused were also found guilty of offences punishable under Sections 366, 342 and 506 of the IPC.

23. Subsequently by an order dated 3rd April 1992 Satish Prakash and Basti Ram were sentenced under Section 376(2)(g) of the IPC to 10 years rigorous imprisonment for the gang rape of H.L. They were also asked to pay a fine of Rs.2,000/- and in default thereof to undergo further rigorous

imprisonment for one year. For the remaining offences, they were sentenced to various terms of imprisonment, but all sentences were to run concurrently and, therefore, we are not going into the details of the punishment awarded.

Proceedings in the High Court:

24. Feeling aggrieved by the conviction and sentence, both the convicts preferred an appeal in the High Court of Punjab and Haryana, being Criminal Appeal No. 162-SB/1992.

25. The High Court examined the evidence in a rather cursory manner and after noting the contentions urged by learned counsel for the parties, the High Court held as follows:

> "After going through the contention of learned counsel for both the parties, I am of the opinion that ASI Jai Dev PW 22 has admitted that he recorded the statement of Mohinder who has stated that he and Sat Narain had enticed away H.L. and, thereafter, sent her to Bareli with somebody else and that he can get H.L. recovered. In Ex.D1 H.L. has clearly written to Mohinder that she was absent from School for four days while accompanying Mohinder to Delhi and she also admitted that she has been questioned by Satish Kumar appellant and her maternal grandfather and grand-mother with regard to absence for four days. Satish also reprimanded her that she had been missing for four days without disclosing her whereabouts and he would stop her from going to School and send her to her father's house after performing betrothal to some boy. In letter Ex. D8 also she has named Dr. Satya asking help from him for making a programme in the day time as it is difficult to come out of the house at night.
>
> Taking the totality of facts and the circumstances of the case into consideration the above evidence casts heavy doubt on the prosecution version and does not inspire any confidence. Therefore, I have no option but to accept this appeal and acquit both the appellants of the charges framed against them after setting aside the order of conviction and sentence passed by the Trial Court. Bail bonds tendered before the trial Court stand discharged."

26. On the above basis, the learned Single Judge allowed the appeal and set aside the conviction of Satish Prakash and Basti Ram.

27. The State of Haryana has challenged the judgment and order passed by the learned Single Judge of the High Court.

Discussion and conclusion:

28. During the pendency of the appeal before us, Satish Prakash expired and the appeal only survives as against Basti Ram.

29. The law on the issue whether a conviction can be based entirely on the statement of a rape victim has been settled by this Court in several decisions. A detailed discussion on this subject is to be found in *Vijay @ Chinee v. State of Madhya Pradesh,* (2010) 8 SCC 191. After discussing the entire case law, this Court concluded in paragraph 14 of the Report as follows:-

> "Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix if found to be worthy of credence and reliable, requires no corroboration. The Court may convict the accused on the sole testimony of the prosecutrix."

This decision was recently adverted to and followed in *State of Rajasthan v. Babu Meena,* 2013 (2) SCALE 479.

30. A reading of the judgment and order of the High Court indicates that it has not discussed the statement of H.L. under Section 164 of the Cr.P.C. before the Magistrate nor her testimony before the Trial Judge. On going through her

statement recorded by the Magistrate, we find that it is rather detailed and the least that was expected of the High Court was to consider that statement. If it was found to be not credible, the High Court was entitled to reject it and also her testimony before the Trial Judge. But, to completely ignore what the prosecutrix had said, merely on the basis of a handful of letters which she had written (even though she had explained the circumstances in which she had written those letters) is a rather unsatisfactory way of dealing with the entire case.

31. Normally, we would have gone through the entire evidence on record and decided whether the acquittal of Basti Ram should be sustained or not. However, in the absence of any discussion or analysis of the evidence by the High Court in first appeal, we are of the opinion that a right of appeal available to Basti Ram would be taken away if we were to consider the case on its merits without the opinion of the High Court. Additionally, for a proper appreciation of the case, it is necessary for us to have the views of the High Court on record. This is important since the High Court has reversed a finding of conviction given by the Trial Judge.

32. Under the circumstances, the more appropriate course of action would be to set aside the impugned judgment and order passed by the High Court and remand the matter for reconsideration on merits after taking into account the entire evidence on record, including the statement and testimony of H.L. as well as the law on the subject. We do so accordingly.

