RAKESH AND ANOTHER
v.
STATE OF HARYANA
(Criminal Appeal No. 1779 of 2009)

MARCH 22, 2013

[P. SATHASIVAM AND M.Y. EQBAL, JJ.]

Penal Code, 1860 - ss.498A and 302 r/w s.34 - Dowry death - Prosecution of husband and mother-in-law - Conviction by courts below relying on dying declaration of the deceased - Held: Prosecution case established beyond reasonable doubt - The dying declaration is acceptable in view of the facts of the case - Conviction upheld.

The appellants-accused were prosecuted u/ss. 498-A and 302 r/w s. 34 IPC. The prosecution case was that A-1 and A-2, husband and mother-in-law of the deceased respectively, used to harass the deceased for dowry and killed her setting her on fire. Trial court convicted the accused primarily relying on the Dying Declaration of the deceased. High Court confirmed the conviction.

In appeal to this Court the appellants-accused inter alia contended that the Dying Declaration was not reliable and that in view of the burn injuries on the hands of the accused-husband, it was highly improbable that he set the deceased on fire.

Dismissing the appeal, the Court

HELD: 1. The prosecution has established its case beyond reasonable doubt. The materials placed by the prosecution about the recording of dying declaration, procedure followed, fitness of the deceased to make the statement, the evidence of doctor and the evidence of

Magistrate, who recorded the statement, amply prove their case. The statement of the deceased in the form of dying declaration is fully acceptable since on receipt of intimation from the police, the Judicial Magistrate (PW-10) reached the hospital and after satisfying herself through the statement of the duty doctor that the deceased was conscious and fit to make a statement, recorded her statement in the form of question and answers. In the dying declaration, she had specifically stated that her husband scolded her for not brining money in the marriage of her sister. He used to demand money from her father. Her in-laws used to harass/tease her for not bringing sufficient dowry and on the relevant date her mother-in-law caught hold of her hands and her husband set her on fire with a match stick after sprinkling kerosene oil. It is also seen from her dying declaration that before she was set on fire, her husband gave beat on her neck with his leg and she was beaten up mercilessly. The claim that there was wrong description of names in the dying declaration and some of the relatives were present at the time of recording of dying declaration, are not material contradictions which would affect the prosecution case. [Paras 16, 18 and 21] [304-G-H; 305-A-D, H; 360-A, E]

2. The plea - that in view of the burn injuries in the hands sustained by accused-husband, it was highly impossible that he set the deceased ablaze - is not sustainable. Though the accused-husband took the deceased to the hospital admittedly, he did not try to get any treatment from the doctor for his own alleged burn injuries. Nothing prevented him from taking treatment on the same day from the same doctor. Admittedly, he did not get treatment till he was arrested on 21.05.1998. [Para 17] [305-D-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1779 of 2009.

From the Judgment and Order dated 15.05.2006 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal No. 575-DB of 2001.

R.N. Kush, S.K. Sabharwal for the Appellants.

Kamal Mohan Gupta, Mohd. Zahid Hussain for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal has been filed against the final judgment and order dated 15.05.2006 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 575-DB of 2001 whereby the Division Bench of the High Court dismissed the appeal preferred by the appellants herein and confirmed the judgment on conviction and sentence dated 27.09.2001 and 28.09.2001 respectively, passed by the Additional Sessions Judge, Sonepat, Haryana in Sessions Case No. 39 of 1998/2001 holding the appellants guilty for the offence punishable under Sections 498-A and 302 read with Section 34 of the Indian Penal Code, 1860 (for short 'IPC') and sentenced them to undergo rigorous imprisonment (RI) for one year for the offence punishable under Section 498-A and a fine of Rs.500/- each and RI for life for the offence punishable under Section 302 read with 34 IPC and a fine of Rs.2000/- each, in default, to undergo RI for one year and both the sentences to run concurrently.

2. **Brief facts:**

(a) The case of the prosecution is that the deceased - Kailash was married to Rakesh, resident of Gohana, Sonepat about 8 years prior to the date of the incident. Out of the wedlock, four children were born to them. At the time of marriage, adequate dowry was given by the parents of the deceased. However, being unsatisfied with the dowry, Kailash has been subjected to harassment and cruelty in her

matrimonial home by Rakesh (A-1) and Smt. Ram Piari, (A-2) mother-in-law. 15 days prior to the occurrence, the deceased attended the marriage of her sister along with her husband and in-laws. The accused started harassing her for not bringing adequate amount after seeing the marriage of her sister.

(b) On 14.05.1998, at about 11 p.m., a quarrel took place in the house of Rakesh (A-1) where he put his leg on the neck of the deceased and beaten her mercilessly. Thereafter, Ram Piari (A-2) caught hold of the hands of the deceased while Rakesh (A-1) sprinkled kerosene upon her and set her ablaze. At that time, Lala, younger brother of Rakesh (A-1) was also present in the house. On the same night, Rakesh (A-1), Ram Piari (A-2) and Siri Ram - father-in-law took the deceased to the hospital and admitted her in the hospital on 15.05.1998 at 1.30 a.m. After getting a telephonic message, the parents of the deceased also reached the hospital.

(c) On 16.05.1998, on receipt of telephonic information about the admission of Kailash in PGI MS, Rohtak, on account of burn injuries, the police contacted Kailash and an application was moved by the investigating officer to the Duty Magistrate at 5.50 p.m. Ms. Shalini Nagpal, Judicial Magistrate, on getting the permission of the doctor at 6.10 p.m. about the fitness of the victim to make a statement, recorded her statement.

(d) On the same day, a copy of the statement was sent to the police station for registration of the case. An FIR was registered and the investigating officer took the case for investigation on 17.05.1998.

(e) On 21.05.1998, Rakesh was arrested and got medically examined by the doctor who opined that his hands were found to be having superficial to deep burns. On his disclosure, a stove containing the kerosene was recovered.

(f) On 29.05.1998 Ram Piari- mother-in-law of the deceased was also arrested. Ultimately, on 04.06.1998,

Kailash succumbed to her injuries in Safdarjung Hospital at New Delhi.

(g) On completion of the investigation, charges for the offence punishable under Sections 498-A and 302 read with Section 34 IPC were framed against the accused.

(h) The Additional Sessions Judge, Sonepat, after examination of all the witnesses, vide judgment 27.09.2001, convicted the accused persons guilty for the offences punishable under Sections 498-A and 302 read with Section 34 IPC. By judgment dated 28.09.2001, the trial Judge, sentenced the accused persons to RI for one year and a fine of Rs.500/- under Section 498-A and RI for life and a fine of Rs.2000/- under Section 302/34 IPC and in default of payment of fine, both the accused shall have to undergo RI for one year. Both the sentences shall run concurrently.

(i) Being aggrieved, the accused persons (A-1 and A-2) filed an appeal before the High Court of Punjab and Haryana at Chandigarh. After hearing both the parties, by impugned judgment dated 15.05.2006, the High Court confirmed the judgment of the trial Court and dismissed the appeal preferred by the appellants herein.

(j) Questioning the conviction and sentence, Rakesh (A-1) and Smt. Ram Piari (A-2) preferred this appeal by way of special leave before this Court and leave was granted on 11.09.2009.

3. Heard Mr. R.N. Kush, learned counsel appearing for the appellants-accused and Mr. Kamal Mohan Gupta, learned counsel appearing for the respondent-State.

Contentions:

4. Mr. R.N. Kush, learned counsel for the appellants, at the foremost, contended that since the deceased - Kailash was not fit to make a statement as she was suffering from 85% burn

injuries, reliance and conviction based on the dying declaration cannot be sustained. He further submitted that Rakesh (A-1) also suffered injuries which are indicative of the fact that he came to rescue her wife on seeing her burning. On the other hand, Mr. Gupta, learned counsel for the respondent-State contended that the dying declaration was recorded by the Judicial Magistrate only after the duty doctor duly certified that she was in a fit condition to make a statement and the same was rightly relied on by both the courts below. As regards the second contention, it is pointed out by that if the injuries alleged to have been sustained by Rakesh (A-1) as claimed by him, nothing prevented him from taking treatment on the date of the incident, particularly when he took the deceased to the Hospital. However, the fact remains that only on 21.05.1998, when he was arrested by the police, he showed his alleged injuries to the doctor which itself create a doubt about his version.

5. We have perused all the relevant materials and considered the rival contentions.

Discussion:

6. It is not in dispute that the deceased - Kailash sustained burn injuries at the house of the accused - Rakesh where they were living for about eight years. The incident occurred at 11.00 p.m. on 14.05.1998 and she was admitted in the hospital on 15.05.1998 at about 1.30 a.m. It is also not in dispute that the deceased was under the supervision of doctors as well as the accused Rakesh till 10.00 a.m. on 16.05.1998.

7. Now, let us consider the dying declaration, its contents, and the procedure followed while recording the same. It is seen that after knowing the condition of the deceased, the police requested Ms. Shalini Nagpal, the Judicial Magistrate, Ist Class, Rohtak (PW-10) for recording her statement. It is further seen that before recording her statement, the Magistrate (PW-10) asked for the opinion of the duty doctor about her condition whether she was fit to make a statement. The record shows

that after obtaining the opinion of doctor, all the police officials and relatives were directed to leave the ward. Dr. Raman Sethi (PW-6) explained to the patient that she is deposing before the Magistrate and apprised that she is free to make her statement voluntarily without any fear or pressure. After satisfying her position to make a statement, the Magistrate (PW-10) recorded the statement of the deceased. It reads as follows:

"Q: How many years have passed to your marriage?

Ans: 8 years

Q: How many children have you?

Ans: Four

Q: On which day the incident took place?

Ans: The quarrel was continuing for the last 15 days.

Q: On the night of last Thursday at 11.00 P.M. what happened with you?

Ans: My husband used to say as to why I did not bring money in the marriage of my sister. He used to demand money from my father. My mother-in-law Ram Piari and father-in-law Siri Ram used to harass/tease me for dowry. It was Thursday, my mother-in-law, Devar (husband's younger brother) Lala were at home. My mother-in-law caught hold of my hand and my husband set me on fire with match stick after sprinkling kerosene oil. My devar came afterwards, when I was set on fire. My husband gave beating to me and set me ablaze. Then my husband put his leg on my neck and I was beaten up mercilessly. After that my father-in-law came, but he did not set me on fire. My husband, mother-in-law and father-in-law brought me to the hospital.

Q: Do you want to say any thing else?

Ans: No

(Right great Toe impression of Patient) Sd/- J.M.I.C.(D)

R.O. & A.C.

Patient remained fit and conscious during the statement

Sd/- in English Dr. Raman Sethi
P.G. Surg 5/IV"

8. In order to strengthen the above statement, the prosecution examined Dr. Raman Sethi (PW-6) who certified the condition of the deceased. In his evidence, he deposed that on 16.05.1998, Ram Kumar (ASI) moved an application (Ex. PD) before him seeking opinion regarding fitness of Kailash, W/o Rakesh, resident of Gohana for making a statement. PW-6 declared her fit to make a statement at 6.30 p.m. on 16.05.1998. Basing on his statement, the duty Magistrate recorded her statement. Even after recording the statement, PW-6 again examined Kailash and opined that the deceased remained fit and conscious during her statement. He also stated that the statement was over within 20 minutes and also informed that he did not treat the patient at any stage and denied that he gave wrong opinion at the behest of Magistrate.

9. Ms. Shalini Nagpal, Judicial Magistrate, Ist Class, Rohtak, who recorded the dying declaration of the deceased was examined as PW-10. According to her, on 16.05.1998, the police had moved an application before her for recording the statement of Kailash, and she had visited PGIMS, Rohtak at about 5.50 p.m. on the same day and contacted the doctor concerned in Ward No.5 and sought his opinion about her fitness to make a statement. She asserted that the doctor had declared Kailash fit to make a statement (Memo Ex PB/3). She further explained that thereafter, she recorded her statement in the form of question and answers form which is Ext. PB. The

statement was concluded by her at 6.25 p.m and PW-6, after examining the deceased certified that Kailash was in her sense throughout the period of her examination. She also deposed that the statement (Ex.PB) had been recorded by her in the very language of Kailash without any addition or omission and her certificate to that effect is Ex.PB/5. The certificate of the doctor about the physical condition of the deceased during the course of examination is Ex.PB/4. She also informed the Court that the statement was read over to Kailash who accepted the contents to be correct. She also stated that she did not obtain the thumb impression of the patient as both her hands were burnt, hence she elected to obtain the impression of her right toe. In the cross examination, she admitted that the document exhibited as Ex.PB by her is the carbon copy prepared by her in the same process. It is also clear from her evidence that before recording the statement of the deceased, she specifically directed the police officials and relatives to leave the ward so that the patient was not under any influence while making the statement before her. Though, in the evidence, it has come on record that few of the relatives were standing in the ward, in view of the assertion of the Magistrate (PW-10) who recorded her statement, mere presence of some of the close relatives would not affect the contents of the declaration.

10. Dr. S.P. Chug, Casualty Medical Officer, PGIMS, Rohtak was examined as PW-11. In his evidence, he deposed that on 15.05.1998 at about 1.30 a.m., he examined Kailash W/o Rakesh and on examination he found that the patient was conscious, pulse and BP were unrecordable. He further stated that there were superficial to deep burns involving almost all the body except the legs below the knees. There was approx. 85% burns which were subjected to surgeon's opinion and was kept under observation. Though it was pointed out that while recording the history of the patient, he noted that it was the accidental fire while cooking food, in view of categorical statement by the deceased in her dying declaration the

reference made by PW-11 while recording the history of the patient would not affect the prosecution case.

11. Dr. B.S.Kadian, Medical Officer of CHC, Gohana was examined as PW-7. In his evidence, he explained the nature of burn injuries.

12. Dr. L.K. Barua, who was examined as PW-13 has conducted the post mortem on the dead body of Kailash and submitted the report vide (Ex.PH). He asserted that the death was due to burn injuries.

13. Hiralal, father of the deceased was examined as PW-14. He explained the manner in which the in-laws of Kailash was behaving with her prior to the occurrence. He has supported the entire prosecution version.

14. Madhu - daughter of Rakesh aged about 12 years, was examined as a defence witness. Though she deposed that her mother caught fire, per chance, from the kersone stove, however, she admitted that her father Rakesh was present in the house at the time of the incident.

15. It is not in dispute that the accused did not inform the parents of the deceased about the incident. Though it is the claim of A-1 that it was he who informed PW-14, father of the deceased, in his evidence, he denied the same and according to him, he received a message from Hukum Chand. It is also relevant to note that only after arrival of PW-14 and on seeing the deteriorating condition of her daughter, he complained to the doctor concerned to shift her to Safdarjung Hospital, New Delhi. The fact remains that the accused did not take any such step.

16. The statement of the deceased in the form of dying declaration is fully acceptable since on receipt of intimation from the police, the Judicial Magistrate (PW-10) reached the hospital and after satisfying herself through the statement of the duty doctor that the deceased was conscious and fit to make

a statement, recorded her statement in the form of question and answers. In the dying declaration, which we have extracted in the earlier part of our order, she had specifically stated that her husband scolded her for not brining money in the marriage of her sister. He used to demand money from her father. Her in-laws used to harass/tease her for not bringing sufficient dowry and on the relevant date her mother-in-law caught hold of her hands and her husband set her on fire with a match stick after sprinkling kerosene oil. It is also seen from her dying declaration that before she was set on fire, her husband gave beat on her neck with his leg and she was beaten up mercilessly. Considering the materials placed by the prosecution about the recording of dying declaration, procedure followed, her fitness to make a statement, the evidence of doctor and the evidence of Magistrate, who recorded her statement, it amply prove their case.

17. Coming to the claim that inasmuch as the husband Rakesh also sustained burn injuries in his hands, it is highly impossible to set her ablaze, it is relevant to note that the incident occurred late night on 14.05.1998, though the accused-husband took her to the hospital admittedly, he did not tried to get any treatment from the doctor for the alleged burn injuries. As rightly pointed out by the learned counsel for the State, if he had sustained burn injuries in his hands nothing prevented him from taking treatment on the same day from the same doctor. Admittedly, he did not get treatment till he was arrested on 21.05.1998. In view of the same, the argument of the learned counsel for the appellant that inasmuch as the burn injuries were found on the hands of the husband, it was necessary to look for corroboration is liable to be rejected. In view of the factual position, the decisions of various Courts relied on by the counsel for the appellants on this aspect are not applicable to the case on hand and there is no need to refer the same.

18. The claim that there was wrong description of names in the dying declaration and some of the relatives were present

at the time of recording of dying declaration are not material contradictions which would affect the prosecution case.

19. Though learned counsel for the appellants contended that in view of the conduct of A-1 taking the deceased to the hospital and he also sustained injuries on his hand prayed for altering the conviction from Section 302 to Section 304 Part I, in view of our earlier discussion, we are not in a position to accept the same. It is not in dispute that the occurrence took place in the house of the accused where Kailash was residing, and unfortunately, even after having four children, she died at the matrimonial home due to burn injuries at the instance of the accused appellants. There is no valid ground to alter the conviction as pleaded by the counsel for the first appellant.

20. Inasmuch as the second appellant-Ram Piari had been released after 14 years on the orders of the appropriate Government, no argument was advanced about the decision of the courts below.

21. In view of the above discussion, we are satisfied that the prosecution has established its case beyond reasonable doubt and we are in entire agreement with the conclusion arrived at by the trial Court as well as the High Court. Consequently, the appeal fails and the same is dismissed.

K.K.T. Appeal dismissed.

MADHAVI AMMA & ORS.
v.
S. PRASANNAKUMARI & ORS.
(Civil Appeal Nos. 2735-2736 of 2005)

MARCH 22, 2013

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

Kerala Land Reforms Act, 1963 - ss. 80, 80B, 79A, 102 and 125 - Eviction proceedings under the 1965 Act - Reference u/s.125(3) of the 1963 Act, by Rent Control Authority calling for decision as to status of appellant(s) as a tenant or Kudikidappukaran - On Reference, Land Tribunal returned a finding that appellant(s) was not a Kudikidappukaran but was only a tenant occupying a building belonging to the respondent and not a hut or homestead - Held: The only scope to challenge the conclusion of the Land Tribunal was by way of an appeal under the provisions of 1965 Act by virtue of the specific stipulations contained in s.125(6) of the 1963 Act - In order for a person to claim the status of Kudikidappukaran, he has to ensure that the status claimed is in the first instance accepted by the local authority in appropriate proceedings u/s.80 of the 1963 Act and more importantly in proof for such acceptance his name is entered as Kudikidappukaran in the register prepared and maintained for that purpose by the local authority - Approach made by the appellant(s) by invoking s.80B of the 1963 Act in order to assert his right as Kudikidappukaran even without getting his status ascertained in appropriate proceedings u/s.80 of the 1963 Act was wholly invalid and rightly rejected by the original authority - Appellate Authority failed to understand the scope, power and jurisdiction of Appellate power u/s.102 of the 1963 Act as against the order passed u/s.80B of the 1963 Act - Order of Appellate Authority was, wholly without any jurisdiction

and rightly set aside by the High Court - Kerala Buildings (Lease and Rent Control) Act, 1965.

Kerala Land Reforms Act, 1963 - s.125 - Status of Kudikidappukaran - Determination - Bar of jurisdiction of Civil Court/Rent Control Court - Held: Such question can be exclusively decided only by the Land Tribunal - However, after such decision is rendered pursuant to a reference made to it and the ultimate decision of the Civil Court/Rent Control Court is taken up by way of appeal, the Appellate Court/ appellate authority of a Civil Court or Rent Control Court while examining the merits of the decision of the concerned Civil Court or the original authority on the question of eviction can also examine the correctness of the decision rendered by the Land Tribunal as regards the status as a Kudikidappukaran.

The respondents landlord filed RCP No. 140/85 for eviction of the tenant, sub-tenant and other occupants under the Kerala Buildings (Lease and Rent Control) Act, 1965. When that eviction petition was pending, one of the tenants, who was predecessor of the appellant (s) herein, filed a petition under Section 125 (3) of the Kerala Land Reforms Act, 1963 claiming rights as a Kudikidappukaran. The Rent Controller referred the issue as to whether such a claim made by the tenant was admissible, to the Land Tribunal. The tenant also filed an application under Section 80B of the 1963 Act for purchase of Kudikidappu under his occupation of the lands before the Land Tribunal. By orders dated 19.2.1991, the Land Tribunal returned a finding in the Reference made by the Rent Control Authority to the effect that the predecessor-in-interest of the appellant (s) did not possess any Kudikidappu rights. In the application filed under Section 80B of the Act also such a claim came to the rejected. Having regard to the provisions contained in Section 125 (5) of the 1963 Act, the Rent Control proceedings in RCP 140/85 was

determined holding that the tenant's right as a Kudikidappukaran was not maintainable and thereafter the eviction petition was also ordered on merits in favour of the respondent-landlord herein.

On the side of the appellant (s), a separate appeal was preferred in AA 37/91 as against the rejection of the application under section 80B of the 1963 Act which came to be allowed by the Appellate Authority by its order dated 13.11.1995. As against the order of the Rent Control Authority in RCP No.140/85 dated 2.7.1991 on behalf of the appellant(s), an appeal was also preferred in RCA No.133/1991 before the Rent Control Appellate Authority. The said appeal was dismissed by order dated 28.10.1995. In the above stated background, the High Court passed the impugned order confirming the order of eviction as against the appellant (s) and also setting aside the order of the appellate authority dated 13.11.95 in AA 37 of 1991 passed under the provisions of 1963 Act.

In the instant appeals, the appellant(s) contended that irrespective of the decision of the Land Tribunal in its order passed in the Reference Case being RC No.16/ 89 dated 19.2.1991 which was acknowledged, approved and accepted by the Rent Control Authority in its ultimate order of eviction dated 02.7.1991, the order which came to be passed by the appellate authority under the 1963 Act in AA 37 of 1991 would prevail which has ultimately concluded that the appellants' right as Kudikiddappukaran was well-founded.

Dismissing the appeals, the Court

HELD: 1. Section 125 of the Kerala Land Reforms Act, 1963 creates a bar of jurisdiction of Civil Court to settle, decide or deal with any question or to determine any matter which is by or under the 1963 Act required to be settled, decided or dealt with or to be determined by

the Land Tribunal or the Appellate Authority or the Land Board or the Taluk Land Board or the Government or an officer of the Government. Further the proviso to Section (1) to Section 125 excludes such a bar of civil Court jurisdiction in respect of proceedings pending in any Court at the commencement of the Kerala Land Reforms Amendment Act, 1969. Even while creating such a bar of jurisdiction of civil Courts, the law makers wanted to ensure that no person is allowed to abuse or misuse the benefits conferred under 1963 Act while claiming rights as a Kudikidappukaran and with that laudable object engraved sub-Section (3) in Section 125 itself by which any Civil Court or authority before whom any other proceedings regarding rights of a tenant or of a Kudikidappukaran arise for consideration, enjoins upon such civil Court or other authority to stay the proceedings temporarily and also simultaneously make a reference to the Land Tribunal having jurisdiction over the area in which the land or part thereof is situate along with the relevant records for the decision of the question as to whether a person is a tenant or a Kudikidappukaran. While under Section 125(3), having regard to the bar of jurisdiction of Civil Court/Rent Control Court to decide the question about the status of a Kudikidappukaran or a tenant which can be exclusively decided only by the land Tribunal, after such a decision is rendered pursuant to a reference made to it and the ultimate decision of the Civil Court/Rent Control Court is taken up by way of an appeal to the Appellate Court/appellate authority of a Civil Court or Rent Control Court while examining the merits of the decision of the concerned Civil Court or the original authority on the question of eviction can also examine the correctness of the decision rendered by the Land Tribunal as regards the status as a Kudikidappukaran. [Para 14] [332-B-F; 333-B-D]

2. Serious discrepancy was explicit in the order of

the Appellate Authority dated 13.11.1995 in AA 37/91. In the first place, as rightly held by the High Court when a Reference was made under Section 125 (3) of the 1963 Act by the Rent Control Authority calling for a decision as to the status of the appellant(s) as a tenant or Kudikidappukaran for the purpose of deciding the eviction proceedings, and in that Reference the Land Tribunal returned a finding that the appellant(s) was not a Kudikidappukaran but was only a tenant occupying a building belonging to the respondent and not a hut or homestead, thereafter the only scope to challenge the said conclusion of the Land Tribunal was only by way of an appeal under the provisions of the Kerala Buildings (Lease and Rent Control) Act, 1965 by virtue of the specific stipulations contained in Section 125(6) of the 1963 Act. [Para 19] [337-C-F]

3. Consequently, when a decision was reached by the Land Tribunal in a Reference made to it under Section 125 (3) of the 1963 Act, having regard to the scheme of the Act as from the definition of Kudikidappukaran under Section 2(25), the benefits that would accrue to a Kudikidappukaran as provided under Section 79A, the procedure prescribed under Section 80 by which a person claiming the rights of Kudikidappukaran has to ensure the recognition of such status as Kudikidappukaran in a proceeding before the concerned local authority and get his name registered in the prescribed register to be prepared by the local authority and to be maintained for that purpose, one fails to see how any person claiming such status as Kudikidappukaran can seek for such status to be recognized by resorting to any other proceedings under the other provisions of the 1963 Act. In order for a person to claim the status of Kudikidappukaran for the purpose of availing the benefits available as a Kudikidappukaran as spelt out under Section 79A of the 1963 Act, he has

to ensure that the status claimed by him as Kudikidappukaran is in the first instance accepted by the local authority in appropriate proceedings under Section 80 of the Act and more importantly in proof for such acceptance his name is entered as Kudikidappukaran in the register prepared and maintained for that purpose by the local authority. If any such person is not able to get such recognition in the first instance before the local authority, the statute prescribes a remedy of appeal under Section 80(5) before appropriate appellate authority. Only after establishing such a right in the prescribed manner as provided under Section 80 of the Act, there would be any scope for anyone to claim validly that he is entitled for all the benefits that would flow from his status as a Kudikidappukaran. In other words, it can be validly stated that the claim of a status of a Kudikidappukaran can be determined only under Section 80 of the Act. [Para 20] [337-G-H; 338-A-F]

4. In contradistinction to Section 80, what is provided under Sections 80A or 80B were the consequential benefits such as the right to purchase the Kudikidappu and the procedure to be followed for effecting the purchase by approaching the concerned authorities and thereby ascertain his ownership rights after such purpose. By no stretch of imagination, the right to purchase provided under Section 80A and the procedure prescribed for purchase of such right under Section 80B can be invoked, by a person whose status as Kudikidappukaran was yet to be ascertained earlier. The approach made by the appellant(s) by invoking Section 80B of the Act in order to assert his right as Kudikidappukaran even without getting his status ascertained in the appropriate proceedings under Section 80 of the Act was wholly invalid and was rightly rejected by the original authority in its order dated 19.2.1991 in OA 78/88. The Appellate Authority that decided the appeal as

against the said order in AA 37/91 failed to understand the scope, power and jurisdiction of Appellate power under Section 102 of the Act as against the order passed under Section 80B of the 1963 Act which resulted in the passing of the order dated 13.11.1995 in AA 37/91. The order of the Appellate Authority (LR) Attingal, dated 13.11.1995 in AA 37/91 was, wholly without any jurisdiction and was rightly set aside by the High Court. [Paras 21, 22] [338-G-H; 339-A-D, E]

5. The only other aspect to be examined is the correctness of the order passed by the Rent Control Authority in RCP No.140/85 dated 2.7.1991 on the merits of ground of eviction, namely, the alleged default in payment of rent, necessity for demolition and re-construction and the claim for own-occupation. In those aspects, as the conclusion was arrived at by the Rent Control Court based on a detailed consideration of the merits which are mainly based on facts and in the absence of any legal error in the said conclusion arrived at by the Rent Control Authority as well as the Rent Control Appellate Authority in the decision dated 28.10.1995 passed in RCA No.133/91, there is no scope to find fault with the ultimate decision of the High Court in dismissing the revision preferred by the appellant(s). The decision of the High Court in allowing the revision preferred by the respondent as against the order of the appellate authority (LR) dated 13.11.1995 in AA 37/91 was also justified. [Para 23] [339-F-H; 340-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2735-2736 of 2005

From the Judgment & Order dated 18.12.2002 of the High Court of Kerala at Ernakulam in CRP No. 833 and 1411 of 1996.

Romy Chacko, Varun Mudgal for the Appellants.

S. Balakrishnan, Bina Madhavan, Praseena E. Joseph, P. Narasimhan, Subramonium Prasad, S.N. Jha for the Respondents.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. These appeals are directed against the common judgment of the Division Bench of the High Court of Kerala at Ernakulam dated 18.12.2002 passed in CRP No.1411/1996 (C) and CRP No.833/1996(H). CRP No.1411/1996 (C) was preferred by one Appukuttan Nair along with the appellant (s) herein challenging the decision of the Rent Control Appellate Authority, Thiruvananthapuram dated 28.10.1995 in RCA No.133/1991 by which the eviction ordered by the Rent Control Court in its order dated 02.7.1991 in RCP No.140/1985 was confirmed. CRP. No.833 of 1996 (H) was preferred by the respondents herein challenging the order of the Appellate Authority (LR), Attingal in AA No.37/91 dated 13.11.1995 by which the order of the Land Tribunal, Thiruvananthapuram dated 19.02.1991 in OA No.78/1988 filed by the predecessor of the appellant (s), namely, Appukkuttan Nair under Section 80B of the Kerala Land Reforms Act for the purchase of his Kudikidappu right in respect of survey No.1536/A of Vanchiyoor Village, Thiruvananthapuram Taluk was reversed.

2. By the common order of the Division Bench, the eviction ordered by the Authorities under the Kerala Rent Control Act, 1963 and Kerala Buildings (Lease and Rent Control) Act, 1965 was confirmed and the order of the appellate authority dated 13.11.1995 in AA 37/1991 was set aside.

3. To trace the brief facts, the respondents landlord filed RCP No. 140/85 for eviction of the tenant, sub-tenant and other occupants under the provisions of the Kerala Buildings (Lease and Rent Control) Act, 1965 hereinafter called 'the 1965 Act'. When that eviction petition was pending, at the instance of one of the tenants, who was predecessor of the appellant (s) herein

filed a petition under Section 125 (3) of the Kerala Land Reforms Act, 1963 hereinafter called 'the 1963 Act' by which the predecessor of the appellant (s) claimed rights as a Kudikidappukaran. The learned Rent Controller referred the issue as to whether such a claim made by the tenant was admissible, to the Land Tribunal, having jurisdiction over the area in which the land situated together with the relevant records for the decision on that question.

4. Be that as it may, the tenant also filed an application under Section 80B of the 1963 Act for purchase of Kudikidappu under his occupation of the lands before the Land Tribunal. By independent orders dated 19.2.1991, the Land Tribunal returned a finding in the Reference made by the learned Rent Control Authority to the effect that the predecessor-in-interest of the appellant (s) did not possess any Kudikidappu rights. In the application filed under Section 80B of the Act also such a claim came to the rejected. Having regard to the provisions contained in Section 125 (5) of the 1963 Act, the Rent Control proceedings in RCP 140/85 was determined holding that the tenant's right as a Kudikidappukaran was not maintainable and thereafter the eviction petition was also ordered on merits in favour of the respondent-landlord herein.

5. On the side of the appellant (s), a separate appeal was preferred in AA 37/91 as against the rejection of the application under section 80B of the 1963 Act which came to be allowed by the Appellate Authority by its order dated 13.11.1995. As against the order of the Rent Control Authority in RCP No.140/85 dated 2.7.1991 on behalf of the appellant(s), an appeal was also preferred in RCA No.133/1991 before the Rent Control Appellate Authority. The said appeal was dismissed by order dated 28.10.1995.

6. It is in the above stated background, the Division Bench of the High Court passed the impugned order confirming the order of eviction as against the appellant (s) and also setting aside the order of the appellate authority dated 13.11.95 in AA

37 of 1991 passed under the provisions of 1963 Act.

7. We heard Mr. Romy Chacko, Advocate for the appellant(s) and Sri Balakrishnan, learned senior counsel for the respondents. The learned counsel for the appellant(s) vehemently contended that irrespective of the decision of the Land Tribunal in its order passed in the Reference Case being RC No.16/89 dated 19.2.1991 which was acknowledged, approved and accepted by the learned Rent Control Authority in its ultimate order of eviction dated 02.7.1991, the order which came to be passed by the appellate authority under the 1963 Act in AA 37 of 1991 would prevail which has ultimately concluded that the appellants' right as Kudikiddappukaran was well-founded. In other words, according to learned counsel as the claim of the appellant(s) as Kudikiddapkaran under the provision of 1963 Act was substantial in nature which has been examined and held in their favour by the concerned authority under the provision of the 1963 Act, the same should prevail over the rent control proceedings which was contrary to the decision passed under the 1963 Act.

8. As against the above submission, Sri Balakrishnan, learned senior counsel for the respondent-landlord contended that the claim of the appellant(s) as the Kudikidappukaran having been rejected by the authority constituted under the 1963 Act, in a Reference made to it which issue was also subject matter of consideration in the appeal preferred against the order of the Rent Control Authority, namely, before the Rent Control Appellate Authority as provided under Section 125(6) of the Act, the said decision could alone determine the rights of the appellant(s) even as regards the status as Kudikidappukaran and any contrary finding made in an application under Section 80B of the 1963 Act cannot prevail over the proceedings under Section 125 of the 1963 Act.

9. The crucial question which arises for consideration in this appeal is as to what is the scheme of the Act in regard to the decision as to the status of a person as Kudikidappukaran,

his rights and entitlements on the one hand and the effect of the decision of the Civil Court or any other authority in deciding an issue relating to the rights of a landlord as against a tenant in which any question is raised by the tenant claiming rights as a Kudikidappukaran.

10. In order to decide the above question some of the relevant provisions of the 1963 Act require to be noted, namely, Section 2 (25) the definition of 'Kudikidappukaran', Section 79A which prescribes the customary and other rights of Kudikidappukaran, Section 80 which prescribes the procedure for the registration of a person as Kudikidappukaran, Sections 80A and 80B which prescribe the right of Kudikidappukaran, to purchase his Kudikidappu rights and the procedure to be followed for effecting such purchase. Under Section 102 of the Act the right of appeal against an order passed under Section 80B of the 1963 Act is provided. Provision for revision before the High Court is provided under Section 103 of the Act as against any Appellate Authority's decision. There is an in built provision under Section 125 for making a Reference to a Land Tribunal to decide the question about the status of a person as Kudikidappukaran and further appeal remedy against such a decision. The said provisions are as under:

> **"2.(25)** "Kudikidappukaran" means a person who has neither a homestead nor any land exceeding in extent three cents in any city or major municipality or five cents in any other municipality or ten cents in any panchayat area or township, in possession either as owner or as tenant, on which he could erect a homestead and
>
> (a) who has been permitted with or without an obligation to pay rent by a person in lawful possession of any land to have the use and occupation of a portion of such land for the purpose of erecting a homestead; or
>
> (b) who has been permitted by a person in lawful possession of any land to occupy, with or without an

> obligation to pay rent, a hut belonging to such person and situate in the said land; and "Kudikidappu" means the land and the homestead or the hut so permitted to be erected or occupied together with the easements attached thereto:
>
> [xxxx]
>
> **Explanation I.** - In calculating the total extent of the land of a Kudikidappukaran for the purposes of this clause, three cents in a city or major municipality, shall be deemed to be equivalent to five cents in any other municipality, and three cents in a city or major municipality or five cents in any other municipality shall be deemed to be equivalent to ten cents in a panchayat area or township.
>
> **Explanation II.** - For the purposes of this clause.
>
> (a) "hut" means any dwelling house constructed by a person other than the person permitted to occupy it-
>
> (i) at a cost, at the time of construction, not exceeding seven hundred and fifty rupees; or
>
> (ii) which could have at the time of construction, yielded a monthly rent not exceeding five rupees,
>
> and includes any such dwelling house reconstructed by the Kudikidappukaran in accordance with the provisions of section 79; and
>
> (b) "homestead" means, unless the context otherwise requires, any dwelling house erected by the person permitted to have the use and occupation of any land for the purpose of such erection, and includes any such dwelling house reconstructed by the Kudikidappukaran in accordance with the provisions of section 79.
>
> **[Explanation IIA.** - Notwithstanding any judgement, decree or order of any court, a person, who, on the 16th day of

August, 1968, was in occupation of any land and the dwelling house thereon (whether constructed by him or by any of his predecessors-in-interest or belonging to any other person) and continued to be in such occupation till the 1st day of January, 1970, shall be deemed to be a Kudikidappukaran:

Provided that no such person shall be deemed to be a Kudikidappukaran-

(a) in cases where the dwelling house has not been constructed by such person or by any of his predecessors-in-interest, if-

(i) such dwelling house was constructed at a cost, at the time of construction, exceeding seven hundred and fifty rupees; or

(ii) such dwelling house could have, at the time of construction, yielded a monthly rent exceeding five rupees; or

(b) if he has a building or is in possession of any land exceeding in extent three cents in any city or major municipality or five cents in any other municipality or ten cents in any panchayat area or township, either as owner or as tenant, on which he could erect a building];

Explanation III. - Where any Kudikidappukaran secures any mortgage with possession of the land in which the Kudikidappu is situate, his Kudikidappu right shall revive on the redemption of the mortgage, provided that he has at the time of redemption no other homestead or any land exceeding three cents in any city or major municipality or five cents in any other municipality or ten cents in any panchayat area or township, in possession either as owner or as tenant, on which he could erect a homestead.

Explanation IV. - Where a mortgagee with possession

erects for his residence a homestead, or resides in a hut already in existence, on the land to which the mortgage relates, he shall, notwithstanding the redemption of the mortgage, be deemed to be a Kudikidappukaran in respect of such homestead or hut, provided that at the time of the redemption-

(a) he has no other Kudikidappu or residential building belonging to him, or any land exceeding three cents in any city or major municipality or five cents in any other municipality or ten cents in any panchayat area or township, in possession either as owner or as tenant, on which he could erect a homestead; and

(b) his annual income does not exceed two thousand rupees.

Explanation V. - Where a Kudikidappukaran transfers his right in the Kudikidappu to another person, such person shall be deemed to be a Kudikidappukaran, if-

(a) he has no other homestead or any land in possession, either as owner or as tenant, on which he could erect a homestead; and

(b) his annual income does not exceed two thousand rupees,

Explanation VI. - For the purposes of this clause, a person occupying any hut belonging to the owner of a plantation and situate in the plantation shall not be deemed to be a Kudikidappukaran if such person was permitted to occupy that hut in connection with his employment in the plantation, unless

(a) he was, immediately before the commencement of this Act, entitled to the rights of a Kudikidappukaran or the holder of a protected ulkudi or Kudikidappu under any law then in force; or

(b) he would have been entitled to the rights of a Kudikidappukaran if the area in which that hut is situate had not been converted into a plantation subsequent to his occupation of that hut.

[Explanation VII. - For the removal of doubts it is hereby declared that a person occupying a homestead or hut situate on a land held or owned by the Government of Kerala or the Government of any other State in India or the Government of India shall not be deemed to be a Kudikidappukaran];

[79A. Customary and other rights of Kudikidappukaran. - (1) Notwithstanding anything contained in any law, or in any contract, or in any judgment, decree or order of court, the Kudikidappukaran shall be entitled to all rights accrued to him by custom, usage or agreement and which he was enjoying immediately before the commencement of this Act.

(2) Notwithstanding anything contained in any law, or in any judgment, decree or order of court, but without prejudice to any rights to which a Kudikidappukaran may be entitled under any other law for the time being in force or under any custom, usage or contract a Kudikidappukaran shall in respect of his Kudikidappu have all the rights and privileges conferred on the owner of a land under the Indian Easements Act, 1882, as if the Kudikidappukaran were the owner of his Kudikidappu from the date on which the hut or homestead, as the case may be, was occupied or erected.

(3) Notwithstanding anything contained in any law, or in any judgment, decree or order of court, or in any contract it shall not be necessary to obtain the consent of the owner or occupier or both of the land in which a Kudikidappu is situate, to lay down or place any electric supply line or other work on, over or under such land for the purpose of supply

of electrical energy to the Kudikidappu for domestic consumption and use.

(4) Notwithstanding anything contained in any law, or in any judgment, decree or order of court, or in any contract, it shall not be necessary to obtain the consent of the owner or occupier or both of the land in which a kudikidappu is situate to lay down any pipe or to carry out any other work on, over or under such land for the purpose of supply of water to the Kudikidappu for domestic consumption and use.

Explanation. - For the purpose of this section, enjoyment of any benefit or concession for a continuous period of three years immediately preceding the commencement of this Act shall be deemed to be enjoyment of a right accrued to the Kudikidappukaran by custom, usage or agreement.]

80. Register of Kudikidappukars. - (1) The Government shall cause a register of Kudikidappukars [within the limits of each local authority to be prepared and maintained.]

(2) The register shall show-

(a) the description of land in which the Kudikidappu is situate;

(b) the location of the Kudikidappu and its extent;

(c) the name of the landowner and of the person in possession of the land in which the Kudikidappu is situate;

(d) the name and address of the Kudikidappukaran; [xxxx]

[(dd) the rights referred to in section 79A; and

(e) such other particulars as may be prescribed.

[3) Subject to such rules as may be made by the

Government in this behalf, the local authority shall prepare a register of Kudikidappukars within its jurisdiction.

(4) The register shall be maintained by the local authority in such manner as may be prescribed.

(5) Any person aggrieved by the registration of a Kudikidappukaran under sub-section (3) or the refusal to register a person claiming to be a Kudikidappukaran may, within ninety days from the date of registration or refusal, as the case may be, appeal-

(a) to the Revenue Divisional Officer having jurisdiction, where the decision appealed against is that of a municipal corporation or a municipal council;

(b) to the Tahsildar having jurisdiction, in other cases.

(6) On receipt of an appeal under sub-section (5), the Revenue Divisional Officer or the Tahsildar, as the case may be, may call for the record of any proceeding which has been taken by the local authority under this section and may make such enquiry or cause such enquiry to be made and may pass such orders thereon as he thinks fit:

Provided that no order prejudicial to any person shall be passed without giving him an opportunity of being heard.

(7) For the purposes of this section, "local authority" shall not include a cantonment board.]

[80A. Right of Kudikidappukaran to purchase his Kudikidappu. - (1) Notwithstanding anything to the contrary contained in any law for the time being in force, a Kudikidappukaran shall, subject to the provisions of this section, have the right to purchase the Kudikidappu occupied by him and lands adjoining thereto.

(2) xxx xxx

(3) The extent of land which the Kudikidappukaran is entitled to purchase under this section shall be three cents in city or major municipality or five cents in any other municipality or ten cents in a panchayat area or township:
xxx xxx

(4) xxx xxx

(5) xxx xxx

(6) xxx xxx

(7) xxx xxx

(8) xxx xxx

(9) xxx xxx

(10) xxx xxx

(11) xxx xxx

(12) xxx xxx

80B. Procedure for purchase by Kudikidappukaran. - (1) A Kudikidappukaran entitled under section 80A to purchase the Kudikidappu occupied by him and lands adjoining thereto may apply to the Land Tribunal for such purchase.

(2) An application under sub-section (1) shall be in such form and shall contain such particulars as may be prescribed.

(3) The Land Tribunal shall, after giving notice to the Kudikidappukars in the land in which the Kudikidappu is situate and other persons interested in the land and after such enquiry as may be prescribed, pass such orders on the application as it thinks fit:,

Provided that where an application under sub-section (1)

of section 77 in respect of the Kudikidappu is pending, the Land Tribunal shall not pass any order under this sub-section before the disposal of that application.

(4) An order under sub-section (3) allowing an application shall specify.-

(i) the extent of land which the Kudikidappukaran is entitled to purchase;

(ii) the purchase price payable in respect of the land allowed to be purchased by the Kudikidappukaran;

(iii) the amounts due to the person in possession of the land in which the Kudikidappu is situate and other persons interested in the land;

(iv) the value of encumbrances subsisting or claims for maintenance or alimony charged on the land allowed to be purchased by the Kudikidappukaran;

(v) the amount payable to the holder of the encumbrance or the person entitled to the maintenance or alimony and the order of priority in which such amount is payable;

(vi) such other particulars as may be prescribed.

(5) If the person in possession of the land in which Kudikidappu is situate or the landowner or the intermediary, if any, of the land is liable to pay any amount to the Kudikidappukaran towards the price of the homestead or the cost of shifting the Kudikidappu, the Land Tribunal shall in passing orders on the application for purchase set off such amount against the purchase price payable to such person.

(6) Where the right, title and interest of the person in possession of the land in which the Kudikidappu is situate or any other person interested in the land form part of the security for any encumbrance or charge for maintenance

or alimony, the Land Tribunal shall, for the purpose of determining the value of the encumbrance or the charge for the maintenance or alimony relating to the portion in respect of which purchase is allowed, apportion the entire encumbrance or charge for the maintenance or alimony between the land in which the Kudikidappu is situate and the portion allowed to be purchased in proportion to the values of the two portions.

(7) Where the person in possession of the land in which the Kudikidappu is situate is a tenant, the purchase price payable in respect of the land to be purchased shall be apportioned among the landowner, the intermediaries, if any, and the tenant in possession of the land in proportion to the profits derivable by them from the holding.

Explanation. - "Profits derivable from the land" shall be deemed to be equal to,-

(i) in the case of a landowner, the rent which he was entitled to get from the tenant holding immediately under him;

(ii) in the case of an intermediary, the difference between the rent which he was entitled to get from his tenant and the rent for which he was liable to his landlord; and

(iii) in the case of the tenant in possession, the difference between the net income and the rent payable by him; and the rent payable by such tenant and the intermediary for the purposes of this Explanation shall be as calculated under the provisions of this Act.

102 - Appeal to appellate authority. - (1) The Government or any person aggrieved by any order of the Land Tribunal under sub-section (2) of section 12, sub-section (3) of section 13A, section 22, section 23, sub-section (2) of section 26 (where the amount of arrears of rent claimed exceeds five hundred rupees), section 31,

section 47, sub-section (3) or sub-section (4) of section 48, sub-section (3) of section 49, sub-section (6) of section 52, section 57, sub-section (5) of section 66, section 72F, section 73, sub-section (2) of section 77, section 80B, sub-section (4) of section 90, section 106 or section 106A may appeal against such order within such time as may be prescribed to the appellate authority.

(2) …….

(3) ……....

(4) …….

103 - Revision by High Court (1) Any person aggrieved by -

(i) any final order passed in an appeal against the order of the Land Tribunal or;

(ii) xxx xxx

(iii) xxx xxx

may, within such time as may be prescribed, prefer a petition to the High Court against the order on the ground that the [appellate authority or the Land Board, or the Taluk Land Board], as the case may be, has either decided erroneously, or failed to decide, any question of law.

(1A) …….

(1B) …….

(2) The High Court may, after giving an opportunity to the parties to be heard, pass such orders as it deems fit and the orders of the appellate authority or the Land Board, 1or the Taluk Land Board as the case may be, shall, wherever necessary, be modified accordingly.

(3) xxx xxx

(4) The power of the High Court under this section may be exercised by a Bench consisting of a Single Judge of the High Court.

125 - Bar of jurisdiction of civil courts. - (1) No Civil Court shall have jurisdiction to settle, decide or deal with any question or to determine any matter which is by or under this Act required to be settled, decided or dealt with or to be determined by the Land Tribunal or the appellate authority or the Land Board or the Taluk Land Board or the Government or an officer of the Government:

Provided that nothing contained in this sub-section shall apply to proceedings pending in any court at the commencement of the Kerala land Reforms Amendment Act, 1969.

(2) No order of the Land Tribunal or the appellate authority or the Land Board or the Taluk Land Board or the Government or an officer of the Government made under this Act shall be questioned in any civil court, except as provided in this Act.

(3) If in any suit or other proceedings any question regarding rights of a tenant or of a Kudikidappukaran (including a question as to whether a person is a tenant or a Kudikidappukaran) arises, the civil court shall stay the suit or other proceeding and refer such question to the Land Tribunal having jurisdiction over the area in which the land or part thereof is situate together with the relevant records for the decision of that question only.

(4) The Land Tribunal shall decide the question referred to it under subsection (3) and return the records together with its decision to the civil court.

(5) The civil court shall then proceed to decide the suit or

other proceedings accepting the decision of the Land Tribunal on the question referred to it.

(6) The decision of the Land Tribunal on the question referred to it shall, for the purposes of appeal, be deemed to be part of the finding of the civil court.