33. Since the allegation of rape is of the year 1989-1990, we request the High Court to accord high priority to the disposal of the case.

34. Appeal is disposed of.

K.K.T. Appeal disposed of & Matter remitted to High Court.

RUSHI GUMAN SINGH
v.
STATE OF ORISSA & ORS.
(Civil Appeal No. 2968 of 2013)

APRIL 09, 2013

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

Service Law:

Orissa Civil Services (CCA) Rules, 1962 - r.12(4) - Suspension under - During further enquiry by Disciplinary Authority after direction of Court - Held: Though the delinquent officer was not under suspension at the time of the order of removal from service, he was rightly directed to be deemed suspended u/s.12(4) from the date of the original order of removal.

The appellant-officer was placed under suspension on 12 June, 1998 pending a disciplinary inquiry u/s.12(1)(a) of Orissa Civil Services (CCA) Rules, 1962. The suspension was later revoked during the inquiry itself i.e. on 20th July, 1999. Enquiry Officer exonerated the delinquent officer of all the charges. However, Disciplinary Authority passed punishment of removal from Service and directed that the period of suspension would be treated as such.

When the order was challenged, the Court directed the disciplinary authority to provide reasonable opportunity to the delinquent officer, before taking final decision. Thereafter, the disciplinary authority informed the delinquent officer that under the provisions of r.12(4) of OCS (CCA) Rules, 1962, he was placed under suspension from the date of the original order of removal from service and would continue to remain under

suspension until further orders. The challenge to the suspension order was dismissed by the State Tribunal as well as the High Court.

In appeal to this Court, the appellant contended that since the appellant was not under suspension at the time when the order of his removal from service was passed, he could not be placed under deemed suspension by invoking r.12(4); that he could be placed under suspension under r.12(1); and that r.12(3) would come into operation, if the appellate authority sets aside a penalty of removal and remits the case to the authority for further enquiry.

Dismissing the appeal, the Court

HELD: 1. It is not correct to say that even though the order of removal was set aside by the High Court on the ground that the disciplinary authority had passed the order directing the removal of the appellant from Government service, in breach of rules of natural justice, it was necessary for the Government to pass an order of suspension of the appellant under Rule 12(1) of OCS (CCA) Rules, 1962. The High Court directed the disciplinary authority to continue with the disciplinary proceedings after giving an opportunity of hearing to the appellant. Rule 12(1) enables the appointing authority or any authority to which it is subordinate to place a Government servant under suspension where a disciplinary proceeding against him is contemplated or is pending. The aforesaid stage in the present case came to an end when the appellant was suspended for the first time on 12th June, 1998. Undoubtedly, the aforesaid order of suspension was revoked on 20th July, 1999. Thereafter the appellant was removed from service on 14th February, 2003 when the disciplinary authority disagreed with the findings of the enquiry officer exonerating the appellant. It was this order of removal

which has been set aside by the High Court. At that stage, a department had no option but to pass an order under Rule 12(4) directing that the appellant shall be deemed to have been suspended w.e.f. 14th February, 2003 i.e. the date of his removal from service. [Para 10] [868-F-H; 869-A-C]

Khem Chand vs. Union of India and Ors. **AIR 1963 SC 687: 1963 Suppl. SCR 229 - relied on.**

H.L. Mehra vs. Union of India **(1974) 4 SCC 396: 1975 (1) SCR 138 - referred to.**

2. Rule 12(4) cannot be read down to mean that the deemed suspension shall only be in case the employee was under the suspension at the time when the order of punishment was passed. Sub-rules (3) and (4) have been correctly divided into two separate classes and subjected to differential treatment. Sub-rule (3) is applicable to these groups of cases, where the interference with the penalty is connected with the merits of the charge. The cases which attract sub-rule (4) are those where the penalty imposed on the government servant is set aside on technical grounds not touching the merits of the case. This situation is entirely different from that in the cases covered by sub-rule (3). [Paras 12, 13] [871-F; 873-A, F-G; 874-E-F]

Nelson Motis vs. Union of India and Anr. **(1992) 4 SCC 711:1992 (1) Suppl. SCR 325 - relied on.**

Case Law Reference:

1975 (1) SCR 138	**referred to**	**Para 6**
1963 Suppl. SCR 229	**relied on**	**Para 10**
1992 (1) Suppl. SCR 325	**relied on**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2968 of 2013.

From the Judgment and order dated 15.09.2011 of the High Court of Orissa at Cuttack in WPC No. 16450 of 2010.

K.V. Viswanatha, Sunil Mund, T. Sakthi Kumaran and Sibo Sankar Mishra for the Appellant.

Kirti Mishra, Shipashish Mishra for the Respondent.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. Leave granted.

2. This appeal is directed against the order dated 15th September 2011 of the High Court of Orissa at Cuttack dismissing the Writ Petition (C) No.16450 of 2010 filed by the appellant challenging the order dated 25th February, 2009 directing that the appellant shall be under deemed suspension with effect from 14th February, 2003.

3. Briefly stated the facts are that the appellant, who was working as a Soil Conservation Officer (Class I) with the Government of Orissa, was placed under suspension by order dated 12th June, 1998 in contemplation of a disciplinary inquiry as envisaged under Rule 12(1)(a) of the Orissa Civil Services (CCA) Rules, 1962 (in short "OCS (CCA) Rules"). However, the suspension was revoked during the pendency of the enquiry proceeding on 20th July, 1999. In his report, dated 30th March, 2000, the enquiry officer exonerated the appellant of all the charges. However, the disciplinary authority disagreed with the findings of the enquiry officer and issued a show cause notice to the appellant dated 4th February, 2002 proposing the punishment of dismissal. The appellant submitted his reply to the show cause notice on 4th March, 2002. By an order dated 14th February, 2003, the disciplinary authority passed an order imposing the punishment of removal on the appellant. It was also directed that the period of suspension from 13th June, 1998 to 20th July, 1999 is treated as such.

4. Aggrieved by the order dated 14th February, 2003, the appellant moved the Orissa Administrative Tribunal, (OAT),

Cuttack Bench, Cuttack in OA No.994 of 2003. On 7th July, 2006, the OA was dismissed by the OAT. The appellant challenged the order of OAT in Writ Petition (C) No.10653 of 2006 in the Orissa High Court. By an order dated 24th June, 2008, the writ petition was allowed. The order of OAT was set aside and the order of the Government of Orissa dated 14th February, 2003 was quashed. A direction was issued to the disciplinary authority to provide reasonable opportunity to the appellant before taking a final decision in the matter relating to the findings on the charges framed against him. Special Leave Petition (C) No.24190 of 2008 filed by the State of Orissa against the aforesaid order of the High Court was dismissed by this Court on 17th October, 2008. After dismissal of the aforesaid SLP, pursuant to the orders passed by the High Court on 24th June, 2008, the disciplinary authority issued a show cause notice dated 25th February, 2009 to the appellant calling for his representation. He was also informed that as per the provisions of law in Rule 12(4) of the OCS (CCA) Rules, he has been placed under suspension from the date of the original order of removal, i.e., 14th February, 2003, from Government service and shall continue to remain under suspension until further orders. Being aggrieved by the aforesaid order of suspension, the appellant moved the OAT Bench at Cuttack in OA No.1915 © of 2009 which was dismissed. The appellant challenged the order passed by the Government of Orissa dated 25th February, 2009 and the order passed by the OAT, by filing the Writ Petition (C) NO.16450 of 2010. The aforesaid writ petition has been dismissed by the High Court by an order dated 15th September, 2011. It is this order which has been challenged in the present appeal.

5. In the impugned order, the High Court has considered the provisions contained in Rule 12(4) of the OCS (CCA) Rules which reads as under :-

> "Rule 12(4). Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Government servant is set side or declared or rendered

void in consequence of or by a decision of a court of law and disciplinary authority, on a consideration of the circumstances of the case decides to hold a further inquiry against him on the allegations on which the penalty of dismissal; removal or compulsory retirement was originally imposed, the Government servant shall be deemed to have been placed under suspension by the appointing authority form the date of the original orders of dismissal, removal or compulsory retirement and shall continue to remain under suspension until further orders."