(7) No civil court shall have power to grant injunction in any suit or other proceedings referred to in sub-section (3) restraining any person from entering into or occupying or cultivating any land or Kudikidappu or to appoint a receiver for any property in respect of which a question referred to in that sub-section has arisen, till such question is decided by the Land Tribunal, and any such injunction granted or appointment made before the commencement of the Kerala Land Reforms (Amendment) Act, 1969, or before such question has arisen, shall stand cancelled.]

[(8) In this section, "civil court" shall include a Rent Control Court as defined in the Kerala Buildings (Lease and Rent Control) Act, 1965.]"

11. When we refer to Section 2(25) which defines Kudikidappukaran, the main ingredients to be noted are that to fall within the said definition a person has to establish that he had neither a homestead nor any land existing in extent of three cents in any city or major municipality or five cents in any other municipality or ten cents in any Panchayat area or township either as an owner or as a tenant at which he could erect a homestead. Such person should have been permitted with or without an obligation to pay rent. The possession should be lawful possession of any land for the purpose of erecting a homestead. Such a person in lawful possession should have erected his own hut or homestead which should have also been permitted by the owner of the land with whatever easementary rights attached thereto. Explanation II (a) and II (b) of Section 2(25) define what a hut and homestead mean respectively. The Explanation IIA prescribes a cut off date, namely, 16.8.1968

and those persons who were in occupation of any land and dwelling house thereon constructed on his own or by any of his predecessors-in-interest or even belonging to any other person, as deemed Kudikidappukaran, subject to certain exceptions. Explanation VII of Section 2(25) totally prohibits anyone to claim status as Kudikidappukaran even if such a person is occupying a homestead or hut situate in a land which is held or owned by the Government of Kerala or the Government of any other State in India or the Government of India itself.

12. Keeping the above relevant part of definition of Kudikidappukaran under Section 2(25) of the Act, when we examine Section 79A which starts with a non-obstante clause and provides that notwithstanding anything contained in any law or contract or judgment or decree or order of the Court, the person falling within description of Kudikidappukaran would be entitled to all rights accrued to him by custom, usage or agreement which he was enjoying immediately before the commencement of the Act, namely, 1.4.1964 by which Sections 2 to 71, 73 to 82, 84, 99 to 108 and 110 to 132 were brought into force after receiving the assent of the President on 31.12.1963 which was published in Kerala Government Gazette Extraordinary No.7 dated 14.1.1964. In order to avail the benefits which are provided under Section 79A, the Act prescribes the mode by which the status of a person who claims himself to be a Kudikidappukaran to be entered as such in a register prescribed under the Act. The procedure for getting such a registration has been set out in Section 80 of the Act. While under sub-Section (1) of Section 80 the Government has been ordained to prepare and maintain a register by the local authority wherever such land situate, under sub-Section (2) of Section 80 the details as regards the description of the land, the location, the name of land owner and the person in possession, the name and address of Kudikidappukaran, the nature of rights available to such Kudikidappukaran as prescribed under Section 79A and such other relevant

particulars are to be noted in the said register as prescribed under Section 80 (2) of the Act. Sub-Section (3) and (4) of Section 80 enjoin upon the local authority to prepare a register of Kudikidappukars within its jurisdiction and continue to maintain in the manner prescribed therein. Sub-section (5) of Section 80 is more relevant for our purpose which specifically states that in the event of the local authority refusing to register a person claiming to be a Kudikidappukaran as prescribed under sub-Section (3) of Section 80, such a person would be entitled to file an appeal within 90 days from the date of such refusal, to the Revenue Divisional Officer having jurisdiction where the decision is that of an authority of Municipal Corporation or a Municipal Council or to the Tahsildar in all other cases. The appellate authority has been empowered under sub-Section (6) of Section 80 to call for the record of any proceeding where a decision has been taken by the local authority and after holding such enquiry pass orders in the appeal. The proviso to sub-Section (6) of Section 80 specifically provides for an opportunity of personal hearing to the concerned appellant(s). Thereafter in the event of the registration of a person's claim having fructified in the prescribed register as a Kudikidappukaran, such person would gain a right to seek for purchase of Kudikidappu rights under Section 80A of the Act. An application has to be preferred by a registered Kudikidappukaran which is to be decided by the land Tribunal after giving an opportunity of hearing to a person interested in the land and after holding an enquiry. Under sub-Section (4) of Section 80B, the details to be specified in any order to be passed under sub-Section (3) of Section 80B has been prescribed.

13. Anyone aggrieved by the order passed under Section 80B has got a right of appeal under Section 102 of the Act within the prescribed time limit. Against any such order in appeal a further right of revision is provided under Section 103(1) (i) to the High Court wherever the decision of land

Tribunal is erroneous or which failed to decide any question of law.

14. Section 125 stands apart from the above provisions which creates a bar of jurisdiction of Civil Court to settle, decide or deal with any question or to determine any matter which is by or under the 1963 Act required to be settled, decided or dealt with or to be determined by the Land Tribunal or the Appellate Authority or the Land Board or the Taluk Land Board or the Government or an officer of the Government. Further the proviso to Section (1) to Section 125 excludes such a bar of civil Court jurisdiction in respect of proceedings pending in any Court at the commencement of the Kerala Land Reforms Amendment Act, 1969. Even while creating such a bar of jurisdiction of civil Courts, the law makers wanted to ensure that no person is allowed to abuse or misuse the benefits conferred under 1963 Act while claiming rights as a Kudikidappukaran and with that laudable object engraved sub-Section (3) in Section 125 itself by which any Civil Court or authority before whom any other proceedings regarding rights of a tenant or of a Kudikidappukaran arise for consideration, enjoins upon such civil Court or other authority to stay the proceedings temporarily and also simultaneously make a reference to the Land Tribunal having jurisdiction over the area in which the land or part thereof is situate along with the relevant records for the decision of the question as to whether a person is a tenant or a Kudikidappukaran. Sub-Section (8) of Section 125 which was introduced in the statute book w.e.f. 2.11.1972 made it clear that civil Court would include a Rent Control Court as defined in the 1965 Act. Sub -section (4) enjoins upon the Land Tribunal to decide the question referred to it under sub-Section (3) and return the records together with his decision back to the Civil Court/Rent Control Court. Under sub-Section(5) of Section 125 the civil Court/Rent Control Court should then proceed to decide the suit or other proceedings by accepting the decision of the Land Tribunal on the question referred to it. Sub-Section (6) of Section 125 makes the position clear that while the decision

of the Land Tribunal on the question referred to it should be accepted by the concerned Civil Court/Rent Control Court which refers the question, the further determination as to the correctness or otherwise of such decision by the Land Tribunal can be examined in the channel of appeal provided in the respective jurisdictional Appellate Court of the Civil Court/Rent Control Court. In other words, while under Section 125(3), having regard to the bar of jurisdiction of Civil Court/Rent Control Court to decide the question about the status of a Kudikidappukaran or a tenant which can be exclusively decided only by the land Tribunal, after such a decision is rendered pursuant to a reference made to it and the ultimate decision of the Civil Court/Rent Control Court is taken up by way of an appeal to the Appellate Court/appellate authority of a Civil Court or Rent Control Court while examining the merits of the decision of the concerned Civil Court or the original authority on the question of eviction can also examine the correctness of the decision rendered by the Land Tribunal as regards the status as a Kudikidappukaran.

15. Having analysed the scheme of the 1963 Act based on the above provisions, we are able to discern the scheme of the Act vis-à-vis the civil court jurisdiction including the Rent Control Court and the Rent Control Appellate Authority under the provisions of the 1965 Act. Keeping the above scheme of the Act, in relation to the issue which has come up for consideration in these appeals, in our mind, when we examine the controversies raised in these appeals as noted by us earlier, when the respondent herein filed application for eviction before the Rent Control Court in RCP No.140/1985, since on behalf of the appellant(s), an objection was raised to the effect that the building was a hut and that the respondent in the RCP claimed himself to be a Kudikidappukaran entitled to get Kudikidappu right over the scheduled building and property, the Rent Control Court rightly referred the said issue, namely, whether the appellants' predecessor in interest was entitled to claim the status of Kudikidappukaran or merely a tenant to be

decided by the Land Tribunal by way of Reference in RC No.16/89. As far as the eviction sought for by the respondent was on the ground of default in payment of rent, demolition and reconstruction, as well as for bonafide need for own occupation, the Rent Control Authority after making an initial reference in RC No.16/89 to the Land Tribunal and after receipt of the decision of the land Tribunal in its order dated 19.2.1991 in RC No.16/89 held that the predecessor-in-interest of the appellant(s) was not a Kudikidappukaran over the petition scheduled building, accepted the said decision and thereafter proceeded to decide whether the ground of eviction as sought for by the respondent landlord was made out. By its order dated 02.7.1991 in RCP 140/85, the Rent Control Authority concluded that there was a landlord-tenant relationship between the respondent and the appellant(s), and that there was a sub-lease of the tenanted building, that there was bonafide need for demolition and re-construction as well as for own-occupation and consequently directed eviction of the appellant(s) to enable the respondent to go in for re-construction and occupation of the same on their own.

16. On behalf of the appellant(s), an appeal was preferred as against the decision of the Rent Control Authority dated 02.7.1991 by way of an appeal before the Rent Control Appellate Authority in RCA No.133/91. Before the Appellate Authority also, the question as to the decision of the Land Tribunal, namely, whether the appellant(s) were entitled for status of Kudikidappukaran as well as the grounds of eviction were subject matter of consideration. The Appellate Authority under the Rent Control Act ultimately by its order dated 28.10.95 confirmed the order of the learned Rent Controller by dismissing the appeal preferred by the appellant(s). Be that as it may, as pointed out earlier on behalf of the appellant(s), an application was independently filed in OA 78/88 by invoking Section 80B of the 1963 Act before the Land Tribunal apparently, on the assumption that the appellants' status as a Kudikidappukaran existed. The said application was decided

by the learned Tribunal in a detailed order passed on 19.2.1991 which incidentally was the date on which RC No.16/89 was also decided by the Land Tribunal which decision was forwarded to the Rent Control Court for passing further orders in the eviction proceedings.

17. It is relevant to note that the application preferred on behalf of the appellant(s) under Section 80B of the 1963 Act in OA 78/88 was rejected by the Land Tribunal, Thiruvananthapuram and some of the relevant findings were as under:-

> "Ext.A1 (Property tax assessment) when examined it is found that Appukuttan Nair, the applicant is an occupant in a building TC No.6/482 and the owner of the building is B. Chembakakutty Amma. The revised annual tax of the said building is arrived at Rs.22.68 by calculating the annual rent of the building as Rs.168/- i.e. monthly rent for the year 1965-66 is Rs.14/-. A building for which a monthly rent of Rs.14/- is assessed by the assessing authority in the year 1965-66 will not in any account be a hut or a kudil. It must be a full fledged house. It is not prudent to believe that it is a hut. This building assessment leads to believe that the contention of the respondents are true and correct. The wife and witness of the applicant in the cross examination has stated that Kamalamma is in possession of a separate ration card and also she has admitted that the land lord has filed BRC for eviction of the tenants from the schedule building. The Revenue Inspector has also stated that Kamalamma who is the sister of the applicant also possess separate ration card in the address of the same building which shows that there are at least two sets of occupants in one building. Therefore it is reasonable to believe that the applicant is occupied only a portion of a big building occupation in a part of a building cannot be construed as Kudikidappu as decided in cases reported in 1968 KLT 888 and 1974 KLT 738. Another

> point to be noted is the tax assessment of the building which brought out in Ext.A1. According to this the monthly rent of the building is reckoned as Rs.14/-. This also is enough to believe that the schedule building is not a kudil. There is nothing in evidence to show that the applicant satisfy the requirements under explanation II of Section 2(25) of the K.L.R. Act. Moreover it has been proved that the applicant is residing in a part of the building wherein some other occupants are also residing. On the above ground I enter into finding that the applicant is not entitled to the fixity of Kudikidappu in the property comprising in Sy.No.1536A of Vanchiyoor village. In the result in exercise of powers conferred upon me under section 80B(3) I do hereby dismiss the original application."

18. On behalf of the appellant(s), a separate appeal was preferred before the Appellate Authority (LR) in AA 37/91 as against the decision dated 19.2.1991 in OA 78/88. The said Appellate Authority concluded as under in paras 9 and 15.

> "9) The Revenue Inspector filed his report. He has reported that it is a thatched hut. The cost at the time of construction of the hut would be Rs.400/-. The rent which would have fetched is Rs.4/- per month. The respondents have no case that it is a full fledged house. They have not taken any step for the examination of the Revenue Inspector. No commission was taken out to disprove the report filed by the Revenue Inspector. No oral evidence was adduced by the respondents. Ext.A1 is the copy of the extract of the assessment register in respect of the said hut for the period 1965-66. The rental value which was existing at the time of assessment was Rs.60/-. The monthly rent would have been Rs.5/- which is within the ambit of the KLR Act. In the absence of any evidence from the side of the respondents, I can only accept the reports filed by the Revenue Inspector and accordingly hold that it is a hut and not a full fledged house.

15) From the forgoing discussion I can only hold that the dwelling house is a hut and not a full fledged house. The findings of the LT that it is a full fledged house and the Kudikidappu is claimed over a part of the building is erroneous and unsustainable. The appellant is entitled to fixity of Kudikidappu. The appeal is liable to be allowed."

19. After so holding, the Appellate Authority (LR) set aside the order dated 19.2.1991 passed in OA 78/88 by the Land Tribunal in the Section 80B application. It is relevant to point out the serious discrepancy which were explicit in the order of the Appellate Authority dated 13.11.1995 in AA 37/91. In the first place, as rightly held by the Division Bench of the High Court when a Reference was made under Section 125 (3) of the 1963 Act by the Rent Control Authority calling for a decision as to the status of the appellant(s) as a tenant or Kudikidappukaran for the purpose of deciding the eviction proceedings, and in that Reference the Land Tribunal returned a finding that the appellant(s) was not a Kudikidappukaran but was only a tenant occupying a building belonging to the respondent and not a hut or homestead, thereafter the only scope to challenge the said conclusion of the Land Tribunal was only by way of an appeal under the provisions of 1965 Act by virtue of the specific stipulations contained in Section 125(6) of the 1963 Act. When we consider the scope and content of Section 125 on the whole, we are convinced that the conclusion arrived at by the Division Bench could have been the only conclusion and we do not find any good grounds to differ from the same.

20. Consequently, when a decision was reached by the Land Tribunal in a Reference made to it under Section 125 (3) of the 1963 Act, having regard to the scheme of the Act as from the definition of Kudikidappukaran under Section 2(25), the benefits that would accrue to a Kudikidappukaran as provided under Section 79A, the procedure prescribed under Section 80 by which a person claiming the rights of Kudikidappukaran has

to ensure the recognition of such status as Kudikidappukaran in a proceeding before the concerned local authority and get his name registered in the prescribed register to be prepared by the local authority and to be maintained for that purpose, we fail to see how any person claiming such status as Kudikidappukaran can seek for such status to be recognized by resorting to any other proceedings under the other provisions of the 1963 Act. To put it differently, it has to be held that in order for a person to claim the status of Kudikidappukaran for the purpose of availing the benefits available as a Kudikidappukaran as spelt out under Section 79A of the 1963 Act, he has to ensure that the status claimed by him as Kudikidappukaran is in the first instance accepted by the local authority in appropriate proceedings under Section 80 of the Act and more importantly in proof for such acceptance his name is entered as Kudikidappukaran in the register prepared and maintained for that purpose by the local authority. If any such person is not able to get such recognition in the first instance before the local authority, the statute prescribes a remedy of appeal under Section 80(5) before appropriate appellate authority. Only after establishing such a right in the prescribed manner as provided under Section 80 of the Act, there would be any scope for anyone to claim validly that he is entitled for all the benefits that would flow from his status as a Kudikidappukaran. In other words, it can be validly stated that the claim of a status of a Kudikidappukaran can be determined only under Section 80 of the Act.

21. In contradistinction to Section 80, what is provided under Sections 80A or 80B were the consequential benefits such as the right to purchase the Kudikidappu and the procedure to be followed for effecting the purchase by approaching the concerned authorities and thereby ascertain his ownership rights after such purpose. By no stretch of imagination, the right to purchase provided under Section 80A and the procedure prescribed for purchase of such right under Section 80B can be invoked, by a person whose status as

Kudikidappukaran was yet to be ascertained earlier. The approach made by the appellant(s) by invoking Section 80B of the Act in order to assert his right as Kudikidappukaran even without getting his status ascertained in the appropriate proceedings under Section 80 of the Act was wholly invalid and was rightly rejected by the original authority in its order dated 19.2.1991 in OA 78/88. Unfortunately, the Appellate Authority that decided the appeal as against the said order in AA 37/91 failed to understand the scope, power and jurisdiction of Appellate power under Section 102 of the Act as against the order passed under Section 80B of the 1963 Act which unfortunately resulted in the passing of the order dated 13.11.1995 in AA 37/91.

22. It has to be stated in uncontroverted terms that the said order of the Appellate Authority (LR) Attingal, dated 13.11.1995 in AA 37/91 was, therefore, wholly without any jurisdiction and was not in tune with the powers vested with the said Appellate Authority under Section 102 of the 1963 Act while examining the order passed under Section 80B of the Act. It has to be stated that the said order was far in excess of the jurisdiction vested in the said authority and, therefore, the said order was rightly set aside by the Division Bench of the High Court.

23. Once, we steer clear of the correctness of the said order dated 13.11.1995 in AA 37/91, the only other aspect to be examined is the correctness of the order passed by the Rent Control Authority in RCP No.140/85 dated 2.7.1991 on the merits of ground of eviction, namely, the alleged default in payment of rent, necessity for demolition and re-construction and the claim for own-occupation. In those aspects, as the conclusion was arrived at by the Rent Control Court based on a detailed consideration of the merits which are mainly based on facts and in the absence of any legal error in the said conclusion arrived at by the Rent Control Authority as well as the Rent Control Appellate Authority in the decision dated 28.10.1995 passed in RCA No.133/91, there is no scope to

find fault with the ultimate decision of the Division Bench of the High Court in dismissing the revision preferred by the appellant(s). Having bestowed our detailed consideration on the impugned judgment, we hold that the decision of the Division Bench in allowing the revision preferred by the respondent as against the order of the appellate authority (LR) dated 13.11.1995 in AA 37/91 was also justified. These appeals, therefore, fail and the same are dismissed.

B.B.B. Appeals dismissed.

KHACHAR DIPU @ DILIPBHAI NAKUBHAI
v.
STATE OF GUJARAT
(Criminal Appeal Nos.532-33 of 2013)

APRIL 04, 2013

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

Penal Code, 1860 – s.302 – Murder – Appellant and two other accused – Deceased was going to his field on cycle – Appellant dashed motor vehicle from behind – Deceased was thrown off from his cycle – He was then tied behind the motor vehicle and dragged for considerable distance – Few days earlier, the accused had quarrelled with the deceased and had threatened him – Conviction of appellant u/s.304 Part I by trial court – Altered to that u/s.302 by High Court – On appeal, held: Post mortem report showed injuries on vital parts of the deceased's body, the face was crushed and further there were marks of dragging – A quarrel or altercation has its own triviality but it gets magnified when the dashing of the vehicle is proven and the nature of the injuries caused on the deceased is taken note of – That apart, there is evidence that the body was dragged – Intention to cause bodily injury proved – Injuries sufficient in the ordinary course of nature to cause death – No flaw in the analysis made by the High Court for altering the conviction u/s.304 Part I recorded by the trial Judge to that u/s.302.

Evidence – Witness – Hostile witness – Appreciation of.

A-1 (appellant) and A-2 had a dispute with the deceased (the brother of the complainant). Few days later, when the deceased was going to his field on cycle about 9.00 p.m., A-1, allegedly with the intention of killing him, dashed motor vehicle from behind and when the deceased was thrown off from his cycle, A-1 tied him

behind the motor vehicle and dragged him about 10 kilometers and threw the dead body on the road and destroyed the evidence. The other two accused persons allegedly abetted the crime with common intention to assist A-1.

The trial court held A-1 guilty under Section 304 Part-I of IPC and, accordingly, sentenced him to undergo rigorous imprisonment for five years. The other accused persons were, however, acquitted. On appeal by the State, the High Court held that it was not a case of accident; and that the intention to cause death was proved by material evidence, oral as well as documentary and accordingly converted the conviction of A-1 (appellant) to that of an offence punishable under Section 302 of IPC and sentenced him to undergo life imprisonment. The acquittal of A-2 and A-3 was, however, not interfered with by the High Court.

Dismissing the appeals, the Court

HELD: 1. The post mortem report show that there were injuries on the vital parts of the body, the face was crushed and further there were marks of dragging which were found on the upper part of the body and on the back, and the private part was crushed. PW-16, who conducted the post-mortem in his evidence, has categorically stated that on the body there were marks of dragging which was on the front part of the body and on the back. The evidence in this regard has totally gone unchallenged. PW-15, Scientific Officer, has deposed that on the rear part of the bumper of the vehicle, there were skin pieces stuck and blood masses were seen. The scientific report of FSL confirms that the back side of the cycle had a colour mark of the front side of the motor vehicle. Thus, dashing of the cycle by the motor vehicle in question is established by this scientific evidence also. There is sufficient proof that after the accident, there was

dragging of the deceased by the vehicle in question. The trial Judge has not accepted the allegation of dragging of the deceased solely on the basis that no injuries were caused on the wrist. He has totally ignored the other evidence collected by the Investigating Officer on the site, the opinion of the doctor that the injuries were caused by the accident and dragging of the body and the F.S.L. report. [Paras 9, 10] [349-E-F; 350-F, G-H; 351-A, D-G]

2. Some of the witnesses had turned hostile during trial. However, it is well settled in law that the evidence of the hostile witness can be relied upon by the prosecution as well as by the defence. The High Court has referred to the depositions of two witnesses, namely, PW-20, and PW-21. On a careful scrutiny of the testimonies of the said two witnesses, it is seen that both of them have categorically deposed that the motor vehicle involved in the accident had dashed against the cycle of the deceased as a result of which he had fallen down. In cross-examination by the accused, they have not paved the path of variance in this regard. Their evidence support the prosecution version that the motor vehicle had dashed against the cycle. One of the witnesses has not identified the accused in court but the other witness, PW-20 has identified. That apart, as far as the identification of the accused is concerned, there is ample evidence on record to support the same. The singular purpose of referring to the testimonies of these two witnesses is that the incident did occur and the accused had dashed the vehicle against the cycle. [Paras 11, 12] [352-D-E; 353-C-F]

Rameshbhai Mohanbhai Koli and Others v. State of Gujarat **(2011) 11 SCC 111: 2010 (14) SCR 1;** *Bhagwan Singh v. State of Haryana* **(1976) 1 SCC 389: 1976 (2) SCR 921;** *Rabindra Kumar Dey v. State of Orissa* **(1976) 4 SCC 233: 1977 (1) SCR 439;** *Syad Akbar v. State of Karnataka*

(1980) 1 SCC 30; *Khujji v. State of M.P.* **(1991) 3 SCC 627: 1991 (3) SCR 1;** *State of U.P. v. Ramesh Prasad Misra* **(1996) 10 SCC 360: 1991 (3) SCR 1;** *Balu Sonba Shinde v. State of Maharashtra* **(2002) 7 SCC 543: 2002 (2) Suppl. SCR 135;** *Gagan Kanojia v. State of Punjab* **(2006) 13 SCC 516;** *Radha Mohan Singh v. State of U.P.* **(2006) 2 SCC 450: 2006 (1) SCR 519;** *Sarvesh Narain Shukla* v. *Daroga Singh* **(2007) 13 SCC 360: 2007 (11) SCR 300 and** *Subbu Singh* v. *State* **(2009) 6 SCC 462: 2009 (7) SCR 383 – relied on.**

3. The High Court has taken note of the injuries and the conduct of the accused persons and opined that it is a brutal murder. It accepted the prosecution version of murder, regard being had to the effective crushing of the body intentionally and dragging of the same to cause death. The High Court held that there was intention on the ground that dashing of the motor vehicle and dragging was with the intention to inflict such bodily injury that was sufficient to cause death in the ordinary course of nature. To put it differently, the High Court has brought the case under Section 300 "thirdly" of the IPC. The accused had not taken the plea that there was an accident because of bad light or due to the negligence of the deceased. He has taken the plea of complete denial. Under these circumstances, the evidence of the son of the deceased, PW-18, gains significance. He has deposed that there was a quarrel between the accused and the deceased relating to dumping of garbage and his father was threatened by the accused. The said evidence has gone unchallenged. Such a quarrel or altercation has its own triviality but it gets magnified when the dashing of the vehicle is proven and the nature of the injuries caused on the deceased is taken note of. That apart, there is evidence that the body was dragged. Thus, it can safely be concluded that the intention to cause bodily injury is actually found to have been proved and such injuries are sufficient in the ordinary course of nature to cause death.

When such injuries are inflicted, it will be travesty of justice to hold that it was an accident without the intention to cause death. There is no flaw in the analysis made by the High Court for altering the conviction under Section 304 Part I of IPC recorded by the trial Judge to that under Section 302 of IPC. [Paras 14, 15, 19, 20] [354-C-E; 357-F-G; 358-A-D]

Virsa Singh v. State of Punjab **AIR 1958 SC 465: 1958 SCR 1495;** *State of Andhra Pradesh v. Rayavarapu Punnayya and Another* **(1976) 4 SCC 382: 1977 (1) SCR 601;** *Rajwant v. State of kerala* **AIR 1966 SC 1874;** *Rampal Singh v. State of Uttar Pradesh* **(2012) 8 SCC 289: 2012 (7) SCR 160;** *Vineet Kumar Chauhan v. State of U.P.* **(2007) 14 SCC 660: 2007 (13) SCR 727;** *Ajit Singh v. State of Punjab* **(2011) 9 SCC 462: 2011 (12) SCR 375 and** *Mohinder Pal Jolly v. State of Punjab* **(1979) 3 SCC 30: 1979 (2) SCR 805 – referred to.**

Case Law Reference:

2010 (14) SCR 1	**relied on**	**Para 11**
1976 (2) SCR 921	**relied on**	**Para 11**
1977 (1) SCR 439	**relied on**	**Para 11**
(1980) 1 SCC 30	**relied on**	**Para 11**
1991 (3) SCR 1	**relied on**	**Para 11**
1991 (3) SCR 1	**relied on**	**Para 11**
2002 (2) Suppl. SCR 135	**relied on**	**Para 11**
(2006) 13 SCC 516	**relied on**	**Para 11**
2006 (1) SCR 519	**relied on**	**Para 11**
2007 (11) SCR 300	**relied on**	**Para 11**
2009 (7) SCR 383	**relied on**	**Para 11**

1958 SCR 1495	**referred to**	**Para 15**
1977 (1) SCR 601	**referred to**	**Para 16**
AIR 1966 SC 1874	**referred to**	**Para 16, 18**
2012 (7) SCR 160	**referred to**	**Para 18**
2007 (13) SCR 727	**referred to**	**Para 18**
2011 (12) SCR 375	**referred to**	**Para 18**
1979 (2) SCR 805	**referred to**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 532-533 of 2013.

From the Judgment & Order dated 12.04.2012 of the High Court of Gujarat at Ahmedabad in Criminal Appeal No. 1075 of 2009 with Criminal Appeal No. 950 of 2009.

Harshit S. Tolia, P.S. Sudheer, Rishi Maheshwari, Abu John Mathew for the Appellant.

Jesal, Nandini Gupta, Hemantika Wahi for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. In these appeals, the appellant, original accused No. 1, has called in question the legal propriety of the judgment of conviction and order of sentence passed by the High Court of Gujarat in Criminal Appeal No. 950 of 2009 whereby the Division Bench has allowed the appeal of the State and converted the conviction under Section 304 Part-I of the Indian Penal Code (for short 'IPC') recorded by the learned trial Judge to that of an offence punishable under Section 302 of IPC and sentenced him to undergo life imprisonment and further the defensibility of the decision of dismissal of Criminal Appeal No.

1075 of 2009 wherein the appellant had assailed the judgment and conviction and order of sentence dated 5.3.2009 passed by the learned Additional Sessions Judge, Bhavnagar in Sessions case No. 166 of 1998.

3. The factual score which led to the trial of the appellant along with two others is that three days prior to the date of occurrence, i.e., 21.5.1998, accused Nos. 1 and 2, namely, Khachar Dipu alias Dilipbhai Nakubhai and Vahtubhai Nakubhai, had a dispute regarding dumping of manure with the brother of the complainant and there were altercations which led to an inimical relationship between the parties. On the date of occurrence, when the deceased Shambhubhai, the brother of the complainant, was going to his field by cycle about 9.00 p.m. on 20.05.1998, the accused No. 1, with the intention of extinguishing the life spark of the deceased, dashed the motor vehicle No. GJ-7-U-2385 from behind and when the deceased was thrown off from his cycle, the accused No. 1 tied him behind the motor vehicle and dragged him about 10 kilometers and threw the dead body on the Gadhada Road and destroyed the evidence. The other two accused persons abetted with the common intention to assist accused No. 1. On an FIR being lodged, the criminal law was set in motion and after investigation, the accused persons were arrested and, eventually, a charge sheet for offences under Sections 302/201 read with Section 34 of the IPC was laid before the learned Magistrate who, in turn, committed the matter to the Court of Session. The accused persons denied the charges and claimed to be tried.

4. The prosecution, in order to establish its case, examined 24 witnesses and exhibited 31 documents. The defence chose not to adduce any evidence.

5. The learned Sessions Judge, on analysis of the evidence, came to hold that the accused No. 1 was guilty of the offence punishable under Section 304 Part-I of IPC and, accordingly, sentenced him to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.500/- and, in default, to suffer further simple imprisonment of one month. As far as the other accused persons are concerned, they stood acquitted of the charges.

6. Being grieved by the aforesaid judgment, the convicted persons and the State of Gujarat preferred Criminal Appeal Nos. 950 of 2009 and 1075 of 2009 respectively. The High Court took note of the earlier quarrel that had taken place between the parties, the injuries on the dead body, the evidence of the prosecution witnesses, the material brought on record relating to the incident, and accepting the fact that the motor vehicle had dashed against the cycle ridden by the deceased and further analyzing the reasoning ascribed by the learned trial Judge, opined that the learned Sessions Judge had flawed in recording the conviction under Section 304 Part-I of IPC and not under Section 302 of IPC. The High Court opined that it was not a case of accident inasmuch as the injuries on the whole body had effectively crushed the entire body and it could not have happened if the motor vehicle had only dashed against cycle from behind. The High Court further opined that had it been a case of negligence in driving, the accused would not have lifted the body of the deceased after dashing his vehicle against the cycle of the deceased. The Division Bench further proceeded to state that the muscle tissues found from the bumper of the motor vehicle coupled with the condition of the body of the deceased and the fact that it was left on the road with the motor vehicle at a distance of about 10 to 15 kms away from where it had dashed gave credence to the prosecution version that it was not a case of mere dashing of the motor vehicle with the cycle and the findings of the learned Sessions Judge pertaining to absence of pre-meditation to cause death was totally against normal prudence, and therefore, the findings recorded by the learned Sessions Judge were perverse and the intention to cause death was proved by material evidence, oral as well as documentary. Considering the totality of facts and circumstances, the Division Bench concluded that the

learned Sessions Judge was in error in holding that A-1 was guilty of offence under Section 304 Part-I of IPC and not under Section 302 of IPC.

7. Be it noted, the High Court chose not to interfere with the acquittal of the accused A-2 and A-3 as the allegations were not established and, accordingly, allowed the appeal preferred by the State in part. As far as the appeal preferred by the accused-appellant A-1 is concerned, it was dismissed.

8. We have heard Mr. Harshit S. Tolia, learned counsel for the appellant, and Ms. Jesal, learned counsel for the respondent in both the appeals.

9. The issues that arise for consideration in these appeals are whether the accused-appellant is entitled to a judgment of complete acquittal or the conviction and sentence as recorded by the learned trial Judge is absolutely justified in the obtaining factual matrix which did not warrant interference by the High Court while entertaining the appeal by the State by converting the conviction under Section 304 Part-I of the IPC to Section 302 of the IPC and sentencing thereunder. To appreciate the said issues, it is necessary to refer to the post mortem report which would show the injuries on the deceased. On a perusal of the same, it appears that there were injuries on the vital parts of the body, the face was crushed and further there were marks of dragging which were found on the upper part of the body and on the back, and the private part was crushed. The High Court, in its judgment, has enumerated the injuries in seriatim which we reproduce: -

"1. Destruction of brain and skull.

2. Destruction of face and its bone (crushing)

3. Crushing of all ribs on Rt. Side and some ribs on left side.

4. CLW over left leg just below knee, above ankle joint.

5. Abrasion all over front part of chest, abdomen, leg and hand, liner mark with contaminated of road metal.

6. Fracture of all ribs with sternum

7. Fracture on Rt. Femur bone at lower end.

8. Fracture of numerous at it's upper part.

9. Abrasion over heel of Rt. Leg up to bone.

10. Abrasion over the finger of both hand.

11. Abrasion on front of abdomen at lateral side and back of abdomen. All part.

12. Abrasion all over thoracial part back side.

13. Abrasion over knee joint and middle side of Rt. Leg upto muscle deep.

14. The skull was fractured and crushed and the portion of brain was hanging out. It was also crushed. The road metal was also found therefrom. Lungs, heart, brain, all vital parts were crushed.

10. Dr. Kanjibhai, PW-16, who conducted the autopsy on the dead body, has opined that the injuries were possible in vehicular accident or if the vehicle is run over the body. He has deposed that even after death, if the body was dragged or the vehicle runs over the body, the injuries could have been caused. The cross-examination was focused to elicit from this witness about the absence of marks on the wrist part of the deceased to demolish the version of the prosecution to the extent that the deceased was tied behind the vehicle and was dragged on the road. In fact, the said witness has categorically stated that there were marks of dragging on the body of the deceased. PW-15, Kishorebhai Chhaganal Naina, Scientific Officer, has deposed that on the rear part of the bumper of the

vehicle, there were skin pieces stuck and blood masses were seen. On an examination of the cycle, he has found that the motor vehicle had collided with the cycle and thereafter, the orange colour of the front bumper of the motor vehicle was seen stuck on the back of the fan. He had taken into custody 7 articles, namely, two pieces of blood stained tar cotton thread, clothes of the deceased, skin pieces from the motor vehicle No. GJ-7-U-2385, cotton thread rubbed on the rear of the motor vehicle, the blood stained cotton thread, a coloured iron piece from the front of the motor vehicle near the bumper, and rear part of the cycle on which the orange colour of the motor vehicle was stuck. He had given suggestion for sending the same to the Forensic Science laboratory at Junagarh. The items suggested along with several other items were sent by the Investigating Officer to the Forensic Science Laboratory and the said report was exhibited during the trial as Exhibit-44. It is revealed from the said report that the skin that was sent for examination was human skin. As regards the cotton thread, the report mentioned that blood was found. The scientific report of FSL confirms that the back side of the cycle had a colour mark of the front side of the motor vehicle. Thus, dashing of the cycle by the motor vehicle in question is established by this scientific evidence also. We have referred to the same only to highlight as there is sufficient proof that after the accident, there was dragging of the deceased by the vehicle in question. Learned trial Judge has not accepted the allegation of dragging of the deceased solely on the basis that no injuries were caused on the wrist. He has totally ignored the other evidence collected by the Investigating Officer on the site, the opinion of the doctor that the injuries were caused by the accident and dragging of the body and the F.S.L. report. In our considered opinion, there is definite material on record to come to the conclusion that the body was dragged but it cannot be said with certainty about the distance. It is worthy to note that the dead body was found at a distance of 10 kms., but it is not necessary to establish that the accused had dragged the deceased for about 10 kms. suffice it to say that there is evidence to establish that the body

was dragged for a considerable distance. Dr. Kanjibhai, PW-16, who conducted the post-mortem in his evidence, has categorically stated that on the body there were marks of dragging which was on the front part of the body and on the back. The evidence in this regard has totally gone unchallenged. The finding of the learned trial Judge is solely based on the fact that there was no mark which would indicate that the wrists were tied. It is useful to note here that the accused had not taken the plea that there was an accident. On the contrary, he has taken the plea of complete denial of the occurrence.

11. At this juncture, we may scrutinize the oral evidence on record. Apart from the testimony of Bhimjibhai, PW-1, there is other evidence on record which can be taken aid of. It is noticeable that some of the witnesses had turned hostile during trial. The High Court has referred to the depositions of two witnesses, namely, Shantibhai Lakhmanbhai, PW-20, and Gobarbhai Bavubhai, PW-21. It is well settled in law that the evidence of the hostile witness can be relied upon by the prosecution as well as by the defence. In *Rameshbhai Mohanbhai Koli and Others v. State of Gujarat,*[1] the said principle has been reiterated stating that:-

> **"16.** It is settled legal proposition that the evidence of a prosecution witness cannot be rejected in toto merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof. (Vide *Bhagwan Singh v. State of Haryana*[2], *Rabindra Kumar Dey v. State of Orissa*[3], *Syad Akbar v. State of Karnataka*[4] and *Khujji v. State of M.P.*[5])

1. (2011) 11 SCC 111.
2. (1976) 1 SCC 389.
3. (1976) 4 SCC 233.
4. (1980) 1 SCC 30.
5. (1991) 3 SCC 627.

17. In *State of U.P. v. Ramesh Prasad Misra*[6] this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in *Balu Sonba Shinde v. State of Maharashtra*[7], *Gagan Kanojia v. State of Punjab*[8], *Radha Mohan Singh v. State of U.P.*[9], *Sarvesh Narain Shukla v. Daroga Singh*[10] and *Subbu Singh v. State*.[11]"

12. On a careful scrutiny of the testimonies of the said two witnesses, it is seen that both of them have categorically deposed that the motor vehicle involved in the accident had dashed against the cycle of the deceased as a result of which he had fallen down. It is interesting to note that in cross-examination by the accused, they have not paved the path of variance in this regard. In our opinion, their evidence support the prosecution version that the motor vehicle had dashed against the cycle. We may note with profit that one of the witnesses has not identified the accused in court but the other witness, PW-20, Shantibhai Lakhmanbhai, has identified. That apart, as far as the identification of the accused is concerned, there is ample evidence on record to support the same. The singular purpose of referring to the testimonies of these two witnesses is that the incident did occur and the accused had dashed the vehicle against the cycle.

13. From the aforesaid evidence on record, certain

6. (1996) 10 SCC 360.
7. (2002) 7 SCC 543.
8. (2006) 13 SCC 516.
9. (2006) 2 SCC 450.
10. (2007) 13 SCC 360.
11. (2009) 6 SCC 462.

aspects became clear:- namely, (i) on the fateful night at 9.00 p.m., the deceased was going on a cycle, (ii) the motor vehicle bearing registration number No. GJ-7-U-2385 belonging to the accused-appellant dashed against the cycle, (iii) number of injuries were sustained by the deceased, (iv) there was dragging of the deceased after the accident occurred, and (v) the accused was involved in the commission of the crime.

14. The learned trial Judge had convicted the accused under Section 304 Part I of IPC as there was no previous deliberation or pre-meditation on the part of the accused and there was no evidence that the dead body was dragged upto 10 kms. The High Court, as is noticeable, accepted the prosecution version of murder, regard being had to the effective crushing of the body intentionally and dragging of the same to cause death.

15. One aspect that has to be seen is whether the High Court was justified in saying that there was intention. Such a view has been expressed on the ground that dashing of the motor vehicle and dragging was with the intention to inflict such bodily injury that was sufficient to cause death in the ordinary course of nature. To put it differently, the High Court has brought the case under Section 300 "thirdly". In this context, we may refer with profit to the decision in *Virsa Singh v. State of Punjab*[12] wherein Vivian Bose, J., speaking for a three-Judge Bench, laid down what is required for the prosecution to prove to bring the case under the said clause. It has been stated therein that first, it must be established, quite objectively, that a bodily injury is present; Secondly, the nature of the injury must be proved and these are purely objective investigations; thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended; and once these three elements are proved to be present, the enquiry proceeds further; and fourthly, it must be proved that

12. AIR 1958 SC 465.

the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. Thereafter, in that case, it has been stated as follows:-

> "Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under Section 300 "thirdly". It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death. No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional."

16. In *State of Andhra Pradesh v. Rayavarapu Punnayya and Another*[13], after referring to the rule laid down in *Virsa Singh's* case (supra) and *Rajwant v. State of kerala*[14], the Court proceeded to enunciate that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder', on the facts of a case, it

13. (1976) 4 SCC 382.

14. AIR 1966 SC 1874.

will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300, Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the first or the second part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If the question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the first part of Section 304, Penal Code.

17. We may hasten to clarify that in the said case, the two-Judge Bench observed that the aforestated principles are only broad guidelines and not cast-iron imperatives. In most cases, their observance would facilitate the task of the court. However, adding a word of caution, it observed that sometimes the facts are so intertwined and the second and the third stages so telescoped into each other that it may not be convenient to give a separate treatment to the matters involved in the second and third stages.

18. Recently, in *Rampal Singh v. State of Uttar Pradesh,*[15] after referring to the pronouncements in *Rayavarapu Punnayya*

15. (2012) 8 SCC 289.

(supra), *Vineet Kumar Chauhan v. State of U.P.*[16], *Ajit Singh v. State of Punjab,*[17] and *Mohinder Pal Jolly v. State of Punjab*[18], the Court opined thus: -

> "The evidence led by the parties with reference to all these circumstances greatly helps the court in coming to a final conclusion as to under which penal provision of the Code the accused is liable to be punished. This can also be decided from another point of view i.e. by applying the "principle of exclusion". This principle could be applied while taking recourse to a two-stage process of determination. Firstly, the Court may record a preliminary finding if the accused had committed an offence punishable under the substantive provisions of Section 302 of the Code, that is, "culpable homicide amounting to murder". Then secondly, it may proceed to examine if the case fell in any of the Exceptions detailed in Section 300 of the Code. This would doubly ensure that the conclusion arrived at by the court is correct on facts and sustainable in law. We are stating such a proposition to indicate that such a determination would better serve the ends of criminal justice delivery."

19. Regard being had to the aforesaid enunciation of law, it is to be seen whether the opinion expressed by the High Court is correct and justified. As has been stated hereinbefore, the High Court has taken note of the injuries and the conduct of the accused persons and opined that it is a brutal murder. At this juncture, it is apt to note that the accused had not taken the plea that there was an accident because of bad light or due to the negligence of the deceased. He has taken the plea of complete denial. Under these circumstances, the evidence of the son of the deceased, Himmatbhai Sambhubhai, PW-18, gains significance. He has deposed that there was a quarrel between

16. (2007) 14 SCC 660.

17. (2011) 9 SCC 462.

18. (1979) 3 SCC 30.

the accused and the deceased relating to dumping of garbage and his father was threatened by the accused. The said evidence has gone unchallenged. Such a quarrel or altercation has its own triviality but it gets magnified when the dashing of the vehicle is proven and the nature of the injuries caused on the deceased is taken note of. That apart, there is evidence that the body was dragged. Thus, it can safely be concluded that the intention to cause bodily injury is actually found to have been proved and such injuries are sufficient in the ordinary course of nature to cause death. When such injuries are inflicted, it will be travesty of justice to hold that it was an accident without the intention to cause death.

20. In view of the aforesaid premised reasons, we do not find any flaw in the analysis made by the High Court for reversing the conviction under Section 304 Part I of IPC recorded by the learned trial Judge to that of 302 of IPC and, accordingly, we concur with the same. The resultant effect of the same is dismissal of both the appeals which we direct.

B.B.B. Appeals dismissed.

B.T. KRISHNAMURTHY
v.
SRI BASAVESWARA EDUCATION SOCIETY & ORS.
(Civil Appeal No. 2948 of 2013 etc.)

APRIL 8, 2013

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

Service Law:

Reinstatement and regularization - Of part-time lecturer - Held: Temporary/ part-time lecturer working without any appointment letter and without any selection process, cannot be reinstated and his services cannot be regularized.

Termination - Temporary/part-time Lecturer - Working without appointment letter - Termination of service orally communicated - Legality of - Held: Termination simplicitor is not per se illegal and not violative of principles of natural justice.

The respondent in Civil Appeal No. 2949 was working as a Lecturer in the College run by respondent-Society from 28.6.1990. No appointment letter was issued to him. On 22.7.1995 he was orally told that his services were terminated. Thereafter, the college invited applications for appointment on the post of Lecturer. Respondent No.1 also applied for the same. Another person was appointed. Since the person appointed, left the service, another advertisement was issued for appointment on the said post, and appointment was made thereon. Respondent No.1 approached the court challenging his termination from service. Education Appellate Tribunal directed the Society to reinstate respondent No.1 with all consequential benefits and to regularize his services. The order of the Tribunal was upheld by Single Judge of High

Court as well as Division Bench of High Court. Hence the present appeals.

Allowing the appeals, the Court

HELD: 1. The Tribunal completely misdirected itself in passing an order of regularisation and reinstatement in a case, where the respondent allegedly worked in the College as part- time Lecturer without any appointment letter and without any selection process. Since the Society never issued any letter of appointment a letter of termination was also not served upon the respondent. [Para 24] [370-B-C]

2. In the absence of any appointment letter, issued in favour of the respondent, as he was temporary/part-time Lecturer in the College, there cannot be any legitimate expectation for his continuing in the service.. This was the reason that when in the years 1995 and 1996, two persons were appointed one after the other on the post of Lecturer in History, the respondent did not challenge the said appointments. Even assuming that the respondent was permitted to work in the College as part-time lecturer for some period, the action of the management of the college asking him to stop doing work cannot be held to be punitive. The termination simplicitor is not per se illegal and is not violative of principles of natural justice. [Para 25] [370-D-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2948 of 2013.

From the Judgment and Order dated 11.07.2011 of the High Court of Karnataka at Bangalore in WA No. 1812 of 2006.

WITH

Civil Appeal No. 2949 of 2013.

P. Vishwanatha Shetty, P.S. Patwalia, C.M. Angadi, Vijay

Kumar, Rameshwar Prasad Goyal, Bipin Kalappa, Krishma, Ajay Singh, Tushar Bakshi, N. Ganpathy, S.N. Bhat, D.P. Chaturvedi, N.P.S. Panwar, Ravi Panwar, V.N. Raghupathy for the appearing parties.

The Judgment of the Court was delivered by

M.Y. EQBAL, J. 1. Leave granted.

2. Since these two appeals arose out of the common judgment and order dated 11.07.2011 passed in Writ Appeal Nos. 1812 of 2006 and 1865 of 2006, the same have been heard and disposed of by this common judgment.

3. By the impugned judgment and order, a Division Bench of the Karnataka High Court dismissed the appeals and affirmed the order dated 20 0f 2006 passed by a learned Single Judge in Writ Petition Nos. 52603 of 2003 and 54201 of 2003 and the order dated 03.12.2002 passed by the Education Appellate Tribunal in EAT No.16 of 1996.

4. The facts of the case lie in a narrow compass:-

5. Respondent No.1 T.D. Viswanath, in Civil Appeal arising out SLP(C) No. 27130 of 2011 (in short respondent no.1) alleged to have been appointed as a Lecturer in Sri Basaveswara Junior College (in short, 'the college') run by Sri Basaveswara Education Society (in short, 'the Society'). According to the said respondent No.1, since the date of appointment i.e. 28.06.1990 he continuously worked as a Lecturer in the College run by the Society. It was alleged that all of a sudden on 22.07.1995 the Society/College issued oral directions directing respondent No.1 not to attend the College and take classes on the ground that his services have been terminated.

6. It appears that on 19.06.1995, the Society issued an advertisement in the newspaper inviting applications for appointment on the post of Lecturer in History in the said

College. Pursuant to the said advertisement, respondent No.1 applied for the said post and was called for interview, but he was not selected and in his place one T.S. Malleshappa was selected for the said post. The said T.S. Malleshappa joined the said post of Lecturer, but within a year he left the service and joined M.Phil Course. Subsequently, the Society issued another advertisement dated 03.05.1996 inviting applications from eligible candidates for the post of Lecturer (History). Again after interview, one R. Siddegora was appointed as a Lecturer (History) for a period of two years. In the meantime, respondent No.1 filed a writ petition being No. 31770 of 1995 before the Karnataka High Court seeking a mandamus directing the Society of the College to reinstate him in service with all consequential benefits and further direction was sought not to make any appointment in his place. The said writ petition was dismissed on 29.10.1996 by the High Court on the ground of alternative remedy of appeal available before the Education Appellate Tribunal (in short, the 'Tribunal').

7. Respondent No.1 thereafter filed an appeal before the Tribunal challenging his termination/removal from the post of Lecturer. Along with the said appeal, an application for condonation of delay was also filed. Pending appeal, the Tribunal passed interim order dated 17.12.1996, restraining the Society and the Principal of the College from appointing any person to the post of Lecturer.