6. It has been held that under the aforesaid provision where a penalty of removal from Government service has been set aside by a Court of law and the disciplinary authority decides to hold a further inquiry against him, on the allegations on which the penalty of removal was originally imposed, the Government servant shall be deemed to have been placed under suspension. In coming to the aforesaid conclusion, the High Court has relied on the ratio of law laid down by this Court in the case of *H.L. Mehra Vs. Union of India*[1] and the Constitution Bench Judgment in the case of *Khem Chand Vs. Union of India & Ors.*[2]

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

8. Mr. K.V. Viswanathan, learned senior advocate appearing for the appellant has submitted that after the order of removal was quashed by the High Court on 24th June, 2008, the appellant was entitled to be reinstated in service. In passing the order dated 25th February, 2009 retrospectively placing the appellant under the deemed suspension with effect from 14th February, 2003, the respondents have wrongly invoked Rule 12(4) of the OCS (CCA) Rules. He submitted that the appellant was not under suspension at the time when the order of removal was passed on 14th February, 2003. Therefore, it was

1. (1974) 4 SCC 396.
2. AIR 1963 SC 687..

necessary for the respondents to consider the question as to whether the appellant was to be placed under suspension under Rule 12(1) of the OCS (CCA) Rules. Learned counsel submitted that this Court in the cases of *H.L. Mehra* and *Khem Chand* (supra) had considered a similar situation under Rule 10(4) of the Central Civil Services (Classification, Control and Appeal) Rules, 1965 which is pari materia to Rule 12(4) of the OCS (CCA) Rules. Therefore, the law laid down in the aforesaid two judgments would be applicable to the facts of this case.

9. Mr. Shibashish Misra, learned counsel appearing for the respondents submitted that the order under Rule 12(4) of the OCS (CCA) Rules dated 25th February, 2009 was consequential to the direction issued by the High Court on 24th June, 2008. By the aforesaid order, the High Court had directed to provide reasonable opportunity of hearing to the appellant before taking a final decision in the matter relating to the findings on the charges framed against him. Therefore, under Rule 12(4) of OCS (CCA) Rules, the appellant was deemed to be placed under suspension, by operation of Law, even if he was not under suspension at the time Order dated 14th February, 2003 was passed.

10. We have considered the submissions made by the learned counsel for the parties. We do not find any merit in the submissions of Mr. Viswanathan that even though the order of removal was set aside by the High Court on the ground that the disciplinary authority had passed the order dated 14th February, 2003 directing the removal of the appellant from Government service, in breach of rules of natural justice, it was necessary for the Government to pass an order of suspension of the appellant under Rule 12(1). The High Court directed the Disciplinary Authority to continue with the Disciplinary Proceedings after giving an opportunity of hearing to the appellant. Rule 12(1) enables the appointing authority or any authority to which it is subordinate to place a Government servant under suspension where a disciplinary proceeding

against him is contemplated or is pending. The aforesaid stage in the present case came to an end when the appellant was suspended for the first time on 12th June, 1998. Undoubtedly, the aforesaid order of suspension was revoked on 20th July, 1999. Thereafter the appellant was removed from service on 14th February, 2003 when the disciplinary authority disagreed with the findings of the enquiry officer exonerating the appellant. It was this order of removal which has been set aside by the High Court on 24th June, 2008 in W.P.(C) No.10653 of 2006. At that stage, a department had no option but to pass an order under Rule 12(4) directing that the appellant shall be deemed to have been suspended w.e.f. 14th February, 2003. The aforesaid understanding of the Rules by the Government of Orissa as well as by the High Court is in consonance with the interpretation of the identical rule, Rule 12(4) which was under consideration of this Court in the case of *Khem Chand* (supra). In *Khem Chand's* case (supra), the appellant had challenged the vires of Rule 12(4) of Central Civil Service (Classification, Control & Appeal) Rules, 1957, this Court upon consideration of the entire matter held that the rule did not offend the provision contained in Article 19(1)(f) of the Constitution of India.

11. Mr. Viswanathan, however, submitted that this Court had held that Rule 12(3) will come into operation when the appellate authority sets aside a penalty of dismissal, removal or compulsory retirement and remits the case to the authority which imposed the penalty for further enquiry. In such circumstances, there would be no deemed suspension unless the employee was earlier under suspension. But in the same situation, there would be deemed suspension when the order of removal is set aside by the Court. This, according to Mr. Vishwanathan, would render Rule 12(4) ultra vires Articles 14 and 16 of the Constitution of India. It is not necessary for us to examine the aforesaid submission on merits as the issue is no longer res integra. A three Judge Bench of this Court in *Nelson Motis Vs. Union of India & Anr.*[3], considered the scope and

3. (1992) 4 SCC 711.

ambit of the provisions contained in sub-rule (3) and (4) of Rule 10 of CCS (CCA) Rules, 1965. The aforesaid rules are pari materia to Rule 12(3) and (4) of OCS (CCA) Rules. Rule 12(1), (3) and (4) of OCS (CCA) Rules reads as under :