8. In the year 1998, Director of Pre-University Education Board by communication dated 24.08.1998 asked the Society to fill up the remaining three posts from reserved category in order to obtain the approval for the teaching staff. Consequently, posts were advertised and one B.T. Krishnamurthy, who is appellant in Civil Appeal arising out of the Special Leave Petition No. 27031 of 2011 was appointed as Lecturer.

9. However, the Tribunal by order dated 03.12.2002, allowed the appeal filed by respondent No.1 and directed the Society to reinstate respondent No.1 in service w.e.f.

23.07.1995 and to pay him all pecuniary benefits w.e.f. 23.07.1995. The Tribunal further directed the Society to regularize the services of respondent No1. The Tribunal further declared the appointment of B.T. Krishnamurthy as illegal and improper.

10. Aggrieved by the aforesaid order of the Tribunal, the appellants herein - the Society and B.T. Krishnamurthy filed separate writ petitions challenging the order passed by the Tribunal. The High Court dismissed the writ petitions by judgment and order dated 20.09.2006 and refused to interfere with the order passed by the Tribunal. The Society and B.T. Krishnamurthy then preferred intra- court appeals before the Division Bench of the High Court which were heard and dismissed in terms of the impugned judgment and order dated 11.07.2011. Hence, these appeals.

11. The case of respondent No.1, T.D. Viswanath before the Tribunal was that he was appointed to the post of Lecturer in History on 28.06.1990 against a clear vacancy available in the College. From the date of appointment, he was assigned the work for development of literacy and other curriculum. It was alleged that during the year 1995 when the institution was admitted for grant-in-aid by the Government he was working in the same institution. However on 22.07.1995, without any previous notice, the appellant-institution called upon him and directed not to come for duty in future.

12. Respondent No.1 first filed a writ petition before the Karnataka High Court, but the same was dismissed with liberty to him to approach the competent forum i.e. Education Appellate Tribunal. Accordingly, respondent No.1 approached the Tribunal and prayed for regularization of his services.

13. The case of the appellant-institution was that the institution had not issued any appointment order either permanently or temporarily appointing him to work in the institution. As a matter of fact, respondent No.1 was allowed

to serve the institution temporarily on the post of Lecturer purely on ad hoc basic. For the first time in the year 1995, several posts of Lecturers in the College were advertised. Pursuant to that, respondent No.1 T.D. Viswanath also applied for the post of Lecturer in History on 22.06.1995, but he was not selected for the said post,. Consequently, a writ petition was filed before the High Court and thereafter an appeal before the Tribunal seeking regularisation of his services.

14. The Tribunal proceeded on the basis of some entries made in different registers of the College and the certificate dated 27.04.1991 allegedly issued by the Principal of the College certifying that the respondent T.D.Viswanath worked as part-time Lecturer in the institution from July 1990 to March 1991. The Tribunal also noticed the certificate said to have been issued on 22.07.1995 certifying that T.D. Viswanath was working as Lecturer in History in the College on part time temporary basis. In the prospectus of the College for the years 1992-93 and 1993-94 the name of respondent finds place as a Lecturer. The Tribunal further noticed the relevant provisions of the Education Act and finally came to the conclusion that the respondent was serving the College as temporary part-time Lecturer which is evident from the attendance register maintained by the College. The Tribunal, therefore, held that even presuming that the respondent was a temporary employee he was to be removed from service by passing appropriate orders and that by reason of the passage of time the respondent acquired right for regularization in service. The Tribunal further held that respondent No.1 was in service till 22.07.1995 on which date he was asked not to come to College again. In that view of the matter, the respondent was entitled to reinstatement retrospectively from that date. Finally, the Tribunal held that B.T.Krishnamurthy cannot be allowed to occupy the vacancy and inasmuch as his appointment was illegal and it is for the management to absorb him in any other subject. According to the Tribunal, the appointment of B.T.Krishnamurthy has to be

held as illegal and improper. On these findings, the Tribunal passed the following order:

"The appeal filed by the appellant stands allowed. The respondent No.1 and 3 are directed to reinstate the appellant in service from 23.7.1995. The appellant will be entitled to all service and pecuniary benefits attached to service. However, the management shall pay to him retrospectively from 23.7.1995 salary in the scale of pay that was being paid to him and his services shall be regularized and he shall be paid salary at the Government scale of pay admissible to the employee of that cadre.

In view of this order, the appointment of Shri B.T.Krishnamurthy is held to be illegal and improper and therefore the management i.e. respondents 1 and 3 are required to take consequential action to comply with this order.

However, it is observed that in case B.T.Krishnamurthy could be absorbed as a lecturer in any other subject in the institution. The management shall explore all opportunity to continue his employment.

As the consequence of this order as services of Shri B.T.Krishnamurthy will stand terminated therefore I feel it is appropriate to grant two months time to the management to do the needful.

In the circumstances, there is no order to costs.

Pronounced in open Court by dictating to the judgment-writer on this 3rd day of December 2002, then transcribed, computerized and print out taken by him, and after correction, signed by me."

15. The aforesaid order and award of the Tribunal was challenged by both the appellants herein namely, the Society and B.T. Krishnamurthy before the High Court. The learned

Single Judge without analyzing the finding recorded by the Tribunal dismissed both the writ petitions on 20.09.2006. Para 8 and 9 of the order passed by the learned single Judge is as under:

"The tribunal, having arrived at findings of fact on an elaborate consideration of the pleadings and material placed before it, it cannot be said that it has committed an error which would warrant interference by this Court in its writ jurisdiction. I do not find any ground for interference and though an argument is canvassed as regards the appeal having been entertained without condoning the delay in the first instance, neither of the petitioners have sought to raise any such ground in the petitions and hence, it would not warrant consideration. In any event, the tribunal having proceeded to pass an award after taking into consideration that the question of limitation was kept open and having rendered a positive order in favour of the respondent No.4, it is to be deemed that the delay in filing the appeal was condoned.

Accordingly, I do not find any ground for interference. The petitions in W.P.No. 52603/2003 as well as W.P. No. 54201/2003 are hereby dismissed."

16. Both the appellants preferred intra-court appeals before the Division Bench of the High Court against the order passed by the learned Single Judge dismissing the writ petitions. The Division Bench also proceeded on the basis that respondent no.1 worked as a History Lecturer from 28.06.1990 to 22.07.1995 pursuant to the Notification dated 26.05.1990. However, in the said notification nothing was mentioned that the appointment is made for the post of History Lecturer on part-time basis or temporary arrangement. The Division Bench also considered the fact that the State Government by its Notification dated 21.04.1995 had made it clear that the reservation policy of the State Government regarding appointment of teaching and non-teaching employees was to be left undisturbed. The

Division Bench, however, not disputed the fact that neither appointment order nor termination letter was issued in the case of the respondent no.1. There was also no evidence to show that the appointment of respondent no.1 was temporary or on part-time. On the basis of those facts, the Division Bench refused to interfere with the order passed by the learned Single Judge.

17. We have heard Mr. P. Viswanatha Shetty and Mr. P.S. Patwalia, learned senior advocates appearing for the appellants and also Mr. S.N. Bhat, learned Advocate appearing for the respondents.

18. Mr. P. Viswanatha Shetty learned senior counsel at the very outset submitted that appellant B.T.Krishnamurthy was appointed on reserved category and it has nothing to do with the other appointments made by the Society. Learned counsel submitted that the Tribunal has committed serious error of law in setting aside the appointment of the appellant. Learned counsel further submitted that respondent No.1 T.D. Viswanath has failed to prove that he was regularly appointed in 1990 on the post of Lecturer in History. He did not even examine himself before the Tribunal. Learned counsel further submitted that the respondent No.1 has even not challenged the appointments of Malleshappa and Siddegora made in the year 1995-1996. Nothing has been produced by respondent No.1 to show that he was appointed either permanently or temporarily on the post of Lecturer in the said college. In the absence of any such document, the Tribunal and also the High Court have committed serious illegality in directing reinstatement of respondent No.1 in service.

19. Mr. P.S. Patwalia, learned Senior Advocate appearing for the Society and the College, apart from the aforesaid submissions made by Mr. Shetty, submitted that in the year 1995 pursuant to the advertisements issued by the College for appointment of Lecturer, respondent No.1 participated in the selection process, but he was not found suitable for the said

post and was not selected. The said selection was not challenged by respondent no.1. On the contrary, he approached the Tribunal after one and half years. Learned counsel submitted that both the Tribunal and the High Court have not correctly appreciated the facts of the case and the law applicable thereto.

20. Mr. S.N. Bhat, learned advocate appearing for respondent no.1 T.D. Viswanath on the other hand, submitted that the findings recorded by the Tribunal are based on various documents and entries made in different registers maintained by the College and, therefore, the findings cannot be held to be perverse or without any basis. Learned counsel submitted that the Tribunal also noticed the interpolation made in various registers of the College to make out a case that the said respondent was not continuously working in the said College.

21. We have carefully considered the submissions made by the learned counsel appearing on either side.

22. Indisputably, the respondent T.D. Viswanath, alleged to have worked on the post of Lecturer in History in the year 1990 and continued as such for a few years, but before his appointment neither the post was advertised nor any selection process was followed. No appointment letter was issued by the Society appointing him either permanently or temporarily in the said post. It is also not in dispute T.D. Vishwanath did not receive any letter of termination or relieving order from the Society. According to him, the Society orally directed him not to continue in the College.

23. It is also not in dispute that on 19.06.1995, the Society issued advertisement in the newspaper for appointment on the post of Lecturer in History and pursuant to that respondent No.1 along with other candidates participated in the interview conducted by the College. After the selection process and interview, respondent No.1 was not selected rather one T.S. Malleshappa was selected for the said post. The said Malleshappa joined and continued for about a year and

thereafter he left service and joined M.Phil Course. Thereafter, the Society issued another advertisement dated 03.05.1996 inviting applications from eligible candidates for the post of lecturer and one R. Siddegora was appointed as Lecturer in History on probation for a period of two years. Curiously enough, respondent No.1 did not challenge the selection and appointment of the above-named two candidates, Malleshappa and Siddegora. Instead a writ petition was filed by the respondent No.1 seeking regularization of his services on the post of Lecturer in History with all consequential benefits. The respondent No.1 ultimately approached the Tribunal. As noticed above, the Tribunal on the basis of some entries made in the registers maintained by the College passed the impugned order for regularization of the services with all monetary benefits. It is worth to mention here that the Tribunal although came to the conclusion that the certificate produced by respondent No.1 goes to show that he was in the College as temporary and part-time employee even then the Tribunal held that due to passage of time the Court will be justified in directing the College/Society to regularize his services. The Tribunal although directed regularization as mentioned hereinabove but in the subsequent paragraph the Tribunal further directed reinstatement of the respondent in service. Para 43 of the order passed by the Tribunal is quoted herein below:-

> "The other aspect is that the appellant is out of service. The date of his retrenchment is shown as 22.7.1995, by the appellant, whereas the management disputes that aspect. On the basis of the material discussed above, I am constrained to hold that the appellant was in service till 22.7.1995, on which date he was asked not to come to the college again. Thus that become the material date for decision about his reinstatement. The appellant will be entitled to reinstatement retrospectively from that date and as it is shown that such a situation was created due to acts of the management, the management cannot absolve itself from discharging its consequential liabilities. The consequential liabilities to pay are loss of pay to the appellant from that date. Thus, the appellant would also be entitled to reinstatement in service as a lecturer in history from 23.7.1995 and he will also be entitled to emoluments, which he was entitled to receive."

24. In our considered opinion, the Tribunal completely misdirected itself in passing such an order of regularisation and reinstatement in a case where the respondent allegedly worked in the College as part- time Lecturer without any appointment letter and without any selection process. Since the Society never issued any letter of appointment a letter of termination was also not served upon the respondent.

25. As stated above, in the absence of any appointment letter, issued in favour of the respondent as he was temporary/ part-time lecturer in the College, there cannot be any legitimate expectation for his continuing in the service.. This was the reason that when in the years 1995 and 1996, two persons were appointed one after the other on the post of Lecturer in History, the respondent did not challenge the said appointments. Even assuming that the respondent was permitted to work in the College as part-time lecturer for some period, the action of the management of the college asking him to stop doing work cannot be held to be punitive. The termination simplicitor is not per se illegal and is not violative of principles of natural justice.

26. After giving our anxious consideration in the matter and analyzing the entire facts of the case, we are of the view that the impugned order passed by the Education Appellate Tribunal and the High Court cannot be sustained in law and are liable to be set aside.

27. For the reasons aforesaid, these appeals are allowed and the impugned orders are set aside.

K.K.T. Appeals allowed.

AARUSHI DHASMANA
v.
UNION OF INDIA AND OTHERS
(Writ Petition (Civil) No.232 of 2012)

APRIL 10, 2013

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

Human rights – Craniopagus Twins (CTs), two minor girls 'S' and 'F' – Parental consent not forthcoming either for investigation or for surgical operation – Duty of the Court – Right to life – Right to bodily integrity – Wardship Jurisdiction – Exercise of – Application of "least detrimental test" – Held: The Court has to adopt a balancing exercise – First and foremost consideration of the Court is "welfare of the children", which overrides the views or opinions of the parents – Parents of 'S' and 'F' are against carrying on any investigation as well as surgical operation but, 'S' and 'F' being ward of the Court, the Court has got a responsibility to find out whether it is possible to save both and if not, at least one, for which investigations are necessary – Intrinsic value of both 'S' and 'F' is equal, but when medical investigation is carried on, a balance sheet has to be drawn up of the advantages and disadvantages which flow from the performance or the non-performance of a surgical treatment – If the balance shifts heavily in favour of one, that has to be accepted, otherwise, both will sink and die – Proper medical investigation could not be carried out by the medical team of AIIMS, mainly, because of the parental opposition – Medical team of AIIMS could not come out with a solution, they were apprehensive of the fact that the investigations had their own risk and had also opined that detailed medical treatment would be possible only after thorough investigation – No positive direction can be given in the absence of an expert medical opinion indicating that either of 'S' and 'F' can be saved due to surgical

operation or at least one – Directions issued considering the facts and circumstances of this case — Constitution of India, 1950 – Article 21.

Craniopagus Twins (CTs) are conjoined twins fused at the cranium. The Supreme Court, in the instant writ petition, was concerned with the fate of Saba and Farha, Craniopagus Twins (CTs) both female aged 15 years, and their survival, unless subjected to surgical separation.

The AIIMS Medical Team stated in its report about the risk involved in the operation to separate Saba and Farah which according to the Medical Team can be elaborated only after detailed investigations, at AIIMS, added to that it has been stated that the investigations have their own risks. The State of Bihar and the Central Government, however, have extended their fullest support in meeting the expenses for the surgical treatment. AIIMS have also expressed opinion that they would carry out the investigations but for the unwillingness of the parents and the family members.

Disposing of the writ petition, the Court

HELD: 1. Medical law: Barring a few exceptions, as a general rule, the conduct of investigations and performance of medical operation on a person, without his or her consent is unlawful. This Court, in this case, is however, concerned with two minor girls, conjoint twins, faced with a situation where their parental consent is not forthcoming either for investigation or for the surgical operation. [Para 10] [380-D-E, F]

F. v. West Berkshire Health Authority (Mental Health Act Commission intervening) **[1989] 2 All E.R. 545 – referred to.**

2. Right to life: Right to life is guaranteed under Article 21 of the Constitution of India, so also the right to

bodily integrity. In the absence of any medical report, it cannot be said as to whether both Saba and Farah could be saved or either of them. There can also be conflict of interests between the CTs that is Saba and Farha, in such situation the Court has to adopt a balancing exercise to find out the least detrimental alternative. This Court is not in a position to undertake that exercise in the instant case, because there is no medical report stating that if CTs are subjected to surgical operation, one of them might survive. If there is an authentic medical report that the life of one could be saved, by surgical operation, otherwise both would die, this Court would have applied the "least detrimental test" and saved the life of one, even if parents are not agreeable to that course. Every life has an equal inherent value which is recognised by Article 21 of the Constitution and the Court is duty bound to save that life. [Paras 11, 12] [380-G-H; 381-B-D]

3. Parents consent and duty of the Court:

3.1. In the instant case, both, parents, as well as the brother are against shifting Saba and Farah to AIIMS, New Delhi for further investigation and also for further surgical operation. They believe, the same is risky and both might not survive. However, Saba and Farah are now wards of this Court and this Court is exercising Wardship Jurisdiction as well. The first and foremost consideration of the Court is "welfare of the children", which overrides the views or opinions of the parents. [Paras 13, 15] [381-D-E; 382-E-F]

3.2. In the instant case, since Saba and Farah's parents are against carrying on any investigation as well as surgical operation but, being Saba and Farah are ward of this Court, this Court has got a responsibility to find out whether it is possible to save both and if not, at least one, for which investigations are necessary. Each life has an inherent value in itself and the right to life

guaranteed under Article 21 of the Constitution is of general nature to apply to both Saba and Farah. Intrinsic value of both Saba and Farah is equal, but when medical investigation is carried on, a balance sheet has to be drawn up of the advantages and disadvantages which flow from the performance or the non-performance of a surgical treatment. If the balance shifts heavily in favour of one, that has to be accepted, otherwise, both will sink and die. [Paras 16, 17] [383-G-H; 384-A-B, C-D]

Gillick v. West Norfolk and Wisbech Area Health Authority **(1985) 3 All E.R.; Re Z (a minor) (freedom of publication) [1995] 4 All ER 961 and** *Re B (a minor) (wardship: medical treatment)* **[1981] (1990 3 ALL E.R. 927 – referred to.**

Lack of Medical Report

4.1. Proper medical investigation could not be carried out by the medical team of AIIMS, mainly, because of the parental opposition. What they wanted is financial help for the maintenance of both Saba and Farah. Financial help, of course, has to be extended to them since parents are coming from poor circumstances, but when the lives of both are stake, can one not save the life of at least one. Medical team of AIIMS could not come out with a solution, they were apprehensive of the fact that the investigations had their own risk and had also opined that detailed medical treatment would be possible only after thorough investigation. [Para 18] [384-D-F]

4.2. Nobody is concerned with the pain and agony CTs are undergoing, not even the parents, what they want is financial help as well as palliative care. No positive direction can be given in the absence of an expert medical opinion indicating that either of them can be saved due to surgical operation or at least one. Directions issued considering the facts and circumstances of this

case. [Para 19] [384-G-H; 385-A]

Case Law Reference:

[1989] 2 All E.R. 545	**referred to**	**Para 10**
(1985) 3 All E.R.	**referred to**	**Para 13**
[1995] 4 All ER 961	**referred to**	**Para 14**
[1981] (1990 3 ALL E.R. 927	**referred to**	**Para 15**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 232 of 2012.

Under Article 32 of the Constitution of India.

S.K. Chauhan, Mehul Milind Gupta, R.P. Gupta, Suman Gupta for the Appellant.

Siddharth Luthra, Indira Jaisingh, ASGs, Krishna Kumar, Anita Shenoy, Gargi Khanna, Sushma Suri, Devika Sehgal, Sonam Anand, Rohit Sharma, Gopal Singh, Manish Kumar, Mehmood Pracha, Sumit Babbar for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. We are, in this case, concerned with the fate of Saba and Farha, Craniopagus Twins (CTs) and their survival, unless subjected to surgical separation.

2. Saba and Farha, CTs, both female, are minors, togetherness, of course, will not bring joy to them or to their parents, to the family members or the people at large who happen to see them or heard about them. The doors of this Court have been knocked by a good Samaritan and since this Court has a fundamental duty to look after the interest of minor children, especially when they are CTs, fighting for their lives. We spent sleepless nights to find out a solution. Seldom society cares or knows the mental and psychological trauma, in such

situations, Judges undergo, especially, when they are called upon to decide an issue touching human life, either to save or take away.

3. We are in this case concerned with lives of two minor girls, placed in an unfortunate, calamitous and infelicitous situation. CTs are conjoined twins who are fused at the cramium. Medical science says that at least 25% of the CTs may survive and can be considered for a surgical separation, especially due to advances in medicine, including brain imaging, neuro-anaesthesia and neuro surgical techniques, but risk is always there.

4. We were informed, both Saba and Farha had earlier attended to by Dr. Benjmin Carson, a U.S. Specialist who had noticed that they shared a vital blood vessel in the brain and that Farha had two kidneys while Saba had none. Earlier also medical experts had ruled that separating Saba and Farha would require 5 or 6 operations over nine months, but each stage held a one-in-five chance that either of the girls might die. Consequently, the family had decided to go against any operation, even though it was reported that crown prince of Abu Dhabi, Sheikh Mohammed bin Zayed, offered to meet the entire medical expenses.

5. We heard the matter on 30.7.2012 and directed the Chief Secretary of Bihar to make arrangements to bring CTs to AIIMS, New Delhi by an Air Ambulance. Direction was also given to constitute a medical team to examine them and to take up further follow up action. Arrangements were also made to take parents along with them at the expenses of the State for their treatment. The parents were, however, not agreeable to that arrangement but only wanted financial assistance to look after CTs.

6. The AIIMS medical team, New Delhi in compliance of this Court order dated 21.8.2012 reached Patna on 21.10.2012 to examine CTs. After examining, they submitted

the following report dated 31st October, 2012 before this Court, which reads as under:

"As per the Supreme Court orders in Writ Petition (Civil) No.232 of 2012 and instructions of the AIIMS administration, the following doctors team from AIIMS visited Patna, Bihar on 21.10.2012 to examine the conjoint twins Saba and Farah both female age 15 years D/o Rabia Khatoon.

1. Prof. M.V. Padma, Professor of Neurology
2. Prof. Arvind Chaturvedi, Professor of Neuro-anaesthesia
3. Dr. S.K. Kale, Additional Professor of Neuro-surgery

After discussion with Mr. S. Luthra, Additional Solicitor General, the report submitted earlier is elaborated as under:

According to the brother of the patients one of the twins does not have kidneys, and the twins between their brain have one common sagittal sinus (biggest vein). There is no evidence/investigation to either prove or disprove these statements made by the brother.

1. The risk involved in the operation to separate the conjoint twins (Craniopaguys) Saba and Farha cannot be elaborated without investigations. The statements made by the brother regarding kidneys and the sagittal sinus also need extensive investigations.

2. The investigations will have to include CT scan, MRI, MRI Angiography, 4Vessel IA DSA and investigations for other organ functions, and can be

performed by experts at AIIMS.

3. These investigations have their own risks.

4. The parents and the brother are not willing to take any risk including the risk involved in investigations.

5. A detailed medical report is not possible without investigations.

The brother and the parents handed over a written submission requesting for financial help and palliative care. This submission was attached in the earlier report.

Signature	Signature	Signature
Prof. M.V. Padma Prof. of Neurology AIIMS, New Delhi	Prof. A. Chaturvedi Prof. of Neuro-anaesthesia, AIIMS New Delhi,	Dr. S.S. Kale Addl. Prof. Neuro-Surgery AIIMS, New Delhi"

7. We find when the medical team of AIIMS visited to Patna on 21.10.2012 to examine the CTs they were served with a letter by the mother of the CTs, Rabia Khatoon. The letter reads as follows:

"To

The Enquiry Committee (Medical Team)
AIIMS,
New Delhi.

Sub: **Help of monthly pension for conjoint sisters Sabaa and Farha –reg**.

Sir,

It is requested that we do not want our daughters to get operated because operation is very risky and we do

not want to take risk. There are lot of expenses involved for my daughters – food and medicines etc. I request that monetary help of Rs.8000/- may be given to my each daughter. The financial condition of my home is not good. I have big family of ten members. We need help as we don't have any means of livelihood.

I am sure that that you will consider my request seriously. I will forever remain indebted to you. My one son has been looking after both the sisters & family by borrowing money as there is no mean of livelihood. He is still unemployed. He may be helped in getting employment so that both the sisters are taken care of.

Yours faithfully,
Sd/-
(Rabia Khatoon)
Moh. Samanpura, Raja Bazaar,
P.O. BP College, PS Shastri Nagar,
Distt. Patna-800014
Mob. 9308566555"

8. Above facts would clearly indicate that the medical team of AIIMS could not make any proper investigation of the CTs. They opined that the investigation would involve CT Scan, MTI, MRI angiography, 4Vessel IA DSA etc. which could be performed only at AIIMS. They also expressed the view that those investigations have their own risks and that since the parents and brother were not willing to take any risk, including the risks involved in the investigation, it would not be possible to make detailed medical report without proper investigations of the CTs.

9. The case of Saba and Farha give rise to various questions about the rights of the minors, their right to life, their inter-se rights, inherent value of lives, right to bodily integrity, balancing of interests, best interest standards, parents views, courts' duty, doctors duty etc. The questions raised above are inter-connected and inter-related and have their roots in

medical law, family law, criminal law and human rights law. Should we go for the best interest of Saba and Farah, or either of them? Can a Court override the wishes of the parents when we apply the best interest standard for saving the life of at least one?

Medical Law

10. The AIIMS Medical Team has stated in its report dated 21.10.2012 about the risk involved in the operation to separate Saba and Farah which according to the Medical Team can be elaborated only after detailed investigations, at AIIMS, added to that it has been stated that the investigations have their own risks. The State of Bihar and the Central Government, however, have extended their fullest support in meeting the expenses for the surgical treatment. AIIMS have also expressed opinion that they would carry out the investigations but for the unwillingness of the parents and the family members. Barring a few exceptions, as a general rule, the conduct of investigations and performance of medical operation on a person, without his or her consent is unlawful. In *F.* v. *West Berkshire Health Authority (Mental Health Act Commission intervening)* [1989] 2 All E.R. 545 at 564 Lord Goff while adopting the words of Cardozo has stated "Every human being of adult years and sound mind has a right to determine what shall be done with his own body". We are, in this case, however, concerned with two minor girls, conjoint twins, faced with a situation where their parental consent is not forthcoming either for investigation or for the surgical operation.

Right to Life:

11. Right to life is guaranteed under Article 21 of the Constitution of India, so also the right to bodily integrity. We are, in this case, not in a position to say, in the absence of any medical report, as to whether both Saba and Farah could be saved or either of them. Let us pose the following questions to ourselves: Is it in Saba's best interest that she be separated

from Farah? Is it Farah's best interest that she be separated from Saba? Both Saba and Farah are dear to us, but in a situation where both in the absence of surgical separation might die, and in case of a surgical operation, one would survive, is there not a duty on the Court to save at least one.

12. There can also be conflict of interests between the CTs that is Saba and Farha, in such situation the Court has to adopt a balancing exercise to find out the least detrimental alternative. We are not in a position to undertake that exercise in the instant case, because there is no medical report before us stating that if CTs are subjected to surgical operation, one of them might survive. If there is an authentic medical report before us that the life of one could be saved, due surgical operation, otherwise both would die, we would have applied the "least detrimental test" and saved the life of one, even if parents are not agreeable to that course. Every life has an equal inherent value which is recognised by Article 21 of the Constitution and the Court is duty bound to save that life.

Parents consent and duty of the Court

13. Both, parents, as well as the brother are against shifting Saba and Farah to AIIMS, New Delhi for further investigation and also for further surgical operation. They believe, the same is risky and both might not survive. In *Gillick* v. *West Norfolk and Wisbech Area Health Authority* (1985) 3 All E.R. The Court held that "the common law has never treated the parental rights and powers as sovereign or beyond review or control.

14. We may also refer to an off-repeated passage of Bingham MR in Re Z (a minor) (freedom of publication) [1995] 4 All ER 961 at 986:

> "I would for my part accept without reservation that the decision of a devoted and responsible parent should be treated with respect. It should certainly not be disregarded or lightly set aside. But the role of the court is to exercise

> an independent and objective judgment. If that judgment is in accord with that of the devoted and responsible parent, well and good. If it is not, then it is the duty of the court, after giving due weight to the view of the devoted and responsible parent, to give effect to its own judgment. That is what it is there for. Its judgment may of course be wrong. So may that of the parent. But once the jurisdiction of the court is invoked its clear duty is to reach and express the best judgment it can.
>
> That is the law. That is what governs my decision. That is what I am desperately trying to do. I do not discern any very significant difference between the law, as set out above, and the Archbishop's fifth overarching moral consideration which he expresses in these terms:
>
> "Respect for the natural authority of parents requires that the courts override the rights of parents only when there is clear evidence that they are acting contrary to what is strictly owing to their children."

15. Saba and Farah are now wards of this Court and we are exercising Wardship Jurisdiction as well. Law of this land has always recognised the rights of parents with their wards/ minors and first and foremost consideration of the Court is "welfare of the children", which overrides the views or opinions of the parents. In *Re B (a minor) (wardship: medical treatment)* [1981] (1990 3 ALL E.R. 927 was a case where a child was born suffering from Down's Syndrome and an intestinal blockage, required an operation to relieve the obstruction if she was to live more than a few days. Doctor opined that if the operations were performed, the child might die within a few months but it was probable that her life expectancy would be 20 to 30 years. Parents, though, it would be kinder to allow her to die rather than live as a physically and mentally disabled person, consequently, refused to consent for the operation. The local authority made the child a ward of court and when a surgeon decided that the wishes of the parents should be

respected, they sought an order authorising the operation to be performed by other named surgeon. Lord Templeman said:

> "Counsel for the parents has submitted very movingly…. That this is a case where nature has made its own arrangements to terminate a life which would be fruitful and nature should not be interfered with. He has also submitted that in this kind of decision the views of responsible and caring parents, as these are, should be respected, and that their decision that it is better for the child to be allowed to die should be respected. Fortunately or unfortunately, in this particular case the decision no longer lies with the parents or with the doctors, but lies with the court. It is a decision which of course must be taken in the light of the evidence and views expressed by the parents and the doctors, but at the end of the day it devolves on this court in this particular instance to decide ….." 1990 (3) All E.R. 927 at 929.

Lord Dunn also said:

> "I have great sympathy for the parents in the agonising decision to which they came. As they put it themselves: "God or nature has given the child a way out." But the child now being a ward of court, although due weight must be given to the decision of the parents which everybody accepts was an entirely responsible one thing what they considered was the best, the fact of the matter is that this court now has to make the decision. It cannot hid behind the decision of the parents or the decision of the doctors; and in making the decision of this court's first and paramount consideration is the welfare of this unhappy little baby." (1990) 3 All E.R. 927 at 929.

16. We are faced with the same situation in this case, since Saba and Farah's parents are against carrying on any investigation as well as surgical operation but, being Saba and Farah are ward of this Court, this Court has got a responsibility

to find out whether it is possible to save both and if not, at least one, for which investigations are necessary.

17. We are adopting such standards because each life has an inherent value in itself and the right to life guaranteed under Article 21 of the Constitution is of general nature to apply to both Saba and Farah. But what about the inherent value of life of one, who can survive due to surgical separation. Is it not necessary to save inherent value of the ward who may survive not the other. Intrinsic value of both Saba and Farah is equal, but when medical investigation is carried on, a balance sheet has to be drawn up of the advantages and disadvantages which flow from the performance or the non-performance of a surgical treatment. If the balance shifts heavily in favour of one, that has to be accepted, otherwise, both will sink and die.

Lack of Medical Report

18. We are, in this case, concerned with a situation where a proper medical investigation could not be carried out by the medical team of AIIMS, mainly, because of the parental opposition. What they wanted is financial help for the maintenance of both Saba and Farah. Financial help, of course, has to be extended to them since parents are coming from poor circumstances, but when the lives of both are stake, can we not save the life of at least one. Medical team of AIIMS could not come out with a solution, as already indicated, they were apprehensive of the fact that the investigations had their own risk and had also opined that detailed medical treatment would be possible only after thorough investigation.

19. We are sorry to note that nobody is concerned with the pain and agony CTs are undergoing, not even the parents, what they want is financial help as well as palliative care. No positive direction can be given in the absence of an expert medical opinion indicating that either of them can be saved due to surgical operation or at least one. Considering the facts and

circumstances of this case, we are, however, inclined to give the following directions:

1. Civil Surgeon, Medical Centre, Patna should periodically carry on the medical examination of both Saba and Farah and send periodical reports, at least quarterly to AIIMS and AIIMS would make their own suggestion based on the investigation which is being conducted by the medical team from Patna.

2. The State of Bihar is directed to meet the complete medical expenses for the treatment of both Saba and Farah and also would pay a consolidated amount of Rs.5,000/- monthly to look after both Saba and Farah.

3. CTscondition as well as the treatment given to them be reported to this Court every six months.

4. The State of Bihar is directed to move this Court for further directions, so that better and more scientific and sophisticated treatment could be extended to Saba and Farah.

With these directions, this writ petition is disposed of.

B.B.B. Writ Petition disposed of.

V.K. SURENDRA
v.
V.K. THIMMAIAH & ORS.
(Civil Appeal No. 1499 of 2004)

APRIL 10, 2013.

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

Suit - Partition suit - By daughter - Claiming 1/10 share in the property of her deceased father - Claiming that the property was self-acquired - The 3 sons of deceased stated that the property was ancestral - One of the sons D-3 claimed a specific share in the property on the strength of a Will executed by the deceased - Trial court held that D-3 was entitled to the share through the Will - High Court decreed the suit holding that the property was ancestral and therefore the deceased and his four sons were entitled to equal share i.e. 1/5th - Thus the four sons were entitled to 11/50th share and the five daughters and the sole descendant of one of the daughters were entitled to 1/50th share - Held: The High Court rightly held that the property was ancestral and not self-acquired - No interference with the order of High Court is called for.

Plaintiff-respondent No.4 filed a suit for partition and separate possession of 1/10th share in the suit schedule properties. Her case was that the property in question was self acquired by her father 'K'. Defendant Nos.1, 2 and 4 (three out of the four sons of 'K') defended the suit claiming the suit property to be ancestral property and claimed 1/5 share therein. Defendant No.3 (fourth son of 'K') claimed that he was entitled to total extent of 32 acres 55 cents in the property, stating that the same was bequeathed in his favour under a Will by 'K'. Defendant Nos.5, 6, 7, 8 (the 4 daughters of 'K') and defendant No.9

(descendant through fifth daughter of 'K') did not file any written statement. Trial court held that the property was self-acquired property of 'K' and defendant No.3 was entitled for the share in the property in question. High Court decreed the suit holding that the property was ancestral property and thus was joint family property of 'K' and his children and therefore 'K' had no right to bequeath the property to defendant No.3. Thus, the sons of 'K' (defendant Nos.1, 2, 3 and 4) and 'K' himself were entitled to 1/5th share. Hence daughters of 'K' and descendant through daughter were entitled to 1/50th share and his sons were entitled to 11/50th share. Hence the present appeal by appellant-defendant No.3.

Dismissing the appeal, the Court

HELD: 1. The appellant who examined himself as DW.4, failed to produce either documentary or oral evidence to show that the lands were the self-acquired properties of 'K'. In absence of any division in the family of 'K' and his sons, the family of 'K' continued to be the joint family. If a co-parcener of a joint family claims that properties are his self-acquired properties, the burden is on him to prove that the same are the self-acquired properties. In that background the High Court has rightly held that 'K' had no right to change the character of the joint family properties by transferring the same either under a Will or a gift to any party without the consent of the other co-parceners. [Para 14] [395-H; 396-A-C]

2. In his deposition DW.1 stated that in the year 1976 when 'K' was alive, the names of all his sons were entered in the Jamabandhi. DW.2, deposed in his evidence that the suit schedule properties are the ancestral properties of 'K'. DW.3, in his evidence has deposed that the father of 'K' possessed of about 30 acres of wet land and 24 acres of garden land. He further stated that 'K' had purchased the lands after the sale of

the lands to the grandfather of DW.2. He further stated that when the lands were purchased under Ex.D-1,'K' was a minor and his grandmother purchased those properties as a guardian of minor 'K'. Even the appellant-defendant No.3 as DW.4 admitted that the lands sold, under Ex.D-5 are the joint family properties and if lands were not sold he and his brothers would have been entitled for a share. Therefore, the suit schedule properties are joint family properties of 'K' along with 4 sons and the co-parceners have equal shares in the properties. Accordingly, 4 sons and 'K' are entitled to 1/5th share of the total properties. [Paras 15 to17] [396-C-G; 397-A-C]

3. So far as 1/5th share of 'K' is concerned, apart from 4 sons, i.e., defendant Nos. 1, 2, 3 and 4, the daughters of 'K' are entitled to 1/50th share each whereas the sons, i.e., defendant Nos.1, 2, 3 and 4 are entitled to 11/50th share each, inclusive of their respective shares. Defendant No.9 who is the son of the first daughter having succeeded the estate of his mother, a co-parcener is also entitled to 1/50th share. [Para 17] [397-D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1499 of 2004.

From the Judgment and Order dated 20.01.2003 of the High Court of Karnataka at Bangalore in R.F.A. No. 319 of 1998.

G.V. Chandrashekar, N.K. Verma, P.P. Singh for the Appellant.

Shantha Kr. Mahale, Harish S.R., Rajesh Mahale, Venkata Krishna Kunduru, B.S. Prasad, Nandish F. Pati, A.S. Bhasme for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. This appeal has been preferred by defendant No.3 against the judgment dated 20th January, 2003 passed by the High Court of Karnataka in R.F.A. No.319 of 1998. By the impugned judgment and decree the High Court allowed the appeal, set aside the judgment and decree of trial court and decreed the suit declaring that defendant Nos.1,2,3 and 4 are entitled to 11/50th share each and the plaintiff, defendant Nos.5,6,7,8 and 9 are entitled to 1/50th share each in the suit schedule properties.

2. The facts of the case are as follows:

The plaintiff-respondent No.4 filed a suit for partition and separate possession of 1/10th share in the suit schedule properties by metes and bounds and also sought for an enquiry under Order 20 Rule 12 C.P.C. to ascertain the mesne profits. She is the second daughter of late Shri Kunnaiah whereas defendant Nos.1,2,3 and 4, including the appellant herein are the sons and defendant Nos.5,6,7 and 8 are the daughters of late Shri Kunnaiah. Defendant No.9 is the son of the first daughter of late Shri Kunnaiah.

3. Plaintiff claimed that the suit schedule properties are self-acquired properties of late Shri Kunnaiah and, therefore, she is entitled for 1/10th share in the suit schedule properties.

Defendant Nos.1, 2 and 4 filed a joint written statement claiming 1/5th share in the suit schedule properties, as according to them the suit schedule properties are the ancestral joint family properties. The appellant-defendant No.3 filed a separate written statement claiming the right over total 32 acres 55 cents of lands. According to defendant No.3, the suit schedule properties are the self-acquired properties of their father, late Shri Kunnaiah who bequeathed the same in his favour under a Will dated 14th June, 1991. As per the Will he is entitled for a total extent of 32 acres 55 cents of lands in respect of which the plaintiff and other defendants have no right

whatsoever. The rest of the defendants did not choose to file written statement.

4. The trial court framed the following issues:

"1. Whether the suit schedule properties are the self-acquired properties of late Shri Kunnaiah as contended by plaintiff or they are joint family properties as contended by defendants 1, 2 and 4 ?

2. Whether the plaintiff is entitled to1/10th share as contended by her or she is entitled to 1/50th share as contended by defendants 1, 2 and 4 ?

3. Whether the plaintiff is entitled to the relief prayed for ?

4. Whether defendants 1, 2 and 4 are entitled to the reliefs prayed for in the counter claim ?

5. What decree or order ?"

On issue No.1 the trial court has held that the suit schedule properties are the self-acquired properties of late Shri Kunnaiah. On issue No.2 it was held that the Will set up by defendant No.3 has been proved and, therefore, the plaintiff was not entitled for a share in the suit schedule properties. Issue Nos.3 and 4 were accordingly answered in negative.

Two additional issues were also framed by the trial court which are as follows:

"1. Whether 3rd defendant proves that late Shri Kunnaiah executed a Will dated 14.6.1991 under which the properties mentioned in para 9 of his written statement have been bequeathed in his favour ?

2. Whether the event of the court holding that the properties were not the self acquisitions of late Shri Kunnaiah the properties in the possession of 3rd defendant could be allotted to him, as prayed for by him in para 2 of the additional written statement filed on 26.05.1997 ?"

The trial court answered additional issue No.1 in the affirmative and held that consequently additional issue No.2 was not necessary to be decided.

5. In appeal, the High Court considered the following three questions:

"i) Whether the suit schedule properties are the joint family properties of late Shri Kunnaiah and if so what share is to be allotted to each of the parties in the suit ?

ii) Whether the defendant No.3 proves the execution of the Will dated 14.06.1991 said to have been executed by late Shri Kunnaiah ?

iii) In the event if the Will dated 14.06.1991 is proved to be valid in law what is the effect of the said Will on the suit schedule properties in the event if the said properties are held to be joint family properties ?"

Taking into consideration the evidence on record and the stand taken by the plaintiff and the defendants, the High Court held that there was no evidence on record to prove that the suit schedule properties are self-acquired properties of late Shri Kunnaiah and it further held that the suit schedule properties are joint family properties of late Shri Kunnaiah and his children.

6. So far as the Will (Ex.D-17) relied on by defendant No.3 the High Court held that late Shri Kunnaiah who is the father of defendant Nos. 1 to 4 had no right whatsoever to bequeath the

suit schedule properties under a Will or partition without the consent of all the co-parceners. Therefore, Ex.D-17 is not binding on the other co-parcerners. In determining the shares to be allotted to each of the parties in the proceedings, the High Court held that the sons, defendant Nos.1,2,3 and 4, and late Shri Kunnaiah are entitled for 1/5th share of the suit schedule properties. In so far as 1/5th share of late Shri Kunnaiah¸ sons and daughters were entitled for 1/50th share. Regarding defendant No.9 who is the son of the first daughter, the High Court held that since he is the only heir to succeed to the estate of first daughter, he is also entitled for 1/50th share. The appeal was allowed with the aforesaid observation and suit was decreed by the High Court declaring that defendant Nos.1,2,3 and 4 are entitled to 11/50th share each and the plaintiff, defendant Nos.5,6,7,8 and 9 are entitled to 1/50th share each.

7. According to the appellant-defendant No.3, when late Shri Kunnaiah was a minor, his mother purchased certain properties including suit schedule properties by a sale deed dated 7th May, 1918-Ex.D-1, in the joint name of herself (Ningamma mother) and son, Kunnaiah. Later on Kunnaiah sold certain landed properties on 16th July, 1942, properties situated at Kaikere village on 19th March, 1953 and some other properties on 4th November, 1963. These sale deeds were not challenged by the plaintiff or the defendants. Since, the children of Kunnaiah were major, their names were got entered in the Revenue records by him in the year 1975 with a view to give those properties to the children. To sell some of the properties, Kunnaiah got consent of his children as their names were appearing in the Revenue records which were sold on 23rd July, 1976.

Further, according to the appellant, Kunnaiah, wanted partition of the properties and effected division by executing a Will on 20th January, 1984 distributing the properties to all the children. The respondents were aware of such arrangement.

However, the said Will was cancelled by late Shri Kunnaiah on 7th January, 1991 with the knowledge of all the children as Pranesh(defendant No.9), grandson through daughter Tayamma was not given property. Subsequently, a fresh Will was executed by late Shri Kunnaiah on 14th June, 1991(Ex.D-17) whereby the suit schedule properties were settled in favour of his children, Thimmaiah, B.K. Ramachandra, Ganesh, all the daughters and Pranesh son of a predeceased daughter. On 9th July, 1993, Kunnaiah died leaving behind him his 9 children, i.e., 4 sons and 5 daughters. Under the Will-Ex.D-17 dated 14th June, 1991, Kunnaih gave away all the properties owned by him and the children of Kunnaiah came to the possession of their respective portions given to each of them under the Will.

8. Learned counsel for the appellant submitted that in absence of any plea taken by the plaintiff or most of the defendants that the suit schedule properties were ancestral, the High Court was not justified to hold that the said properties are the joint family properties. Even assuming the said properties as joint family properties, it was open to the father to divide the properties under the Will -Ex.D-17. The respondents were aware of the execution of the Will (Ex.D-17) and also the earlier Will which was cancelled but they kept quiet for a long time which will amount to giving their consent to the father to partition the properties, as the same is permissible under the Hindu Law.

9. In order to consider whether the suit schedule properties are joint family properties or self-acquired properties of late Shri Kunnaiah, it is necessary to notice the documentary as well as the oral evidence produced by the parties.

10. By the sale deed dated 7th May, 1918 (Ex.D-1), the lands in Sy.No.211 measuring 5 acres 28 cents; Sy.No.208 measuring 19 acres 83 cents; Sy.No.209 measuring 4 acres 89 cents; Sy.No.209/A measuring 27 cents; Sy.No.210 measuring 9 acres 28 cents and Sy.No.205/2 measuring 5 acres 33 cents of Attur Village, Virajapet Taluk, South Kodagu District were purchased in the name of Kunnaiah(minor) along

with her mother late Smt. Ningamma. Kunnaiah was then admittedly a minor and was the only son of late Shri Thimmaiah. There is no evidence on record to show that Kunnaiah who was minor as on the date of purchase of the said lands, possessed of any immovable property or properties yielding any income so as to purchase the lands under Ex.D-1. The appellant-defendant No.3 has also failed to adduce any evidence to show that late Smt. Ningamma, mother of Kunnaiah had any income from movable or immovable properties so as to purchase the above said properties.

11. In his evidence, DW.1 deposed that their grandfather Thimmaiah owned 1000 batti boomi and 24 acres, i.e, about 54 acres of land including a house in Hoskote. Their grandmother Ningamma was only a house wife and she did not own any property in her name; out of the income derived from the lands situated at Hoskote the suit schedule lands were purchased in the name of his father late Kunnaiah. Aforesaid statement made by DW.1 in the examination-in-chief was not questioned by any of the parties during the cross-examination.

DW.1, in his statement further stated that out of the income of lands aforesaid, the lands in Attur were purchased in the year 1918. After the death of Thimmaiah, Smt. Ningamma mother of Kunnaiah was managing the affairs of the family as there was no other male member living with her except Kunnaiah who was minor.

12. It is true that late Kunnaiah had sold some properties at Hoskote under the registered sale deed dated 16th July, 1942 by Ex.D-7. The reason for sale of the said lands under Ex.D-7 was mentioned, that is to discharge the loan borrowed by him for the purpose of purchasing the lands at Kaikere village and to improve the lands. It is not the case of the appellant that Kunnaiah had owned land in his own name in Hoskote. The properties at Hoskote were belonging to his grand father Thimmaiah. In this background the High Court has rightly held that the properties purchased by Kunnaiah at

Kaikere village out of the money received by him from the sale of the ancestral lands under Ex.D-7, are the ancestral properties.

Lands at Attur village measuring 1 acre 6 guntas in Sy.No.208/3; 4 acres 77 cents in Sy.No.210 were sold by late Kunnaiah under Ex.D-3. The recital in Ex.D-3 discloses that the above lands are the ancestral properties of late Kunnaiah. For that reason before selling the said land under Ex.D-3, consent of all the sons of Kunnaiah was taken. The consent certificate was produced and is marked as Ex.D-4. Through the aforesaid evidence the High Court rightly came to the conclusion that the recitals in Ex.D-3 and consent certificate Ex.D-4 are binding on the persons who were parties in the said documents and, therefore, when Kunnaiah himself admitted in Ex.D-3 that the lands sold under Ex.D-3, which were the lands purchased under Ex.D-1, are the ancestral properties, the High Court rightly held that it was not open for defendant No.3 to say that the said lands are self-acquired properties of late Kunnaiah.

13. Similarly, the land measuring 5 acres 33 cents of Sy.No.205/2 was sold by Kunnaiah to a person under Ex.D-11 on 19th March, 1953. Kunnaiah had also sold the lands measuring 3 acres in Sy.No.208/2 and 4 acres in Sy.No.208/1 of Attur village to Orange Growers Cooperative Society under sale deed dated 4th November, 1963 Ex.D-6. In these sale deeds though the properties are described as self-acquired properties, it is apparent that both the lands were purchased under Ex.D-1. The High Court has noticed that Kunnaiah has also himself described the lands in Attur village as ancestral properties purchased under Ex.D-1. Therefore, the sale deed dated 23rd July, 1976, Ex.D-3 and the sale deed dated 4th November, 1963, Ex.D-6 cannot be said to be self-acquired properties of Kunnaiah merely because they have been described as self-acquired properties in those evidence.

14. We have noticed that though the appellant examined himself as DW.4 he failed to produce either documentary or

oral evidence to show the lands at items Nos.2,3 and 5, situated at Village Kaikere are the self-acquired properties of Kunnaiah. In absence of any division in the family of Kunnaiah and his sons, we hold that the family of Kunnaiah continued to be the joint family. If a co-parcener of a joint family claims that properties are his self-acquired properties, the burden is on him to prove that the same are the self-acquired properties. In that background the High Court has rightly held that Kunnaiah had no right to change the character of the joint family properties by transferring the same either under a Will or a gift to any party without the consent of the other co-parceners.

15. In his deposition DW.1 stated that in the year 1976 when Kunnaiah was alive, the names of all his sons were entered in the Jamabandhi in column No.6. He further stated that since their names were in the Jamabandhi their consent was asked for the purpose of advancement of loan. DW.2, Krishna, a resident of Hoskote deposed in his evidence that the suit schedule properties are the ancestral properties of Kunnaiah. DW.3, Raja, resident of Bilagunda in his evidence has deposed that his father and Kunnaiah's father belong to the same family. He has further stated that the father of Kunnaiah possessed of about 30 acres of wet land and 24 acres of garden land in Hoskote. He further stated that Kunnaiah had purchased the lands in Kaikere village after the sale of the lands at Hoskote to the grandfather of DW.2. He has further stated that when the lands were purchased under Ex.D-1, Kunnaiah was a minor and his grandmother purchased those properties as a guardian of minor Kunnaiah. DW.4 stated that he, his father and brothers are all the members of the joint family. He also admitted that the consent letter given by him along with his brothers under Ex.D-4 was for the purpose of sale of lands under Ex.D-3. He further admitted that the lands sold under Ex.D-5 are the lands purchased under Ex. D-1 and these are the joint family properties. In his evidence, defendant No.3 (DW.4) deposed that his father had sold about 25 acres of land

and if the above said lands were not sold he and his brothers were entitled for a share in the said properties.

16. From the aforesaid statement, it is clear that even defendant No.3 (DW.4) admits that the lands sold under Ex.D-5 are the joint family properties and if lands were not sold he and his brothers would have been entitled for a share.

17. In the light of discussions as made above, we hold that those suit schedule properties are joint family properties of Kunnaiah along with 4 sons and the co-parceners have equal shares in the properties. Accordingly, 4 sons and Kunnaiah are entitled to 1/5th share of the total properties.

So far as 1/5th share of Kunnaiah is concerned, apart from 4 sons, i.e., defendant Nos. 1, 2, 3 and 4, the daughters of Kunnaiah are entitled to 1/50th share each whereas the sons, i.e., defendant Nos.1, 2, 3 and 4 are entitled to 11/50th share each, inclusive of their respective shares. Defendant No.9 who is the son of the first daughter having succeeded the estate of his mother, a co-parcener is also entitled to 1/50th share. In this background no interference with the impugned judgment is called for. In absence of any merit the appeal is dismissed. The parties shall bear their respective costs.

K.K.T. Appeal dismissed.

RAMJI GUPTA & ANR.
v.
GOPI KRISHAN AGRAWAL (D) & ORS.
(Civil Appeal No. 629 of 2004 etc.)

APRIL 11, 2013

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

Suit - Suit by landlord against tenants alleging default in payment of rent - Tenants claiming to be owners of the property on the strength of sale deed executed by the vendor (mother of the landlord) - Small Causes Court decreed the suit, relying on a judgment passed in 1958 (whereby vendor (a Hindu female) was held to be life estate holder in the property) and held that by virtue of the judgment, the son of the vendor (landlord) acquired the property - Judgment confirmed by District Judge and High Court - On appeal, held: Courts below rightly decreed the suit.

Provincial Small Causes Courts Act, 1887 - s.23 - Adjudication of issue of title - By Small Causes Court - Held: Small Causes Court cannot adjudicate upon issue of title - Such question if decided incidentally by Small Causes Court, would not operate as res-judicata in a subsequent suit based on title - In the instant case, trial court rightly refused to go into such issue.

'J' after the death of her husband, was given life interest in the property in question by her father-in-law through a 'Will'. Respondent No.1 who claimed to be the adopted son of 'J', filed a suit against 'J', wherein the Court by judgment dated 23.4.1958 held that 'J' was only a life estate holder of the property in question therein (including the property in question in the present case). The property in question was under tenancy of father of

the appellants. 'J' sold the property to the mother of the appellants in 1974. Appellants inherited the tenancy after death of their father and continued to pay the rent to the vendee i.e. their mother.

Respondent No.1 filed a suit alleging that the appellants had defaulted in payment of rent. During pendency of the suit, respondent No.1 sold the property to respondent No.2. Appellants contested the suit claiming to be owner of the property. Small Causes Court decreed the suit holding that respondent No.1 acquired the property by virtue of judgment dated 23.4.1958 and landlord-tenant relationship could be deemed to have been created between the parties. The order was further confirmed by District Judge as well as High Court.

In appeal to this Court, the appellants contended that the courts erred in adjudicating upon the issue of title because such issue can be decided only by civil court and not small Causes Court; and that judgment dated 23.4.1958 could not be given effect to, in view of provisions of s.14(2) of Hindu Succession Act, 1956.

Dismissing the appeals, the Court

HELD: 1. A question regarding title in a small cause suit, may be regarded as incidental only to the substantial issue in the suit, and therefore, when a finding as regards title to immovable property is rendered by a Small Causes Court, res judicata cannot be pleaded as a bar in the subsequent regular suit, for the determination or enforcement of any right or interest in the immovable property. A question of title could also be decided upon incidentally, and that any finding recorded by a Judge, Small Causes Court in this behalf, could not operate as res judicata in a suit based on title. [Para 7] [407-F-H; 408-A]

Dhulabai etc. v. State of M.P. and Anr. **AIR 1969 SC 78: 1968 SCR 662;** *Smt. Gangabai w/o Rambilas Gilda v. Smt. Chhabubai w/o Pukharajji Gandhi* **(1982) 1 SCC 4: 1982 (1) SCR 1176;** *Life Insurance Corporation of India v. M/s. India Automobiles and Co. and Ors.* **AIR 1991 SC 884: 1990 (3) SCR 545;** *Rameshwar Dayal v. Banda (Dead) through His L.Rs. and Anr.* **(1993) 1 SCC 531: 1993 (1) SCR 198 - relied on.**

2. In view of Section 23 of the Provincial Small Cause Courts Act, 1887, it is evident that the Small Causes Court cannot adjudicate upon the issue of title. In the instant case therefore, the trial court has rightly refused to go into such issue, and neither can any fault be found with the findings recorded by the courts below in this regard. Furthermore, as it is an admitted fact that defendant Nos.1 and 2 were tenants of the original plaintiffs, the question of title could not be adjudicated at the behest of the appellants under any circumstance. [Para 8] [408-C, F-H]

Nirmal Jeet Singh Hoon v. Irtiza Hussain and Ors. **(2010) 14 SCC 564: 2010 (14) SCR 109 - relied on.**

3. The Court of Small Causes, while determining the issues involved therein, has taken note of the result of the earlier Suit No.45 of 1956, decreed vide judgment and decree dated 23.4.1958, and also of the Execution Appeal No.64 of 1965, wherein it was held, that 'J', being a life estate holder had no right to transfer the property. In Execution Appeal No.64 of 1965, vendee, was made a party, however, so far as the issue of title by the courts below is concerned, the trial court held that the court could not determine the question relating to proprietary right/ownership of the parties; and that this court has limited jurisdiction to decide as to whether there existed the relationship of house-owner and tenants between the parties or not. The said finding has been upheld by all the courts. [Para 10] [409-D-G; 410-A]

4. Section 14(2) of Hindu Succession Act, 1956 carves out an exception to rule provided in sub-section (1) thereof, which clearly provides that if a property has been acquired by a Hindu female by a Will or gift, giving her only a "life interest", it would remain the same even after commencement of the Act 1956, and such a Hindu female cannot acquire absolute title. [Para 6] [407-B-C]

*Shivdev Kaur (D) by L.Rs. and Ors. v. R.S. Grewa***l 2013 (4) SCC 636;** *Mst. Karmi v. Amru and Ors.* **AIR 1971 SC 745;** *Navneet Lal @ Rangi v. Gokul and Ors.* **AIR 1976 SC 794: 1976 (2) SCR 924;** *Sadhu Singh v. Gurdwara Sahib Narike and Ors.* **AIR 2006 SC 3282: 2006 (5) Suppl. SCR 799;** *Jagan Singh (Dead) Through LRs. v. Dhanwanti and Anr.* **(2012) 2 SCC 628: 2012 (2) SCR 303;** *Munianan jappa Ors. v. R. Manual and Anr.* **AIR 2001 SC 1754: 2001 (2) SCR 1113;** *Sharad Subramanyan v. Soumi Mazumdar and Ors.* **AIR 2006 SC 1993;** *Gaddam Ramakrishnareddy and Ors. v. Gaddam Ramireddy and Anr.* **(2010) 9 SCC 602: 2010 (11) SCR 656 - relied on.**

Radha Rani Bhargava v. Hanuman Prasad Bhargava (deceased) thr. L.Rs. and Ors. **AIR 1966 SC 216: 1966 SCR 1;** *M/s. Supreme General Films Exchange Ltd. v. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar and Ors.* **AIR 1975 SC 1810: 1976 (1) SCR 237 - referred to.**

Case Law Reference:

2013 (4) SCC 636	**relied on**	**Para 6**
AIR 1971 SC 745	**relied on**	**Para 6**
1976 (2) SCR 924	**relied on**	**Para 6**
2012 (2) SCR 303	**relied on**	**Para 6**
2001 (2) SCR 1113	**relied on**	**Para 6**
AIR 2006 SC 1993	**relied on**	**Para 6**

2010 (11) SCR 656	**relied on**	**Para 6**
1968 SCR 662	**relied on**	**Para 7**
1982 (1) SCR 1176	**relied on**	**Para 7**
1990 (3) SCR 545	**relied on**	**Para 7**
1993 (1) SCR 198	**relied on**	**Para 7**
2010 (14) SCR 109	**relied on**	**Para 8**
1988 (2) Suppl. SCR 238	**relied on**	**Para 9**
1966 SCR 1	**referred to**	**Para 11**
1976 (1) SCR 237	**referred to**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 629 of 2004.

From the Judgment and Order dated 06.09.2002 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 25785 of 2002.

WITH

C.A. Nos. 630 of 2004.

Rakesh Dwivedi, DInesh Kumar Garg, Abhishek Garg, Dhananjay Garg, B.S. Billowria, Dr. Krishan Singh Chauhan, Tara Chandra Sharma, Neelam Sharma, Rupesh Kumar, Arvind Kumar, Laxmi Arvind, Poonam Prasad, Pradeep Kumar Mathur, T. Anamika for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J.

C.A. No.629 of 2004

1. This appeal has been preferred against the judgment and order dated 6.9.2002, passed by the High Court of

Allahabad in CMWP No.25785 of 2002, by way of which, the High Court has dismissed the writ petition of the appellants, affirming the judgment and decree of the Small Causes Court dated 20.4.2001, which stood affirmed by the Revisional Court, vide judgment and decree dated 13.5.2002. Civil Appeal No.630 of 2004 has been filed against the judgment and order dated 25.2.2003, in Review Application No.206905 of 2002 of the High Court of Judicature at Allahabad, dismissing the review petition. In the aforesaid judgments, the courts below have held, that the relationship of a landlord and tenant did not exist between respondent nos.1 and 2 and the appellants.

2. Facts and circumstances giving rise to this appeal are that:

A. The dispute pertains to the ownership of shop no.53/11 (old number) corresponding to its new number, i.e. 53/8, Nayayaganj, Kanpur Nagar. Janki Bibi (Ist) daughter of Har Dayal, was married to one Durga Prasad, son of Dina Nath. Radhey Shyam was the adopted son of Durga Prasad, whose son Shyam Sunder was married to Janki Bibi (2nd). Shyam Sunder died in the year 1914. Thus, Radhey Shyam created a life interest in the property in favour of Janki Bibi (2nd), by way of an oral Will, which further provided that she would have the right to adopt a son only with the consent of Mohan Lal, the grand son of Har Dayal. Gopi Krishan, the great grand son of Mohan Lal, claims to have been adopted by Janki Bibi (2nd), with the consent of Mohan Lal, and as regards the same, a registered document was also prepared.

B. Gopi Krishan filed a Regular Suit No.45 of 1956 against Smt. Janki Bibi (2nd) in the Court of the Civil Judge, Mohanlal Ganj in Lucknow, seeking the relief of declaration, stating that Janki Bibi was only a life estate holder in respect of the properties shown in Schedule 'A', and that further, she was not entitled to receive any compensation or rehabilitation grant bonds with respect to the village Nawai Perg, Jhalotar Ajgain,

Tehsil Hasangunj, District Unnao. He stated all this, while claiming himself to be her adopted son.

C. Janki Bibi (2nd) contested the suit, denying the aforesaid adoption. However, the suit was decreed vide judgment and decree dated 23.4.1958, holding that while Smt. Janki Bibi (2nd) was in fact the life estate holder of Radhey Shyam's property, she was also entitled to receive the said compensation, in respect of the property in question herein.

D. The suit shop was under the tenancy of one Shri Badri Vishal. However, Janki Bibi (2nd) transferred the same in favour of the appellant's mother Smt. Ram Kumari, wife of Shri Badri Vishal, vide registered sale deed dated 7.5.1974. The said tenant, Shri Badri Vishal died on 23.1.1986, and the tenancy was hence inherited by the appellants. They thus, continued to pay rent to the vendee Smt. Ram Kumari. Smt. Janki Bibi (2nd) died on 27.2.1996.

E. Respondent no.1 Gopi Krishan, filed SCC Suit No.77 of 1989 on 21.2.1989, alleging that the appellants had defaulted in making the payment of rent, and that a sum of Rs.2,768.62 was outstanding against them, as rent payable between the time period 17.2.1986 to 13.8.1988, and also damages for the period 14.8.1988 to 21.2.1989, amongst other amounts due. During the pendency of the suit, Shri Gopi Krishan respondent no.1, sold the said suit property to Smt. Vidyawati Rathaur respondent no.2, vide registered sale deed dated 3.8.1989. In view thereof, respondent no.2 got herself impleaded as plaintiff no.2 in Suit No.77 of 1989.

F. The appellants contested the suit on various grounds, claiming themselves to be the owners of the property on the basis of a sale deed. Smt. Vidyawati Rathaur respondent no.2, also filed Suit No.792 of 1995 before the Civil Court, Kanpur, seeking permanent injunction, restraining the appellants from

causing any addition(s) or alteration(s) in the shop in dispute. The said suit is still pending.

G. The Small Causes Court, Kanpur, dismissed Suit No.77 of 1989 vide judgment and decree dated 10.5.1999, holding that no relationship of landlord and tenant existed between respondent nos.1 and 2 and the appellants. However, the said judgment and decree was set aside by the Revisional Court, vide judgment and decree dated 8.3.2000, and the case was remanded to the Judge, Small Causes Court for deciding the same afresh.

H. After such remand, the suit was decreed vide judgment and decree dated 20.4.2001, holding that the suit property had been acquired by Gopi Krishan Agrawal, plaintiff/respondent, by virtue of the judgment in Suit No.45 of 1956, which was decided on 23.4.1958, and that the relationship of a landlord and tenant, could in fact be deemed to have been created between the parties. The appellants/defendants had hence, been in default of payment of rent.

I. Aggrieved, the appellants filed Revision No.57 of 2001 before the learned District Judge, Kanpur, which was dismissed vide judgment and order dated 13.5.2002. The said judgment and order has been affirmed by the High Court, dismissing the writ petition vide judgment and order dated 6.9.2002.

J. Aggrieved, the appellants preferred a review petition, which has also been dismissed by the impugned judgment and order dated 25.2.2003.

Hence, this appeal.

3. Shri D.K. Garg, learned counsel appearing for the appellants, has submitted that the Small Causes Court has no jurisdiction/ competence, to determine the issue of title over the property, and that all the courts below have erred, as they have adjudicated upon the issue of title. Such a course is not

permissible in collateral proceedings, as the issue of title can be adjudicated upon, only by the Civil Court. Moreover, the judgment and order dated 23.4.1958 could not be given effect, in view of the provisions of Section 14(2) of the Hindu Succession Act, 1956 (hereinafter referred to as the 'Act, 1956'). Therefore, the appeal deserves to be allowed.

4. Per contra, Shri Rakesh Dwivedi, learned senior counsel and Shri Arvind Kumar, learned counsel, appearing for the respondents, have opposed the appeals, contending that the courts below have not touched upon or determined the issue of title. It was necessary for the courts below, to rely upon the said judgment and decree dated 23.4.1958, wherein it was categorically held that Smt. Janki Bibi (2nd) was a life estate holder, and that as she had not acquired absolute title over the property, the sale deed executed by her in favour of Smt. Ram Kumari, was null and void. The said judgment and decree dated 23.4.1958, was also relied upon in collateral proceedings, wherein Smt. Ram Kumari, mother of the appellants and vendee in the sale deed dated 7.5.1974, had taken several pleas, all of which were rejected, and such findings have been affirmed by the High Court. Thus, the appeal has no merit, and is hence, liable to be dismissed.

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

6. In *Shivdev Kaur (D) by L.Rs. & Ors. v. R.S. Grewal* (Civil Appeal Nos.5063-5065 of 2005, decided on 20.3.2013), this Court dealt with the issue of Section 14(2) of the Act 1956 and held :-

"Thus, in view of the above, the law on the issue can be summarised to the effect that if a Hindu female has been given only a "life interest", through Will or gift or any other document referred to in Section 14 of the Act 1956, the said rights would not stand crystallised into the absolute ownership as interpreting the provisions to the effect that

she would acquire absolute ownership/title into the property by virtue of the provisions of Section 14(1) of the Act 1956, the provisions of Sections 14(2) and 30 of the Act 1956 would become otios.

Section 14(2) carves out an exception to rule provided in sub-section (1) thereof, which clearly provides that if a property has been acquired by a Hindu female by a Will or gift, giving her only a "life interest", it would remain the same even after commencement of the Act 1956, and such a Hindu female cannot acquire absolute title."

While deciding the said issue, this Court has placed reliance upon various previous judgments of this Court, including *Mst. Karmi v. Amru & Ors.,* AIR 1971 SC 745; *Navneet Lal @ Rangi v. Gokul & Ors.,* AIR 1976 SC 794; *Sadhu Singh v. Gurdwara Sahib Narike & Ors.,* AIR 2006 SC 3282; and *Jagan Singh (Dead) Through LRs. v. Dhanwanti & Anr.,* (2012) 2 SCC 628.

(See also: *Munianan jappa & Ors. v. R. Manual & Anr.,* AIR 2001 SC 1754; *Sharad Subramanyan v. Soumi Mazumdar & Ors.,* AIR 2006 SC 1993; and *Gaddam Ramakrishnareddy & Ors. v. Gaddam Ramireddy & Anr.,* (2010) 9 SCC 602).

7. In order to operate as res judicata, the finding must be such, that it disposes of a matter that is directly and substantially in issue in the former suit, and that the said issue must have been heard and finally decided by the court trying such suit. A matter which is collaterally or incidentally in issue for the purpose of deciding a matter which is directly in issue in the case, cannot be made the basis for a plea of res judicata. A question regarding title in a small cause suit, may be regarded as incidental only to the substantial issue in the suit, and therefore, when a finding as regards title to immovable property is rendered by a Small Causes Court, res judicata cannot be pleaded as a bar in the subsequent regular suit, for

the determination or enforcement of any right or interest in the immovable property. (Vide: *Dhulabai etc. v. State of M.P. & Anr.,* AIR 1969 SC 78; *Smt. Gangabai w/o Rambilas Gilda v. Smt. Chhabubai w/o Pukharajji Gandhi,* (1982) 1 SCC 4; *Life Insurance Corporation of India v. M/s. India Automobiles & Co. & Ors.,* AIR 1991 SC 884; and *Rameshwar Dayal v. Banda (Dead) through His L.Rs. & Anr.* (1993) 1 SCC 531).

8. In *Nirmal Jeet Singh Hoon v. Irtiza Hussain & Ors.,* (2010) 14 SCC 564, this Court has held, that the Small Causes Court has no right to adjudicate upon the title of the property, as Section 23 of the Provincial Small Cause Courts Act, 1887 (hereinafter referred to as the Act, 1887) reads:

"Return of plaints in suits involving questions of title-(1) Notwithstanding anything in the foregoing portion of this Act, when the right of a plaintiff and the relief claimed by him in a Court of Small Cause depend upon the proof or disproof of a title to immovable property or other title which such a Court cannot finally determine, the Court may at any stage of the proceedings return the plaint to be presented to a Court having jurisdiction to determine the title.

(2) xx xx xx xx"

(Emphasis added)

Thus, it is evident from the above, that the Small Causes Court cannot adjudicate upon the issue of title. In the instant case therefore, the trial court has rightly refused to go into such issue, and neither can any fault be found with the findings recorded by the courts below in this regard. Furthermore, as it is an admitted fact that defendant nos.1 and 2 were tenants of the original plaintiffs, the question of title could not be adjudicated at the behest of the appellants under any circumstance.

9. While dealing with the provisions of Section 23 of the Act, 1887, this Court in *Budhu Mal v. Mahabir Prasad & Ors.,* AIR 1988 SC 1772 held, that a question of title could also be decided upon incidentally, and that any finding recorded by a Judge, Small Causes Court in this behalf, could not operate as res judicata in a suit based on title.

Furthermore, the procedure adopted in the trial of a case before the Small Causes Court is summary in nature. Clause (35) of Schedule II to the Act 1887, has made the Small Causes Court a court of limited jurisdiction. Certain suits are such, in which the dispute is incapable of being decided in a summarily.

10. We have further examined the record of the case, and the Court of Small Causes, while determining the issues involved therein, has taken note of the result of the earlier Suit No.45 of 1956, decreed vide judgment and decree dated 23.4.1958, and also of the Execution Appeal No.64 of 1965, in the matter of Smt. Bibi Devi v. Janki Bibi, wherein it was held, that Janki Devi (2nd), being a life estate holder had no right to transfer the property. In Execution Appeal No.64 of 1965, Smt. Ram Kumari, mother of the appellants was made a party, however, so far as the issue of title by the courts below is concerned, the trial court held as under:

> "This court cannot determine the question relating to proprietary right/ownership of the parties. On this point, this court has limited jurisdiction to decide as to whether there exists the relationship of house-owner and tenants in between the parties or not. As per the judgment passed by the competent court, Smt. Janakibibi had the right in the disputed property during her life time only. She had no right or authority to sale or transfer the disputed property. This court is bound to accept the aforesaid conclusion. Therefore, if Smt. Janakibibi has transferred the disputed property, contrary to her rights, to the defendant no. 4 - Smt. Ramkumari on 7th of May, 1974, then because of that, no rights are established to Smt. Ramkumari. Such document is a nullity and no legal cognizance can be taken in account." (Emphasis added)

The said finding has been upheld by all the courts.

11. We are not inclined to enter into the controversy regarding Section 34 of the Specific Relief Act, 1963, as it has been submitted that the remedy of declaration envisaged by the said provisions is not exhaustive, and that there can be a declaration even outside the scope of the said Section 34. In support of the said contention, submissions have been made on the basis of the judgments of this Court in *Radha Rani Bhargava v. Hanuman Prasad Bhargava (deceased) thr. L.Rs. & Ors.,* AIR 1966 SC 216; and *M/s. Supreme General Films Exchange Ltd. v. His Highness Maharaja Sir Brijnath Singhji Deo of Maihar & Ors.,* AIR 1975 SC 1810.

12. In view of the above, we do not see any cogent reason to interfere with the impugned judgments. The appeal lacks merit and is accordingly, dismissed.

C.A. No. 630 of 2004

In view of the judgment in C.A. No.629 of 2004, no specific order is required in this appeal. It is accordingly dismissed.

K.K.T. Appeals dismissed.

R.K. JAIN
v.
UNION OF INDIA & ANR.
(Civil Appeal No. 3878 of 2013)

APRIL 16, 2013

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

Right to Information Act, 2005 - ss.8(1)(j) and 11 - Information regarding ACR of public servant - Whether can be disclosed to third person - ACR record of an officer cannot be disclosed to third person, except in cases involving overriding public interest - However, such disclosure of information would be after following the procedure under s.11(1).

The appellant filed application u/s. 6 of Right to Information Act, 2005, seeking information regarding ACR of the Member, CESTAT, relating to adverse entries in the ACR and 'the follow-up action' taken therein on the question of her integrity. The statutory authorities denied the same, on the ground that the information sought, attracted Clause (j) of s.8(1) of the Act.

In the Writ Petition against the order, Single Judge of High Court held that ACR record cannot be disclosed, except in cases involving overriding public interest and remanded the matter to Central Information Commission (CIC) for considering the issue whether in larger public interest, the information sought could be disclosed and if conclusion was in the affirmative, CIC to follow procedure u/s.11(1). Writ appeal against the order of the Single Judge was dismissed by Division Bench of High Court. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1. Section 8 of Right to Information Act, 2005 deals with exemption from disclosure of information. Under clause (j) of Section 8(1), there shall be no obligation to give any citizen, information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual, unless the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information. [Para 12] [420-C-D]

2. Section 11 of the Act deals with third party information and the circumstances when such information can be disclosed and the manner in which it is to be disclosed, if so decided by the Competent Authority. Under Section 11(1), if the information relates to or has been supplied by a third party and has been treated as confidential by the third party, and if the Central Public Information Officer or a State Public Information Officer intends to disclose any such information or record on a request made under the Act, in such case after written notice to the third party of the request, the Officer may disclose the information, if the third party agrees to such request or if the public interest in disclosure, outweighs in importance any possible harm or injury to the interests of such third party. [Para 13] [421-A-C]

3. The judgment of High Court on the question of appellant's seeking inspection of documents relating to the ACR of the Member, CESTAT, inter alia, relating to adverse entries in the ACR and the 'follow up action' taken therein on the question of integrity, does not call for any interference. [Para 17] [427-F-G]

Girish Ramchandra Deshpande vs. Central Information

Commissioner and Ors. **(2013) 1 SCC 212: 2012 (8) SCR 1097 - relied on.**

Arvind Kejriwal vs. Central Public Information Officer **AIR 2010 Delhi 216;** *Centre for Earth Sciences Studies vs. Anson Sebastian* **2010 (2) KLT 233 - referred to.**

State of U.P. vs. Raj Narain **AIR 1975 SC 865: 1975 (3) SCR 333 - cited.**

Case Law Reference:

1975 (3) SCR 333	**cited**	**Para 8**
2010 (2) KLT 233	**referred to**	**Para 14**
AIR 2010 Delhi 216	**referred to**	**Para 15**
2012 (8) SCR 1097	**relied on**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3878 of 2013.

From the Judgment and Order dated 20.04.2012 of the High Court of Delhi at New Delhi in LPA No. 22 of 2012.

Prashant Bhushan for the Appellant.

A.S. Chandiok, ASG, Rajiv Nanda, Anirudh Sharma, B. Krishna Prasad for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. Leave granted.

2. In this appeal, the appellant challenges the final judgment and order dated 20th April, 2012 passed by the Delhi High Court in L.P.A. No. 22/2012. In the said order, the Division Bench dismissed the appeal against the order of the learned Single Judge dated 8th December, 2011, wherein the Single Judge held that "the information sought by the appellant herein

is the third party information wherein third party may plead a privacy defence and the proper question would be as to whether divulging of such an information is in the public interest or not." Thus, the matter has been remitted back to Chief Information Commissioner to consider the issue after following the procedure under Section 11 of the Right to Information Act.

3. The factual matrix of the case is as follows:

The appellant filed an application to Central Public Information Officer (hereinafter referred to as the 'CPIO') under Section 6 of the Right to Information Act, 2005 (hereinafter referred to as the 'RTI Act') on 7th October, 2009 seeking the copies of all note sheets and correspondence pages of file relating to one Ms. Jyoti Balasundram, Member/CESTAT. The Under Secretary, who is the CPIO denied the information by impugned letter dated 15th October, 2009 on the ground that the information sought attracts Clause 8(1)(j) of the RTI Act, which reads as follows:-

"R-20011-68/2009 - ADIC - CESTAT
Government of India
Ministry of Finance
Department of Revenue
New Delhi, the 15.10.09

To

Shri R.K. Jain
1512-B, Bhishm Pitamah Marg,
Wazir Nagar,
New Delhi - 110003

Subject: Application under RTI Act.

Sir,

Your RTI application No.RTI/09/2406 dated

7.10.2009 seeks information from File No.27-3/2002 Ad-1-C. The file contains analysis of Annual Confidential Report of Smt. Jyoti Balasundaram only which attracts clause 8 (1) (j) of RTI Act. Therefore the information sought is denied.

Yours faithfully,

(Victor James)
Under Secretary to the Govt. of India"

4. On an appeal under Section 19 of the RTI Act, the Director (Headquarters) and Appellate Authority by its order dated 18th December, 2009 disallowed the same citing same ground as cited by the CPIO; the relevant portion of which reads as follows:

"2. I have gone through the RTI application dated 07.10.2009, wherein the Appellant had requested the following information;

(A) Copies of all note sheets and correspondence pages of File No. 27/3/2002 - Ad. IC relating to Ms. Jyoti Balasundaram.

(B) Inspection of all records, documents, files and note sheets of File No.27/3/2002 - Ad. IC.

(C) Copies of records pointed out during / after inspection.

3. I have gone through the reply dated 15.10.2009 of the Under Secretary, Ad. IC-CESTAT given to the Appellant stating that as the file contained analysis of the Annual Confidential Report of Ms. Jyoti Balasundaram, furnishing of information is exempted under Section 9 (1) (j) of the R.T.I. Act.

5. The provision of Section 8 (1) (j) of the RTI Act, 2005 under which the information has been denied by the CPIO

is reproduced hereunder:

"Information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information……"

6. File No.27/3/2002- Ad.1C deals with follow-up action on the ACR for the year 2000-2001 in respect of Ms. Jyoti Balasundaram, Member (Judicial), CEGAT" (now CESTAT). The matter discussed therein is personal and I am not inclined to accept the view of the Appellant the since Ms. Jyoti Balasundaram is holding the post of Member (Judicial), CESTAT, larger public interest is involved, which therefore, ousts the exemption provided under Section 8 (1) (j). Moreover, Ms. Jyoti Balasundaram is still serving in the CESTAT and the ACR for the year 2000-2001 is still live and relevant insofar as her service is concerned. Therefore, it may not be proper to rush up to the conclusion that the matter is over and therefore, the information could have been given by the CPIO under Section 8(1)(i). The file contains only 2 pages of the notes and 5 pages of the correspondence, in which the ACR of the officer and the matter connected thereto have been discussed, which is exempt from disclosure under the aforesaid Section. The file contains no other information, which can be segregated and provided to the Appellant.

7. In view of the above, the appeal is disallowed."

5. Thereafter, the appellant preferred a second appeal before the Central Information Commission under Section 19 (3) of the RTI Act which was also rejected on 22nd April, 2010 with the following observations:-

"4. Appellant's plea is that since the matter dealt in the above-mentioned file related to the integrity of a public servant, the disclosure of the requested information should be authorized in public interest.

5. It is not in doubt that the file referred to by the appellant related to the Annual Confidential Record of a third-party, Ms. Jyoti Balasundaram and was specific to substantiation by the Reporting Officer of the comments made in her ACRs about the third - party's integrity. Therefore, appellant's plea that the matter was about a public servant's integrity per-se is not valid. The ACR examines all aspects of the performance and the personality of a public servant - integrity being one of them. An examination of the aspect of integrity as part of the CR cannot, therefore, be equated with the vigilance enquiry against a public servant. Appellant was in error in equating the two.

6. It has been the consistent position of this Commission that ACR grades can and should be disclosed to the person to whom the ACRs related and not to the third - parties except under exceptional circumstances. Commission's decision in P.K. Sarvin Vs. Directorate General of Works (CPWD); Appeal No. CIC/WB/A/2007/00422; Date of Decision; 19.02.2009 followed a Supreme Court order in *Dev Dutt Vs. UOI* (Civil Appeal No. 7631/2002).

7. An examination on file of the comments made by the reporting and the reviewing officers in the ACRs of a public servant, stands on the same footing as the ACRs itself. It cannot, therefore, be authorized to be disclosed to a third-party. In fact, even disclosure of such files to the public servant to whom the ACRs may relate is itself open to debate.

8. In view of the above, I am not in a position to authorize disclosure of the information."

6. On being aggrieved by the above order, the appellant filed a writ petition bearing W.P(C) No. 6756 of 2010 before the Delhi High Court which was rejected by the learned Single Judge vide judgment dated 8th December, 2011 relying on a judgment of Delhi High Court in *Arvind Kejriwal vs. Central Public Information Officer* reported in AIR 2010 Delhi 216. The learned Single Judge while observing that except in cases involving overriding public interest, the ACR record of an officer cannot be disclosed to any person other than the officer himself/herself, remanded the matter to the Central Information Commission (CIC for short) for considering the issue whether, in the larger public interest, the information sought by the appellant could be disclosed. It was observed that if the CIC comes to a conclusion that larger public interest justifies the disclosure of the information sought by the appellant, the CIC would follow the procedure prescribed under Section 11 of Act.

7. On an appeal to the above order, by the impugned judgment dated 20th April, 2012 the Division Bench of Delhi High Court in LPA No.22 of 2012 dismissed the same. The Division Bench held that the judgment of the Delhi High Court Coordinate Bench in *Arvind Kejriwal* case (supra) binds the Court on all fours to the said case also.

The Division Bench further held that the procedure under Section 11 (1) is mandatory and has to be followed which includes giving of notice to the concerned officer whose ACR was sought for. If that officer, pleads private defence such defence has to be examined while deciding the issue as to whether the private defence is to prevail or there is an element of overriding public interest which would outweigh the private defence.

8. Mr. Prashant Bhushan, learned counsel for the appellant submitted that the appellant wanted information in a separate file other than the ACR file, namely, the "follow up action" which was taken by the Ministry of Finance about the remarks against 'integrity' in the ACR of the Member. According to him, it was

different from asking the copy of the ACR itself. However, we find that the learned Single Judge at the time of hearing ordered for production of the original records and after perusing the same came to the conclusion that the information sought for was not different or distinguished from ACR. The learned Single Judge held that the said file contains correspondence in relation to the remarks recorded by the President of the CESTAT in relation to Ms. Jyoti Balasundaram, a Member and also contains the reasons why the said remarks have eventually been dropped. Therefore, recordings made in the said file constitute an integral part of the ACR record of the officer in question.

Mr. Bhushan then submitted that ACR of a public servant has a relationship with public activity as he discharges public duties and, therefore, the matter is of a public interest; asking for such information does not amount to any unwarranted invasion in the privacy of public servant. Referring to this Court's decision in the case of *State of U.P. vs. Raj Narain,* AIR 1975 SC 865, it was submitted that when such information can be supplied to the Parliament, the information relating to the ACR cannot be treated as personal document or private document.

9. It was also contended that with respect to this issue there are conflicting decisions of Division Bench of Kerala High Court in *Centre for Earth Sciences Studies vs. Anson Sebastian* reported in 2010 (2) KLT 233 and the Division Bench of Delhi High Court in *Arvind Kejriwal vs. Central Public Information Officer* reported in AIR 2010 Delhi 216.

10. Shri A. S. Chandiok, learned Additional Solicitor General appearing for the respondents, in reply contended that the information relating to ACR relates to the personal information and may cause unwarranted invasion of privacy of the individual, therefore, according to him the information sought for by the appellant relating to analysis of ACR of Ms. Jyoti Balasundaram is exempted under Section 8(1)(j) of the RTI Act and hence the same cannot be furnished to the appellant. He

relied upon decision of this Court in *Girish Ramchandra Deshpande vs. Central Information Commissioner and Others,* reported in (2013) 1 SCC 212.

11. We have heard the learned counsel for the parties, perused the records, the judgements as referred above and the relevant provisions of the Right to Information Act, 2005.

12. Section 8 deals with exemption from disclosure of information. Under clause (j) of Section 8(1), there shall be no obligation to give any citizen information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information. The said clause reads as follows:-

> **"Section 8 - Exemption from disclosure of information.**- (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,--
>
> xxx xxx xxx
>
> xxx xxx xxx
>
> (j) information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is satisfied that the larger public interest justifies the disclosure of such information:
>
> Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person."

13. On the other hand Section 11 deals with third party information and the circumstances when such information can be disclosed and the manner in which it is to be disclosed, if so decided by the Competent Authority. Under Section 11(1), if the information relates to or has been supplied by a third party and has been treated as confidential by the third party, and if the Central Public Information Officer or a State Public Information Officer intends to disclose any such information or record on a request made under the Act, in such case after written notice to the third party of the request, the Officer may disclose the information, if the third party agrees to such request or if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party. Section 11(1) is quoted hereunder:

> **"Section 11 - Third party information.**- (1) Where a Central Public Information Officer or a State Public Information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, which relates to or has been supplied by a third party and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:
>
> Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party."

14. In *Centre for Earth Sciences Studies vs. Anson Sebastian* reported in 2010(2) KLT 233 the Kerala High Court considered the question whether the information sought relates to personal information of other employees, the disclosure of which is prohibited under Section 8(1) (j) of the RTI Act. In that case the Kerala High Court noticed that the information sought for by the first respondent pertains to copies of documents furnished in a domestic enquiry against one of the employees of the appellant-organization. Particulars of confidential reports maintained in respect of co-employees in the above said case (all of whom were Scientists) were sought from the appellant-organisation. The Division Bench of Kerala High Court after noticing the relevant provisions of RTI Act held that documents produced in a domestic enquiry cannot be treated as documents relating to personal information of a person, disclosure of which will cause unwarranted invasion of privacy of such person. The Court further held that the confidential reports of the employees maintained by the employer cannot be treated as records pertaining to personal information of an employee and publication of the same is not prohibited under Section 8(1) (j) of the RTI Act.

15. The Delhi High Court in *Arvind Kejriwal vs. Central Public Information Officer* reported in AIR 2010 Delhi 216 considered Section 11 of the RTI Act. The Court held that once the information seeker is provided information relating to a third party, it is no longer in the private domain. Such information seeker can then disclose in turn such information to the whole World. Therefore, for providing the information the procedure outlined under Section 11(1) cannot be dispensed with. The following was the observation made by the Delhi High Court in *Arvind Kejriwal* (supra):

> *"22. Turning to the case on hand, the documents of which copies are sought are in the personal files of officers working at the levels of Deputy Secretary, Joint*

Secretary, Director, Additional Secretary and Secretary in the Government of India. Appointments to these posts are made on a comparative assessment of the relative merits of various officers by a departmental promotion committee or a selection committee, as the case may be. The evaluation of the past performance of these officers is contained in the ACRs. On the basis of the comparative assessment a grading is given. Such information cannot but be viewed as personal to such officers. Vis-à-vis a person who is not an employee of the Government of India and is seeking such information as a member of the public, such information has to be viewed as Constituting 'third party information'. This can be contrasted with a situation where a government employee is seeking information concerning his own grading, ACR etc. That obviously does not involve 'third party' information.

23. What is, however, important to note is that it is not as if such information is totally exempt from disclosure. When an application is made seeking such information, notice would be issued by the CIC or the CPIOs or the State Commission, as the case may be, to such 'third party' and after hearing such third party, a decision will be taken by the CIC or the CPIOs or the State Commission whether or not to order disclosure of such information. The third party may plead a 'privacy' defence. But such defence may, for good reasons, be overruled. In other words, after following the procedure outlined in Section 11(1) of the RTI Act, the CIC may still decide that information should be disclosed in public interest overruling any objection that the third party may have to the disclosure of such information.

24. Given the above procedure, it is not possible to agree with the submission of Mr. Bhushan that the word 'or' occurring in Section 11(1) in the phrase information

"which relates to or has been supplied by a third party" should be read as 'and'. Clearly, information relating to a third party would also be third party information within the meaning of Section 11(1) of the RTI Act. Information provided by such third party would of course also be third party information. These two distinct categories of third party information have been recognized under Section 11(1) of the Act. It is not possible for this Court in the circumstances to read the word 'or' as 'and'. The mere fact that inspection of such files was permitted, without following the mandatory procedure under Section 11(1) does not mean that, at the stage of furnishing copies of the documents inspected, the said procedure can be waived. In fact, the procedure should have been followed even prior to permitting inspection, but now the clock cannot be put back as far as that is concerned.

25. The logic of the Section 11(1) RTI Act is plain. Once the information seeker is provided information relating to a third party, it is no longer in the private domain. Such information seeker can then disclose in turn such information to the whole world. There may be an officer who may not want the whole world to know why he or she was overlooked for promotion. The defence of privacy in such a case cannot be lightly brushed aside saying that since the officer is a public servant he or she cannot possibly fight shy of such disclosure. There may be yet another situation where the officer may have no qualms about such disclosure. And there may be a third category where the credentials of the officer appointed may be thought of as being in public interest to be disclosed. The importance of the post held may also be a factor that might weigh with the information officer. This exercise of weighing the competing interests can possibly be undertaken only after hearing all interested parties. Therefore the procedure under Section 11(1) RTI Act.

26. This Court, therefore, holds that the CIC was not justified in overruling the objection of the UOI on the basis of Section 11(1) of the RTI Act and directing the UOI and the DoPT to provide copies of the documents as sought by Mr. Kejriwal. Whatever may have been the past practice when disclosure was ordered of information contained in the files relating to appointment of officers and which information included their ACRs, grading, vigilance clearance etc., the mandatory procedure outlined under Section 11(1) cannot be dispensed with. The short question framed by this Court in the first paragraph of this judgment was answered in the affirmative by the CIC. This Court reverses the CIC's impugned order and answers it in the negative.

27. The impugned order dated 12th June 2008 of the CIC and the consequential order dated 19th November 2008 of the CIC are hereby set aside. The appeals by Mr. Kejriwal will be restored to the file of the CIC for compliance with the procedure outlined under Section 11(1) RTI Act limited to the information Mr. Kejriwal now seeks."

16. Recently similar issue fell for consideration before this Court in *Girish Ramchandra Deshpande v. Central Information Commissioner and Others* reported in (2013) 1 SCC 212. That was a case in which Central Information Commissioner denied the information pertaining to the service career of the third party to the said case and also denied the details relating to assets, liabilities, moveable and immovable properties of the third party on the ground that the information sought for was qualified to be personal information as defined in clause (j) of Section 8(1) of the RTI Act. In that case this Court also considered the question whether the orders of censure/ punishment, etc. are personal information and the performance of an employee/officer in an organization, commonly known as Annual Confidential Report can be disclosed or not. This Court

after hearing the parties and noticing the provisions of RTI Act held:

"11. The petitioner herein sought for copies of all memos, show-cause notices and censure/punishment awarded to the third respondent from his employer and also details viz. movable and immovable properties and also the details of his investments, lending and borrowing from banks and other financial institutions. Further, he has also sought for the details of gifts stated to have been accepted by the third respondent, his family members and friends and relatives at the marriage of his son. The information mostly sought for finds a place in the income tax returns of the third respondent. The question that has come up for consideration is: whether the abovementioned information sought for qualifies to be "personal information" as defined in clause (j) of Section 8(1) of the RTI Act.

12. We are in agreement with the CIC and the courts below that the details called for by the petitioner i.e. copies of all memos issued to the third respondent, show-cause notices and orders of censure/punishment, etc. are qualified to be personal information as defined in clause (j) of Section 8(1) of the RTI Act. The performance of an employee/officer in an organisation is primarily a matter between the employee and the employer and normally those aspects are governed by the service rules which fall under the expression "personal information", the disclosure of which has no relationship to any public activity or public interest. On the other hand, the disclosure of which would cause unwarranted invasion of privacy of that individual. Of course, in a given case, if the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information, appropriate orders could be passed

but the petitioner cannot claim those details as a matter of right.

13. The details disclosed by a person in his income tax returns are "personal information" which stand exempted from disclosure under clause (j) of Section 8(1) of the RTI Act, unless involves a larger public interest and the Central Public Information Officer or the State Public Information Officer or the appellate authority is satisfied that the larger public interest justifies the disclosure of such information.

14. The petitioner in the instant case has not made a bona fide public interest in seeking information, the disclosure of such information would cause unwarranted invasion of privacy of the individual under Section 8(1)(j) of the RTI Act.

15. We are, therefore, of the view that the petitioner has not succeeded in establishing that the information sought for is for the larger public interest. That being the fact, we are not inclined to entertain this special leave petition. Hence, the same is dismissed."

17. In view of the discussion made above and the decision in this Court in *Girish Ramchandra Deshpande* (supra), as the appellant sought for inspection of documents relating to the ACR of the Member, CESTAT, inter alia, relating to adverse entries in the ACR and the 'follow up action' taken therein on the question of integrity, we find no reason to interfere with the impugned judgment passed by the Division Bench whereby the order passed by the learned Single Judge was affirmed. In absence of any merit, the appeal is dismissed but there shall be no order as to costs.

K.K.T. Appeal dismissed.

UNION OF INDIA & ORS.

v.

RAFIQUE SHAIKH BHIKAN & ORS.

Petition for Special Leave to
APPEAL (CIVIL) NO.28609/2011

APRIL 16, 2013

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Hajj policy – Policy for Haj Committee of India Pilgrims – Held: Practice of framing Hajj Policy on annual basis is ad-hoc and unsatisfactory – Requirement of a policy framework for five years – Proposed Hajj Policy 2013 – 2017 be posted on the website of the Ministry of External Affairs (MEA) inviting objections, comments and suggestions – Final policy to remain valid and operative for five years upto Hajj 2017 and may be amended only in case of any change in arrangements with the Kingdom of Saudi Arabia as per the agreement entered into between the two countries every year.

Hajj policy – Lady pilgrims – Held: Hajj Policy to pay attention to special needs of the lady pilgrims.

Hajj policy – Time bound conduct of Hajj process – Held: Time schedule with regard to the hajj process as fixed by the Haj Committee of India to be strictly adhered to – No authority or court to interfere in the process of submission of applications, scrutiny and allotment of seats by the Haj Committees, in case the interference would lead to disturbing the time schedule.

Hajj policy – Accommodation in Saudi Arabia – Committee constituted by Supreme Court to make arrangements for the pilgrims' accommodation in Saudi Arabia on a long term basis – Committee expected to make arrangements for stay of Indian pilgrims in Saudi Arabia by

taking accommodations on lease for a term not less than five years before the commencement of Hajj 2013.

Hajj policy – Air Fare – Government of India to invite tenders from the three Saudi Airlines and all the Indian registered Airlines besides any other airlines that may be eligible under the Saudi Policy.

Hajj policy – Grievance redressal – Held: At present a Joint Secretary in the Ministry of External Affairs is in-charge of Gulf and Hajj – But both the Gulf and the Hajj involve huge responsibilities – Government of India to give responsibility of the Hajj alone to an Officer of the level of the Joint Secretary – Hajj cell to also have a permanent and effective grievance redressal mechanism – An officer of the level of Deputy Secretary to be made in-charge of dealing with all grievances concerning Hajj received from any of the Haji Committees or any individual or group of individuals – Central Government advised to constitute a high powered committee to review the functioning of the Haj Committee of India, the State Haj Committees and the Union Territory Haj Committees and to consider the suggestions or grievances made by those Committees with a view to improving their performance.

Hajj policy – Policy for Private Tour Operators (PTOs) – Held: Classification of PTOs to categories 1 & 2 fair and reasonable and strikes a proper balance between needs of the pilgrims and also making provision for new entrants on a calibrated basis – Policy, approved after modifications by Supreme Court – Approved policy to be called Policy for Private Tour Operators for Hajj 2013-2017 – It shall remain valid for five years and shall not be questioned before any court or authority.

The instant special leave petition was filed by the Union of India against the judgment passed by the Bombay High Court by which the Government was

directed to release 800 seats from the Government quota in favour of the writ petitioners [a group of Private Tour Operators (PTOs)] under the Government's PTO Policy for Hajj 2011.

Though the special leave petition was on a very limited issue, the Supreme Court decided to treat the case as a public interest litigation and to examine some of the major issues concerning the Hajj Policy of the Government of India. In the past two years, the Supreme Court passed orders on a number of issues concerning the Government Hajj Policy.

While re-iterating and confirming its earlier orders/ directions, some other important issues in the Hajj Policy of the Government of India, viz. i) Policy for Haj Committee of India Pilgrims; ii) time bound conduct of hajj process; iii) accommodation in Saudi Arabia; iv) Air Fare; v) Grievance redressal and vi) Policy for Private Tour Operators were now dealt with by the Supreme Court.