> "12. Suspension - (1) The appointing authority or any authority to which it is subordinate or any authority empowered by the Governor or the appointing authority in that behalf may place a Government servant under suspension -
>
> (a) where a disciplinary proceeding against him is contemplated or is pending, or
>
> (b) where a case against him in respect of any criminal offence is under investigation or trial.
>
> (3) Where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Government servant under suspension is set aside in appeal or on review under these rules and the case is remitted for further inquiry or action or with any other directions, the order of his suspension shall be deemed to have continued in force on and from the date of the original order of dismissal, removal or compulsory retirement and shall remain in force until further orders.
>
> (4) Where penalty of dismissal, removal or compulsory retirement from service imposed upon a Government servant is set aside or declared or rendered void in consequence of or by decision of a court of law and disciplinary authority, on a consideration of the circumstances of the case decides to hold a further inquiry against him on the allegation on which the penalty of dismissal, removal or compulsory retirement was originally imposed, the Government servant shall be deemed to have been placed under suspension by the appointing authority from the date of the original orders of dismissal,

removal or compulsory retirement and shall continue to remain under suspension until further orders."

12. Considering the pari materia sub-rule (3) & (4) of Rule 10 of CCS (CCA) Rules, 1965 this Court has held that sub-rule (3) of Rule 10 is applicable to cases where interference with the penalty is connected with the merits of the charges against the Government servant and is set aside by the appellate authority under Rule 27 or by the Revisional authority under Rule 29 or by the Reviewing authority under Rule 29A. In such circumstances, Government servant shall be deemed to be under suspension only if he was under suspension at the time when the order of punishment was passed. On setting aside the order of punishment in such a case by the Departmental authorities, the findings against the Government servant disappeared and he is restored to the earlier position. This, however, is not the position under sub-rule (4), the language of which clearly stipulates that where a penalty of dismissal, removal or compulsory retirement from service imposed upon a Government servant is set aside or declared or rendered void in consequence of or by a decision of a Court of law, the Government servant shall be deemed to have been placed under suspension by the appointing authority, during the pendency of a further proceeding against him, in a departmental enquiry until further orders are passed. This Court rejected the submissions that the deemed suspension under Rule 12(4) should be read down to mean that the deemed suspension shall only be in case the employee was under the suspension at the time when the order of punishment was passed. It was observed by this Court as follows:

"The language of sub-rule (4) of Rule 10 is absolutely clear and does not permit any artificial rule of interpretation to be applied. It is well established that if the words of a statute are clear and free from any vagueness and are, therefore, reasonably susceptible to only one meaning, it must be construed by giving effect to that meaning,

irrespective of consequences. The language of the sub-rule here is precise and unambiguous and, therefore, has to be understood in the natural and ordinary sense. As was observed in innumerable cases in India and in England, the expression used in the statute alone declares the intent of the legislature. In the words used by this Court in *State of U.P. v. Dr Vijay Anand Maharaj*[4] when the language is plain and unambiguous and admits of only one meaning, no question of construction of a statute arises, for the act speaks for itself. Reference was also made in the reported judgment to Maxwell stating:

"The construction must not, of course, be strained to include cases plainly omitted from the natural meaning of the words."

The comparison of the language with that of sub-rule (3) reinforces the conclusion that sub-rule (4) has to be understood in the natural sense. It will be observed that in sub-rule (3) the reference is to "a Government servant under suspension" while the words "under suspension", are omitted in sub-rule (4). Also the sub-rule (3) directs that on the order of punishment being set aside, "the order of his suspension shall be deemed to have continued in force" but in sub-rule (4) it has been said that "the Government servant shall be deemed to have been placed under suspension". The departure made by the author in the language of sub-rule (4) from that of sub-rule (3) is conscious and there is no scope for attributing the artificial and strained meaning thereto. In the circumstances it is not permissible to read down the provisions as suggested. We, therefore, hold that as a result of sub-rule (4) a government servant, though not earlier under suspension, shall also be deemed to have been placed under suspension by the Appointing Authority from the date of the original order of dismissal, provided of course, that the other conditions mentioned therein are satisfied."

13. Rejecting the next submission that sub-rules (3) and (4) cannot be divided into two separate classes and subjected to differential treatment. The court observed as under :-

> "Let us examine the circumstances which separate the two categories of cases to be governed by the two sub-rules. Sub-rule (3) is attracted only to those cases of dismissal etc. where the penalty is set aside under the CCS (CCA) Rules, and the case is remitted for further inquiry or action in accordance with the direction. The application is, therefore, confined to cases where the penalty is set aside by the appellate authority while hearing a regular appeal under Rule 27 or by the President exercising the power of revision under Rule 29 or of review under Rule 29-A. On all such occasions a reconsideration of the merit of the charge is involved. The grounds mentioned in Rule 27 (2) permit the appellate authority to re-appraise the evidence on the record for examining whether the findings recorded by the disciplinary authority are warranted by such evidence. So far non-compliance of a procedural rule is concerned, the appellate authority is enjoined, by clause (a) of Rule 27 to consider whether such non-compliance has resulted in the failure of justice or in the violation of any constitutional provision, before interfering with the punishment. In view of its sub-rule (3), the same consideration arises under Rule 29. Similarly, the provisions of Rule 29-A indicate that the power to review can be exercised by the President only on discovery of such new evidence which has the effect of changing the very nature of the case. Sub-rule (3) of Rule 10 is applicable to these groups of cases, where the interference with the penalty is connected with the merits of the charge against the government servant. On the setting aside of the order of punishment in such a case, the finding against the government servant disappears and he is restored to the earlier position. Consequently only if he was under suspension earlier, he will be deemed to have continued so with effect from the date of the order of dismissal. On

> the other hand, the second category of cases attracting sub-rule (4) is entirely on a different footing. Sub-rule (4) governs only such cases where there is an interference by a court of law purely on technical grounds without going into the merits of the case. In cases governed by the CCS (CCA) Rules, a court of law does not proceed to examine the correctness of the findings of the disciplinary authority by a reconsideration of the evidence. Unless some error of law or of principle is discovered, a court of law does not ordinarily substitute its own views on the evidence. But the matter does not end there. The scope of the sub-rule, for the purpose of automatic suspension has been further limited by the proviso as mentioned earlier in paragraph 6, which reads as follows:
>
> > "Provided that no such further inquiry shall be ordered unless it is intended to meet a situation where the Court has passed an order purely on technical grounds without going into the merits of the case."
>
> The cases which attract sub-rule (4), are thus those where the penalty imposed on the government servant is set aside on technical grounds not touching the merits of the case. Since at one stage the disciplinary authority records a finding on the charges against the government servant, which is not upset on merits, the situation is entirely different from that in the cases covered by sub-rule (3). The classification is thus founded on an intelligible differentia, having a rational relation to the object of the rules and Rule 10 (4) has to be held as constitutionally valid."

14. In our opinion, the aforesaid observations are a complete answer to the submissions made by Mr. Viswanathan.

15. We see no merit in the appeal and the same is hereby dismissed.

K.K.T. Appeal dismissed.

KAILASH @ TANTI BANJARA
v.
STATE OF MADHYA PRADESH
(Criminal Appeal No. 1962 of 2010)

APRIL 10, 2013

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

Penal Code,1860 - ss. 376 and 506B - Rape - Courts below though found that the intercourse was with the consent of prosecutrix, but convicted him finding that the prosecutrix was 14 years of age - On appeal, held: Conviction justified - In view of the conclusion that the prosecutrix was in the age group of 13-14 years, consent of the prosecutrix has no consequence.

Vijay @ Chinee vs. State of Madhya Pradesh **(2010) 8 SCC 191: 2010 (8) SCR 1150 - relied on.**

Case Law Reference:

2010 (8) SCR 1150	**relied on**	**Para 5**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1962 of 2010.

From the Judgment and Order dated 09.10.2009 of the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No. 1395 of 1994.

Rajeev Kumar Bansal, M.P. SIngh, Akshay K. Ghai for the Appellant.

Vibha Datta Makhija for the Respondent.

The following Order of the Court was delivered

O R D E R

1. This appeal is directed against the impugned judgment of the High Court of Madhya Pradesh at Jabalpur in Criminal Appeal No.1395/1994 by which the conviction and sentence imposed on the appellant under Section 376 IPC to undergo rigorous imprisonment for seven years apart from a fine amount of Rs.500/- and in default of payment of fine, to under one months' additional rigorous imprisonment was confirmed.