Disposing of the Special Leave Petition, the Court

HELD: 1. Policy for Haj Committee of India Pilgrims (Policy in regard to pilgrims going for hajj through the Haj Committee of India in distinction to those going through private tour operators): The practice of framing Hajj Policy on an annual basis is quite *ad-hoc* and unsatisfactory and must be replaced by a policy framework made for a period of five years. It is accordingly, directed that the Hajj Policy that is to be framed this year would be for a period of five years and would be called the Hajj Policy 2013 – 2017. The proposed Hajj Policy will be posted on the website of the MEA inviting objections, comments and suggestions within one month from the date it is made available on the website. The policy would be given the final shape after taking into account any objections, comments or

suggestions that may be worthy of acceptance within a further period of one month. The final policy so framed shall remain valid and operative for a period of five years upto hajj 2017 and may be amended only in case of any change in the arrangements with the Kingdom of Saudi Arabia as per the agreement entered into between the two countries every year. The next five year policy will be similarly framed, keeping in view any problems that might have been encountered in following the previous policy and taking into account any improvements, innovations and technological advances in order to add content and quality to the succeeding policy and to make it perform better than the previous policy. It is further directed that the Hajj Policy should pay attention to special needs of the lady pilgrims and it should be aimed at making the pilgrimage for lady pilgrims as smooth and trouble-free as possible. [Paras 8 and 9] [436-H; 347-A-F]

2. Time bound conduct of hajj process: It is directed that the time schedule with regard to the hajj process as fixed by the Haj Committee of India should be strictly adhered to and no authority or court should interfere in the process of submission of applications, scrutiny and allotment of seats by the Haj Committees, in case the interference would lead to disturbing the time schedule. This direction is made keeping in view that in appropriate cases individual interest must yield to the larger good and in the larger interest. [Paras 12, 13] [438-E-G]

Mridul Dhar v. *Union of India* **(2005) 2 SCC 65: 2005 (1) SCR 380 – relied on.**

3. Accommodation in Saudi Arabia: A Committee comprising of i) Joint Secretary, Gulf and Hajj, Convenor; ii) Consul General of India in Jeddah; iii) Chairman of the Haj Committee of India; iv) Mr. Najeeb Jung, Vice Chancellor, Jamia Milia Islamia; v) Mrs. Syedda Hamid, Member, Planning Commission of India and vi) Mr. Haris Beeran, Counsel for the MEA is directed to be constituted by the Supreme Court to make arrangements for the pilgrims' accommodation in Saudi Arabia on a long term basis. The expenses incurred by the non-official members of the Committee in participating in the Committee's work will be borne by the Central Government. The Committee is expected to make arrangements for stay of the Indian pilgrims in Saudi Arabia by taking accommodations on lease for a term not less than five years before the commencement of hajj 2013. The Joint Secretary Gulf and Hajj is directed to give information in regard to the formation of the Committee for making long term arrangement for accommodations in Saudi Arabia to each of its members so that the Committee may start its work without delay. [Paras 15, 16, 17 and 36] [439-C, D-G, H; 440-A-B; 444-E-F]

4. Air Fare: The air fare charged by the Haj Committee is much higher than the fare charged by private tour operators. The Government of India is directed to invite tenders from the three Saudi Airlines and all the Indian registered Airlines besides any other airlines that may be eligible under the Saudi Policy. [Paras 18-19] [440-C, E-F]

5. Grievance redressal: At present a Joint Secretary in the Ministry of External Affairs is in-charge of Gulf and Hajj. But both the Gulf and the Hajj involve huge responsibilities and it would be better if the responsibility of hajj alone is assigned to a single Officer. Therefore, the Government of India is advised to give the responsibility of the hajj alone to an Officer of the level of the Joint Secretary. In any event, the hajj cell should also have a permanent and effective grievance redressal mechanism and an officer of the level of Deputy Secretary should be made in-charge of dealing with all grievances concerning hajj received from any of the Haj Committees or any individual or group of individuals. At present the PTOs are

required to submit their applications before the Haj Committee of India where the applications are scrutinized before those are taken up for registration with the Ministry of External Affairs. However, the Haj Committee has no concern with the Private Tour Operators or their business. The Ministry of External Affairs is directed to receive the applications from the PTOs directly or through any other appropriate agency. The Central Government is also advised to constitute a high powered committee to review the functioning of the Haj Committee of India, the State Haj Committees and the Union Territory Haj Committees and to consider the suggestions or grievances made by those Committees with a view to improving their performance. [Paras 20, 21 and 22] [440-F-H; 441-A-C, D, F-G]

6. Policy for Private Tour Operators (PTOs): The Attorney General presented the policy for registration of Private Tour Operators – Hajj 2013. The policy appears to have been framed with great care and application of mind. It is framed in light of the stipulation made by the Saudi Government that a Private Tour Operator should be allotted a quota of not less than 150 tickets. Further, the policy presented before the Court accommodates most of the suggestions that were made to the Attorney General by counsel representing the different Private Tour Operators over the past months. Most importantly it avoids creation of any monopoly and makes provision for entry of fresh players. The classification of PTOs to categories I & 2 is fair and reasonable and strikes a proper balance between the needs of the pilgrims and also making provision for new entrants on a caliberated basis. The policy, approved after modifications by this Court, is enclosed as Appendix-I and forms part of this order. The approved policy will be called Policy for Private Tour Operators for hajj 2013-2017. It shall remain valid for five years and shall not be questioned before any court or

authority. [Paras 23, 24, 26 and 28] [441-G-H; 442-A-B, E-H; 443-A]

7. The decision of the Government of India that a person can perform hajj through the Haj Committee only once in a lifetime was sought to be assailed. However, it needs to be made clear that the restriction is not on the performance of hajj as such and any person having gone through the Haj Committee may perform hajj as many times as he may like or may be permitted by the Saudi Government, through Private Tour Operators and by his own means. The decision of the Government of India is not only legal and constitutional, but also fair and reasonable. [Paras 29, 31] [443-B-C, G]

Case Law Reference:

2005 (1) SCR 380 relied on Para 11

CIVIL APPELLATE JURISDICTION : SLP (Civil) No. 28609 of 2011.

From the Judgment & Order dated 05.10.2011 of the High Court of Judicature at Bombay in Writ Petition (L) No. 1945 of 2011.

WITH

T.C.(C) Nos. 90, 91 of 2012, W.P.(C) Nos. 330, 336 of 2012 & T.C.(C) Nos. 92, 94 & 93 of 2012.

Goolam E. Vahanvati, A.G., Huzefa Ahmadi, Indu Malhotra, Dr. Rajeev Dhawan, R. Venkataramani, Colin Gonsalves, Dushyant Dave, Ejaz Maqbool, Mrigank Prabhakar, Rohan Sharma, Haris Beeran, Mohd. Nizamuddin Pasha, Amer Musthaq Salim, B.K. Prasad, Tarique Siddiqui, Anas Tanvir Siddiqui, Irshad Hanif, Rajshekhar Rao, Chandra Bhushan Jha, Ananda Handa, H.S. Mohamed Rafi, Kush, Nishta Shakil Ahmad Syed, Mohd. Parvez Dabas, Shuaib-uddin, B.V. Deepak (for T.T.K. Deepak & Co.) Ramesh Babu M.R., K.K. Mani, Abhishek Krishna, Dave, Boby Augustine, Pravin Satale,

Rajiv Shankar Dvivedi, C. Paramasivam, P. Ramesh, Rakesh K. Sharma, Ainul Ansari, Chandra Bhushan Prasad, M.Z. Chaudhary, Nilofar Qureshi, Khushi Mohd., Rehnuma, Manju Jana, R. Nedumaran, Vinay Navare (for Abha R. Sharma), Yanmi, Jyoti Mendiratta, Khalid Arshad, Tarun Gupta, Sudhanshu S. Choudhary, Anil Katiyar, Gaurav Agarwal, Sridhar Potaraju, Nikhil Goel, Irshad Ahmad, Puja Sharma, Dr. Vipin Gupta, Vikash Singh, Neeraj Shekhar, Suddarshan Rajan, C.N. Sree Kumar, P. George Giri, Praveen Agrawal, Abhijeet Sinha, P. Narasimhan, Usha Nandini V., V.N. Raghupathy, V. Ramasubramanian, Ranjan Mukherjee, Shiv Sagar Tiwari, Renjith B., K.A. Qureshi, Ananga Bhattacharyya for the appearing parties.

The Judgment of the Court was delivered by

AFTAB ALAM,J. 1. This special leave petition was filed by the Union of India against the judgment and order passed by the Bombay High Court by which the Government was directed to release 800 seats from the Government quota in favour of the writ petitioners (a group of private tour operators) under the Government's PTO Policy for hajj 2011. Though the special leave petition was on a very limited issue, this Court by order dated February 17, 2012 decided to treat the case as a public interest litigation and to examine some of the major issues concerning the Hajj Policy of the Government of India.

2. In the past two years this Court has passed orders on a number of issues concerning the Government Hajj Policy. By order dated May 8, 2012, the Court dealt with the issues of Hajj Subsidy and the Goodwill Hajj Delegation and passed necessary directions in that regard. The directions on those issues are reiterated and confirmed and directed to be followed strictly.

3. By the same order, the Court also approved the Government's PTO Policy for Hajj 2012.

4. By order dated July 23, 2012, the Court dealt with the

quota of pilgrims that the Central Government kept reserved for allotment at its discretion and made directions in that regard. Those directions too are reiterated, confirmed and directed to be followed strictly.

5. By order dated July 27, 2012, the Court pointed out to the Attorney General that the PTO Policy for hajj 2012 did not allow the entry of anyone without past experience and asked him to ensure that future PTO policies should have sufficient room for the entry of fresh PTOs every year.

6. We now propose to deal with some other important issues in the Hajj Policy of the Government of India.

7. Mr. Huzefa Ahmadi, senior advocate, who was appointed as *Amicus Curiae* by order dated July 23, 2012, has painstakingly collected detailed information from the Haj Committee of India and the Haj Committees of different States. After scrutinizing the collected information with discernment he presented for consideration the following issues that need to be addressed by the Court:

(i) Policy for Haj Committee of India Pilgrims.

(ii) Time bound conduct of hajj process.

(iii) Accommodation in Saudi Arabia.

(iv) Air Fare

(v) Grievance redressal

(vi) Policy for Private Tour Operators.

We propose to take up all the issues in seriatim.

(i). Policy for Haj Committee of India Pilgrims.

8. This relates to the policy in regard to pilgrims going for hajj through the Haj Committee of India (in distinction to those

going through private tour operators). We accept the suggestion of the *Amicus* and hold that the practice of framing Hajj Policy on an annual basis is quite *ad-hoc* and unsatisfactory and must be replaced by a policy framework made for a period of five years. We, accordingly, direct that the Hajj Policy that is to be framed this year would be for a period of five years and would be called the Hajj Policy 2013 – 2017. The proposed Hajj Policy will be posted on the website of the MEA inviting objections, comments and suggestions within one month from the date it is made available on the website. The policy would be given the final shape after taking into account any objections, comments or suggestions that may be worthy of acceptance within a further period of one month. The final policy so framed shall remain valid and operative for a period of five years upto hajj 2017 and may be amended only in case of any change in the arrangements with the Kingdom of Saudi Arabia as per the agreement entered into between the two countries every year. The next five year policy will be similarly framed, keeping in view any problems that might have been encountered in following the previous policy and taking into account any improvements, innovations and technological advances in order to add content and quality to the succeeding policy and to make it perform better than the previous policy.

9. We further direct that the Hajj Policy should pay attention to special needs of the lady pilgrims and it should be aimed at making the pilgrimage for lady pilgrims as smooth and trouble-free as possible.

10. Mr. E.N.S. Anam, who addressed us in course of hearing of the matter, seems to have some positive and constructive ideas that deserve to be taken into consideration. Mr. Attorney General helpfully stated that he would ask Mr. Haris Beeran to arrange a meeting between Mr. Anam and the concerned officer in the MEA so that Mr. Anam's suggestions may be taken into consideration in the preparation of the draft Hajj Policy 2013 - 2017.

(ii). Time bound conduct of hajj process.

11. Mr. Ahmadi submitted that the entire hajj process must be completed in a time bound manner with permissible grace periods where practicable. He submitted that the schedule for making applications, scrutiny etc. should be published in advance with firm cut off dates in the Hajj Policy itself so that the public at large is informed, well in advance, about those dates which should be treated as inflexible and should not be extended at any cost. Mr. Ahmadi further submitted that in order to complete the hajj process satisfactorily and effectively while dealing with applications running into lakhs it was imperative to adhere to the fixed time schedule, as in the case of admission to medical courses. He invited our attention to a decision of this Court in *Mridul Dhar* v. *Union of India*[1]. In that decision this Court fixed a time schedule for post graduate and super specialty course admissions (vide paragraph 31 of the judgment) and in paragraph 35 of the judgment directed for complete adherence to the time schedule for grant of admission for post graduate courses.

12. We accept the submission of *Amicus* and direct that the time schedule with regard to the hajj process as fixed by the Haj Committee of India should be strictly adhered to and no authority or court should interfere in the process of submission of applications, scrutiny and allotment of seats by the Haj Committees, in case the interference would lead to disturbing the time schedule.

13. This direction is made keeping in view that in appropriate cases individual interest must yield to the larger good and in the larger interest.

(iii). Accommodation in Saudi Arabia.

14. Mr. Ahmadi submitted that the arrangement of

1. (2005) 2 SCC 65.

accommodation of pilgrims in Saudi Arabia made on an annual basis is both expensive and inconvenient for the pilgrims and the arrangement for accommodation must be made on a long term basis, at least for a period of five years, if not for ten or more years. Mr. Ahmadi further submitted that though the proposal in that regard was made long ago, nothing tangible has been achieved so far. He, therefore, requested the Court to constitute a Committee to make arrangements for the pilgrims' accommodation in Saudi Arabia on a long term basis.

15. The learned Attorney General informed the Court that a Committee was already constituted for the purpose of securing accommodations on a long term basis. However, the Committee alluded to by the Attorney General consists only of Government officials and apparently it has not been able to do any thing so far. We feel that a Committee with some non-official members may be more effective in this regard. We, accordingly, constitute a committee of the following persons:

(i) Joint Secretary, Gulf and Hajj, Convenor;

(ii) Consul General of India in Jeddah;

(iii) Chairman of the Haj Committee of India;

(iv) Mr. Najeeb Jung, Vice Chancellor, Jamia Milia Islamia;

(v) Mrs. Syedda Hamid, Member, Planning Commission of India;

(vi) Mr. Haris Beeran, Counsel for the MEA;

16. We are informed that the position of the Chairman, Haj Committee of India, is at present vacant. We direct that the rest of the Committee shall start their work without awaiting the appointment of the Chairman, Haj Committee of India and the Chairman would join the Committee as and when someone is appointed to that office. The expenses incurred by the non-

official members of the Committee in participating in the Committee's work will be borne by the Central Government.

17. We expect the Committee to make arrangements for stay of the Indian pilgrims in Saudi Arabia by taking accommodations on lease for a term not less than five years before the commencement of hajj 2013.

(iv). Air Fare.

18. Mr. Ahmadi stated that admittedly the air fare charged by the Haj Committee was much higher than the fare charged by private tour operators. He submitted that the best fare could be secured by putting out a global tender. The Attorney General, however, pointed out that in view of the constraints of the agreement signed between the Government of India and the Kingdom of Saudi Arabia and the official policy of the Saudi Government, a global tender may not be possible. On this issue there is need to find a middle course and on hearing the *Amicus* and the learned Attorney General, we think that the Government of India can make a beginning in this regard by inviting tenders from the three Saudi Airlines and all the Indian registered Airlines besides any other airlines that may be eligible under the Saudi Policy.

19. We, direct, accordingly.

(v). Grievance redressal.

20. We are informed that at present a Joint Secretary in the Ministry of External Affairs is in-charge of Gulf and Hajj. We acknowledge that the concerned officer is doing commendable work. But both the Gulf and the Hajj involve huge responsibilities and it would be better if the responsibility of hajj alone is assigned to a single Officer. We, therefore, advise the Government of India to give the responsibility of the hajj alone to an Officer of the level of the Joint Secretary. In any event,

the hajj cell should also have a permanent and effective grievance redressal mechanism and an officer of the level of Deputy Secretary should be made in-charge of dealing with all grievances concerning hajj received from any of the Haj Committees or any individual or group of individuals.

21. Mr. Ahmadi submitted that at present the PTOs are required to submit their applications before the Haj Committee of India where the applications are scrutinized before those are taken up for registration with the Ministry of External Affairs. He submitted that the Haj Committee has no concern with the Private Tour Operators or their business. The Haj Committee is itself burdened with lakhs of applications and it should be relieved of the responsibility of receiving applications from the PTOs. We think the submission made by the *Amicus* is reasonable. We accept the submission and direct the Ministry of External Affairs to receive the applications from the PTOs directly or through any other appropriate agency.

22. Mr. Ahmadi submitted that despite having been provided with very inadequate resources and facilities both the Central Haj Committee and the Haj Committees at the State level are discharging their responsibilities in a highly commendable manner. We endorse the compliments paid by the *Amicus* to the Haj Committees and expect them to work with greater sincerity and efficiency. We also advise the Central Government to constitute a high powered committee to review the functioning of the Haj Committee of India, the State Haj Committees and the Union Territory Haj Committees and to consider the suggestions or grievances made by those Committees with a view to improving their performance.

(vi). Policy for Private Tour Operators (PTOs)

23. The Attorney General presented before us the policy for registration of Private Tour Operators – Hajj 2013.

24. The policy appears to have been framed with great

care and application of mind. It is framed in light of the stipulation made by the Saudi Government that a Private Tour Operator should be allotted a quota of not less than 150 tickets. Further, the policy presented before the Court accommodates most of the suggestions that were made to the Attorney General by counsel representing the different Private Tour Operators over the past months. Most importantly it avoids creation of any monopoly and makes provision for entry of fresh players.

25. Here it may be stated that the certain provisions in the policy that tend to relax the eligibility criteria for the PTOs were strongly opposed by one Sangam Travels (I.A. No. 25 of 2013 and I.A. No. 29 of 2013). It was stated on behalf of the applicant that in paragraph 3 of the PTO policy, category II, that makes facilitating 50 *Umrah* pilgrims in a year for any five years as one of the eligibility criterion is quite illegal. We have heard Mr. Rafi, counsel appearing for the applicant and we have considered the submissions carefully.

26. We are of the view that the classification of PTOs to categories I & 2 is fair and reasonable and strikes a proper balance between the needs of the pilgrims and also making provision for new entrants on a caliberated basis. This fully meets with our approval. We, thus, find no merit in the submissions and the IAs are rejected.

27. On other aspects of the PTO policy we have heard, apart from the Attorney General, counsel appearing for many Private Tour Operators represented before the Court and in particular Mr. Dushyant Dave, senior advocate appearing for Rafique Shaikh Bhikan (Respondent No.1).

28. Having heard the Attorney General and the counsel appearing for the different Private Tour Operators, we approve the policy presented by the Attorney General with some slight modifications. The policy, approved after modifications by this Court, is enclosed as Appendix-I and forms part of this order. The approved policy will be called Policy for Private Tour

Operators for hajj 2013-2017. It shall remain valid for five years and shall not be questioned before any court or authority.

29. Before concluding the order, we may state that some parties appearing in-person and some through lawyers also sought to assail before us the decision of the Government of India that a person can perform hajj **through the Haj Committee** only once in a lifetime. It needs to be made clear that the restriction is not on the performance of hajj as such and any person having gone through the Haj Committee may perform hajj as many times as he may like or may be permitted by the Saudi Government, through Private Tour Operators and by his own means. Mr. Beeran, learned counsel appearing for the MEA, submitted that the decision has been relaxed and exceptions are made out in two cases. He submitted that having regard to the difficulties faced by some lady pilgrims in findings *Mehrams* who had not done Hajj before, "repeaters" are allowed to come in as *Mehrams,* subject to the condition that they would not be entitled to hajj travel subsidy provided by the Government of India. Similarly, keeping in view the problems encountered by pilgrims over 70 years of age in finding specified relatives to accompany them who had not done hajj before, "repeaters" were permitted in their case also subject to the condition that they would not be entitled to the hajj travel subsidy provided by the Government of India.

30. However, the decision of the Government was assailed on a number of grounds, even invoking Articles 25 and 14 of the Constitution of India.

31. We are, *prima facie*, satisfied that the decision of the Government of India is not only legal and constitutional, but also fair and reasonable. We find no substance in any of the grounds challenging the Government's decision.

32. We have dealt with all the major issues concerning the Hajj Policy of the Government of India. No useful purpose will be served by keeping this matter pending any further. We,

accordingly, dispose of the special leave petition and close the proceedings.

33. Before putting down the records of the case, however, we would like to state that this Court is indebted to Mr. Goolam E. Vahanvati, the learned Attorney General. It was with his help and cooperation that this Court was able to deal with the issues under consideration to our fullest satisfaction.

34. We would also like to put on record our appreciation for the assistance received from Mr. Huzefa Ahmadi, the learned *amicus curiae*, Mr. Haris Beeran, counsel appearing for the MEA and Mr. Khalid Arshad, learned counsel appearing for the Central Haj Committee. We are also thankful to Mr. Dushyant Dave, Mr. Fakhruddin, Mr. Colin Gonsalves, Mr. R. Venkataramani and all other counsel representing the different private parties.

35. With the disposal of this Special Leave Petition, all other connected matters, including transferred cases and intervention applications and IAs, are disposed of.

36. We direct the Joint Secretary Gulf and Hajj to give information in regard to the formation of the Committee for making long term arrangement for accommodations in Saudi Arabia to each of its members so that the Committee may start its work without delay.

B.B.B. Matters disposed of.

Appendix

MINISTRY OF EXTERNAL AFFAIRS
(GULF & HAJ DIVISION)
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Registration of Private Tour Operators - Haj 2013

The Government of Saudi Arabia has notified that Private Tour Operators (PTOs) registered with the Government of India and involved in the preparation of the Hajj Pilgrimage will be eligible for grant of Hajj group visas subject to fulfillment of other terms and conditions as laid down by the Saudi Authorities.

2. Applications are invited from eligible PTOs for registration for Hajj – 2013. The Eligibility Criteria are at Annexures A and B. The applications must be submitted in the prescribed format (Annexure-C) directly to [MEA or any other agency appointed by it]

3. It is to be noted that Government of Saudi Arabia has stipulated that effective Hajj 2013, a PTO should facilitate at least 150 pilgrims. Accordingly, the PTO Policy has been reframed. For registration and allotment of quota of Hajj seats for Hajj 2013, interested PTOs may apply under the following two categories:

Category I	PTOs registered with MEA and facilitated Hajjis at least for 7 Hajj operations or more.
Category II	PTOs registered with MEA and facilitated Hajjis for at least for 1 to 6 Hajj operations and PTOs which have facilitated at least 50 Umrah pilgrims in a year for any five years.

4. 70% of the overall quota of seats will be allocated to eligible PTOs under Category 3 (I) and 30% to eligible PTOs under Category 3 (II). Distribution of seats among qualified PTOs will be done as follows:

(a) 70% of the Hajj 2013 PTO seats (31,500) will be allocated to eligible PTOs under category 3(I) at the rate of 150 per PTO. In case the number of PTOs exceeds 210, the allocation of seats will be done on draw of lots. If the number of qualified PTOs is less than 210, each PTO will be allocated 150 seats and surplus seats, if any, will be distributed equally among them.

(b) 30% of Hajj 2013 PTO seats (9,000) will be allocated to eligible PTOs under category 3(II) at the rate of 150 seats per qualified PTO. If the number of qualified PTOs exceeds 90, the allocation of seats will be done by draw of lots. In case the number of PTOs is less than 90, each PTO will be allocated 150 seats. Balance seats, if any, will be transferred to Category I and distributed equally among them. A qualified PTO which fails to get selected under the draw of lots in any year will be allocated 150 seats in the ensuing year without Qurrah if it remains a qualified PTO.

5. This Policy is expected to remain valid for five years - 2013-2017 unless there are substantive developments which affect it. The allocation of seats to qualified PTOs in each category will be done every year on the basis of the overall quota of PTO seats specified in the annual India – Saudi Arabia Hajj Agreement and the number of qualified PTOs remaining in each category. The policy envisages cross category upward movement of PTOs from Category II to Category I. A qualified PTO shall remain qualified unless it is otherwise disqualified either by Government of India or by Government of Saudi Arabia for valid reasons. It is to be noted that the PTOs who do not wish to take a minimum of 150 Hajjis or are unable to do so, need not apply.

6. Last date for receipt of applications which should be addressed to [the MEA or any other agency appointed by it]

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ANNEXURE-A

Terms and Conditions for Registration of Private Tour Operators (PTOs) for Haj-2013

Each PTO should establish that it is a genuine and established Tour Operator having experience in sending tourists/pilgrims abroad for which it should produce the following documents:

S.No	Terms and Conditions
I	All documents must be in the name of the applicant PTO and must be dated prior to the last date for submission of the application.
Ii	PTO must sign an agreement with each pilgrim indicating the services to be provided to the pilgrim and charges payable. Services should include inter-alia medical insurance, type of accommodation, transport facility, duration of stay of the pilgrims in Saudi Arabia, etc.). A copy of model agreement to be signed with the pilgrims must be attached with the application.
Iii	Details of registration for service tax.
Iv	Minimum Annual Turnover of INR One Crore during the financial year 2010-11 or 2011-12 along with Balance Sheet and Profit & Loss Account –duly audited by the Statutory Auditors, Tax Audit Report and Income Tax Return (ITR) for financial years 2010-11 and 2011-12.
V	Minimum office area of 250 Sq.ft. (Carpet area). (Supporting documents –drawing/lay out plan approved by the competent authority of the State Government/Union Territory). Lay out plan certified by Chartered Engineers/Architects will also be accepted.
Vi	Minimum capital of Rs. 15 lacs as on March 31, 2012 or March 31, 2013, duly supported by the latest Balance Sheet- audited by the Statutory Auditors and Audit Report.
Vii	Proof of payment made through banking or other authorized channels towards purchase of tickets and hiring of accommodation in Makkah/Madinah. Payments towards purchase of tickets, hiring of accommodation for pilgrims in Makkah/Madinah, by any other means, would not be accepted.
Viii	PAN Card details (PAN Card in the name of Proprietor will be accepted provided the PTO is a Proprietor concern)
Ix	PTO with adverse Police report or involved in criminal court cases will not be c considered at all.
X	Copies of registration Certificate issued to the PTO in support of their claim year wise and PTO category wise.
Xi	Contract for hiring of buildings for pilgrims and "Tasreeh" together with English translations PTO category wise. (Please enclose rental receipts and a copy of lease deed, duly signed with the Saudi owners).
Xii	Copy of Munazzim Card and relevant Hajj visa pages of the Passport of the Proprietor/Owner.
Xiii	A security deposit of Rs. 25 lacs (Rs. Twenty five lacs only) in the form of Fixed Deposits with a Nationalised Bank valid till February 28, 2014, in favour of HCOI, Mumbai.
Xiv	A Demand Draft of INR 5000/- (Rs. Five Thousand only) in favour of Haj Committee of India, payable at Mumbai- to be submitted along with the application as non refundable fee.

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ANNEXURE- B

OTHER IMPORTANT INSTRUCTIONS/ GUIDELINES FOR HAJ-2013

I	Application must be in the prescribed Performa (Annexure-C) and all documents must be serially numbered. An index must be provided at the top of the applications indicating details of documents enclosed.
Ii	Applications that furnish wrong information or suppress any relevant information will be summarily rejected and the applicant PTO will be blacklisted and its security deposit forfeited, provided that blacklisting will not be ordered unless an opportunity to show cause against such blacklisting is given to the PTO concerned.
Iii	PTOs must furnish full information about their pilgrims to the CGI (Consulate General of India), Jeddah and also upload it on the website of CGI-www.jeddah.com before departure of pilgrims to Saudi Arabia.
Iv	PTO must ensure vaccination and other medical checks as per requirement of the Government of Saudi Arabia. Details are available on HCOI's website www.hajcommittee.com. All Pilgrims must carry health cards.
V	PTO should be fully responsible for the stay, transportation and payment of compulsory charges to the Authorities in Saudi Arabia. PTO should honour all terms & conditions of the contract signed with the pilgrims and ensure that none of them is left stranded.
Vi	PTO should provide good quality Identity card, indicating name of the pilgrim and of the PTO, Passport number and place of stay in Makkah/ Madinah, to each pilgrim to be worn around the neck whenever they leave the building.
Vii	PTO should ensure that baggage of all their pilgrims are cleared before they leave the Hajj Terminals in India/Saudi Arabia.
Viii	If a pilgrim sent by a PTO is found begging in Saudi Arabia or declared Fuqra by Saudi Authorities, the PTO will be blacklisted permanently and its security deposit forfeited.
Ix	Selling of Hajj quota seats to any other PTO is strictly prohibited. In case of receipt of any complaint against any PTO indulging in such activity, the PTO would be blacklisted permanently.
X	It may kindly be noted that only one member of the family would be eligible for registration for Haj-2013. Hence, only one member of family should apply for registration. Family will include wife and dependent children. In case more than one member of a family satisfy the eligibility conditions and if one of them is a lady, the lady would be given preference for registration to the exclusion of others and if there is no lady, preference would be given to the member who is the oldest in the business for registration - Haj-2013. No applicant can apply in more than one PTO in his/her capacity as Director/Partner/ Proprietor.
Xi	PTO must submit only one application. If it is found that a PTO has submitted more than one application in different names, all such applications would be rejected and all such PTOs would be

	blacklisted and their security deposit would be forfeited.
Xii	Without prejudice to the foregoing, all claims, disputes and differences shall be subject to the jurisdictions of the Courts in New Delhi/ Mumbai.
Xiii	All the terms and conditions laid down in Annexures A & B will also apply on PTOs that qualify under Category-II by virtue of facilitating a minimum of 50 Umrah pilgrims in a year for any five years, but with the exception of the terms and conditions contained under clauses (vii), (x), (xi), xii of Annexure-A. In addition, these PTOs are also required to submit the proof of payment made through banking or any other authorized Channels towards purchase of tickets and hiring of accommodation in Makkah and Madina in respect of Umrah pilgrims facilitated by them in support of their claim.

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ANNEXURE – C

Hajj 2013 - Application for Registration as Private Tour Operator (PTO)

1.	Name of Private Tour Operator	
2.	Address of firm/ telephone, fax, e-mail and website address (if there has been any change in address since Hajj – 2012 it may also be indicated)	
3.	Name of the firm's representatives along with contact details who would be present in the kingdom of Saudi Arabia during Haj-2013.	
4.	Number of employees (permanent as well as seasonal with break up), Number of computers, and other office equipment.	
5.	Area of Office (Please attach supporting documents with photographs)	
6.	Whether the office is designated specifically for the Hajj/ Umrah or any other business is also carried out from that premises.	
7.	(i)Whether earlier registered with Ministry of External Affairs?	Yes/No
	(ii) If Yes, then enclose copy of certificates and copies of "Tasreeh" in support of their claim year wise.	
8.	(i) Whether member of any Association of Hajj PTOs? If so provide details.	Yes/No
	(ii) Also indicate whether application is submitted through an Association.	

9.	PTOs should enclose copies of contracts for buildings hired for pilgrims, "Tasreeh" with a certified English translation, IATA receipts, details of tickets, and payments made towards purchase of tickets through banking channel in support of their claim. (New Applicants are required to submit the number of Umrah pilgrims facilitated during last five years with supporting documents - purchase of air – tickets, hiring of accommodation in Makkah and Medinah and proof of payments made through banking channels for this purpose)	
10.	Details of Fixed Deposit Receipt (FDR) – original to be enclosed. In case application is through one of the Associations, indicate the details of fixed deposit receipts submitted to the Association.	
11.	Details of bank draft for Rs. 5000/- in favour of Hajj Committee of India, payable at Mumbai as non-refundable processing fee.	
12.	Maktab number and the name of the service provider in Saudi Arabia (in case of previously registered PTOs).	
13.	Likely date of arrival of pilgrims in Kingdom of Saudi Arabia.	
14.	Likely date of departure of pilgrims from Kingdom of Saudi Arabia.	
15.	Type of Transport agreement/arrangements to be made for Pilgrims (Coupon rate and route).	

16.	Arrangements for providing Orientation/ Training programmes.	
17.	Name, address and telephone numbers of local correspondent Company in the Kingdom of Saudi Arabia.	
18.	(a) Whether the PTO has its branches in other places: (b) if yes, please provide details: (c) Have these branches also applied for registration separately? If yes, please provide details.	
21.	Whether any case/complaint is registered against the PTO with police authorities. Please provide complete details. If there is no such case/complaint, please attach an affidavit in support of the claim.	

(Seal and signature of the authorized person of the Company)

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THAMMU PANDURANGA RAO & ANR.
v.
STATE OF ANDHRA PRADESH
(Criminal Appeal No. 1132 of 2009)

APRIL 26, 2013

[P. SATHASIVAM AND M.Y. EQBAL, JJ.]

Penal Code, 1860 :

ss.304 (Part II), 323 and 325 - Prosecution for causing death and injuries - Conviction by trial court u/ss. 304, 323 and 325 - High Court modified the conviction u/s. 304 to 304 (Part II) and reduced the sentence - On appeal, held: High Court order passed after proper analysis of the evidence - Hence does not call for interference - High Court order upheld.

s.97 - Right to private defence - Exercise of - Held: Right to private defence should be used only as a shield to avert an attack - It should not be vindicitve and cannot be used to retaliate - It cannot be exercised for causing more harm than necessary.

The appellants-accused Nos.1 and 2 alongwith other 3 accused, were prosecuted for causing death of one and causing injuries to two (i.e. PWs 1 and 2). Appellants-accused (A-1 and A-2) were convicted by the trial court. A-1 was convicted u/s. 304 and 323 IPC and was sentenced to 10 years RI and six months RI respectively. A-2 was convicted u/s. 304 and 325 IPC and was sentenced to 10 years RI and fine of Rs.500/- with default clause. High Court partly allowed the appeal of the appellants, converting their conviction u/s.304 IPC to conviction u/s. 304 (Part 2) IPC and reducing their sentence of 10 years RI to 3 years.

In appeal to this Court, the appellants-accused inter alia contended that they had inflicted the injuries, in exercise of right to private defence.

Dismissing the appeal, the Court

HELD: 1. It is the cardinal principle of law that everyone has a right to defend his own person and property but the right of private defence cannot be exercised for causing more harm than necessary or for taking revenge. Such right of private defence must be used as a shield to avert an attack and it should not be vindictive and cannot be used to retaliate. In no case, the right of private defence extends to the inflicting of more harm than it is necessary to inflict, for the purpose of defence. [Para 10] [464-E-G]

2. On analysis of the evidence on record, it is clear that appellant No.1 (A-1) beat PW-1 (son of the deceased) on his right wrist with a stout stick with the result his hand broke. A-5 also beat him on the right side of the neck with a stout stick. Then the deceased interfered. He tried to rescue his son. Then A-1 gave a blow on his head with stout stick and caused a bleeding injury. To rescue the deceased, PW-2 (wife of deceased) interfered; then A-1 and A-4 beat her with sticks on her hands and back and caused injuries. Though the deceased was already beaten on his head, when his wife was being beaten by A-1 and A-4, he again mustered his strength and tried to interfere, when A-2 poked with a stick on his abdomen and A-3 beat him with a stick on his back and gave two blows. In fact the deceased in his statement before the Police under Ex.P-20 said that A-2 did not simply poke in his abdomen by the side of his naval with a stick but in fact he pounded at his abdomen with the stick. In fact this was the injury that led to the death of the deceased because the intestines were ruptured and bleeding took place internally and serious damage was caused to the

vital organs inside and caused the death of the deceased. [Para 11] [464-G-H; 465-A-D]

3. The High Court has fully gone into the evidence of the witnesses examined and injuries sustained by the deceased and PW-2, and came to the conclusion that the cumulative effect of the injuries led to the death of the deceased and appellant No.1 being the person, who participated in the commission of the offence, was also having common intention to attack the deceased. However, the High Court in the facts and circumstances of the case modified the order of the conviction and sentence. In view of the facts and circumstances of the case and the evidence available on record, there is no reason to interfere with the impugned judgment of conviction and sentence passed by the High Court. [Paras 12 and 13] [465-D-G]

CRIMINAL APPELLATE JURISDICTION : CRIMINAL Appeal No. 1132 of 2009.

From the Judgment and Order dated 09.10.2007 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Criminal Appeal No, 1187 of 2002.

Venkateswara Rao Anumolu, Prabhakar Parnam for the Appellants.

Shishir Pinaki, D. Mahesh Babu, Suchitra Hrangkhawl, Amjid Maqbool, Amit K. Nain, M. Bala Shivudu for the Respondent.

The Judgment of the Court was delivered by

M.Y. EQBAL, J. 1. The present appeal by special leave is directed against the judgment and order dated 9th October, 2007 passed by the High Court of Judicature of Andhra Pradesh partly allowing Criminal Appeal No. 1187 of 2002 filed by the appellants herein (accused Nos. 1 and 2) by *inter alia*

modifying the conviction of accused Nos. 1 and 2 for the offence under Section 304 IPC into conviction for the offence under Section 304(2) IPC and reducing the sentence of rigorous imprisonment of 10 years to three years in respect of both the accused and the sentence of rigorous imprisonment of four years for the offence under Section 325 IPC in respect of accused No. 2 to one year.

2. The case of the prosecution which led to the conviction of accused Nos. 1 and 2 is that the deceased Boddu Maraiah and accused No. 2 were having prior disputes between them. The son of said accused loved the daughter of the deceased. As the elders did not agree to the proposal, the deceased married his daughter to some other person. Even after her marriage, the son of accused used to go to her house and tried to create problems in her married life, because of which the son of accused was beaten by the deceased and his family members which became the subject matter of a criminal case. Thus, it was alleged that there was inimical term between the two families. On 2.11.1998 at about 5.30 p.m., while accused Nos. 1 to 5 (A-1 to A-5) (accused No. 4 is son of accused No. 2; accused No. 2 is the nearest relative of accused No. 1; accused No. 3 is his son; and accused No. 5 is a close relative of accused Nos. 1 to 4) were returning to their village after finishing their fishing work and when they reached near the cattle shed of the deceased, they heard PW-2 (wife of deceased) abusing her cattle sarcastically. All are stated to be residents of Ramannamodi. The accused suspected that PW-2 was abusing them. On PW-2 being questioned by A-2 as to why she was abusing them, the deceased interfered and attacked A-2. A-1 also interfered and the deceased beat him whereupon A-1 beat the deceased on his head with a stick and induced A-2 to A-5 to beat the deceased. A-2 beat the deceased by poking against his abdomen with stick near his naval, A-3 beat him on his back with a stick, A-1 and A-4 beat PW-2 with sticks and caused injuries and A-1 and A-4 beat PW-1 (son of deceased) on his left hand wrist and on his neck

with sticks. After beating the deceased, PW-1 and PW-2, the accused ran away from the place of occurrence. Later PW-1 went to police station and registered a complaint (Ex.P-13) and a case under Section 324/34 IPC was started. The deceased, PW-1 and PW-2 were sent to the Government Headquarters Hospital, Machilipatnam. After the deceased succumbed to injuries on 4.11.1998 in the hospital, the police altered the FIR to Section 302 IPC and took up investigation, held inquest over the dead body, observed the scene of offence, conducted panchnama, got the post mortem examination done and after receipt of post mortem report laid the chargesheet under Section 302/34 IPC against A-1 and A-2, under Section 325 against A-2, under Section 323 against A-1, A-4 and A-5 and under Section 114 against A-5. In support of its case, the prosecution examined PWs 1 to 14, marked Exhibits P-1 to P-23 and also MOs 1 to 26. No defence witness was examined but Exhibits D-1 to D-9 were marked on their side.

3. PW-9 Dr. K. Sanjeevarao who held inquest over the dead body and issued post mortem certificate opined that the deceased died of shock due to rupture of mesenteric vessel and damage to the intestines. The doctor stated that the injuries mentioned in the certificate would have been caused with sticks like MOs1 to 5 and that the internal injuries 2 and 3 were sufficient to cause the death in the ordinary course of nature. The following external injuries were found on the dead body:

1. A three sutured injury 1 ½" in length on the right parietal region.

2. A blue black abrasion 3" x ¼ " on the right shoulder.

3. A blue black abrasion 1" x ¼ " over the left loin.

4. A black abrasion 1" x ½ " on the back of right lumber region.

5. A blue black abrasion 1 ½ " x 1" on the back and left lower part of the chest.

4. On internal examination, the doctor found (1) about 2 ½ litre of blood present in the abdominal cavity and ½ litre of blood present in the pelvic cavity, hemoperitoneum present and all the intestines congested; (2) bluish contusion 6" x 1" on the middle third of small intestine; (3) the mesentance vessels ruptured and the entire mesentery blood stained; (4) three bluish blood clots each 30 grams on the mecentary near the superior mesenteric artery; (5) all the internal organs like liver, both the lungs, spleen and both the kidneys congested; (6) the stomach empty and its mucosa congested; (7) the brain and its menings congested; (8) hyoid bone intact; (9) urinary bladder and the gall bladder empty; and (10) the chambers of the heart empty. The doctor opined that the deceased appeared to have died of shock due to rupture of mesenteric vessels and contusion of the intestines and death would have been occurred within 24 hours prior to the *post mortem* examination and Ex.P-7 is the *post mortem* certificate he issued. The injuries mentioned in Ex.P-7 would have been caused with sticks like MOs.1 to 5 and that the internal injuries 2 and 3 are sufficient to cause the death in the ordinary course of nature.

5. As regards injuries to PW-1 and PW-2, PW-8 Dr. M. Polaiah who medically examined PW-1 and PW-2 stated in his deposition that he was of the opinion that injury No. 1 i.e. "Swelling deformity of lower third of left forearm. Tender" caused to PW-1 was grievous in nature and injury No. 2 i.e. "Abrasion of 1" x ¼ " over the anterior of triangle of left side of neck. Bleeding present" was simple in nature and those injuries could have been caused with sticks. As regards injuries i.e. "Swelling deformity of left hand and Contusion of 1" x 2" over right shoulder blade", the doctor opined that the said injuries were simple in nature and could have been caused with sticks as alleged.

6. The trial court on consideration of testimony of the witnesses held that a case has been made out against A-1 and A-2 (appellants herein) finding them guilty for the offences under Sections 304/34, 324/34 and 325 IPC. Accordingly, they were

convicted for the offence under Section 304 IPC and sentenced to undergo rigorous imprisonment for 10 years and in default to suffer simple imprisonment for three months. A-1 was further convicted for the offence under Section 323 IPC and sentenced to undergo rigorous imprisonment for six months. A-2 was further convicted under Section 325 IPC and sentenced to undergo rigorous imprisonment for four years and also to pay a fine of Rs.500/- and in default to suffer simple imprisonment for two months. A-4 and A-5 were sentenced to pay fine of Rs.1,000/- each, in default to suffer simple imprisonment for two months. All the sentences imposed on respective accused were directed to run concurrently. A-3 had died on 5.12.1998 due to ill health while under judicial custody. In arriving at its conclusion as regards conviction and sentence of A-1 and A-2 (appellants herein), the trial court gave the following reasoning:

> "21. .....The oral evidence and medical evidence on record clinchingly proved that on account of injuries caused by A-1 and A-2 the deceased died, especially the injuries caused by A-2. But the common intention of A-1 and A-2 in beating the deceased is clear. Whether they intended to kill him is doubtful, though PW-1 stated in his evidence that the accused uttering `SACHADU NA KODUKU' went away because that material aspect was not mentioned by him in Ex. P-1 or he stated the same before the Police. The deceased also did not mention in Ex.P-20 that the accused left the scene of offence uttering so. Therefore, the intention to cause death to the deceased on the part of A-1 and A-2 cannot be inferred from the circumstances but the subtle situation led each party to self provocation. Consequently A-1 and A-3 beat the deceased as well as PWs-1 and 2. In fact on both sides there was no intention or preparation for the quarrel. It was a sudden and unexpected quarrel that arose on account of bitter enmity. Passions roused on seeing each other. Both sides plunged into a free fight. So it can be safely held that A-1 and A-2 in furtherance of common intention beat the deceased Maraiah which injuries caused his death in the ordinary course of nature. It cannot be held that they have committed the offence u/s 302 r/w section 34 IPC, but they have committed an offence punishable u/s 304 r/w section 34 IPC, in other words culpable homicide not amounting to murder.
>
> 22. ... it has been established beyond doubt that on account of the injury caused by A-1, the left hand of PW-1 was broken. Not only a reading of Ex.P-1 but also a reading of Ex.P-20 coupled with the oral and medical evidence on record this offence against A-1 u/s 325 IPC has been established.
>
> xxx xxx xxx
>
> 24. It is the case of the prosecution that A-1 and A-4 beat PW-2 and caused her two simple injuries with sticks. PW-2 received injuries on her left hand and right shoulder blade. The evidence of PW-8 and the wound certificate Ex. P-6 corroborates the evidence of PW-1 and PW-2. In Ex. P-1 and P-20 also these injuries caused to PW-2 were attributed to A-1 and A-4. Thus, it has been established by the prosecution that A-1 and A-4 beat PW-2 and caused injuries to her by beating with sticks punishable u/s 323 IPC."

7. Aggrieved by the judgment of the trial court, A-1 and A-2 (appellants herein) preferred an appeal before the High Court and contended that as their guilt was not proved beyond all reasonable doubt, their conviction and sentence ought to be set aside. The High Court after going through the entire material on record held that the lower court gave sufficient reasons as to why the respective accused were convicted for the offences under various Sections of IPC; cumulative effect of the injuries led to the death of the deceased and A-1 being the person who participated in the commission of the offence was also having

common intention to attack the deceased; there was no ground to interfere with the conviction of the accused for the offences under Sections 304, 325 and 323 IPC; and conviction under Section 304 could be brought under Section 304(2) IPC and accordingly modified the same. After taking into consideration the motive behind the incident, the nature of weapons used and the circumstances, the High Court was of the view that the accused did not use sharp edged weapons to kill the deceased but they caused injuries with a knowledge that they are likely to cause the death. In the result, the appeal of A-1 and A-2 (appellants herein) was partly allowed by the High Court as mentioned hereinbefore. Finally the High Court held:-

> "By taking into consideration the motive behind the incident, the nature of weapons used and the circumstances explained by the learned defence counsel, I am of the view that the accused did not use sharp edged weapons to kill the deceased, but they caused injuries with a knowledge that they are likely to cause the death. As the offence under Section 304 I.P.C. was brought under Section 304(2) I.P.C., the sentence of imprisonment imposed on the accused is excessive. Therefore, I am inclined to reduce the sentence imposed against the accused for the offence under Section 325 I.P.C. Therefore, the sentence imposed against Accused No.2 for the offence under Section 325 I.P.C. is reduced.
>
> In the result, the appeal is allowed in part. The conviction of Accused Nos. 1 and 2 for the offence under Section 304 I.P.C., is modified into conviction for the offence under Section 304(2) I.P.C. Regarding Rigorous Imprisonment, it is reduced to rigorous Imprisonment of three years to each of the accused. The fine and default sentence remain un-altered. The conviction of Accused No.1 for the offence under Section 323 I.P.C., and the sentence of Rigorous Imprisonment for six months is confirmed. Conviction of Accused No.2 for the offence under Section 325 I.P.C., is confirmed, but the sentence of rigorous imprisonment of four years is reduced to Rigorouos Imprisonment of one year. The fine amount remains un-altered. All the sentences of imprisonment against each of the accused shall run concurrently."

8. Mr. Venkateswara Rao Anumolu, learned counsel appearing for the appellants assailed the impugned judgment of the High Court mainly on the ground that the conviction and sentence cannot be sustained as the injuries were inflicted by the appellants while exercising their right of private defence. Admittedly, the accused -appellants were on inimical terms with the deceased and the witnesses. Learned counsel drew our attention to the injuries sustained by the parties and the report of the doctor and submitted that in the facts and circumstances of the case, the impugned judgment of conviction is liable to be set aside.

9. Mr. Shishir Pinaki, learned counsel appearing for the respondent, on the other hand, submitted that the evidence of the prosecution witnesses including the injured witnesses and the injuries inflicted on the deceased completely ruled out the application of right of private defence.

10. It is the cardinal principle of law that everyone has a right to defend his own person and property but the right of private defence cannot be exercised for causing more harm than necessary or for taking revenge. Such right of private defence must be used as a shield to avert an attack and it should not be vindictive and cannot be used to retaliate. In no case the right of private of defence extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

11. From analyzing the evidence on record which has already been noticed by the trial court, it is clear that appellant No.1(A-1) beat PW-1 on his right wrist with a stout stick with the result his hand broken. A-5 also beat him on the right side of the neck with a stout stick. Then the deceased interfered.

He tried to rescue his son. Then A-1 gave a blow on his head with stout stick and caused a bleeding injury. To rescue the deceased, PW-2 interfered; then A-1 and A-4 beat her with sticks on her hands and back and caused injuries. Though the deceased was already beaten on his head when his wife was being beaten by A-1 and A-4, he again mustered his strength and tried to interfere when A-2 poked with a stick on his abdomen and A-3 beat him with a stick on his back and gave two blows. In fact the deceased in his statement before the Police under Ex.P-20 said that A-2 did not simply poke in his abdomen by the side of his naval with a stick but in fact he pounded at his abdomen with the stick. In other words, in vernacular 'KULLA BODICHI NADU' in fact this is the injury that led to the death of the deceased because the intestines were ruptured and bleeding took place internally and serious damage was caused to the vital organs inside and caused the death of the deceased.

12. The High Court has fully gone into the evidence of the witnesses examined and injuries sustained by the deceased and PW-2 and came to the conclusion that the cumulative effect of the injuries led to the death of the deceased and appellant No.1 being the person, who participated in the commission of the offence, was also having common intention to attack the deceased. However, the High Court in the facts and circumstances of the case modified the order of the conviction and sentence.

13. Considering the entire facts and circumstances of the case and the evidence available on record, we do not find any reason to interfere with the impugned judgment of conviction and sentence passed by the High Court.

14. For the reasons aforesaid, there is no merit in this appeal, which is accordingly dismissed. The bail bonds of the accused-appellants stand cancelled. They shall surrender forthwith to serve out the remaining period of the sentence.

K.K.T. Appeal dismissed.

REPUBLIC OF ITALY & ORS.

v.

UNION OF INDIA & ORS.

(Writ Petition (Civil) No. 135 of 2012 etc.)

APRIL 26, 2013

[ALTAMAS KABIR,CJI., ANIL R. DAVE AND VIKRAMAJIT SEN , JJ.]

International Law - Incident of killing of two fishermen by two marines of Italy - At the distance of 20.5 nautical miles from the Indian sea-coast, off the coastline of the State of Kerala - Initiation of Criminal proceedings against the marines by the Sate of Kerala - Writ Petition by Republic of Italy and SLP by the two marines questioning the jurisdiction of Republic of India and the State of Kerala to investigate and try the case - Supreme Court disposed of the Petitions holding that the State of Kerala had no jurisdiction to investigate and try the case and Union of India had jurisdiction to proceed with the investigation and trial until it was proved that Article 100 of UNCLOS, 1982 was applicable to the case - Direction was given to Union of India to set up Special Court to try the case and to dispose of the same in accordance with the provisions of the Maritime Zones Act, 1976, IPC, Cr.P.C. and provisions of UNCLOS, 1982 - Matter mentioned before supreme Court stating that Government of India received a communication from the Embassy of Italy which indicated that the Government of Italy had decided not to return the accused marines to India to stand trial - Court after giving certain directions enquired as to what steps were taken to constitute the Special Court - The Court was informed that National Investigation Agency was appointed to take-over the investigation - Handing-over the investigation to the National Investigation Agency was opposed by the accused marines - Held: Supreme Court cannot be called upon to decide as to

which would be the agency to investigate - It is for the Central Government to take decision in the matter - As the Central Government has duly taken steps in terms of the directions given in the main judgment, it is left to the Central Government to take further steps in the matter.

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

Under Article 32 of the Consitution of India.

WITH

SLP (C) No. 20370 of 2012.

Goolam E. Vahanvati, AG, Siddharth Luthra, Mukul Rohatgi, Suhail Dutt, Diljeet Titus, Viplav Sharma, Jagjit Singh Chhabra, Ujjwal Sharma, Ninad Laud, Achint Singh Gyani, Sulabh Sharma, S.A. Haseeb, Anoopam Prasad, B. Krishna Prasad, Rekha Pandey, S.S. Rawat, Supriya Juneja, Arjun Diwan, D.S. Mahra, Ramesh Babu M.R., Sushrut Jindal for the appearing parties.

The order of the Court was delivered by

O R D E R

ALTAMAS KABIR, CJI. 1. These proceedings are an offshoot of the judgment delivered by this Court on 18th January, 2013, disposing of Writ Petition (Civil) No.135 of 2012 filed by the Republic of Italy through its Ambassador in India and the two marines who had been arrested by the Kerala Police in connection with the killing of two Indian fishermen on board an Indian fishing vessel at a distance of 20.5 nautical miles from the Indian sea-coast off the coastline of the State of Kerala. While the Special Leave Petition was filed by the two marines challenging the dismissal of their Writ Petition No.4542 of 2012 by the Kerala High Court rejecting their prayer for quashing of FIR No.2 of 2012 on the file of the Circle Inspector of Police, Neendakara, Kollam District, Kerala, as being without

jurisdiction, the Writ Petition (Civil) No.135 of 2012 was also filed for much the same reliefs. Both the matters were, therefore, taken up together for hearing and were disposed of together on 18th January, 2013.

2. While disposing of the two matters, this Court held that the State of Kerala had no jurisdiction to investigate into the incident and that till such time it is proved that the provisions of Article 100 of UNCLOS, 1982, applied to the facts of this case, it is the Union of India which alone has the jurisdiction to proceed with the investigation and trial of the Petitioner Nos.2 and 3 in the Writ Petition. We, accordingly, directed the Union of India, 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 the provisions of UNCLOS 1982. It was further directed that the proceedings before the Chief Judicial Magistrate, Kollam, would stand transferred to the Special Court to be constituted in terms of the judgment, upon the expectation that the trial would be conducted expeditiously. Liberty was given to the Petitioners to re-agitate the question of jurisdiction once the evidence was adduced on behalf of the parties.

3. On 14th March, 2013, the matter was mentioned by the learned Attorney General, on basis of Note Verbale No.89/635 dated 11th March, 2013, received by the Ministry of External Affairs, Government of India, from the Embassy of Italy in New Delhi, whereby it was indicated that the Government of Italy had decided not to return the accused marines to India to stand trial for the offences alleged to have been committed by them. Pursuant to the directions given on that date, the matter was again listed on 2nd April, 2013, and the learned Attorney General was requested by the Court to indicate what steps had been taken for constitution of a separate Court to try the two Italian marines separately on a fast track basis, in order to dispose of the matter as quickly as possible. The matter was

then listed again on 22nd April, 2013, when the learned Attorney General informed the Court that pursuant to the directions of this Court in its judgment dated 18th January, 2013, the Government of India, in the Ministry of Home Affairs, had appointed the National Investigation Agency created under the National Investigation Agency Act, 2008, to take over the investigation on the basis of FIR No.2 of 2012 dated 29th August, 2012, Coastal PS Neendakara, Kollam. The case was re-registered at PS NIA, New Delhi as Case No.RC-04/2013/ NIA/DLI under Sections 302, 307, 427 read with Section 34 of the 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. The learned Attorney General submitted that the case is under investigation by the National Investigation Agency, and such investigation would be completed shortly.

4. The submissions made by the learned Attorney General were vehemently opposed by Shri Mukul Rohatgi, learned Senior Advocate, on behalf of the accused mainly on the ground that by handing over the investigation to the National Investigation Agency, the Government was also altering the forum before which the matter could be heard. Furthermore, by entrusting the investigation to the National Investigation Agency, the investigating authorities were being permitted to invoke the provisions of the Suppression of Unlawful Acts Against Safety of Maritime Navigation and Fixed Platforms on Continental Shelf Act, 2002, which provides for death penalty in regard to cognizance being taken on any of the scheduled offences. Mr. Mukul Rohtagi, learned Senior Advocate, who appeared for the Petitioners, urged that since the provisions of the aforesaid Act had not been included in the original charge-sheet, the investigating authorities could not be permitted to take recourse to the same, especially when directions had been given by this Court in the judgment dated 18th January, 2013, that the case was to be tried under the provisions of the Maritime Zones Act,

1976, the Indian Penal Code, the Code of Criminal Procedure and the provisions of UNCLOS 1982.

5. Mr. Rohtagi submitted that since the National Investigation Agency could only try the Scheduled Offences, referred to in the Act, the investigation could not, in any event, be taken up under the National Investigation Agency Act, 2008.

6. Having heard the learned Attorney General for India and Mr. Mukul Rohtagi for the Petitioners, we do not see why this Court should be called upon to decide as to the agency that is to conduct the investigation. The direction which we had given in our judgment dated 18th January, 2013, was in the context of whether the Kerala Courts or the Indian Courts or even the Italian Courts would have the jurisdiction to try the two Italian marines. It was not our desire that any particular Agency was to be entrusted with the investigation and to take further steps in connection therewith. Our intention in giving the direction for formation of a special Court was for the Central Government to first of all entrust the investigation to a neutral agency, and, thereafter, to have a dedicated Court having jurisdiction to conduct the trial. Since steps have been duly taken for the appointment of a Court of competent jurisdiction to try the case, the Central Government appears to have taken steps in terms of the directions given in our judgment dated 18th January, 2013. It is for the Central Government to take a decision in the matter.

7. If there is any jurisdictional error on the part of the Central Government in this regard, it will always be open to the accused to question the same before the appropriate forum.

8. We, therefore, take note of the steps taken by the Central Government pursuant to the directions given in our judgment dated 18th January, 2013, and leave it to the Central Government to take further steps in the matter.

9. In addition to the above, we sincerely hope that the

investigation will be completed at an early date and the trial will also be conducted on a day-to-day basis and be completed expeditiously as well.

10. The terms and conditions regarding bail, as were indicated in our Order dated 18th January, 2013, will continue to remain operative in the meantime.

K.K.T. Matters disposed of.

STATE OF RAJASTHAN & ANR.

v.

MILAP CHAND JAIN & ANR. ETC.

(Special Leave Petition (C) Nos.20363-20368 of 2013)

MAY 1, 2013

[GYAN SUDHA MISRA AND J. CHELAMESWAR, JJ.]

Constitution of India, 1950 – Article 136 – SLPs filed by petitioner-State challenging the same order which was the subject matter of challenge in previous SLPs – Held: A fresh batch of SLPs against the impugned judgment and order against which SLPs were earlier dismissed, cannot be entertained by a coordinate Bench unless the coordinate Bench were inclined to take a different view and were to refer the matter to a larger Bench – On facts, although the question of law was allowed to be kept open in the earlier matter, no discriminatory treatment should be meted out to another set of teachers who were affected by one and the same order of the State of Rajasthan, wherein the order of the State was set aside by the High Court and one batch of special leave petitions against the same as also Review were dismissed – The implication of the observation in regard to the fact that the question of law was allowed to be kept open was meant to be urged in a matter arising out of a subsequent event in which a similar question arose – Insofar as instant SLPs are concerned, that is not the situation as the SLPs have been filed by the petitioner-State of Rajasthan against the same impugned order, which was the subject matter of challenge in the earlier appeals – Instant SLPs fit to be dismissed solely on the ground of parity –Practice and Procedure.

CIVIL APPELLATE JURISDICTION : SLP (Civil) Nos. 20363-20368 of 2013.

From the Judgment & Order dated 29.11.2011 of the High

Court of Judicature for Rajasthan Jaipur bench at Jaipur in D.B. Civil Special Appeal (Writ) Nos. 29, 105, 154, 277, 564 & 673 of 2005.

WITH

SLP Nos. 20386-20390, 20373-20377, 20379-20383, 20378, 20812, 14592 of 2013 and SLP (Civil) No. C.C. No. 9440 of 2013 and SLP (C) No. 34866 of 2012.

Dr. Manish Singhvi, AAG (for Irshad Ahmad), Manoj Swarup, Lalita Kohli (for Manoj Swarup & Co.) Pragati Neekhra for the Petitioners.

Ashok Gaur, S.P. Sharma, Ranjit Kumar, Abhishek Gupta, Ajat Shatru Mina, Sumit Attri, Kiran Suri, S.J. Amith for the Respondents.

The following order of the Court was delivered by

O R D E R

SLP(C)..C.C.NOS.7465-7470/2012,8287-8291/2012, 8403-8407/2012, 8464-8468/2012, 19503/2012, SLP(C) No.34866/2012, C.C.No.9200/2013, SLP(C) No.14952/2013

1. Delay condoned.

2. This batch of special leave petitions are directed against the judgment and order of the High Court of Rajasthan dated 29.11.2011 by which the appeals filed by the petitioner-State of Rajasthan were rejected by the Division Bench observing therein that the Apex Court has already dismissed the appeal of the State against the impugned judgment and order dated 10.3.2011. This order was passed by this Court in a batch of petitions (C.A. Nos.469 of 2007 and C.A. No.470 of 2007)

Thereafter, the petitioner-State filed review petitions against the order dated 10.3.2011 passed in the aforesaid petitions in which they also raised the grounds on the merit of the matter but the review petitions were also dismissed.

3. Thereafter, instant batch of special leave petitions were filed by the petitioner-State challenging the same order which was the subject matter of challenge in the previous special leave petitions. But it is obvious that a fresh batch of special leave petitions against the impugned judgment and order against which special leave petitions were dismissed, cannot be entertained by a coordinate Bench unless the coordinate Bench were inclined to take a different view and were to refer the matter to a larger Bench.

4. Having heard the counsel for the parties, we are of the view that although the question of law was allowed to be kept open in the earlier matter, no discriminatory treatment should be meted out to another set of teachers who were affected by one and the same order of the State of Rajasthan, wherein the order of the State was set aside by the High Court and one batch of special leave petitions against the same as also Review were dismissed. The implication of the observation in regard to the fact that the question of law was allowed to be kept open obviously was meant to be urged in a matter arising out of a subsequent event in which a similar question arose.

5. Insofar as these special leave petitions are concerned, that is not the situation as the special leave petitions have been filed by the petitioner-State of Rajasthan against the same impugned order, which was the subject matter of challenge in the earlier appeals, as already stated hereinabove. We are further conscious of the fact that if a view different from the earlier order were to be taken by this Court for any reason whatsoever, appropriate reasons could be assigned in this regard. But if a similar view is taken, then dismissing one set of the batch of matters but allowing the other set, is bound to result into unjust discrimination to the same class of persons.

Apart from the fact that, we see no ground to differ from the view taken earlier, we have been informed that the financial implication of the payment towards Carrier Advancement Scheme is borne by the University Grants Commission to the extent of 80% and only 20% is to be borne by the petitioner-State. If the petitioner-State has accepted the grant to the extent of 80% from the University Grants Commission and the State has to add 20%, it is not open for the State to urge that it will not bear the 20% financial liability specially when its plea already stands rejected. If the petitioner-State at all had any reason to deny this claim in spite of the entitlement of the respondent-teachers, the State in the first place should not have accepted 80% grant from the University Grants Commission. These observations have been recorded herein merely in the interest of fairness and justice to the parties as these special leave petitions are fit to be dismissed solely on the ground of parity as the High Court had also refused to entertain the writ appeals on the ground of parity which clearly implies that any other view different from the one taken earlier is bound to result into unjust and discriminatory treatment which we cannot permit to prevail.

6. The special leave petitions are, thus, devoid of merit and are, therefore, dismissed.

S.L.P.(C)...CC NO. 9440 of 2013

7. The counsel for the petitioner, Mr. Manoj Swarup, submitted that this petition is not maintainable as the petitioner had not moved the High Court before the Division Bench against the judgment and order of the Single Bench. He may, therefore, be permitted to withdraw this special leave petition.

8. In view of his request, the special leave petition is dismissed as withdrawn.

B.B.B. SLP dismissed.

HABIB

v.

STATE OF UTTAR PRADESH

(Criminal Appeal No. 911 of 2007 etc.)

MAY 1, 2013

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

Penal Code, 1860 – s.302 – Prosecution of 3 accused – Acquittal by trial court – High Court convicting 2 of the accused and upholding acquitted of one – Appeal by the convicted accused – Held: Prosecution case is supported by evidence of eye-witnesses and medical evidence – Conviction upheld.

Administrationof Criminal Justice – If two views are possible, one pointing to the guilt and other to the innocence, view favourable to the accused to be adopted.

Motive – Evidentiary value – Held: Motive loses its significance in case of direct trust-worthy evidence.

Witness – Interested witness – Evidentiary value – A witness, if trustworthy, cannot be discarded merely because, it is interested.

Appeal – Appeal against acquittal – Held: In such appeal, appellate court is required to re-appreciate the evidence.

The Appellants-accused 'H' and 'M' alongwith another accused were prosecuted for murder. As per prosecution, there were eye-witnesses to the incident. Trial court acquitted all the accused. In appeal, High Court maintained the acquittal of one accused, but setting aside the acquittal of appellants-accused, convicted accused 'H' u/s 302 IPC and convicted accused 'M' u/s 302/34 IPC. Hence, the present appeals.

Dismissing the appeals, the Court

HELD: 1. The High Court has correctly appreciated the oral and documentary evidence, including the medical evidence of PW6 and rightly came to the conclusion that the trial court had committed an error in discarding their evidence. [Para 10] [483-B]

2. In an appeal against acquittal, the appellate court is entitled to re-appreciate the evidence on record if the court finds that the view of the trial court acquitting the accused was unreasonable or perverse. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to the innocence, the view which is favourable to the accused should be adopted. However, the paramount consideration of the court is to ensure that miscarriage of justice is prevented. [Para 10] [483-B-D]

State of Punjab vs. Ajaib Singh and Ors. **(2005) 9 SCC 94;** *V.N.Ratheesh v. State of Kerala* **(2006) 10 SCC 617: 2006 (3) Suppl. SCR 314 – relied on**

3. If there is direct trustworthy evidence of witnesses as to the commission of offence, motive part loses its significance. Therefore, if the genesis of the occurrence is proved, the ocular testimony of the witnesses could not be discarded only by the reason of the absence of motive, if otherwise the evidence is worthy of reliance. [Para 6] [481-F-G]

Sheo Shankar Singh vs. State of Jharkhand **(2011) 3 SCC 654: 2011(4) SCR 312;** *Bipin Kumar Mondal vs. State of West Bengal* **(2010) 12 SCC 91: 2010 (8) SCR 1036 – relied on.**

4. The mechanical rejection of the evidence on the sole ground that it is interested, would invariably lead to the failure of justice. The mere fact that PW1 and PW2 are interested witnesses, being relatives, is not a reason to discard their evidence, if the evidence is trustworthy. Both, PW 1 and PW 2 have, categorically stated that the first shot was fired by appellant-accused 'M' but missed his aim and it was appellant-accused 'H' who fired the fateful shot at the neck of the deceased and thereafter three culprits ran away from the spot. Prosecution also placed reliance on the testimony of PW 3, who was a co-villager of the informant and he fully corroborated the testimony of other witnesses regarding the part played by the three accused persons in the commission of crime. Nothing could be brought out in the corss-examination of PW1, PW2, PW3 to discredit their statement. [Paras 7, 8] [482-A-E]

Brathi vs. State of Punjab **(1991) 1 SCC 519: 1990 (2) Suppl. SCR 503;** *State of Jammu and Kashmir vs. S. Mohan Singh and Anr.* **(2006) 9 SCC 272;** *Shyamal Ghosh vs. State of West Bengal* **(2012) 7 SCC 646: 2012 (10) SCR 95 – relied on.**

Case Law Reference

2011 (4) SCR 312	**relied on**	**Para 6**
2010 (8) SCR 1036	**relied on**	**Para 6**
1990 (2) Suppl. SCR 503	**relied on**	**Para 8**
(2006) 9 SCC 272	**relied on**	**Para 8**
2012 (10) SCR 95	**relied on**	**Para 8**
(2005) 9 SCC 94	**relied on**	**Para 10**
2006 (3) Suppl. SCR 314	**relied on**	**Para 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 911 of 2007.

From the Judgment & Order dated 23.3.2007 of the High Court of Judicature at Allahabad in Government Appeal No. 114 of 1982.

WITH

Crl. A.No. 915 of 2007.

M.Z. Chaudhary, Aftab Ali Khan for the Appellant.

Vibhu Tiwari, Bharti Tyagi, Ravi Prakash Mehrotra for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. The appellants herein were charge-sheeted for the offences punishable under Section 302 of the Indian Penal Code. The accused Habib was charge-sheeted under Section 302 IPC and the remaining two accused persons including Manuwa were charge-sheeted under Section 302 read with 34 IPC, however, Manuwa was also charge-sheeted under Section 307 IPC as well.

2. The trial court after appreciating the oral as well as documentary evidence acquitted all the accused persons vide its judgment dated 3.10.2008. Aggrieved by the said order the State preferred G.A. No.114 of 1982 before the High Court of judicature at Allahabad. The High Court, vide its judgment dated 23.3.2007 confirmed the acquittal of the accused Bhappa but acquittal of Habib and Manuwa was set aside. Habib was found guilty and convicted for the offences punishable under Section 302 IPC and accused Manuwa was convicted under Section 302 read with Section 34 IPC. Aggrieved by the said order Habib has filed Criminal Appeal No.911 of 2007 and Manuwa has filed Criminal Appeal No.915 of 2007.

3. The prosecution story is that Sammo, daughter of deceased Fakira and sister of Hamid (PW 1) - complainant was married to Habib, one of the accused. Sammo left the matrimonial home due to demand of dowry. Later PW 1 settled her marriage with another person but the nikah was not performed since no divorce was obtained from her husband–accused Habib. The prosecution version is that on 13.1.1981 at about 6.30 PM PW 1 Hamid accompanied by his father Fakira (deceased), his brother Rafique, servant Ashraf and other person namely Kailash Chandra were proceeding to a place Goverdhan along with cattle through a canal road. The accused Manuwa, his son Habib, appellants herein, and his brother Bhappa met PW 1 and others on the way and enquired about their destination. PW 1 informed that they are going to Goverdhan for cattle business. On seeing them, accused Manuwa instigated his sons Habib and Bhappa to challenge PW 1 and others. Manuwa himself opened fire with a view to kill Fakira, but it did not hit Fakira, Habib also opened fire and shot Fakira at his neck and he fell down and died on the spot. PW1 Hamid lodged a report to the police station Goverdhan, Mathura on 13.1.1981 at about 8.45 PM. Thereafter a case Crime No.13 under Section 302 IPC was registered. The case was tried by the Sessions Judge, Mathura. Prosecution, in order to bring home the charge, examined PW 1 Hamid, the informant, PW 2 Rafique, brother of the deceased, PW 3 Kailash Chandra, eye-witness to the murder, PW 4 Radhey Shayam, head constable, PW 5 Ram Kheladi, constable, PW 6 Dr. K.K. Khanna, CMO of Mathura to prove the post-mortem report, prepared by Dr. K.K. Seth. PW 7 Brijpal Singh – Investigating Officer and PW 8 Bankey Lal, constable. On the side of the defence, accused examined Abdul as DW1 and Rajendra Prasad Pandey as DW2.

4. Sessions Court after appreciating the oral and documentary evidence acquitted all the accused persons and on appeal preferred by the State, the High Court reversed the judgment of the trial court and, as already stated, convicted the

accused persons and sentenced them to undergo imprisonment for life.

5. Mr. M.Z. Chaudhary, learned counsel appearing for the appellants submitted that the High Court has committed a serious error in reversing the order acquittal which was passed by the trial court after appreciating the oral and documentary evidence adduced by the prosecution as well as by the defence. He submitted that various circumstances pointed out by the trial court in disbelieving the evidence of the prosecution witnesses should not have been disturbed by the High court and no reason exist to do so. Learned counsel also pointed out that the eye-witnesses are closely related and there are possibilities of false implication due to some grudge entertained by the deceased and the complainant against the accused persons since PW 1's sister was married to Habib.

6. Sammo, sister of Hamid, as already stated, was married to accused - Habib, son of Manuwa and the third accused Bhappa is real brother of Manuwa and uncle of Habib. Sammo left the matrimonial home due to strained relationship with Habib, the accused. Prior to the incident the deceased and PW 1 had settled the marriage of Sammo with somebody before getting divorce from Habib. The motive for the murder was the strained relationship between the accused persons and PW 1 and the deceased. It is settled legal position that if there is direct trustworthy evidence of witnesses as to the commission of offence, motive part loses its significance. Therefore, if the genesis of the occurrence is proved, the ocular testimony of the witnesses could not be discarded only by the reason of the absence of motive, if otherwise the evidence is worthy of reliance. This legal position has been settled by this Court in its Judgment in *Sheo Shankar Singh v. State of Jharkhand* (2011) 3 SCC 654 and Bipin Kumar Mondal *v.* State of West Bengal (2010) 12 SCC 91.

7. We are of the view that the mere fact that PW 1 Hamid, PW 2 Rafique are son and brother of the deceased, that itself

is not a ground to disbelieve their evidence. Both, PW 1 and PW 2 have, categorically stated that the first shot was fired by Manuwa but missed his aim and it was Habib who fired the fateful shot at the neck of the deceased and thereafter three culprits ran away from the spot. Prosecution also placed reliance on the testimony of PW 3, Kailash Chandra who is a co-villager of the informant and he fully corroborated the testimony of other witnesses regarding the part played by the three accused persons in the commission of crime. We have gone through the depositions of PW1, PW2, PW3 and nothing could be brought out in the corss-examination to discredit their statement.

8. We are of the view, the mere fact that PW1 and PW2 are interested witnesses being relatives is not a reason to discard their evidence, if the evidence is trustworthy. This Court in *Brathi v. State of Punjab* (1991) 1 SCC 519 held that the mechanical rejection of the evidence on the sole ground that it is interested would invariably lead to the failure of justice. In *State of Jammu and Kashmir v. S. Mohan Singh and Another* (2006) 9 SCC 272 this Court held that in a murder trial, merely because a witness is interested or inimical, his evidence cannot be discarded unless the same is otherwise found to be trustworthy. In *Shyamal Ghosh v. State of West Bengal* (2012) 7 SCC 646 this Court held that merely because three witnesses were related to the deceased, the other witnesses, not similarly paced would not attract any suspicion of the court on the credibility and worthiness of their statements.

9. The medical evidence of PW6, Dr. K.K. Khan, who was examined to prove the port-mortem report by Dr. K.K. Seth, would indicate that Fakira was done to death as a result of gunshot injury on his neck. The doctor, who conducted the autopsy found that death had taken place about one day prior to the examination which was done at 5.30 PM on 14.1.1981. Doctor also found one gun short wound of entry trachea deep on the front of neck and there were fractures of third and fourth

cervical vertebrae and laceration at the level of third and fourth cervical vertebrae.

10. We are of the view that the High Court has correctly appreciated the oral and documentary evidence, including the evidence of PW6, the Chief Medical Officer and rightly came to the conclusion that the trial court had committed an error in discarding their evidence. This Court in *State of Punjab v. Ajaib Singh and Others* (2005) 9 SCC 94, also recorded that in an appeal against acquittal, the appellate court is entitled to re-appreciate the evidence on record if the court finds that the view of the trial court acquitting the accused was unreasonable or perverse. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to the innocence, the view which is favourable to the accused should be adopted. However, the paramount consideration of the court is to ensure that miscarriage of justice is prevented as noted in the Judgment of this Court in *V.N. Ratheesh v. State of Kerala* (2006) 10 SCC 617.

11. We are of the considered view that the High Court has rightly found that the finding recorded by the trial court was unreasonable and perverse and reversed the order of acquittal passed by the trial Court. The appeals, therefore, lack merits and the same are dismissed.

K.K.T. Appeals dismissed.

MADHAO AND ANR.
v.
STATE OF MAHARASHTRA AND ANR.
(Criminal Appeal No.684 of 2013)

MAY 3, 2013

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

Code of Criminal Procedure, 1973 – ss.156(3) and 190 – Government of Maharashtra framed scheme as per which land was to be purchased by the Government and made available to SCs and neo-Buddhists below the poverty line – Appellants while working under the Scheme were involved in execution of sale deeds in favour of the Government of Maharashtra – Complaint against appellants and others alleging that under the said scheme, certain land was purchased from a dead person – Direction of Magistrate to the Police to investigate the matter u/s.156(3) and to submit a detailed report within one month – Challenged – Held: Magistrate before taking cognizance of the offence can order investigation u/s.156(3) – When a Magistrate receives a complaint he is not bound to take cognizance – If on a reading of the complaint, he finds that the allegations therein disclose a cognizable offence and forwarding of the complaint to the police for investigation u/s.156(3) will be conducive to justice and save the valuable time of the Magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence itself – Where a Magistrate orders investigation by the police before taking cognizance u/s.156(3) and receives the report thereupon he can act on the report and discharge the accused or straightaway issue process against the accused or apply his mind to the complaint filed before him and take action u/s.190– In the instant case, while issuing direction for

investigation u/s.156(3), the Magistrate did not exceed his power nor violated any of the provisions contained in CrPC – Procedure adopted and power exercised by the Magistrate was acceptable and in accordance with the scheme of CrPC.

The Government of Maharashtra framed a scheme as per which land was to be purchased by the Government and made available to Scheduled Castes and neo-Buddhists below the poverty line. As per the Scheme, a Committee was constituted in each district and the Collector of the district was to act as Head of the Committee. Appellant No.1 while working as Special District Welfare Officer and Member Secretary of the Samiti under the Scheme, did several transactions under the supervision of the District Collector. Appellant No.2 was working as Assistant of appellant No.1 in the said Scheme. She was authorized by appellant No.1 to get Sale deeds executed in favour of the Government of Maharashtra under the Scheme.

A person claiming himself to be a Social Worker, filed a Criminal Complaint in the court of the Judicial Magistrate, First Class, against the appellants, Sub-Registrar and few more persons alleging that the accused persons had purchased certain land from a dead person, while the appellants were acting in their official capacity under the said Scheme. The Magistrate directed the Police to investigate the matter under Section 156(3) CrPC and to submit a detailed report within one month. The appellants filed application under Section 482 of Cr.P.C. seeking quashing of their prosecution. High Court dismissed the application.

The procedure adopted and the power exercised by the Magistrate ordering investigation under Section 156(3) of Cr.P.C. was challenged in the instant appeals.

The question that arose for consideration was whether the Magistrate was justified in directing the Police to investigate and submit a detailed report within one month under Section 156(3) CrPC.

Dismissing the appeals, the Court

HELD: 1. Sub-section (3) of Section 156 CrPC enables any Magistrate empowered under Section 190 may order such an investigation in terms of sub-section (1) of that section. Any judicial magistrate before taking cognizance of the offence can order investigation under Section 156(3) CrPC. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein. [Paras 11, 12] [493-C-D; 494-A-B]

CREF Finance Ltd. v. Shree Shanthi Homes (P) Ltd. and Anr. **(2005)7 SCC 467: 2005 (2) Suppl. SCR 873 – relied on.**

2.1. When a magistrate receives a complaint he is not bound to take cognizance, and has discretion in the matter. If on a reading of the complaint, he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156(3) will be conducive to justice and save the valuable time of the magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence itself. In the case of a complaint regarding the commission of cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). However, if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to revert back to the pre-cognizance stage and avail of Section 156(3). [Para 13] [494-C-F]

2.2. Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives: (*a*) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightaway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses; (*b*) The Magistrate can postpone the issue of process and direct an enquiry by himself; (*c*) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police. [Para 14] [494-F-H; 495-A-B]

2.3. In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint. [Para 15] [495-B-C]

2.4. Where a Magistrate orders investigation by the police before taking cognizance under Section 156(3) CrPC and receives the report thereupon he can act on the report and discharge the accused or straightaway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190 CrPC. [Para 16] [495-C-D]

Devarapalli Lakshminarayana Reddy and Ors. **(1976) 3 SCC 252: 1976 (0) Suppl. SCR 524 and** *Tula Ram and Ors. v. Kishore Singh* **(1977) 4 SCC 459: 1978 (1) SCR 615 – relied on.**

3. In the instant case, while issuing direction for investigation under Section 156(3) CrPC, the magistrate has not exceeded his power nor violated any of the provisions contained in the Code of Criminal Procedure. The magistrate need not order any investigation if he presupposes to take cognizance of the offence and once he takes cognizance of the offence, he has to follow the procedure provided in Chapter XV of the Code. The procedure adopted and the power exercised by the magistrate in this case is acceptable and in accordance with the scheme of the Code. [Paras 18, 19] [495-E-G; 496-A-B]

Case Law Reference:

2005 (2) Suppl. SCR 873	**relied on**	**Para 12**
1976 (0) Suppl. SCR 524	**relied on**	**Para 17**
1978 (1) SCR 615	**relied on**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 684 of 2013.

From the Judgment & Order dated 02.09.2009 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Criminal Application No. 3112 of 2006.

WITH

Crl. A. Nos. 685, 686 & 687 of 2013

Uday U. Lalit, Gaurav Agrawal, Shankar Narayanan, Sharmila Upadhyay, Prashant Kumar for the Appellants.

Shankar Chillarge, AGA, Asha Gopalan Nair, Sudhanshu S. Choudhari, Watsalya Veg, Rajshri Dubey for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted in all the special leave petitions.

CRIMINAL APPEAL NO. OF 2013

(Arising out of S.L.P. (Crl.) No. 7293 of 2009)

2. This appeal is directed against the final judgment and

order dated 02.09.2009 passed by the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in Criminal Application No. 3112 of 2006 whereby the High Court dismissed the appeal filed by the appellants herein while confirming the order dated 27.09.2005, passed by the Court of Judicial Magistrate, First Class, Ghatanji in Criminal Complaint Case No. 92 of 2005.

3. **Brief facts:**

(a) The Government of Maharashtra has published a Government Resolution on 02.06.2004 wherein it was informed to the public at large that the percentage of educated un-employed amongst the Scheduled Caste and neo-Buddhist are on the higher side and those who are below poverty line are required to work under different schemes and their standard of living is consequently adversely affected. For the said reason, it was resolved that land should be made available to such people to create a source of income for them. For the said purpose, a scheme was framed by name Karamveer Dadasaheb Gaikwad Sabalikaran and Swabhiman Yojana Samiti. As per the Scheme, a Committee was constituted in each district and the Collector of the district was to act as Head of the Committee. The said Scheme was made applicable with effect from 01.04.2004. As per the Scheme, land was to be purchased by the Government and was to be made available to the persons belonging to the Scheduled Caste and neo-Buddhist who were below poverty line.

(b) Madhao Rukhmaji Vaidya-Appellant No.1 herein while working as Special District Welfare Officer and Member Secretary of the Samiti under the Scheme, did several transactions under the supervision of District Collector, Yavatmal. Sau. Sadhana Mahukar Yavalkar-appellant No.2, a Warden at Government Hostel, Ghatanji, District Yavatmal was working as Assistant of appellant No.1 in the said Scheme. She was authorized by appellant No.1 to get the Sale deeds

executed in favour of the Government of Maharashtra under the Scheme.

(c) On 04.04.2005, the State Government purchased agricultural land situated at village Koli-Bujruq. The said land was jointly owned by eight persons. The appellants, after perusing the revenue records of the said land purchased it from the Vendors by getting executed a registered sale deed. At the time of execution of sale deed, on 07.05.2005, an affidavit was sworn by the Vendors that they were residents of Mouza Koli-Buzruq, Tahsil Ghatanji, District Yavatmal and were the owners of Gut No. 43 of the said property.

(d) On 04.06.2005, A newspaper by name “Tarun Bharat” published an article in which it was alleged that the petitioners have purchased agricultural land showing Ramesh as alive while he was dead. It was further alleged that one Ramesh Shikaji Rathod had signed the sale deed as Ramesh Shika Jadhav.

(e) On coming to know about the said publication, appellant No. 1 on 29.06.2005 made an enquiry and recorded the statements of the said eight Executants and on 02.07.2005 lodged a report in Ghatanji P.S. against them for an offence of impersonation and cheating.

(f) On 07.07.2005, the officials of Ghatanji P.S. registered offences punishable under Sections 420, 419, 468 and 34 of the Indian Penal Code, 1860 (for short ‘IPC’) for the acts of fraud, criminal breach of trust and impersonation against the said accused persons vide Crime No. 88 of 2005.

(g) On 09.09.2005, one Rajnikant Deluram Borele, claiming himself to be a Social Worker, filed a Criminal Complaint in the court of the Judicial Magistrate, First Class, Ghatanji, which was registered as Case No. 92 of 2005 against the appellants-herein, Sub-Registrar and few more persons. In the complaint it was alleged that the accused had purchased

the land from a dead person, namely, Ramesh Shikaji Jadhav, while the appellants were acting in their official capacity under the said Scheme.

(h) Learned Magistrate, by order dated 27.09.2005, directed the Police to investigate the matter under Section 156(3) of the Code of Criminal Procedure Code, 1973 (in short the "Code") and to submit a detailed report within one month.

(i) On 15.09.2006, the appellants (Madhao Rukhmaji Vaidya and Sau. Saudhana Mahukar Yavalkar) filed an application under Section 482 of Cr.P.C. being Criminal Application No. 3112 of 2006 before the Bombay High Court seeking quashing of the prosecution of the applicants (appellants herein) in Crime No. 92 of 2005.

(j) On 02.09.2009, after hearing the parties, the High Court dismissed the Criminal Application preferred by the appellants-herein by holding that the procedure adopted and the power exercised by the Magistrate ordering investigation under Section 156(3) of Cr.P.C. is just and proper.

(k) Being aggrieved, appellants herein filed SLP No. 7293 of 2009.

CRIMINAL APPEAL NO. OF 2013

(Arising out of S.L.P. (Crl.) No. 7324 of 2009)

4. On 27.09.2006, one of the accused, namely, Akash Dattatraya Marawar (A-1), business man, also filed Criminal Application No. 3242 of 2006 before the High Court seeking quashing of the prosecution in Crime No. 92 of 2005. The High Court, by order dated 02.09.2009, dismissed the application. Being aggrieved, he filed special leave petition No. 7324 of 2009.

CRIMINAL APPEAL NO. OF 2013

(Arising out of S.L.P. (Crl.) No. 7332 of 2009)

5. On 24.10.2006, another accused, namely, Omprakash Hiralal Jaiswal, Sub-Registrar, also filed Criminal Application No. 3526 of 2006 before the High Court seeking quashing of the prosecution in Crime No. 92 of 2005. The High Court, by order dated 02.09.2009, dismissed the application. Being aggrieved, he filed special leave petition No. 7332 of 2009.

CRIMINAL APPEAL NO. OF 2013

(Arising out of S.L.P. (Crl.) No. 7693 of 2009)

6. On 29.10.2006, one of the accused, namely, Aslam Shakil Julphikar Khan, employee of Akash Dattatraya Marawar (A-1), business man, also filed Criminal Application No. 3240 of 2006 before the High Court seeking quashing of the prosecution in Crime No. 92 of 2005. The High Court, by order dated 02.09.2009, dismissed the application. Being aggrieved, he filed special leave petition No 7693 of 2009.

7. Heard Mr. Uday U. Lalit, learned senior counsel for the appellant and Mr. Shankar Chillarge, learned Additional Advocate General for the respondent-State of Maharashtra.

8. The only point for consideration in all these appeals is whether the learned Magistrate is justified in directing the Police to investigate and submit a detailed report within one month under Section 156(3) of the Code.

9. The order of the learned Magistrate shows that before passing the direction for investigation under Section 156(3), heard the counsel for the complainant, perused the allegations made against the accused in the complaint and documents annexed therewith. It also shows that taking note of the fact that some of the accused are public officers and after observing that it needs proper investigation prior to the issue of process against the accused under Section 156(3) of the Code directed the P.S.O. Ghatanji to investigate the matter and submit a detailed report within one month.

10. Chapter XIV of the Code speaks about conditions requisite for initiation of proceedings. Section 190 deals with cognizance of offences by Magistrates. In terms of sub-section (1) subject to the provisions of the said Chapter, any Magistrate of first class, and any Magistrate of the second class specially empowered in this behalf under sub-section (2), may take cognizance of any offence – (a) upon receiving a complaint of facts which constitute such offence; (b) upon a police report of such facts; (c) upon information received from any person other than a police officer, or upon his own knowledge, that such offence has been committed.

11. Sub-section (3) of Section 156 of the Code enables any Magistrate empowered under Section 190 may order such an investigation in terms of sub-section (1) of that section.

12. In *CREF Finance Ltd.* vs. *Shree Shanthi Homes (P) Ltd. and Another*, (2005) 7 SCC 467, while considering the power of a Magistrate taking cognizance of the offence, this Court held:

> "10. …. Cognizance is taken at the initial stage when the Magistrate peruses the complaint with a view to ascertain whether the commission of any offence is disclosed. The issuance of process is at a later stage when after considering the material placed before it, the court decides to proceed against the offenders against whom a prima facie case is made out. It is possible that a complaint may be filed against several persons, but the Magistrate may choose to issue process only against some of the accused. It may also be that after taking cognizance and examining the complainant on oath, the court may come to the conclusion that no case is made out for issuance of process and it may reject the complaint. It may also be that having considered the complaint, the court may consider it appropriate to send the complaint to the police for investigation under Section 156(3) of the Code of Criminal Procedure…."

It is clear that any judicial magistrate before taking cognizance of the offence can order investigation under Section 156(3) of the Code. If he does so, he is not to examine the complainant on oath because he was not taking cognizance of any offence therein.

13. When a magistrate receives a complaint he is not bound to take cognizance if the facts alleged in the complaint disclose the commission of an offence. The magistrate has discretion in the matter. If on a reading of the complaint, he finds that the allegations therein disclose a cognizable offence and the forwarding of the complaint to the police for investigation under Section 156(3) will be conducive to justice and save the valuable time of the magistrate from being wasted in enquiring into a matter which was primarily the duty of the police to investigate, he will be justified in adopting that course as an alternative to taking cognizance of the offence itself. As said earlier, in the case of a complaint regarding the commission of cognizable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognizance of the offence under Section 190(1)(a). However, if he once takes such cognizance and embarks upon the procedure embodied in Chapter XV, he is not competent to revert back to the pre-cognizance stage and avail of Section 156(3).

14. Where a Magistrate chooses to take cognizance he can adopt any of the following alternatives:

> (*a*) He can peruse the complaint and if satisfied that there are sufficient grounds for proceeding he can straightaway issue process to the accused but before he does so he must comply with the requirements of Section 200 and record the evidence of the complainant or his witnesses.
>
> (*b*) The Magistrate can postpone the issue of

process and direct an enquiry by himself.

(*c*) The Magistrate can postpone the issue of process and direct an enquiry by any other person or an investigation by the police.

15. In case the Magistrate after considering the statement of the complainant and the witnesses or as a result of the investigation and the enquiry ordered is not satisfied that there are sufficient grounds for proceeding he can dismiss the complaint.

16. Where a Magistrate orders investigation by the police before taking cognizance under Section 156(3) of the Code and receives the report thereupon he can act on the report and discharge the accused or straightaway issue process against the accused or apply his mind to the complaint filed before him and take action under Section 190 of the Code.

17. The above principles have been reiterated in *Devarapalli Lakshminarayana Reddy and Others* vs. *V. Narayana Reddy and Others*, (1976) 3 SCC 252 and *Tula Ram and Others* vs. *Kishore Singh*, (1977) 4 SCC 459

18. Keeping the above principles, if we test the same with the direction issued by the magistrate for investigation under Section 156(3) of the Code and facts of these cases, we are satisfied that the magistrate has not exceeded his power nor violated any of the provisions contained in the Code. As observed earlier, the magistrate need not order any investigation if he pre-supposes to take cognizance of the offence and once he takes cognizance of the offence, he has to follow the procedure provided in Chapter XV of the Code. It is also settled position that any judicial magistrate before taking cognizance of the offence can order investigation under Section 156(3) of the Code.

19. As rightly observed by the High Court, the magistrate

before taking cognizance of the offence can order investigation under Section 156(3) of the Code, we are of the view that the procedure adopted and the power exercised by the magistrate in this case is acceptable and in accordance with the scheme of the Code. We are also satisfied that the High Court rightly refused to exercise its power under Section 482 of the Code.

20. In the light of the above discussion and conclusion, we find no merit in all these appeals, consequently, the same are dismissed.

B.B.B. Appeals dismissed.

BHAIKON @ BAKUL BORAH
v.
STATE OF ASSAM
(Criminal Appeal No. 194 of 2008)

MAY 3, 2013

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

Penal Code, 1860 – ss.302 and 376 – Rape and murder – Trial court convicted the accused and imposed death sentence and life imprisonment for offences punishable u/ss.302 and 376 respectively – High Court confirmed the conviction, but reduced the death sentence to life imprisonment and the sentence of life imprisonment to 7 years imprisonment – Held: Version of the eye-witness is reliable and the same is corroborated by evidence of another witness and also by medical evidence – Hence, conviction and sentence awarded by High Court upheld.

Sentence/sentencing – Remission of sentence of life imprisonment – Held: Life imprisonment means imprisonment for whole of the life subject to the remission power granted under Articles 72 and 161 of the Constitution – When death sentence is commuted to life imprisonment, executive power of remission to be exercised cautiously, taking note of the gravity of the offence – Constitution of India, 1950 – Articles 72 and 161.

The appellant-accused was prosecuted for committing rape and murder of the victim. PW-1 was the eye-witness to the incident. Trial court convicted the appellant-accused u/ss. 376 and 302 IPC and sentenced him to death for the offence punishable u/s. 302 IPC and to life imprisonment (RI) for the offence punishable u/s. 376 IPC. The accused preferred appeal and the trial court preferred Death Reference. High Court disposed of the

appeal and the Death Reference by confirming the conviction and altering the death sentence to life imprisonment and the sentence of life imprisonment to imprisonment for 7 years.

In appeal to this Court, the appellant-accused contended that conviction could not have been based upon sole testimony of PW-1 as the same is not reliable; that in view of the remarks of the doctor (PW9 who conducted post-mortem of the deceased) to the effect that no-mark of sexual violence was found on the genital organs of the deceased, the conviction u/s.376 was unsustainable; and that inasmuch as the High Court modified the death sentence into imprisonment for life, the authorities ought to have released him after expiry of a period of 14 years.

Dismissing the appeal, the Court

HELD: 1. The trial court and the High Court rightly held that there was no reason to disbelieve the version of PW-1 (the eye-witness) and the corroborative evidence of PW-2, (father of the deceased). In the same way, the injuries noted by PW-9 also support the prosecution story though he has noted that there was no sign of injury on the genital organs of the deceased. Therefore, in view of oral and documentary evidence led in by the prosecution, particularly, the evidence of PWs 1, 2 and 9 as well as the statement of co-villagers, the conclusion arrived at by the trial court and affirmed by the High Court is acceptable. [Paras 11 and 12] [506-E-G]

2.1. Life imprisonment means imprisonment for whole of life subject to the remission power granted under Articles 72 and 161 of the Constitution of India. However, for adequate reasons, it is for the executive authorities to exercise their power provided under the Constitution, in an appropriate case. [Paras 15 and 16] [507-F-G; 508-

B-C]

Life Convict @ Khoka Prasanta Sen vs. B.K. Srivastava and Ors. **(2013) 3 SCC 425;** *Mohinder Singh vs. State of Punjab* **(2013) 3 SCC 294;** *Sangeet and Anr. vs. State of Haryana* **(2013) 2 SCC 452;** *Rameshbhai Chandubhai Rathod (2) vs. State of Gujarat* **(2011) 2 SCC 764: 2011 (1) SCR 829;** *Chhote Lal vs. State of Madhya Pradesh* **(2011) 8 SCR 239;** *Mulla and Anr. vs. State of Uttar Pradesh* **(2010) 3 SCC 508: 2010 (2) SCR 633;** *Maru Ram vs. Union of India and Ors.* **(1981) 1 SCC 107;** *State of Madhya Pradesh vs. Ratan Singh and Ors.* **(1976) 3 SCC 470: 1976 (0) Suppl. SCR 552;** *Gopal Vinayak Godse vs. State of Maharashtra* **AIR 1961 SC 600: 1961 SCR 440 – relied on.**

2.2. When death sentence is commuted to imprisonment for life by the appellate court, the concerned Government is permitted to exercise its executive power of remission cautiously, taking note of the gravity of the offence. [Para 17] [508-C-D]

Swami Shraddananda (2) @ Murli Manohar Mishra vs. State ofKarnataka **(2008) 13 SCC 767: 2008 (11) SCR 93;** *Sahib Hussain @ Sahib Jan vs. State of Rajasthan* **2013 (6) Scale 219 – relied on.**

Case Law Reference:

(2013) 3 SCC 425	**relied on**	**Para 15**
(2013) 3 SCC 294	**relied on**	**Para 15**
(2013) 2 SCC 452	**relied on**	**Para 15**
2011 (1) SCR 829	**relied on**	**Para 15**
(2011) 8 SCR 239	**relied on**	**Para 15**
2010 (2) SCR 633	**relied on**	**Para 15**
(1981) 1 SCC 107	**relied on**	**Para 15**

1976 (0) Suppl. SCR 552	**relied on**	**Para 15**
1961 SCR 440	**relied on**	**Para 15**
2008 (11) SCR 93	**relied on**	**Para 17**
2013 (6) Scale 219	**relied on**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 194 of 2008.