2. According to the prosecution on 11.4.1991 the victim P.W.4, an agricultural labourer was in the field of Moti Singh Darbar and loading the wheat on the vehicle. After the field work, she was proceeding to her village which was 1½ miles away. The appellant was following P.W.4 who was proceeding alongwith minor girl Manju, aged 10 years in his motorcycle. On the way, P.W.4 suffered thorn bite in her foot and while she was removing the thorn, Manju left her and proceeded towards her home. Taking advantage of the lonliness of P.W.4, the appellant stated to have grabbed her hand against her will, took her near the bushes at Kauve near the drain and had forcible sexual intercourse for about ½ an hour. According to the victim P.W.4, sexual intercourse was carried out by the appellant near the drain and again after taking her to his house under the threat of knife point and performed the same evil act in the house also. Subsequently at about 3.00 in the midnight, he took her in his motorcycle and dropped near the community well and after threatening her at knife point that if she reveal any of the act committed by him, she would kill her, left that place. P.W.4 felt humiliated and having ashamed of loss of modesty, jumped into the community well while the appellant stated to have fled away from that place. Though P.W.4 jumped into the well, according to her, she was able to grab the rope which was present inside the well and she cried for help. On hearing her distress call, the villagers stated to have turned up and rescued her. Thereafter, her father and grand father stated to have reached that place whereafter she was taken to her house and after change of

cloth she went to the Police Station and lodged the FIR.

3. The appellant was charged for the offence under Section 376 read with Section 506 B,IPC. The trial Court after a detailed consideration of the evidence placed before it concluded that the FSL report, Exhibit P.14 established that in the peticoat of P.W.4, in her private parts as well as the vagina, human sperms was found present and therefore the plea of ignorance pleaded by the appellant was not true. The trial court however, concluded that the intercourse was with the consent of P.W.4. Based on the expert evidence and applying the principles for ascertaining the age of the victim, the trial court has concluded as under:

> "14. For ascertaining the age the position of gums, private part and under arms are of great help. According to the statement of Dr. Smt. Saluja (P.W.2) 7 teeth in the right and 6 teeth in the left total 13 teeth were found in the upper jaw. In the lower jaw 7-7 teeth in the right and left sides were found. Therefore, total 14 teeth were found in the lower jaw. It is clear from the position of the teeth that third molar in the right upper jaw did come and second and third molar in the left side was not present and like this in the lower jaw third molar was not present in the right and left side. It is clear that in this situation that in abssence of third molar in the jaw age was below 17 years. Therefore, according to the chart given in the Modi's book at page No.29 according to the situation of the teeth in the jaw the age of the girl must be 14 to 15 years.

4. The conclusion of the trial court was that the victim P.W.4 was aged 14 years on the date of occurrence and since sexual intercourse carried out by the appellant though with the consent fell within the four corners of the offence falling under Section 376 and convicted the appellant for the said act. The High Court having examined the case of the appellant, considered the whole gamut of the evidence placed before the trial Court, as well as, the conclusion reached by the trial court held that there was no scope to interfere with the conviction and sentence imposed on the appellant.

5. Heard Mr. Rajeev Kumar Bansal, learned counsel for the appellant and Ms. Vibha Dutta Makhija, learned counsel for the State. Learned counsel appearing for the appellant strenuously contented that the medical evidence placed before the court below did show that the victim was beyond 16 years of age, that even going by her own evidence it came out that there were serious contradictions as to the nature of offence alleged against the appellant; that the trial court has held that sexual intercourse was performed with full consent of the victim and therefore sentence imposed was liable to be interfered with. As against the above submission, learned counsel for the State by referring to the decision of this Court in *Vijay @ Chinee vs. State of Madhya Pradesh* (2010) 8 SCC 191 in para 27, submitted that the trial court having applied the principles laid down therein based on the FSL report for the purpose of ascertaining the age of the victim having concluded that she was 14 years of age on the date of the occurrence, in the absence of any other reliable contra evidence to dislodge the said conclusion of the trial court as affirmed by the High Court, no interference is called for.

6. Having heard learned counsel for the appellant as well as for the respondent, we are also convinced that the submission of learned counsel for the State deserves to be accepted. The ascertainment of age has been done by the trial court concerned, by applying the various principles laid down by this Court. In this context, we refer to the decision of this Court in *Vijay alias Chinee,* (supra) and in which one of us (Hon'ble Chauhan, J.) was a party. We have held in paragraphs 27 to 30 as under:

> *"Determination of Age*
>
> 27. As per Modi's Medical Jurisprudence and Toxicology,

23rd Edn., the age of a person can be determined by examining the teeth (Dental Age), Height, Weight, General appearance (minor signs) i.e. secondary sex characters, ossification of bones and producing the birth and death/ school registers etc. However, for determining the controversy involved in the present case, only a few of them are relevant.