From the Judgment & Order dated 26.09.2006 of the Gauhati High Court (the High Court of Assam, Nagaland, Meghalaya, Manipur, Tripura, Mizoram and Arunachal Pradesh) at Gauhati in Criminal Appeal No. 67 of 2006.

Pandit Parmanand Katara, Abhishek Sharma, C.K. Sucharita, Kusum Lata Sharma for the Appellant.

Navnit Kumar, Avijit Roy, Corporate Law Group for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM,J. 1. This appeal is filed against the judgment and order dated 26.09.2006 passed by the Division Bench of the Gauhati High Court in Criminal Death Reference No. 1 of 2006 along with Criminal Appeal No. 67 of 2006 whereby the High Court disposed of the appeal preferred by the appellant-herein by confirming his conviction and altering the sentence of death to imprisonment for life passed by the Court of Ad-hoc Additional Sessions Judge, Lakhimpur at North Lakhimpur dated 18.03.2006 in Sessions Case No. 40(NL) 03 for the offence punishable under Sections 302 and 376 of the Indian Penal Code, 1860 (in short 'IPC').

2. **Brief facts:**

(a) As per the prosecution case, on 29.03.2000, at around 12 noon, one Rupamoni Dutta (the deceased), aged about 22

years, r/o Mauza Talwa, Village Kakattiup, PS Lakhimpur, Assam went to the field near an embankment to attend her goats. When she did not return home, Ganesh Dutta (PW-2), father of the deceased, went in search for her. After enquiring about her daughter in the house of his elder brother, Khira Dutta, PW-2 started searching for her along the embankment. While returning, he heard a loud laughter at the farm house of the appellant-accused. Thereafter, he returned home and called for his daughter but when he found that she did not return, he again went to the embankment and shouted for her. On hearing this, the appellant came out of the farm house and looked at him. Then, PW-2 came down the embankment by a path where he saw his daughter lying dead on the left side. There was cut injury on her chin and blood was also oozing from her body.

(b) On seeing this, he raised alarm and his son - Bhaba Kanta (PW-3) came there and they tried to lift her. By that time, other people from the village also gathered there. The appellant-accused also came and enquired. Thereafter, they brought home the dead body. On being informed, Anand Ozah, Sub-Inspector of Police, Panigaon Police Outpost, came and seized the wearing apparels of the deceased and prepared a seizure list. After holding inquest over the dead body, the same was sent for *post-mortem* examination.

(c) On the same day, PW-3, brother of the deceased, lodged a written complaint with the police at Panigaon police out-post. A case was registered vide G.D. Entry No. 389, at North Lakhimpur P.S. During the course of investigation, the police seized the underwear of the deceased stained with semen on that very day. The appellant-accused Bhaikon @ Bakul Bora and Balin Saikia (PW-1) were also apprehended and interrogated.

(d) On 30.03.2000, at about 9.30 a.m., the police alleged to have seized a blue underwear of the appellant-accused suspected to have been stained with semen. They also seized one bed sheet, a sporting and a 'dao' from the farm house of

the appellant-accused and prepared a seizure list. The seized underwears of both the appellant and the deceased were sent to FSL for examination. The post mortem was conducted on the dead body by Dr. Tulen Pagu (PW-9), who submitted a report stating that the victim died of asphyxia as a result of throttling. He also stated that the vaginal smear showed no spermatozoa.

(e) On 31.03.2000, the Magistrate recorded the statement of PW-1 under Section 164 of the Code of Criminal Procedure, 1973 (in short 'the Code). After conclusion of the investigation, the police submitted charge-sheet against the appellant-accused under Sections 376 and 302 of the IPC. The case was committed to the Court of Ad-hoc Additional Session Judge, Lakhimpur and numbered as Sessions Case No. 40 (NL) of 2003.

(f) The Additional Sessions Judge, Lakhimpur, by order dated 18.03.2006, convicted the appellant under Sections 376 and 302 of IPC and sentenced him to death for the offence punishable under Section 302 of IPC and rigorous imprisonment (RI) for life for the offence punishable under Section 376 of IPC along with a fine of Rs. 10,000/-, in default, to further undergo RI for a period of 1 (one) year.

(g) Challenging the order of conviction and sentence, the appellant preferred Criminal Appeal No. 67 of 2006 and the trial Court preferred Death Reference No. 1 of 2006 before the High Court.

(h) By impugned judgment dated 26.09.2006, the High Court disposed of the appeal preferred by the appellant-accused by confirming his conviction and altering the sentence of death to imprisonment for life for the commission of offence punishable under Section 302 of IPC along with a fine of Rs.1,000/-, in default, to further undergo imprisonment for 1 (one) month and for the offence under Section 376 of IPC, the High Court sentenced him to imprisonment for 7 years.

(i) Being aggrieved, the appellant preferred this appeal by way of special leave petition before this Court and leave was granted on 18.01.2008.

3. Heard Mr. Parmanand Katara, learned senior counsel appearing for the appellant-accused and Mr. Navnit Kumar, learned counsel appearing for the respondent-State.

4. Mr. Katara, learned senior counsel for the appellant-accused, raised the following contentions:-

(i) Since the evidence of PW-1 is not reliable, the conviction and sentence based upon his sole testimony cannot be sustained.

(ii) Inasmuch as the High Court has modified the death sentence into imprisonment for life, after expiry of the period of 14 years, the authorities ought to have released the appellant.

5. Mr. Navnit Kumar, learned counsel for the State, after taking us through the entire material relied on by the prosecution submitted that the evidence of PW-1, who witnessed the occurrence is reliable and is corroborated by PW-2, father of the deceased and the doctor (PW-9), who conducted the *post mortem*. He also submitted that inasmuch as the sentence of death was commuted to imprisonment for life, there cannot be automatic release after the expiry of the period of 14 years as claimed by the appellant-accused.

6. We have carefully considered the rival contentions and perused all the relevant materials.

7. Let us deal with the first contention raised by learned senior counsel for the appellant. It is not in dispute that the appellant was charged for the offence punishable under Sections 376 and 302 of the IPC. In other words, according to the prosecution, the appellant along with another person committed rape and, thereafter, murdered the deceased. The

entire prosecution case rests on the solitary evidence of the eye-witness PW-1. According to PW-1, the accused-appellant engaged him as a labourer in his farm house and all along he was working under compulsion. Regarding the incident, he narrated that the incident took place about 4 years ago. He further deposed that on the date of occurrence, he saw the appellant-accused and his friend following the deceased and on seeing the same, he also followed them and saw that the appellant-accused and his companion behaving indecently with the girl, committed rape on her and, thereafter, the appellant-accused assaulted the girl by throttling her neck. He further noticed that because of the acts of the appellant-accused, the girl died on the spot and he also noticed that the appellant-accused along with the accomplice dragged her to the nearby place surrounded by shrubs and bushes and left the body there. Thereafter, the appellant-accused returned home and PW-1 went to the wheat field in order to show that he was busy in attending the goats. He also explained that since both them were having 'Khukri' in their hands, he did not raise alarm out of fear. Though PW-1 remained silent, after 2 hours, when PW-2, father of the victim, raised a commotion at the place of occurrence, the appellant-accused also came there and saw the dead body of the girl. The conduct of PW-1, in view of the above, cannot be doubted because of refusal on his part to open his mouth in the presence of his master. Even the trial Court found him trustworthy that he had nothing to falsely implicate his master and rightly held him to be a reliable witness. Further, the evidence of PW-1 clearly shows that he was forced to work in the house of the appellant-accused. The fact that he was working in the house of the appellant-accused was admitted by him in his statement under Section 313 of the Code. There is no reason to disbelieve the version of PW-1, who is an independent eye-witness to the incident.

8. The next witness relied on by the prosecution is Ganesh Dutta–father of the victim who was examined as PW-2. In his evidence, he explained that his daughter went to the field to

attend the goats but she did not return. He further narrated that when he went in search of her, he found her lying dead with injury on the neck.

9. The prosecution has also relied on the evidence of two brothers of the deceased viz., Bhaba Kanta Dutta as PW-3 and Mahendra Dutta as PW-4 who also corroborated the statement made by PW-2. Apart from the above evidence, the co-villagers, viz., PWs 7 and 8 were also examined who deposed that they had seen the dead body of the deceased.

10. The other evidence relied on by the prosecution is of the doctor (PW-9) who conducted the *post mortem*. He noted the following injuries:-

" A dead body of an average built, female, rigor mortis present.

1. A cut injury over lower part of the chin, size 3"x1"x1/2".

2. Lower part of the mandibular bone was cut at the side of injury size 2"x1/4"x1/4".

3. Bruise mark over middle part of the front of the right side of the back size 11/2"x1".

4. Bruise mark in the middle of the front of the left side of the neck size 21/2"x11/2".

5. Trachea fractured at the level of the bruise marks.

6. Multiple bruises on left side of the neck overlying each other.

Heart was healthy containing dark fluid blood, left side empty.

Above injuries (in No. 1) were ante mortem in nature.

Injury Nos. 1 and 2 were caused by sharp cutting weapon.

Injury Nos. 3, 4, 5 and 6 caused by blunt weapon. Vaginal smear show no spermatozoa. Smear was taken immediately and the pathologist examined the sample/smear on 01.04.2000. Uterus non-gravid. (No sign of pregnancy).

In my opinion, the person died of asphyxia as result of throttling."

PW-9, in his evidence has stated that no mark of sexual violence was found on the genital organs of the body.

11. Learned senior counsel for the appellant, by drawing our attention to the remarks of PW-9 that there was no mark of injury on the genital organs of the body of the deceased contended that conviction under Section 376 of IPC is unsustainable. In the light of overwhelming materials placed by the prosecution, we are unable to accept the said contention. As rightly observed by the trial Court and the High Court, there is no reason to disbelieve the version of PW-1 and the corroborative evidence of PW-2, father of the deceased. In the same way, the injuries noted by PW-9 also support the prosecution story though he has noted that there was no sign of injury on the genital organs of the deceased.

12. Taking note of oral and documentary evidence led in by the prosecution, particularly, the evidence of PWs 1, 2 and 9 as well as the statement of co-villagers, we agree with the conclusion arrived at by the trial Court and affirmed by the High Court regarding the death of Rupamoni Dutta and reject the claim made by learned senior counsel for the appellant-accused.

13. Coming to the second contention, it is not in dispute that considering the heinous crime of committing rape and murder and throwing the dead body in a place surrounded by

bushes and shrubs, the trial Court has awarded the sentence of death, however, the High Court, taking note of the fact that the accused is a young man of 33 years of age and also finding that the case does not come under the purview of the "rarest of rare" category, declined to confirm the sentence of death and altered the same to the imprisonment for life while upholding the conviction under both the counts.

14. Mr. Katara, learned senior counsel for the appellant-accused, by taking us through various sections of the Penal Code viz., Sections 121, 121A, 122, 128, 131, 194, 224 and 238 and the sentences which the Court of Magistrates, Sessions Judges and High Courts may pass and also some of the sections which mention life imprisonment as maximum punishment or imprisonment of either description for a term which may extend to 10 years or lesser than 10 years contended that when statute provides imprisonment for life for an offence and in alternative imprisonment for a term which may extend to 10 years, in that case, incarceration of 14 years should be held sufficient and the appellant is entitled to be released on that ground. After hearing his arguments patiently and noting the same, we are of the view that the case on hand relates to commuting the sentence of death into imprisonment for life and all the contentions raised by learned senior counsel relating to the sentence are unacceptable or irrelevant.

15. This Court, in a series of decisions has held that life imprisonment means imprisonment for whole of life subject to the remission power granted under Articles 72 and 161 of the Constitution of India. [Vide *Life Convict @ Khoka Prasanta Sen* vs. *B.K. Srivastava & Ors.* (2013) 3 SCC 425, *Mohinder Singh* vs. *State of Punjab,* (2013) 3 SCC 294, *Sangeet and Anr.* vs. *State of Haryana* (2013) 2 SCC 452, *Rameshbhai Chandubhai Rathod (2)* vs. *State of Gujarat* (2011) 2 SCC 764, *Chhote Lal* vs. *State of Madhya Pradesh* (2011) 8 SCR 239, *Mulla and Another* vs. *State of Uttar Pradesh* (2010) 3 SCC 508, *Maru Ram* vs. *Union of India & Ors.* (1981) 1 SCC

107, *State of Madhya Pradesh* vs. *Ratan Singh & Others* (1976) 3 SCC 470 and *Gopal Vinayak Godse* vs. *State of Maharashtra* AIR 1961 SC 600].

16. In view of the clear decisions over decades, the argument of learned senior counsel for the appellant-accused is unsustainable, at the same time, we are not restricting the power of executive as provided in the Constitution of India. For adequate reasons, it is for the said authorities to exercise their power in an appropriate case.

17. It is also relevant to point out that when death sentence is commuted to imprisonment for life by the Appellate Court, the concerned Government is permitted to exercise its executive power of remission cautiously, taking note of the gravity of the offence. [Vide *Swami Shraddananda (2) @ Murli Manohar Mishra* vs. *State of Karnataka* (2008) 13 SCC 767 and *Sahib Hussain @ Sahib Jan* vs. *State of Rajasthan* 2013 (6) Scale 219.

18. In view of the categorical and consistent decisions of this Court on the point, we are unable to accept the argument of learned senior counsel for the appellant-accused.

19. Learned senior counsel for the appellant also placed reliance on a decision of this Court in Writ Petition (Crl.) No. 34 of 2009 dated 07.09.2009 wherein the order passed by the Governor of the State of Uttar Pradesh for release on remission of the petitioners therein was set aside by a Division Bench of the High Court of Allahabad and the same was challenged before this Court by way of a writ petition. It was also pointed in the above said writ petition that a number of convicts who had undergone actual sentence of 14 years were directed to be released forthwith by this Court in SLP (Crl.) No. 553 of 2006 dated 09.05.2006. This Court, following the same, issued a similar order in the said writ petition for the release of the petitioners therein. As stated earlier, the case on hand relates to commuting the sentence of death into imprisonment for life

and we have already preserved the right of the executive for ordering remission taking note of the gravity of the offence. Hence, the said decision is not helpful to the facts of this case and the contention of learned senior counsel is liable to be rejected.

20. In the light of the above discussion, we do not find any valid ground for interference, on the other hand, we are in entire agreement with the conclusion arrived at by the High Court, consequently, the appeal is dismissed.

K.K.T. Appeal dismissed.

VIDYA DHAR & ORS.
v.
MULTI SCREEN MEDIA PVT. LTD.
(Special Leave Petition (C) No. 9967 of 2013)

MAY 3, 2013

[ALTAMAS KABIR, CJI, ANIL R. DAVE AND VIKRAMAJIT SEN, JJ.]

Criminal Trial – Free and fair trial – Balancing of interests – Junior Basic Trained (JBT) Teachers Recruitment Scam – Conviction of petitioners – Pending appeal – Proposal of respondent to broadcast / telecast an episode on television on "JBT Teachers Scam"– Suit for permanent injunction by Petitioners to restrain respondent from such broadcast/ telecast – Injunction order passed by Single Judge of High Court – Set aside by Division Bench in appeal – SLPs – Plea of petitioners that they were entitled to a fair trial and the proposed telecast would have prejudicial impact on their rights, and further, though the petitioners might stand convicted, an appeal is a continuation of the trial and even at the appellate stage, there was every possibility of bias against them – Held: Once the trial was completed and the Petitioners convicted and, thereafter, arrested, there was no further possibility of any bias against them at the time of hearing of the appeal – No interference called for with the order of the Division Bench of the High Court – However, in order to safeguard the interests of the Petitioners, certain restrictions imposed at the time of the screening of the episode concerned – Prevention of Corruption Act, 1988 – s.13(2) – Penal Code, 1860 – s.120B – Code of Criminal Procedure, 1973 – s.389.

In a matter relating to the Junior Basic Trained (JBT) Teachers Recruitment scam, the three petitioners were convicted by the trial court under Section 120B IPC read

with Section 13(2) of the Prevention of Corruption Act, 1988 and detained in judicial custody. The Petitioners filed appeal before the High Court, and alongwith the same also filed applications under Section 389 CrPC, seeking suspension of conviction, sentence as well as for grant of interim bail.

Meanwhile, during pendency of the appeal, the Petitioners came to learn that the Respondent was proposing to broadcast an episode of the TV program "CRIME PATROL DASTAK", in which a dramatized version of "JBT Teachers Scam" was to be presented. The Petitioners filed suit before the High Court for permanent injunction to restrain the Respondent from broadcasting/telecasting the above-mentioned television program on any media channel, including the Internet. The Single Judge restrained the Respondent from broadcasting/ telecasting the said program till the application for suspension of sentence under Section 389 of Cr.P.C. was decided. On appeal, the Division Bench set aside the order of injunction passed by the Single Judge.

In the instant SLP, the order passed by the Division Bench of the High Court was challenged on the ground that the said proposed telecast of the episode would have prejudicial impact on rights of the petitioners, who were entitled to a fair trial and further, though the petitioners might stand convicted, an appeal from the judgment of conviction is a continuation of the trial and even at appellate stage, there was every possibility of bias against the petitioners, which would be against the concept of a free and fair trial.

Dismissing the SLP, the Court

HELD:1. Once the trial has been completed and the Petitioners have been convicted and, thereafter, arrested,

there is no further possibility of any bias against them at the time of hearing of the appeal. The contents of the trial and the ultimate judgment of conviction and sentence is now in the public domain and is available for anyone to see. [Para 16] [517-B-C]

2. No interference is called for with the order of the Division Bench of the High Court, setting aside the order of the Single Judge. However, in order to safeguard the interests of the Petitioners, certain restrictions can be imposed at the time of the screening of the said Episodes. Accordingly, the Producers, Directors and Distributors and all those connected with the screening of the aforesaid Episodes on television, shall ensure that there is no direct similarity of the characters in the Serial with the Petitioners, who have been convicted in connection with the JBT Teachers Recruitment and had been sentenced to different periods of custody, and that steps are taken to protect their identity, as far as possible. [Para 17] [517-D-F]

CIVIL APPELLATE JURISDICTION : Special Leave Petition No. 9967 of 2013.

From the Judgment & Order dated 28.02.2013 of the High Court of Delhi at New Delhi in FAO (OS) 119 of 2013.

Giriraj Subramanium, Salman Hashmi, Liz Mathew for the Petitioners.

Subramonium Prasad for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, CJI. 1. The three petitioners before us are now detained in judicial custody in the Tihar Jail on being convicted under Section 120B of Indian Penal Code read with Section 13(2) of the Prevention of Corruption Act, 1988.

2. The petitioner no. 3 was the Chief Minister of the State of Haryana from 1999 to 2005 and during his tenure 3206 Junior Basic Trained Teachers were recruited in the year 2000. During that time, one Shri Sanjiv Kumar, IAS, was the Director, Primary Education, Government of Haryana.

3. From 2000 onwards, upon certain facts being brought to the knowledge of the Government of Haryana, several disciplinary and vigilance inquiries were initiated against the said Shri Sanjiv Kumar. An FIR was registered against him under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988.

4. While the said inquiries were pending, Shri Sanjiv Kumar filed Writ Petition (Criminal) No. 93/2003 before this Court, holding himself out to be a whistle blower and claiming that while he was functioning as Director, Primary Education, Haryana, he was pressurized into altering the lists for appointment of Junior Basic Trained Teachers. Since, he had resisted and did not succumb to such pressure, he was being unfairly targetted by the administration.

5. On the basis of the said Writ Petition, this Court on 25.11.2003, directed the Central Bureau of Investigation, hereinafter referred to as "CBI", to inquire into the allegations made therein. Pursuant to such direction, the CBI registered a Preliminary Enquiry bearing No.PE 1(A)/2003/ACU-IX dated 12.12.2003. Subsequently, the said Preliminary Enquiry was converted into RC 3(A)/2004/ACU-IX on 24.5.2004, under Section 120B read with Section 420/467/468/471 of the Indian Penal Code and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988.

6. On completion of investigation, the CBI filed a charge-sheet on 16.1.2013, against various persons including Shri Sanjiv Kumar, IAS. The CBI also named the Petitioners herein as accused in the said case. The trial of the case was conducted by the learned Special Judge, Rohini, Delhi, who by

his judgment and order dated 16.1.2013, convicted the Petitioners and the said Shri Sanjiv Kumar, IAS, amongst others and on 22.1.2013, sentenced the Petitioners to 10 years of rigorous imprisonment in respect of conviction under Section 120B of Indian Penal Code and for the period of 7 years of rigorous imprisonment in respect of Section 13(2) of Prevention of Corruption Act, 1988.

7. Aggrieved by the said judgment and order of sentence dated 16.1.2013 and 22.1.2013 respectively, the Petitioners preferred an appeal before the Delhi High Court on 15.2.2013. Along with the appeal, the Petitioners had also filed applications under Section 389 of the Code of Criminal Procedure, 1973, hereinafter referred to as "Cr.P.C.", seeking suspension of conviction, sentence as well as for grant of interim bail. The matter appears to be pending before the learned Single Judge of the Delhi High Court which issued notice to the CBI on the appeal and the matter has been posted for further hearing.

8. During the pendency of the appeal before the Delhi High Court, the Petitioners and their family members came to learn that the Respondent was proposing to broadcast Episode Nos. 214-215 of "CRIME PATROL DASTAK" on 23-24.2.2013, in which a dramatized version of "JBT Teachers Scam" was to be presented. The Petitioners thereupon filed CS(OS) No.335/2013 before the Delhi High Court on 20.2.2013 for permanent injunction to restrain the Respondent from broadcasting/telecasting the above-mentioned television program on any media channel, including the Internet. The learned Single Judge issued notice on the matter on 21.2.2013. On 22.2.2013, the Respondent published an advertisement in the Times of India regarding broadcasting of the show wherein a summary of the episodes to be shown, was published. According to the Petitioners, the said summary is a clear misrepresentation of the facts. The learned Single Judge vide order dated 22.2.2013, restrained the Respondent from broadcasting/

telecasting the said program till the application for suspension of sentence under Section 389 of Cr.P.C. was decided.

9. On 23.2.2013, the Respondent filed FAO(OS) No. 119/2013 before the Division Bench of the Delhi High Court and after hearing the parties, the Division Bench by its judgment and order dated 28.2.2013, allowed the first appeal and set aside the order of injunction passed by the learned Single Judge.

10. Thus, against the said judgment and order of the Division Bench of the Delhi High Court, the present Special Leave Petition has been filed.

11. The main ground of challenge to the impugned order passed by the Division Bench of the Delhi High Court on 28.2.2013, is that the proposed telecast of the Episode Nos.214-215 of "CRIME PATROL DASTAK", in which the dramatised version of "JBT TEACHERS RECRUITMENT SCAM" is to be broadcast, will have a prejudicial impact on the rights of the Petitioners who were entitled to a fair trial. It was submitted by Mr. Mukul Rohatgi, learned Senior Advocate, appearing for the Petitioners, that the picturisation of the said Episode was meant to project the Petitioners in a negative light on the basis of allegations made against them by the CBI. Mr. Rohatgi submitted that the entire projection, which apparently was intended to be a picturisation of the events which led to the conviction of the Petitioners, creates a detailed similarity between the actors and the situation in which they performed, with the actual events, which had the potential of destroying the Petitioners' political career.

12. Mr. Rohatgi submitted that, though the Petitioners may stand convicted in respect of the charges framed against them, an appeal from the judgment of conviction is a continuation of the trial and even at the appellate stage, there is every possibility of bias against the Petitioners, which would be against the concept of a free and fair trial.

13. Learned counsel submitted that the Division Bench failed to weigh the prejudice that would be caused to the Petitioners against the broadcast of the aforesaid Episode for commercial gain. Mr. Rohatgi also urged that the object of the television program is to create a prejudiced public environment against the Petitioners and thereby obstructing the administration of justice in a free and fair manner. Mr. Rohatgi urged that the right to freedom of speech did not include within its scope, the right to create a hostile environment when the Petitioners' pending appeal comes up for final hearing. Mr. Rohatgi also urged that since the Petitioners' application under Section 389 Cr.P.C. was pending hearing, the outcome thereof would be highly prejudiced if the Serial in question is allowed to be broadcast prior to the disposal thereof.

14. Mr. K.V. Vishwanathan, learned Senior Advocate, who appeared for some of the other Petitioners, reiterated the submissions made by Mr. Rohatgi on behalf of the Petitioner No.3 and urged that it would be unfair to the Petitioner if the Episode in question was allowed to be screened before the Petitioners' Application under Section 389 Cr.P.C. was disposed of.

15. On the other hand, appearing for the Respondent, Mr. Harish N. Salve, learned Senior Advocate, contended that the trial of the Petitioners stood concluded on their conviction and sentence under the relevant provisions of the Indian Penal Code and the provisions of the Prevention of Corruption Act, 1988. Mr. Salve urged that the entire matter regarding the JBT Teachers Recruitment was in the public domain and the judgment of conviction continues to be operative unless set aside by the Supreme Court. It was urged that in the circumstances, the Division Bench of the Delhi High Court, did not commit any error in rejecting the Petitioners' prayer for withholding the screening of the Serial in question pending disposal of the Petitioners' prayer for stay of conviction and appeal. It was urged that there was no further possibility of the

Petitioners being biased or prejudiced or even discredited, once the judgment had been delivered in the trial. Mr. Salve urged that no cause had been made out for stay of operation of the order of the Division Bench of the High Court, as impugned in the Special Leave Petition.

16. Having considered the submissions made on behalf of the respective parties, we are inclined to agree with Mr. Salve that once the trial has been completed and the Petitioners have been convicted and, thereafter, arrested, there is no further possibility of any bias against them at the time of hearing of the appeal. The contents of the trial and the ultimate judgment of conviction and sentence is now in the public domain and is available for anyone to see.

17. Without going into the question of the right of freedom of speech of the maker of the Television Episodes, we are convinced that no interference is called for with the order of the Division Bench of the High Court, setting aside the order of the learned Single Judge. However, in order to safeguard the interests of the Petitioners, we are also of the view that certain restrictions can be imposed at the time of the screening of the said Episodes. Accordingly, the Producers, Directors and Distributors and all those connected with the screening of the aforesaid Episodes on television, shall ensure that there is no direct similarity of the characters in the Serial with the Petitioners, who have been convicted in connection with the JBT Teachers Recruitment and had been sentenced to different periods of custody, and that steps are taken to protect their identity, as far as possible.

18. The Special Leave Petition is dismissed with the aforesaid observations.

B.B.B. SLP dismissed.

MD. ISHAQUE AND OTHERS
v.
STATE OF WEST BENGAL AND OTHERS
(Criminal Appeal No. 1421 of 2007)

MAY 3, 2013

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

Penal Code, 1860 – s.304 Part I – Number of persons forced out of their houses – Assaulted with various weapons – Death of one person and serious injuries to three others (PWs 1, 2 and 4) – Conviction of accused-appellants u/s.302 – Justification – Held: PWs 1 to 6 subjected to lengthy cross-examination, but nothing significant to discredit their evidence – Mere fact that some witnesses were interested witnesses, not a ground to discard their evidence, when evidence taken as a whole supported the case of the prosecution – PW1, PW2, PW4 sustained serious injuries, and their evidence was believed by the court – Prosecution succeeded in proving the place of occurrence, the time of occurrence as well as the manner of assault made on injured persons who were all examined by the Court and their evidence fully corroborated the prosecution case – Prosecution successfully proved that it was the appellants and others who had committed the crime – Several injuries were caused by the appellants on the vital parts of the deceased and the injured persons, with dangerous weapons and the injuries were sufficient, as certified by the doctor, in the ordinary course of nature to cause death – Appellants caused the injuries with deadly weapons, therefore, intention can be presumed regarding causing injuries likely to cause death, which falls u/s.304 Part I – Conviction therefore converted to that u/s.304 Part I with RI of 10 years and fine of Rs.5,000/-each – 50% of the money recovered as fine to be paid to wife of the deceased as compensation.

Evidence – Witness – Injured witness – Appreciation of.

Evidence – Witness – Interested witness – Appreciation of.

The prosecution case is that some 200-250 persons including the accused-appellants, forced out a number of persons from their houses, and then assaulted them with various sharp cutting weapons as well as blunt weapons. One victim succumbed to his injuries while three other victims, PWs 1, 2 and 4 sustained grievous injuries. PW3, 5 and 6 escaped from the place of assault. The trial court convicted the appellants under Section 302 IPC and some other penal sections. The conviction was affirmed by the High Court, and therefore the instant appeal.

Disposing of the appeal, the Court

HELD: 1. PW-1, in his statement, has categorically stated that the incident had occurred on 5.7.1983 at Siktahar and his evidence finds full support from the evidence adduced by the Investigating Officer PW20. Facts indicate that an incident had taken place on 4.7.1983 at village Malopara, which resulted in the death of 13 persons and due to that occurrence, there was an atmosphere of terror over the surrounding villages and also as a sequel of that massacre of Malopara, Siktahar village was attacked. PWs1 and 6 were directly affected by the incident that had occurred at Siktahar, in which the involvement of the appellants was clearly established. PWs 1 to 6 were subjected to lengthy cross-examination, but nothing significant was brought out to discredit their evidence. [Para 10] [525-A-D]

2. The mere fact that some of the witnesses are interested witnesses, that by itself is not a ground to discard their evidence, when the evidence taken as a whole supports the case of the prosecution. [Para 11] [525-H; 526-A]

Hari Obula Reddy and Ors. v. The State of Andhra Pradesh **(1981) 3 SCC 675 – relied on.**

3. PW1, PW2, PW4 sustained serious injuries, and their evidence was believed by the court. It is trite law that the testimony of injured witnesses is entitled to great weight and it is unlikely that they would spare the real culprit and implicate an innocent person. Of course, there is no immutable rule of appreciation of evidence that the evidence of injured witnesses should be mechanically accepted, it also has to be in consonance with probabilities. In the instant case, the prosecution has succeeded in proving the place of occurrence, the time of occurrence as well as the manner of assault made on injured persons who are all examined by the Court and their evidence fully corroborates the prosecution case. There is sufficient evidence to show that the incident had happened on 5.7.1983, as projected by the prosecution. The prosecution has successfully proved that it was the appellants and others who had committed the crime, so found by the trial Court as well as the High Court. [Paras 12, 14] [527-D-E, G-H; 528-A-B]

Makan Jivan and Ors. v. The State of Gujarat **(1971) 3 SCC 297;** *Machhi Singh and Ors. v. State of Punjab* **(1983) 3 SCC 470: 1983 (3) SCR 413;** *Jangir Singh and Chet Singh and Ors. v. State of Punjab* **(2000) 10 SCC 261 and** *Jaishree v. State of U.P.* **(2005) 9 SCC 788 – relied on.**

4. Large number of persons were involved in the incident that occurred on 5.7.1983. Several injuries were caused by the appellants on the vital parts of the deceased and the injured persons, with dangerous weapons and the injuries are sufficient, as certified by the doctor, in the ordinary course of nature to cause death and the accused persons intended to inflict the injuries that were found on the person of the deceased and injured persons. Appellants caused the injuries with

deadly weapons, therefore, intention can be presumed regarding causing injuries as are likely to cause death, which falls under Section 304 Part I IPC and hence the conviction ordered by the trial court under Section 302 IPC is converted to Section 304 Part I IPC. Consequently, the appellants are found guilty under Section 304 Part I IPC and are sentenced to undergo rigorous imprisonment of 10 years with a fine of Rs.5,000/-each. 50% of the money recovered as fine has to be paid to the wife of the deceased as compensation. [Paras 15, 16] [528-B-F]

Case Law Reference:

(1981) 3 SCC 675	**relied on**	**Para 11**
(1971) 3 SCC 297	**relied on**	**Para 12**
1983 (3) SCR 413	**relied on**	**Para 12**
(2000) 10 SCC 261	**relied on**	**Para 12**
(2005) 9 SCC 788	**relied on**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1421 of 2007.

From the Judgment & Order dated 14.08.2006 of the High Court at Calcutta in CRA Nos. 425 & 463 of 2011.

Pradip Ghosh, Vijay Panjwani, Madhu R. Panjwani for the Appellants.

Bijan Ghosh, Avijit Bhattacharjee, Pijush K. Roy, Kakali Roy Mithilesh Kumar Singh for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. This appeal arises out of a common judgment and order dated 14.8.2006 passed by the High Court of Calcutta in CRA No. 425 of 2001and CRA No. 463 of 2001, whereby the High Court confirmed the conviction and sentence awarded to the appellants.

2. The prosecution version is that on 5.7.1983 at about 5 AM to 5.30 AM, some 200-250 villagers, which included the accused persons as well, armed with various weapons like Lathi, Ladna, Farsa, Hasua and Ballam surrounded the village Siktahar. The accused persons forced out a number of persons from their houses, assaulted them in various ways and ultimately took four of them in tie-bound condition to a place called Hijul Pakur Field which is some distance away from village Siktahar and they assaulted them with various weapons causing serious injuries. The injured persons were admitted to Ratua Public Health Centre and later, shifted to Malda Sadar Hospital. One of the injured, namely Azad Ali, succumbed to his injuries. The remaining injured persons, viz. the informant - Md. Yasin PW1, Hasan Ali PW4 and Farjan Ali PW2 sustained serious injuries. During the course of occurrence, accused persons also assaulted Mohammed Badaruddin PW3, Mohamed Sabiruddin PW5 and Mohammed Kalimuddin PW6. However, those persons could escape from the clutches of the accused persons and flee from the place of assault.

3. Md. Yasin PW1 lodged the FIR on 8.7.1983, which was recorded by N. N. Acherjee, S.I., C.I.D. and forwarded to Ratuna P.S. and a case was registered being Crime No. 9 dated 5.7.1983 under Sections 147, 148, 149, 364, 307, 302 IPC at Ratuna P.S. and the investigation was taken up by the police. Later, investigation was handed over to the C.I.D. and, after completion of the investigation, police submitted the charge-sheet against 31 accused persons. (Of the charge-sheeted persons, accused Ajahar Moral and Tabjul died during the course of trial and the accused No. 25 died during the pendency of the appeal before the High Court). Two other charge-sheeted persons, namely, Hafijuddina and Safijuddin, were not sent up and discharged by S.D.J.M. vide his order dated 9.12.1993. Vide order dated 27.8.1983, the S.D.J.M. committed the case to the Court of Sessions.

4. Charges were framed against 28 accused persons on 10.4.1995, which were read over and explained to accused

persons, to which they pleaded not guilty and claimed to be tried. The prosecution examined 20 witnesses and produced various documents. On defence side, one witness was examined and also produced few documents. The defence took up the stand that the entire incident was stated to have taken place at Malo Para on 4.7.1983 and no occurrence, as alleged, took place either at village Siktahar or at Hajul Pakur Field on 5.7.1983. Further, it was stated that the case was falsely foisted due to political rivalry between two groups. Accused persons belong to the Congress party and the deceased and injured persons belong to CPM.

5. The trial Court, after considering the oral and documentary evidence, found that the prosecution has succeeded in proving the case and convicted 27 accused persons (out of 28 accused persons) and one Abdul Taub found not guilty and was acquitted.

6. Three appeals were filed against the order of conviction passed by the trial Court. CRA No. 425 of 2001 was filed by Md. Ishaque and another, CRA 463 of 2001 filed by Hefjur Rahaman and 24 others and CRA N. 700 of 2006 was filed by Jinnatual Haque, son of deceased, appellant no. 22, Md. Nurul Islam under Section 394 CrPC. The High Court took the view that the trial Court has rightly convicted all the accused persons, except appellants Yasin, Daud Hazi, Mannan, Islam Maulavi and Alauddin. CRA 425 of 2002 and CRA 463 of 2001were, therefore, allowed in part. Since Islam Maulavi was acquitted, CRA 700 of 2006 was also allowed.

7. Aggrieved by the same, 21 accused persons have preferred the present appeal. This Court granted bail to 14 appellants vide its orders dated 19.8.2009 and 27.1.2012. While the appeal was pending, appellants Haji Md. Belal Hossain and Aaiyab Ali died.

8. Shri Pradip Ghosh, learned senior counsel appearing for the appellants, submitted that the prosecution has failed to

establish the case beyond reasonable doubt and the appellants deserve acquittal. Learned senior counsel pointed out that the accused persons were falsely implicated due to political rivalry and the case was framed as a counter-blast to the incident that took place on 4.7.1983, a day earlier, wherein 13 persons from the village of the accused persons were brutally murdered. Learned senior counsel submitted that, on cross-examination of the material witnesses namely PW1 to PW6, with reference to the statement of the investigating officer, it would appear that there were serious omissions and contradictions in their statements, hence, the prosecution story cannot be believed. The prosecution had also failed to establish the place of occurrence, time of the alleged assault and the manner of the alleged assault and there was no corroborative medical evidence to support the various injuries alleged to have been sustained by few of the witnesses. Further, it was pointed out that the doctor who conducted the post-mortem, was not examined. Learned senior counsel also submitted that the High Court has rightly acquitted few of the accused persons and the reasoning adopted by the High Court equally applies in the case of the appellants as well.

9. Shri Bijan Ghosh, learned counsel appearing for the State, on the other hand, submitted that the High Court, after examining the evidence of the eye witnesses and other corroborative evidence, has rightly come to the conclusion that the appellants are guilty and deserve the sentence awarded by the trial Court. Learned counsel submitted that there is nothing on record, wherefrom, it can be gathered that the place of occurrence was not the village Siktahar and, thereafter, at Hijul Pakur Field, where the injured persons and the deceased were assaulted. Learned counsel submitted that the prosecution has succeeded in proving the place of occurrence, the time of occurrence and also the assault on injured persons and the cause of death of the deceased Azad Ali.

10. We heard the parties at length and have also gone

through the evidence, especially the evidence of PW1 to PW6 and also minutely and meticulously examined the entire gamut of the prosecution case. PW1, in his statement, has categorically stated that the incident had occurred on 5.7.1983 at Siktahar and that his evidence finds full support from the evidence adduced by the Investigating Officer PW20. Facts indicate that an incident had taken place on 4.7.1983 at village Malopara coming under the same P.S. Ratua, which resulted in the death of 13 persons and due to that occurrence, there was an atmosphere of terror over the surrounding villages and also as a sequel of that massacre of Malopara, Siktahar village was attacked. PWs1 and 6 were directly affected by the incident that had occurred at Siktahar, in which the involvement of the appellants was clearly established. PWs 1 to 6, particularly PW1 to PW4, who had deposed, narrating both the occurrences of Siktahar and Hizul Pakur Field, was subjected to lengthy cross-examination, but nothing significant was brought out to discredit their evidence. Further, there is nothing in the statement of PW18 to indicate that he found the injured persons of this case at Malopara village, on the contrary, if the statement of PWs 18 and 19 are considered together, it would indicate that the injured persons were found at a field, but not certainly at Malopara. Injured persons, including the deceased Azad Ali, were treated at Ratua Primary Health Centre and, subsequently, at Malda Sadar Hospital. PW14 to 16 attended those injured persons and from the reports prepared by the doctors, it would be clear that on 5.7.1983 all the persons, including the deceased Azad Ali, who were injured, were treated at Ratua Primary Health Centre and thereafter at Malda Sadar Hospital. Ex.14, the post-mortem report of the deceased indicates that the deceased suffered homicidal death and the injuries sustained by him were all ante-mortem in nature and that was the result of assault by several persons with sharp cutting weapons as well as the blunt weapons like Lathi.

11. We also fully endorse the view of the High Court that the mere fact that some of the witnesses are interested

witnesses, that by itself is not a ground to discard their evidence, the evidence taken as a whole supports the case of the prosecution.

In *Hari Obula Reddy and Ors. v. The State of Andhra Pradesh* (1981) 3 SCC 675, this Court laid down certain broad guidelines to be borne in mind, while scrutinising the evidence of the eye-witnesses, in para 13 of the judgement, this Court held as follows:

> "But it is well settled that interested evidence is not necessarily unreliable evidence. Even partisanship by itself is not a valid ground for discrediting or rejecting sworn testimony. Nor can it be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence of interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon. Although in the matter of appreciation of evidence, no hard and fast rule can be laid down, yet, in most cases, in evaluating the evidence of an interested or even a partisan witness, it is useful as a first step to focus attention on the question, whether the presence of the witness at the scene of the crime at the material time was probable. If so, whether the substratum of the story narrated by the witness, being consistent with the other evidence on record, the natural course of human events, the surrounding circumstances and inherent probabilities of the case, is such which will carry conviction with a prudent person. If the answer to these questions be in the affirmative, and the evidence of the witness appears to the court to be almost flawless, and free from suspicion, it may accept it, without seeking corroboration from any

other source. Since perfection in this imperfect world is seldom to be found, and the evidence of a witness, more so of an interested witness, is generally fringed with embellishment and exaggerations, however true in the main, the court may look for some assurance, the nature and extent of which will vary according to the circumstances of the particular case, from independent evidence, circumstantial or direct, before finding the accused guilty on the basis of his interested testimony. We may again emphasise that these are only broad guidelines which may often be useful in assessing interested testimony, and are not iron-cased rules uniformly applicable in all situations."

12. PW1, PW2, PW4 in case sustained serious injuries, their evidence was believed by the court. It is trite law that the testimony of injured witnesses entitled to great weight and it is unlikely that they would spare the real culprit and implicate an innocent person. Of course, there is no immutable rule of appreciation of evidence that the evidence of injured witnesses should be mechanically accepted, it also be in consonance with probabilities (Refs*: Makan Jivan and Ors. v. The State of Gujarat (1971) 3 SCC 297; Machhi Singh and Ors. v. State of Punjab* (1983) 3 SCC 470; *Jangir Singh and Chet Singh and Ors. v. State of Punjab* (2000) 10 SCC 261.

13. In this respect, reference may be made to the judgment of this Court in *Jaishree v. State of U.P.* (2005) 9 SCC 788, wherein this Court held that whether witnesses are interested persons and whether they had deposed out of some motive cannot be the sole criterion for judging credibility of a witness, but the main criterion would be whether their physical presence at the place of occurrence was possible and probable.

14. We are of the view that the prosecution has succeeded in proving the place of occurrence, the time of occurrence as well as the manner of assault made on injured persons who are all examined by the Court and their evidence fully corroborates the prosecution case. We notice, in this case, that there is

sufficient evidence to show that the incident had happened on 5.7.1983, as projected by the prosecution. The prosecution has successfully proved that it was the appellants and others who had committed the crime, so found by the trial Court as well as the High Court.

15. Large number of persons were involved in the incident that occurred on 5.7.1983. Several injuries were caused by the appellants on the vital parts of the deceased and the injured persons, with dangerous weapons and the injuries are sufficient, as certified by the doctor, in the ordinary course of nature to cause death and the accused persons intended to inflict the injuries that were found on the person of the deceased and injured persons. Appellants caused the injuries with deadly weapons, therefore, intention can be presumed regarding causing injuries as are likely to cause death, which falls under Section 304 Part I IPC and hence the conviction ordered by the trial court under Section 302 IPC is converted to Section 304 Part I IPC.

16. Consequently, the appellants are found guilty under Section 304 Part I IPC and are sentenced to undergo rigorous imprisonment of 10 years with a fine of Rs.5,000/-each. On default of payment of fine, they will undergo rigorous imprisonment for another six months. 50% of the money recovered as fine has to be paid to the wife of the deceased as compensation. We further order that if any of the appellants had already undergone sentence of 10 years, they would be let free, on payment of fine and the remaining accused appellants would serve the balance period of sentence and bail granted to them would, therefore, stand cancelled and they will surrender within a week. Appeal is disposed of accordingly.

B.B.B. Appeal disposed of.

MANOJ GIRI
v.
STATE OF CHHATISGARH
(Criminal Appeal No.470 of 2012)

MAY 8, 2013

[T.S. THAKUR AND S.A. BOBDE, JJ.]

Penal Code, 1860 – ss.396 & 376(2)(g) – Dacoity with murder and gang rape – Five accused – Conviction of accused-appellant – Challenged – Held: No merit in the contention that conviction of appellant was unjustified in view of acquittal of the other four accused – It cannot be said that conviction for dacoity with murder can be maintained only when five or more persons are convicted – Evidence against the four co-accused was not sufficient to convict them – If properly convicted each one of them were liable to be punished with death u/s.396 IPC – Since that did not happen, conviction of five persons - or even one - can stand – PW1 was a married woman and was overpowered by several men before she was raped – Ample evidence of rape in view of the forensic report regarding the clothes of PW1 and those of the appellant – Entire evidence alongwith proper and clear identification at identification parade and in the court by PW1 leaves no manner of doubt that the conviction of appellant was well founded.

The prosecution case was that at night, while PW1, her husband (PW2) and father-in-law ('D') were passing by a road, the five accused persons stopped them and assaulted PW2 and 'D' and thereafter raped PW1 one by one. 'D' subsequently died. The accused persons were charged for committing the offences of gang rape, dacoity and murder. The trial court convicted the accused-appellant under Sections 395, 396, 397, 398 and 376 (2)(g) IPC and sentenced him to undergo

imprisonment for life and RI for different periods. The other accused were however acquitted by the trial court. The High Court maintained the conviction of the appellant under Sections 396 and 376 (2)(g) IPC and sentenced him to undergo imprisonment for life and rigorous imprisonment for ten years, respectively, but set aside his conviction under Section 395 IPC.

In the instant appeal, the appellant raised the following contentions: 1) that his conviction was unjustified in view of acquittal of the other accused; 2) that since the other four accused who were similarly charged were acquitted of the offence of dacoity, it was not legal and proper to convict the appellant of the said charge; 3) that the story of PW1 was not credible; and 4) that there were no injuries on PW1 to infer rape.

Dismissing the appeal, the Court

HELD: 1. There is no merit in the contention that conviction of the appellant is unjustified in view of acquittal of the other accused. The trial court did not find sufficient evidence against the other accused to infer their guilt. The trial court found sufficient anomaly in the identification and contradictions in the version of the witnesses. This Court may have been persuaded to take a different view of the evidence but the State did not consider it even worthwhile to file an appeal against the order of the trial court for reasons best known to it. [Para 12] [536-D-F]

2. It cannot be said that a conviction for dacoity with murder can be maintained only when five or more persons are convicted. PW1's father-in-law was killed in the assault by the five accused. The evidence against the other four was not sufficient to convict them. There is no doubt, the murder was committed during the conjoint commission of dacoity. If properly convicted each one of

them were liable to be punished with death vide Section 396 IPC. Since that has not happened the conviction of five persons - or even one - can stand. Therefore the conviction of appellant is maintained for the incident in which there was gang rape of PW1, dacoity and a wanton murder of the hapless father-in-law of PW1. [Paras 14, 15 and 16] [537-C; 538-B-D]

Raj Kumar Alias Raju v. State of Uttranchal **(2008) 11 SCC 709: 2008 (5) SCR 1216 – relied on.**

3.1. PW1 disclosed the incident of gang rape to her husband PW2 when he re-gained consciousness on the incident date itself and then in the morning she disclosed it to the Investigating Officer when her statement was recorded. No inference of any lack of credibility can be drawn from this. The resistance of a woman, who has been raped, to announce it to anyone is well known and there is nothing unnatural for her in disclosing all the facts in details, for the first time to a police officer. [Para 13] [536-G-H; 537-A]

3.2. PW1 was a married woman and was overpowered by several men before she was raped. She was obviously not in a position to resist and to fight several men, who had threatened her with death in case she cried out. There is, however, ample evidence of rape in view of the forensic report regarding the clothes of the prosecutrix and those of the appellant. The report clearly discloses the presence of semen spots and human sperm on the clothes of the accused including the appellant and the prosecutrix. The entire evidence thus collected along with the proper and clear identification of the accused at identification parade and in the court by the prosecutrix leaves no manner of doubt that conviction of the appellant is well founded. [Para 17] [538-E-G]

Case Law Reference:

2008 (5) SCR 1216 relied on Para 15

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 470 of 2012.

From the Judgment & Order dated 13.5.2011 of the High Court Chhatisgarh, Bench at Bilaspur in Criminal Appeal No. 351 of 2005.

Shiva Pujan Singh, Niranjana Singh, Prema Singh, Kumar Rajan Mishra for the Appellant.

C.D. Singh, Sakshi Kakkar for the Respondent.