Teeth- (Dental - Age)

28. So far as permanent teeth are concerned, eruption generally takes place between 6-8 years. The following table shows the average age of eruption of the permanent teeth :-

Central incisors - 6th to 8th year
Lateral incisors - 7th to 9th year
Canines - 11th to 12th year
Second Molars - 12th to 14th year
Third Molars or Wisdom Teeth - 17th to 25th year In total, there are 32 teeth on full eruption of permanent teeth.

Secondary Sex Characters

29. The growth of hair appears first on the pubis and then in the axillae (armpits). In the adolescent stage, the development of the pubic hair in both sexes follows the following stages :-

a) One of the first signs of the beginning of puberty is chiefly on the base of penis or along labia, when there are few long slightly pigmented and curled or straight downy hair;

b) The hair is coarser, darker and more curled, and spread sparsely over the junction of pubis;

c) More or less like an adult, but only a smaller area is covered, no hair on the medial surface of thighs;

30. The development of the breasts in girls commences from 13 to 14 years of age; however, it is liable to be affected by loose habits and social environments. During adolescence, the hormone flux acts and the breasts develop through the following stages:

i) Breasts and papilla are elevated as a small mound, and there is enlargement of areolar diameter.

ii) More elevation and enlargement of breast and areola, but their contours are not separate.

iii) Areola and papilla project over the level of the breast.

iv) Adult stage - only the papilla projects and the areola merges with the general contour of the breast.

In this case, it will be worthwhile to refer to the version of P.W.2 Dr. Smt. Jasbit Kaur Saluja, who examined the victim P.W.4 and in her evidence has stated the physical features of the victim and observed as under:

"(3) Following was the condition of the girl observed on examination:-

Her height - 5", weight - 43 Kgs., normal build, 13 teeth in the upper jaw and 14 in the lower jaw present, hair in armpit had not grown, breast was development, slight pubic hair were noticed."

Ultimately, she has opined in paragraph 14 and 17 that the victim appears to be 14 to 16 years. The High Court in paragraph 9 again considered the said aspect of evidence of P.W.2 and noted as under:

"9. Accordingly, the margin or error could be ± 6 months. This apart, the radiological age, being probably, has to be verified in the face of age-related other evidence on record

(*State of H.P. V. Mange Ram* AIR 2000 SC 2798 referred to). Viewing from this angle, the following physical features described by Dr. Jasbeer Kaur Saluja were sufficient to fortify her assessment that the prosecutrix was between 14 to 16 years of age:-

(i) Auxiliary hair not appeared.

(ii) Public hair scanty.

(iii) Menarche attaned 1 years back.

(iv) Teeth -

$$\frac{7 + 6}{7 + 7} = 27$$

Considering these findings of anthropological and dental examinations, learned trial Judge did not commit any error in holding that age of the prosecutrix was about 14 years only (See *Bishnudayal v. State of Bihar* AIR 1981 SC 39)."

7. In paragraph 30 of the decision in *Vijay alias Chinee,* (supra), this Court has held by making specific reference to the growth of breast in a girl between the age group of 13 and 14 and has specifically referred to the extent at which such growth could be found, while in paragraph 28 based on the eruption of teeth, the age of a person can be ascertained. Again, in paragraph 29 this Court has noted the ascertainment of age based on the growth of pubic hair by which the age of the person can be scientifically arrived.

8. When we apply the above principles laid down by this Court with particular reference to the consideration made by the trial court in paragraph 14, the evidence of doctor P.W.2 as well as the conclusion arrived at by the High Court in paragraph 9, we are convinced with the conclusion that P.W.4

was in the age group of 13/14 years. Once the said conclusion cannot be altered the sexual intercourse indulged in by the appellant was with the consent of P.W.4 will be of no consequence. Having regard to the above said conclusion, we do not find any scope to find fault with the conviction and sentence imposed by the trial court as confirmed by the High Court in the impugned judgment in this appeal.

The appeal lacks merit and the same is dismissed.

K.K.T. Appeal dismissed.