The Judgment of the Court was delivered by

S.A. BOBDE, J. 1. The present appeal arises out of the judgment and order passed by the High Court of Chattisgarh at Bilaspur whereby the High Court maintained the conviction of the appellant under Sections 396 and 376 (2)(g) of the Indian Penal Code, 1860 [in short 'the IPC'] and sentenced him to undergo imprisonment for life and rigorous imprisonment for ten years, respectively, but set aside his conviction under Section 395 of the IPC for a period of five years awarded by the trial court. Earlier, the trial court while acquitting other co- accused held the appellant - Manoj Giri guilty for commission of dacoity, murder of Domara Sahu in the course of committing dacoity etc. and convicted him under Sections 395, 396, 397, 398 and 376 (2)(g) of the IPC and sentenced him to undergo imprisonment for life and RI for different periods.

2. According to the prosecution, on the fateful night of 25.01.2004 at about 9 pm, prosecutrix (PW1) was returning with her husband, namely, Ganesh Sahu (PW2) on the bicycle from Village Gatauri along with her father-in-law – Domara Sahu (since deceased) on other bicycle from village Mohtarat after taking her treatment. It was a lonely road as they were passing

by Koshtha pond at Village Mohtarai, someone focused a torch light on them and then hurled abuses and stopped them. Then two more persons reached there and caught the cycle of Ganesh Sahu and stopped him. Two other persons stopped the cycle of Domara Sahu. One person inflicted iron rod blow to Ganesh Sahu and another slapped Domara Sahu. They took the prosecutrix, her husband and Domara Sahu towards the field and threatened they would be killed if they cried out. Ganesh Sahu was beaten senseless and his hands and legs were tied up with a lungi. Domara Sahu was also beaten senseless. Those persons threatened the prosecutrix and took off her sari and under garments and then raped her one by one. One of them had tied her legs and raped her, another untied her while raping her. Subsequently, after tying her up, they sat for sometime and then ran away. Somehow she untied herself and untied her husband and they reached the house of one Raj Kumar Suryavanshi, who gave them shelter. She narrated the incident to Raj Kumar Suryavanshi, who sent Ashok Kumar (PW 13) to lodge the FIR at about 2.00 am. Domara Sahu who had been carried to local hospital, died at about 4.35 am.

3. Ganesh (PW2) was examined by Dr. A.N. Mandal (PW4), vide Ex.P-4 and following injuries were found :

1. Incised wound of 4 cm X 1 cm X 1 cm on forehead.
2. Lacerated wound of 3 cm X 1 cm. X ½ cm over left temporal region.
3. Lacerated wound of 1 cm X ½ cm. X ¼ cm near left eye.
4. Swelling of 2 cm X 2 cm over right leg.
5. Left eye was blackened and swollen.
6. Left cheek was swollen.

4. For treatment, Ganesh was admitted in the hospital,

Domara Sahu was also examined by Dr. A.N. Mandal (PW4) vide Ex.P-5 and following injuries were found:

1. He was under coma, his general condition was very poor.
2. Blood was coming from nose and ear.
3. Swelling on left temporal region.

5. Domara Sahu was immediately admitted in Surgical Ward for emergency treatment. During treatment, Domara Sahu died on 26.01.2004. The death of Domara Sahu was intimated by the doctor, message was recorded vide Ex.P-22 and on the basis of FIR under zero number, numbered FIR was registered at Ratanpur Police Station vide Ex.P-21. After summoning the witnesses vide Ex.P-19 inquest over the dead body of Domara Sahu was conducted vide Ex.P-20. Thereafter dead body was sent for autopsy to Medical College, Bilaspur vide Ex.P-28. Dr. A.K. Shukla (PW3) conducted autopsy on the body of Domara Sahu and found following injuries as symptoms:

1. Blood clot in nose and ear with swelling.
2. Defused swelling over right temporal region of 8 cm x 7 cm.
3. Haemorrhage inside the skin with swelling.
4. Depressed fracture of temporal bone with swelling.
5. Abrasion over forehead.
6. Fresh abrasions over both the knees.

Cause of death of Domara Sahu was coma. Spot map was prepared by the police vide Ex.P-43.

6. There is no doubt that the death of Domara Sahu was homicidal and that it was caused by the accused persons. The

findings of the trial court and the High Court in that regard are not seriously assailed in the appeal.

7. In the morning of 26.01.2004, the prosecutrix's statement was recorded in detail by the Investigating Officer - Anil Kumar Tiwari. Police seized the clothes of the prosecutrix and those of the accused persons, five in number. The prosecutrix as well as the accused persons were sent for medical examination. Forensic tests were conducted on the clothes of the accused persons. The examination of the prosecutrix conducted by Dr. M. Pandey revealed that her secondary sexual characters were well developed, hymen was old ruptured, vagina admits two fingers easily and she was found accustomed to sexual intercourse.

8. During the course of investigation, accused Dilip, Ashish Dubey, appellant Manoj Giri and Dhruv Narayan were sent for medical examination on 26.01.2004 and they were examined by Dr. Dharmendra Kumar (PW 19) vide Exs. P-32, 33, 34 & 35 respectively. Vide medical examination report Ex.P-34, Dr. Dharmendra Kumar (PW 19) noticed that appellant Manoj Giri was capable of committing sexual intercourse, no injury was found over his private part and smegma was missing over glans penis.

9. Appellant Manoj Dubey was also taken into custody, he made a disclosure statement whereupon an iron rod and lachha (silver ornaments) were recovered at his instance vide Ex.P-38. Stained undergarments (langot) of appellant Manoj Giri was seized vide Ex.P-12. The stained sari and stained petticoat of the prosecutrix were seized vide Ex.P-13. Slides of the vaginal smear of the prosecutrix were also taken. From the other accused other iron rods, one pair of chappal, broken pieces of bangles and part of ear tops were seized and two old cycles and one piece of iron rod were seized from the spot. Seized articles were sent for chemical examination and presence of sperm was confirmed on petticoat and sari.

10. The trial court considered the evidence and came to the conclusion that the accused were properly identified by the prosecutrix and with regard to whom there was sufficient evidence available for conviction held them guilty under Sections 395, 396, 397, 398 and 376 (2)(g) of the IPC. As regards the other accused, the trial court came to the conclusion that the evidence against them was insufficient and contradictory and after the detailed discussion came to the conclusion that it was not possible to convict them mainly on the ground for want of identification. They were thus acquitted.

11. The State did not file any appeal against the acquittal of the other accused. The appellant – Manoj Giri, however, filed an appeal to the High Court. Before us, this appeal has been filed against the said judgment.

12. The first contention of Shri S.P. Singh, the learned counsel for the appellant is that the conviction of the appellant is unjustified in view of the acquittal of the other accused. There is no merit in this contention, since the trial court did not find sufficient evidence against the other accused to infer their guilt. The trial court found sufficient anomaly in the identification and contradictions in the version of the witnesses. We may have been persuaded to take a different view of the evidence but we find that the State did not consider it even worthwhile to file an appeal against the order of the trial court for reasons best known to it.

13. The second contention is that the story of the prosecutrix is not credible for several reasons. According to the learned counsel for the prosecution, the prosecutrix did not disclose the gang rape to any one till the next morning i.e on 26.01.2004 she disclosed it, first time to the Investigating Officer - Anil Kumar Tiwari. This is not so. She did disclose it to her husband Ganesh when he re-gained consciousness at the house of Raj Kumar Suryavanshi on 25.01.2004 itself and then in the morning she disclosed it to the Investigating Officer when her statement was recorded. No inference of any lack of

credibility can be drawn from this. The resistance of a woman, who has been raped, to announce it to anyone is well known and there is nothing unnatural for her in disclosing all the facts in details, for the first time to a police officer.

14. With regard to the appellant's conviction under Section 396 of the IPC for the murder of Damara Sahu in the case of dacoity, it was contended by the learned counsel for the appellant that since the other four accused who have been similarly charged were acquitted of the offence of dacoity, it would not be legal and proper to convict the appellant of the said charge. The argument is based on the presupposition that a conviction for dacoity with murder can be maintained only when five or more persons are convicted. Section 396 of the IPC reads as follows:

> "Section 396 -Dacoity with Murder: If any one of five or more persons, who are conjointly committing dacoity, commits murder in so committing dacoity, every one of those persons shall be punished with death, or [imprisonment for life] or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine".

15. This contention cannot be upheld in view of the observations made by this Court in *Raj Kumar Alias Raju* versus *State of Uttranchal* (Now Uttrakhand) (2008) 11 SCC 709, which read as follows:

> "It is thus clear that for recording conviction of an offence of robbery, there must be five or more persons. In absence of such finding, an accused cannot be convicted for an offence of dacoity. In a given case, however, it may happen that there may be five or more persons and the factum of five or more persons is either not disputed or is clearly established, but the Court may not be able to record a finding as to identity of all the persons said to have committed dacoity and may not be able to convict them

> and order their acquittal observing that their identity is not established. In such case, conviction of less than five persons - or even one - can stand. But in absence of such finding, less than five persons cannot be convicted for an offence of dacoity".

16. The observations squarely apply to this case. Domara Sahu was killed in the assault by the five accused. The evidence against the other four was not sufficient to convict them. There is no doubt, the murder was committed during the conjoint commission of dacoity. If properly convicted each one of them were liable to be punished with death vide Section 396 IPC. Since that has not happened the conviction of five persons - or even one - can stand. We have therefore no hesitation in maintaining the conviction of the appellant for the incident in which there was a gang rape, dacoity and a wanton murder of the hapless father-in-law.

17. It was next contented that there are no injuries on the prosecutrix to infer rape. There is no merit in this contention in view of the fact that the prosecutrix was a married woman and was overpowered by several men before she was raped. She was obviously not in a position to resist and to fight several men, who had threatened her with death in case she cried out. There is, however, ample evidence of rape in view of the forensic report regarding the clothes of the prosecutrix and those of the appellant. The report clearly discloses the presence of semen spots and human sperm on the clothes of the accused including the appellant and the prosecutrix. The entire evidence thus collected along with the proper and clear identification of the accused at identification parade and in the court by the prosecutrix leaves no manner of doubt that conviction of the appellant is well founded. In the result, we see, no merit in the appeal. It is hereby dismissed.

B.B.B. Appeal dismissed.

NATASHA SINGH
v.
CBI (STATE)
(Criminal Appeal No. 709 of 2013)

MAY 8, 2013

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

Code of Criminal Procedure, 1973 – s.311 – Proceedings initiated under the IPC and Prevention of Corruption Act – Three accused including appellant – Appellant, in her defence examined one witness, DW-2 and after proving certain documents closed her defence – Trial Court fixed date for hearing final arguments – Prior to date of final hearing, application filed by appellant u/s.311 CrPC for permission to examine three witnesses – Application dismissed by trial court on ground that examination of the witnesses sought to be examined by the appellant was unnecessary – High Court affirmed the order of trial court – Propriety – Held: Not proper – Application filed u/s.311 Cr.P.C. must be allowed if fresh evidence is being produced to facilitate a just decision –The trial court prejudged the evidence of the witnesses sought to be examined by the appellant, and thereby caused grave and material prejudice to the appellant as regards her defence, which tantamounts to a flagrant violation of the principles of law governing the production of such evidence in keeping with the provisions of s.311 Cr.P.C – Trial Court reached the conclusion that production of such evidence by the defence was not essential to facilitate a just decision of the case – Such an assumption was wholly misconceived, and not tenable in law as appellant has every right to adduce evidence in rebuttal of the evidence brought on record by the prosecution – Furthermore, instant case not one where if application filed by the appellant had

been allowed, the process would have taken much time – In fact, disallowing the said application, has caused delay – No prejudice would have been caused to the prosecution, if the defence had been permitted to examine said three witnesses – Application u/s.311 Cr.P.C. filed by appellant accordingly allowed – Prevention of Corruption Act, 1988 – s.13(2) r/w s.13(1)(d) – IPC – s.120B r/w ss.420, 467, 468, 471.

Code of Criminal Procedure, 1973 – s.311 – Powers under – Scope and object – Held: Power u/s.311 Cr.P.C. must be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection – Determinative factor should be, whether summoning/recalling of the said witness is in fact, essential to the just decision of the case – Adducing evidence in support of the defence is a valuable right – Denial of such right would amount to the denial of a fair trial – Under no circumstances can a person's right to fair trial be jeopardized – Criminal trial – Fair trial.

In a case pertaining to allegations of inflated insurance claim involving a company and a public servant, FIR was registered under Section 120B read with Sections 420, 467, 468, 471 of the IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 against the appellant-Director of the company, another Director and the public servant concerned. Charges were framed by the Trial Court against all the three accused. In support of its case, the prosecution examined 52 witnesses subsequent whereto, the statement of the appellant-accused was recorded. The appellant, in her defence examined only one witness, namely, DW-2 and after proving certain documents closed her defence. Subsequently, one other accused, A-3 concluded his defence after examining two defence witnesses. The Trial Court thereafter, fixed the date for hearing final arguments as 5.3.2013. The appellant

preferred application under Section 311 Cr.P.C. on 5.3.2013 for permission to examine three witnesses. The appellant wished to examine one of the panchnama witnesses, whom the prosecution had neither listed nor examined in court. The second person was Company Secretary of the company, of which the appellant was the Director. The third witness was a hand-writing expert. The Trial court dismissed the application, observing that examination of the witnesses sought to be examined by the appellant-accused was in fact unnecessary, and would in no way assist in the process of arriving at a just decision with respect to the case. The High Court affirmed the order passed by the Trial Court, and therefore the instant appeal.

Allowing the appeal, the Court

HELD:1.1. Section 311 Cr.P.C. empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under the Cr.P.C., or to summon any person as a witness, or to recall and re-examine any person who has already been examined if his evidence appears to it, to be essential to the arrival of a just decision of the case. The Cr.P.C. has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine such a witness, or to recall him for further examination in order to arrive at a just decision of the case. [Para 7] [548-E-H; 549-A]

1.2. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party. The power conferred under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection. The very use of words such as 'any Court', 'at any stage", or 'or any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case. [Para 14] [552-E-H; 553-A-D]

1.3. Fair trial is the main object of criminal procedure,

and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. [Para 15] [553-D-G]

Mir Mohd. Omar & Ors. v. State of West Bengal **AIR 1989 SC 1785: 1989 (3) SCR 735;** *Mohanlal Shamji Soni v. Union of India & Anr.* **AIR 1991 SC 1346: 1991 (1) SCR 712;** *Rajeswar Prasad Misra v. The State of West Bengal & Anr.* **AIR 1965 SC 1887: 1966 SCR 178;** *Rajendra Prasad v. Narcotic Cell through its Officer-in-Charge, Delhi* **AIR 1999 SC 2292 1999 (3) SCR 818;** *P. Sanjeeva Rao v. State of A.P.* **AIR 2012 SC 2242: 2012 (6) SCR 787;** *T. Nagappa v. Y.R. Muralidhar* **AIR 2008 SC 2010: 2008 (6) SCR 959;** *Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr.* **AIR 1958 SC 376: 1958 SCR 1226;** *Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors.* **AIR 2004 SC 3114: 2004 (3) SCR 1050;** *Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors.* **AIR 2006 SC 1367: 2006 (2) SCR 1081;** *Kalyani Baskar (Mrs.) v. M.S. Sampoornam (Mrs.),* **(2007) 2 SCC 258;** *Vijay Kumar v. State of U.P. & Anr.* **(2011) 8 SCC 136: 2011 (11) SCR 893 and** *Sudevanand v. State through C.B.I.* **(2012) 3 SCC 387: 2012 (2) SCR 139 – relied on.**

2.1. An application filed under Section 311 Cr.P.C. must be allowed if fresh evidence is being produced to facilitate a just decision, however, in the instant case, the Trial Court prejudged the evidence of the witness sought

to be examined by the appellant, and thereby cause grave and material prejudice to the appellant as regards her defence, which tantamounts to a flagrant violation of the principles of law governing the production of such evidence in keeping with the provisions of Section 311 Cr.P.C. By doing so, the Trial Court reached the conclusion that the production of such evidence by the defence was not essential to facilitate a just decision of the case. Such an assumption is wholly misconceived, and is not tenable in law as the accused has every right to adduce evidence in rebuttal of the evidence brought on record by the prosecution. The court must examine whether such additional evidence is necessary to facilitate a just and proper decision of the case. The examination of the hand-writing expert may therefore be necessary to rebut the evidence of PW.40, and a request made for his examination ought not to have been rejected on the sole ground that the opinion of the hand-writing expert would not be conclusive. In such a situation, the only issue that ought to have been considered by the courts below, is whether the evidence proposed to be adduced was relevant or not. Identical is the position regarding the panchnama witness, and the court is justified in weighing evidence, only and only once the same has been laid before it and brought on record. The said panchnama witness, thus, may be in a position to depose with respect to whether the documents alleged to have been found, or to have been seized, were actually recovered or not, and therefore, from the point of view of the appellant, his examination might prove to be essential and imperative for facilitating a just decision of the case. [Para 18] [555-D-H; 556-A-C]

2.2. The High Court simply quoted relevant paragraphs from the judgment of the Trial Court and approved the same without giving proper reasons, merely observing that the additional evidence sought to

be brought on record was not essential for the purpose of arriving at a just decision. Furthermore, the same is not a case where if the application filed by the appellant had been allowed, the process would have taken much time. In fact, disallowing the said application, has caused delay. No prejudice would have been caused to the prosecution, if the defence had been permitted to examine said three witnesses. [Para 19] [556-D-E]

2.3. The application under Section 311 Cr.P.C. filed by the appellant is allowed. The parties are directed to appear before the Trial Court, and the Trial Court is requested to fix a date on which the appellant shall produce the three witnesses, and the same may thereafter be examined expeditiously in accordance with law, and without causing any further delay. The prosecution will be entitled to cross examine them. [Para 20] [556-F-H]

Case Law Reference:

1989 (3) SCR 735	**relied on**	**Para 8**
1991 (1) SCR 712	**relied on**	**Para 9**
1966 SCR 178	**relied on**	**Para 10**
1999 (3) SCR 818	**relied on**	**Para 11**
2012 (6) SCR 787	**relied on**	**Para 12**
2008 (6) SCR 959	**relied on**	**Para 13**
1958 SCR 1226	**relied on**	**Para 15**
2004 (3) SCR 1050	**relied on**	**Para 15**
2006 (2) SCR 1081	**relied on**	**Para 15**
(2007) 2 SCC 258	**relied on**	**Para 15**
2011 (11) SCR 893	**relied on**	**Para 15**
2012 (2) SCR 139	**relied on**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 709 of 2013.

From the Judgemnt & Order dated 8.04.2013 of the High Court of Delhi at New Delhi in Crl. M.C. No. 1324 of 2013.

Uday Lalit, Hari Shankar K., Kawal Nain, Aditya Verma for the Appellant.

S.P. Singh. Syed Tanweer Ahmad, Dinesh Kothari, B.V. Balaram Das for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. Leave granted.

2. This appeal has been preferred against the impugned judgment and order dated 8.4.2013 in Criminal Misc. Case No.1324 of 2013, passed by the High Court of Delhi at New Delhi, by way of which it has affirmed the order dated 16.3.2013, passed by the Trial Court, dismissing the application filed by the appellant under Section 311 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.'), observing that examination of the witnesses sought to be examined by the appellant-accused was in fact unnecessary, and would in no way assist in the process of arriving at a just decision with respect to the case.

3. Facts and circumstances giving rise to this appeal are as under:

A. An FIR dated 10.8.1998 was registered under Section 120B read with Sections 420, 467, 468, 471 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 (hereinafter referred to as 'the Act 1988') against the appellant and other accused persons. After the conclusion of

the investigation, a chargesheet was filed on 19.7.2001 by the investigating agency, i.e., CBI against Smt. Rita Singh (A-1), Mrs. Natasha Singh (A-2), appellant, and Mr. Y.V. Luthra (A-3), a Public Servant.

B. In view thereof, charges were framed by the learned Trial Court on 5.5.2003 against all the three accused.

C. In support of its case, the prosecution examined 52 witnesses in the course of over 50 hearings and subsequent thereto, the statement of the appellant-accused was recorded on 28-29.1.2013 and 5.2.2013. The appellant, in her defence examined only one witness, namely, Sudhir Kumar (DW-2) and after proving certain documents closed her defence on 18.2.2013. The other accused, namely, Mr. Y.V. Luthra concluded his defence on 19.2.2013, after examining two defence witnesses, namely, Mr. A.K. Saxena and Mr. Satpal Arora. The Trial Court thereafter, fixed the date for hearing final arguments as 5.3.2013. The appellant preferred an application under Section 311 Cr.P.C. on 5.3.2013 for permission to examine three witnesses. The said application was dismissed by the Trial Court vide order dated 16.3.2013, against which the Criminal Misc. petition filed by the appellant was also dismissed by the High Court, by way of impugned order dated 8.4.2013.

Hence, this appeal.

4. Shri U.U. Lalit, learned senior counsel appearing for the appellant, has submitted that the FIR was lodged in 1998 and if the prosecution has taken more than a decade to examine 52 witnesses, and that if after the appellant had closed her defence, the other accused had laid evidence in his defence, and that thereafter, without losing any time, the appellant had preferred an application seeking permission to examine three witnesses in her defence, and had even given reasons for their examination, the same should not have been dismissed. The Trial Court has committed an error in appreciating the evidence

which could have been provided by the said three witnesses in anticipation. It has also been stated that further, there was no delay on the part of the appellant in moving the application. Had this application been allowed by the courts below, no prejudice would have been caused to the respondent. Thus, the appeal deserves to be allowed.

5. On the contrary, Shri S.P. Singh, learned senior counsel appearing for the respondent, has opposed the appeal contending that the courts below have recorded a finding of fact to the extent that the said evidence was not necessary to arrive a just decision, and that it was left to the discretion of the court whether to allow such an application or not. This Court should not interfere with the manner in which such a discretion has been exercised by the courts below. The courts below have considered the case in correct perspective and thus, no interference is called for. The appeal lacks merit and is liable to be dismissed.

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

7. Section 311 Cr.P.C. empowers the court to summon a material witness, or to examine a person present at "any stage" of "any enquiry", or "trial", or "any other proceedings" under the Cr.P.C., or to summon any person as a witness, or to recall and re-examine any person who has already been examined **if his evidence appears to it, to be essential to the arrival of a just decision of the case.** Undoubtedly, the Cr.P.C. has conferred a very wide discretionary power upon the court in this respect, but such a discretion is to be exercised judiciously and not arbitrarily. The power of the court in this context is very wide, and in exercise of the same, it may summon any person as a witness at any stage of the trial, or other proceedings. The court is competent to exercise such power even suo motu if no such application has been filed by either of the parties. However, the court must satisfy itself, that it was in fact essential to examine

such a witness, or to recall him for further examination in order to arrive at a just decision of the case.

8. In *Mir Mohd. Omar & Ors. v. State of West Bengal,* AIR 1989 SC 1785, this Court examined an issue wherein, after the statement of the accused under Section 313 Cr.P.C. had been recorded, the prosecution had filed an application to further examine a witness and the High Court had allowed the same. This Court then held, that once the accused has been examined under Section 313 Cr.P.C., in the event that liberty is given to the prosecution to recall a witness, the same may amount to filling up a lacuna existing in the case of the prosecution and therefore, that such an order was uncalled for.

9. In *Mohanlal Shamji Soni v. Union of India & Anr.,* AIR 1991 SC 1346, this Court examined the scope of Section 311 Cr.P.C., and held that it is a cardinal rule of the law of evidence, that the best available evidence must be brought before the court to prove a fact, or a point in issue. However, the court is under an obligation to discharge its statutory functions, whether discretionary or obligatory, according to law and hence ensure that justice is done. The court has a duty to determine the truth, and to render a just decision. The same is also the object of Section 311 Cr.P.C., wherein the court may exercise its discretionary authority at any stage of the enquiry, trial or other proceedings, to summon any person as a witness though not yet summoned as a witness, or to recall or re-examine any person, though not yet summoned as a witness, **who are expected to be able to throw light upon the matter in dispute**, because if the judgments happen to be rendered on an inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated.

10. In *Rajeswar Prasad Misra v. The State of West Bengal & Anr.,* AIR 1965 SC 1887, this Court dealt with the ample power and jurisdiction vested in the court, with respect to taking additional evidence, and observed, that it may not be possible for the legislature to foresee all situations and possibilities and

therefore, the court must examine the facts and circumstances of each case before it, and if it comes to the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered, and if such an action on its part is justified, then the court must exercise such power. The Court further held as under:-

> *".....the Criminal Court has ample power to summon any person as a witness or recall and re-examine any such person* ***even if the evidence on both sides is closed*** *and the jurisdiction of the Court must obviously be dictated by* ***exigency of the situation, and fair play and good sense appear to be the only safe guides*** *and that only the requirements of justice command the examination of any person which would depend on the facts and circumstances of each case."* (Emphasis added)

11. In *Rajendra Prasad v. Narcotic Cell through its Officer-in-Charge, Delhi,* AIR 1999 SC 2292, this Court considered a similar issue and held as under:-

> *"Lacuna in the prosecution must be understood as the inherent weakness or a latent wedge in the matrix of the prosecution case. The advantage of it should normally go to the accused in the trial of the case, but an over sight in the management of the prosecution cannot be treated as irreparable lacuna.* ***No party in a trial can be foreclosed from correcting, errors. If proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be magnanimous in permitting such mistakes to be rectified.*** *After all, function of the criminal Court is administration of criminal justice and not to count errors committed by the parties or to find out and declare who among the parties performed better."* (Emphasis added)

12. Similarly, in *P. Sanjeeva Rao v. State of A.P.,* AIR 2012 SC 2242, this Court examined the scope of the provisions of Section 311 Cr.P.C. and held as under:-

"Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in Hoffman Andreas v. Inspector of Customs, Amritsar, (2000) 10 SCC 430. The following passage is in this regard apposite:

'In such circumstances, if the new Counsel thought to have the material witnesses further examined, the Court could adopt latitude and a liberal view in the interest of justice, particularly when the Court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.'

xxx xxx xxx xxx

We are conscious of the fact that recall of the witnesses is being directed nearly four years after they were examined in chief about an incident that is nearly seven years old….. we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself."

13. In *T. Nagappa v. Y.R. Muralidhar,* AIR 2008 SC 2010, this Court held, that while considering such an application, the

court must not imagine or assume what the deposition of the witness would be, in the event that an application under Section 311 Cr.P.C. is allowed and appreciate in its entirety, the said anticipated evidence. The Court held as under:

"What should be the nature of evidence is not a matter which should be left only to the discretion of the court. It is the accused who knows how to prove his defence. It is true that the court being the master of the proceedings must determine as to whether the application filed by the accused in terms of sub-section (2) of Section 243 of the Code is bona fide or not or whether thereby he intends to bring on record a relevant material. But ordinarily an accused should be allowed to approach the court for obtaining its assistance with regard to summoning of witnesses, etc. If permitted to do so, steps therefor, however, must be taken within a limited time. There cannot be any doubt whatsoever that the accused should not be allowed to unnecessarily protract the trial or summon witnesses whose evidence would not be at all relevant."

14. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to **cause serious prejudice** to the defence of the accused, or to give an **unfair advantage to the opposite party.** Further, the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a

witness, is germane to the issue involved. An opportunity of rebuttal however, must be given to the other party.

The power conferred under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection.

The very use of words such as 'any Court', 'at any stage", or 'or any enquiry, trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should therefore be, whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

15. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide: *Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr.,* AIR 1958 SC 376; *Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors.,* AIR 2004 SC 3114; *Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors.,* AIR 2006 SC 1367; *Kalyani Baskar (Mrs.) v. M.S. Sampoornam (Mrs.),* (2007) 2 SCC 258; *Vijay Kumar v. State of U.P. & Anr.,* (2011) 8 SCC 136; and *Sudevanand v. State through C.B.I.,* (2012) 3 SCC 387)

16. The instant case is required to be examined in light of the aforesaid settled legal propositions. The relevant part of the chargesheet dated 19.7.2001 states, that the insurance claim filed by the appellant was inflated and that therefore, the collusion of a Public Servant in this respect attracted the provisions of Sections 420, 467, 468, 471 and 13 of the Act 1988. The chargesheet further revealed that:

"Investigation has revealed that in order to obtain insurance claim, accused Rita Singh (A-1) in her capacity as Director, Mideast India Ltd. accused Natasha Singh (A-2) in her capacity as Director, approached IFCI and in view of the aforesaid necessity for obtaining NOC from Financial Institutions/Banks, Sh. S.S. Batra, Company Secretary, MIL vide letter dated 1.3.96 requested IFCI, New Delhi for issuing a NOC for releasing a sum of Rs.3.75 crores as interim on account payment. Sh. B.B. Huria the then Chief General Manager, IFCI recorded a note on this letter for issuing NOC subject to payment of over dues aggregating to Rs. 58 lacs. Despite the fact that there were over dues to the tune of Rs.58,92,197/- against Mideast (India) Limited, accused Y.V.Luthra dishonestly and fraudulently issued NOC dated 1.3.96 for release of Rs.3.75 crores by the insurance Company in respect of property at B-12/A Phase II, Noida and he on 2.3.96 recorded a note in the office copy of the letter dated 1.3.96 that NOC was issued as there were no over dues as confirmed from Accounts Department. This NOC dated 1.3.96 was handed over to the representative of Mideast (India) Limited, which was presented to Delhi Regional Office of UIICL and on the strength of the said false NOC the Insurance Company's Head Office at Chennai released a payment of Rs.3.60 crores to Mideast (India) Limited vide cheque No.454431 dated 8.3.96 which was credited to the account of Mideast (India) Limited. A sum of Rs.15 lacs was retained out of the approved amount of Rs.3.75 crores towards payment to PNB Capital Finance."

17. The Trial Court, while entertaining the application filed under Section 311 Cr.P.C., had asked the appellant to provide a brief summary of the nature of evidence that would be provided by the defence witnesses mentioned in the application, and in keeping with this, the appellant had furnished an application stating that the appellant wished to examine one Shri B.B. Sharma who was one of the panchnama witnesses, and who the prosecution had neither listed nor examined in court. Therefore, the appellant wished to examine him in defence. The second person was Shri S.S. Batra, Company Secretary of the appellant, as he was the best person to provide greater details of the company of which the appellant is the Director. The third witness was a hand-writing expert, and it was necessary for the defence to examine him regarding the correctness of the signatures of the appellant and others, particularly with respect to the signatures of the appellant.

18. Undoubtedly, an application filed under Section 311 Cr.P.C. must be allowed if fresh evidence is being produced to facilitate a just decision, however, in the instant case, the learned Trial Court prejudged the evidence of the witness sought to be examined by the appellant, and thereby cause grave and material prejudice to the appellant as regards her defence, which tantamounts to a flagrant violation of the principles of law governing the production of such evidence in keeping with the provisions of Section 311 Cr.P.C. By doing so, the Trial Court reached the conclusion that the production of such evidence by the defence was not essential to facilitate a just decision of the case. Such an assumption is wholly misconceived, and is not tenable in law as the accused has every right to adduce evidence in rebuttal of the evidence brought on record by the prosecution. The court must examine whether such additional evidence is necessary to facilitate a just and proper decision of the case. The examination of the hand-writing expert may therefore be necessary to rebut the evidence of Rabi Lal Thapa (PW.40), and a request made for his examination ought not to have been rejected on the sole ground that the opinion of the hand-writing expert would not be

conclusive. In such a situation, the only issue that ought to have been considered by the courts below, is whether the evidence proposed to be adduced was relevant or not. Identical is the position regarding the panchnama witness, and the court is justified in weighing evidence, only and only once the same has been laid before it and brought on record. Mr. B.B. Sharma, thus, may be in a position to depose with respect to whether the documents alleged to have been found, or to have been seized, were actually recovered or not, and therefore, from the point of view of the appellant, his examination might prove to be essential and imperative for facilitating a just decision of the case.

19. The High Court has simply quoted relevant paragraphs from the judgment of the Trial Court and has approved the same without giving proper reasons, merely observing that the additional evidence sought to be brought on record was not essential for the purpose of arriving at a just decision.

Furthermore, the same is not a case where if the application filed by the appellant had been allowed, the process would have taken much time. In fact, disallowing the said application, has caused delay. No prejudice would have been caused to the prosecution, if the defence had been permitted to examine said three witnesses.

20. In view of above, the appeal succeeds and is allowed. The judgment and order of the Trial Court, as well as of the High Court impugned before us, are set aside. The application under Section 311 Cr.P.C. filed by the appellant is allowed. The parties are directed to appear before the learned Trial Court on the 17th of May, 2013, and the learned Trial Court is requested to fix a date on which the appellant shall produce the three witnesses, and the same may thereafter be examined expeditiously in accordance with law, and without causing any further delay. Needless to say that the prosecution will be entitled to cross examine them.

B.B.B. Appeal allowed.

SCHLUMBERGER ASIA SERVICES LTD.
v.
OIL & NATURAL GAS CORPORATION LTD.
ARBITRATION PETITION NO.6 OF 2013

MAY 09, 2013

[SURINDER SINGH NIJJAR, J.]

Arbitration and Conciliation Act, 1996 – s.11(6) – Petition under – For appointment of nominee Arbitrator on behalf of respondent and also appointment of third Arbitrator (Presiding Arbitrator) in Arbitral Tribunal to adjudicate disputes between the parties – Maintainability – Whether arbitration petition liable to be dismissed on ground of limitation as it raises dead claims or the matter ought to be left to be decided by the Arbitral Tribunal – Held: The Chief Justice or the designated Judge can also decide whether the claim was dead one or a long-barred claim – But it is not imperative for the Chief Justice or his designate to decide the questions at the threshold – It can be left to be decided by the Arbitral Tribunal – In the present case, there is a dispute as to whether the repeated notices sent by the petitioner to the respondents were ever received – There are further disputes (even if the notices were received by respondent-ONGC) as to whether they were actually received in the correct section of respondent-ONGC – These are matters of evidence which are normally best left to be decided by the Arbitral Tribunal – It would be appropriate for Supreme Court to constitute the entire Arbitral Tribunal in exercise of powers u/s.11(6).

The instant arbitration petition was filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking direction from this Court for appointment of the nominee Arbitrator on behalf of the respondent and also appointment of third Arbitrator (Presiding Arbitrator) in

the Arbitral Tribunal to adjudicate the disputes between the parties.

The respondent raised preliminary objection to the maintainability of the arbitration petition contending that the petitioner had filed the present case only to bring unnecessary litigation; that the arbitration petition was an abuse of process of law and that the claims made were barred by a long period of time and were, therefore, dead claims.

Per contra, the petitioner submitted that the limitation stops running from the date mentioned in the notice invoking arbitration and in the present case, the notice invoking arbitration was sent on 14th November, 2008; that in any event, the petitioner had sent the final notice on 9th January, 2012 and the respondent had denied the claim through its letter dated 29th February, 2012, thus, the disputes clearly arose only w.e.f. 29th February, 2012 and therefore, the preliminary objection raised by the respondent deserves to be rejected.

The question which arose for consideration was whether the arbitration petition is liable to be dismissed on the ground of limitation as it raises dead claims and it would not be necessary for this Court to leave the matter to be decided by the Arbitral Tribunal.

Allowing the Arbitration Petition, the Court

HELD: 1. A bare perusal of the observations made by this Court in the judgment in *SBP & Co.* case makes it clear that the Chief Justice or the designated Judge can *also* decide whether the claim was dead one or a long-barred claim. But it is not imperative for the Chief Justice or his designate to decide the questions at the threshold. It can be left to be decided by the Arbitral Tribunal. The observations made in *SBP & Co.* case were explained by

this Court in *Indian Oil Co. Ltd.* Case. These observations make it clear that it is optional for the Chief Justice or his designate to decide whether the claim is dead (long-barred). It is also made clear by this Court that the Chief Justice or his designate would do so only when the claim is *evidently* and *patently* a long time-barred claim. The claim could be said to be patently long time-barred, if the contractor makes it a decade or so after completion of the work without referring to any acknowledgment of a liability or other factors that kept the claim alive in law. On the other hand, if the contractor makes a claim, which is slightly beyond the period of three years of completing the work say within five years of completion, the Court will not enter into disputed questions of fact as to whether the claim was barred by limitation or not. The judgment further makes it clear that there is no need for any detailed consideration of evidence. [Paras 16] [569-G-H; 570-A; 571-B-D]

SBP & Co. Vs. Patel Engineering Ltd. & Anr. **(2005) 8 SCC 618: 2005 (4) Suppl. SCR 688; and** *Indian Oil Corporation Ltd. Vs. SPS Engineering Ltd.* **(2011) 3 SCC 507: 2011 (2) SCR 512 – relied on.**

2. In the present case, there is a dispute as to whether the repeated notices sent by the petitioner to the respondents were ever received. There are further disputes (even if the notices were received by ONGC) as to whether they were actually received in the correct section of ONGC. These are matters of evidence which are normally best left to be decided by the Arbitral Tribunal. [Para 17] [571-E-F]

3. It would be appropriate for this Court to constitute the entire Arbitral Tribunal in exercise of powers under Section 11(6) of the Arbitration and Conciliation Act, 1996. [Para 18] [571-G]

Case Law Reference:

2005 (4) Suppl. SCR 688	**relied on**	**Para 12, 15, 16**
2011 (2) SCR 512	**relied on**	**Para 15, 16**

CIVIL ORIGINAL JURISDICTION : Arbitration Petition No. 6 of 2013.

Sanjiv Puri, Aditya Chhibber, B.K. Satija for the Petitioner.

Siddharth Luthra, ASG, Gaurav Agrawal, Shankar Narayanan, Arjun Diwan for the Respondent.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. This petition is filed under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeks a direction from this Court for appointment of the nominee Arbitrator on behalf of the respondent and also appointment of third Arbitrator (Presiding Arbitrator) in the Arbitral Tribunal to adjudicate the disputes arises between the parties.

2. The petitioner is a Company incorporated and registered under the law of Hong Kong having its project office in India and one of the base offices at Mumbai. The respondent is a Corporation registered under the Companies Act, 1956 having its registered office at Jivan Bharti Tower-2, 124, Circus New Delhi.

3. In its counter-affidavit, the respondent has raised a preliminary objection to the maintainability of the petition. It is submitted by the respondent that the petitioner has filed the present case only to bring unnecessary litigation. The arbitration petition is an abuse of process of law and the claims made are barred by a long period of time and are, therefore, dead claims.

4. In order to decide the preliminary objection, it would be necessary to take note of certain relevant events.

5. The petitioner and the respondent had entered into and executed a contract dated 7th December, 2004 (effective from the date of issue of the firm order dated 6th August, 2004). The contract under Clause 27 provides for arbitration as the mechanism for resolution of any dispute that may arise between the petitioner and the respondent. The arbitration clause reads as under:

"**27 ARBITRATION**

27.1 Except as otherwise provided elsewhere in the CONTRACT if any dispute, difference, question or disagreement arises, at any time before or after completion or abandonment of work, between the parties hereto or their respective representatives or assignees, at any time in connection with construction, meaning, operation, effect, interpretation or out of the CONTRACT or breach thereof the same shall be decided by an Arbitral Tribunal consisting of three Arbitrators. Each party shall appoint one Arbitrator and the Arbitrators so appointed shall appoint the third Arbitrator who will act as Presiding Arbitrator.

The party desiring the settlement of dispute shall give notice of its intention to go for arbitration clearly stating all disputes to be decided by arbitral tribunal and appoint its own arbitrator and call upon the other party to appoint its own arbitrator within 30 days. In case a party fails to appoint an arbitrator within 30 days from the receipt of the request to do so by the other party or the two Arbitrators so appointed fail to agree on the appointment of third Arbitrator within 30 days from the date of their appointment, upon request of a party, the Chief Justice of India or any person or institution designated by him (in case of International Commercial Arbitration) shall appoint

the Arbitrators/Presiding Arbitrator. In case of domestic Contracts, the Chief Justice of the High Court or any person or institution designated by him within whose jurisdiction the subject purchase order/CONTRACT has been placed/ made, shall appoint the arbitrator/Presiding Arbitrator upon request of one of the parties.

If any of the Arbitrators so appointed dies, resigns, incapacitated or withdraws for any reason from the proceedings, if shall be lawful for the concerned party/ arbitrators to appoint another person in his place in the same manner as aforesaid. Such person shall proceed with the reference from the stage where his predecessor had left if both parties consent for the same; otherwise, he shall proceed de novo.

It is a term of the CONTRACT that the party invoking arbitration shall specify all disputes to be referred to arbitration at the time of invocation of arbitration and not thereafter.

It is also a term of the CONTRACT that neither party to the CONTRACT shall be entitled for any ante-lite (pre-reference) or pendent-lite interest on the amount of the award.

The Arbitral Tribunal shall give reasoned award and the same shall be final, conclusive and binding on the parties.

The venue of the arbitration shall be at Mumbai, India.

It is a term of the CONTRACT that the cost of the arbitration will be borne by the parties in equal shares.

Subject to as aforesaid the provisions of the Arbitration and Conciliation Act, 1996 and any statutory modifications or re-enactment in lieu thereof shall apply to the arbitration proceedings under this clause."

Clause 26 of the Contract further provides as under:

"**26 JURISDICTION AND APPLICABLE LAW:**

This agreement including all matter connected with this Agreement, shall be governed by the laws of India (both substantive and procedural) for the time being in force and shall be subject to exclusive jurisdiction of the Indian Court at Mumbai. Foreign Companies, operating in Indian or entering into Joint ventures in India, shall have to obey the law of the Land and there shall be no compromise or excuse for the ignorance of the Indian legal system in any way."

6. The petitioner together with its affiliates is a leading oilfield service provider. It is trusted to deliver superior results and improved E&P performance for oil and gas companies around the world, including India. Through its well site operations, research and engineering facilities, it is working to develop products, services and solutions that optimize customer performance in a safe and environmentally sound manner. It employs over 113,000 people of more than 140 nationalities working in 85 countries, including India.

7. The respondent was desirous of hiring four sets of Measurement While Drilling (MWD) and one set of Gyro Equipment & Services (Gyro) collectively referred to as "Equipments" for carrying out its operation. Accordingly, the respondent issued a tender No.MR/DS/MAT/CT/MWD/ 142(390) 2003-04/P46KC04002. The petitioner had the necessary experience of carrying out operation as stated in the tender and submitted a bid on 8th June, 2004 under offer No.SASL/D&M/ONGC 4002/2002-02 for providing the required services against the respondent's tender in accordance with the terms and conditions set-forth therein. The respondent accepted the bid of the petitioner and placed a firm order dated 6th August, 2004 under No.MR/DS/MAT/CT/MWD/ 142(390)2003-04/DY8DF0301/ 9010002261. Accordingly, on

7th December, 2004, the parties entered into and duly executed a contract effective from the date of issue of the firm order i.e. 6th August, 2004. The petitioner agreed to perform a work defined in Appendix-III of the Contract. The respondent in consideration thereto promised to pay the amounts set out in Appendix-IV of the Contract at the time and in the manner prescribed in the contract. The duration of the contract was initially for a period of 2 years from the date of receipt of "Equipments" at Nhava base. The respondent had the option of extending the contract by one more year in two equal installments of six months each at the same rate, terms and conditions. The contract was automatically extendable for completion of jobs in ongoing wells, at the same rates, terms and conditions. The petitioner claims that as it was providing excellent services to the respondent, the contract was extended from 16th October, 2006 to 15th April, 2007 for the first installment of six months. Thereafter, it was extended from 16th April, 2007 to 15th October, 2007 for the second installment of six months on the same rates, terms and conditions as contained in Clause 2.0 of the Special Terms and Conditions of the Contract.

8. The petitioner further claims that it performed the work in terms of the contract and raised invoices for the work performed from time to time. However, invoices amounting to USD 481,252.65 and INR 9,565,616 were either short paid or not paid despite the work under the contract was satisfactorily performed by the petitioner. The details of the invoices raised by the petitioner are as under:

Invoice No.	**Period**	**Amount (USD)**
800001820	March 2006	128,630.00
800001821	March 2006	89,149.00
800001828B	March 2006	31,053.00
800001829B	March 2006	41,406.00

800002119	September	2006	192,169.00
800002120B	September	2006	63,729.00
800002860	September	2007	71,304.00
800002861B	September	2007	96.00
800002862B	September	2007	49,487.00
	Total		**667,023.00**

9. The petitioner further claims that the respondent has refused to make payment against the aforesaid invoices. The respondent totally rejected the various Lost in Hole (LIH) claims of the petitioner. According to the petitioner, in the event of "Equipments" are lost, destroyed or damaged in the site well, the respondent is liable to pay the depreciated replacement value of the "Equipments" stuck/lost in the hole subject to a limit of 50% calculated from the date of first use of such "Equipments" in India. Furthermore, in terms of the Clause 17 of the Contract, the respondent was under an obligation to make an attempt to recover or retrieve the said tools but the respondent failed to discharge this obligation also.

10. Since no payment had been received, the petitioner sent a letter to the respondent on 11th July, 2008 demanding the payment of the outstanding amount. However, there was no response to the aforesaid communication. The petitioner, therefore, issued a legal notice dated 14th November, 2008 invoking arbitration under Clause 27 of the Contract. In the aforesaid notice, the petitioner detailed the disputes that have arisen between the parties. In the same notice, the petitioner informed the respondent that it has nominated the Arbitrator and called upon the respondent to nominate their Arbitrator within 30 days from the date of receipt of the notice, failing which the petitioner shall be constrained to initiate legal steps for appointment of Arbitrator on behalf of the respondent. According to the petitioner, the aforesaid notice was duly

served upon the respondent but no steps were taken by them for appointment of Arbitrator. Thereafter, the petitioner sent a reminder letter on 21st May, 2009 calling upon the respondent to nominate an Arbitrator within 30 days from the date of receipt of the notice. The petitioner reiterated that in case the respondent still failed to nominate the Arbitrator, the petitioner shall initiate proceedings for appointment of Arbitrator on behalf of the respondent. Another reminder was issued by the petitioner on 11th August, 2010 in the same terms as the earlier notices and the reminders. Still there was no response from the respondent, which led the petitioner to send another notice on 9th January, 2012. Finally, on 29th February, 2012, the respondent sent a reply to the petitioner denying that any amount as claimed by the petitioner was due.

11. At this stage, the petitioner finally accepted that disputes have arisen between the parties and filed the present petition under Section 11(6) of the Arbitration and Conciliation Act, 1996 seeking appointment of the nominee Arbitrator on behalf of the respondent as well as the third Arbitrator (Presiding Arbitrator).

12. I have heard the learned counsel for the parties. Mr. Siddharth Luthra, learned senior counsel has submitted that: (1) the petitioner had accepted the payment without demur in 2007. The claims are, therefore, already settled.; (2) The contract had come to an end long time ago upon the petitioner accepting payment in 2007.; (3) The cause of action, if any, arose in 2007, while the arbitration petition is filed in January, 2013.; (4) According to Mr. Luthra, even on pleadings of the petitioner, the cause of action arose to the petitioner for filing petition under Section 11(6) of the Arbitration and Conciliation Act from 14th December, 2008 i.e. on expiry of 30 days from the first notice dated 14th November, 2008 invoking arbitration. Learned senior counsel submitted that the present petition ought to have been filed within a maximum period of 3 years from the said date, i.e., on or before 14th December, 2011 while the present

petition has been filed on 11th January, 2013. Learned senior counsel emphasized that this Court would not entertain the present petition as it raises dead claims. The contract expired after the de-hiring of last unit on 21st October, 2007. The respondent had received the entire amount in the years 2006-07. Pointing out to the averments made in the counter-affidavit, Mr. Luthra submits that the letter dated 14th November, 2008, 21st May, 2009 and 11th August, 2010, which were written to ONGC, were not received in the concerned section of ONGC. The address in the contract for correspondence was given as ONGC Limited, Drilling Services, Mumbai Region, 3B, Vasundhara Bhavan, Bandra-East, Mumbai-51. This was changed to ONGC Limited, Drilling Services, Directional Drilling Section, Mumbai Region, 2nd Floor, 11-High, ONGC, Sion (W), Mumbai-400017 in October, 2005. This was known to the petitioner as it had submitted the invoices to ONGC at new address. However, notices dated 21st May, 2009 and 11th August, 2010 were still sent to the earlier address. In any event, notice dated 14th November, 2008 was never received by the respondent. Mr. Luthra submits that mere sending of subsequent show cause notice/letters would not extend the limitation as the date of cause of action was fixed on the expiry of 30 days from the first notice dated 14th November, 2008. Mr. Luthra points out that Section 43 of the Arbitration and Conciliation Act, 1996 provides that the Limitation Act, 1963 shall apply to arbitrations as it applies to proceedings in Court. Relying on Section 43(2) read with Section 21 of the aforesaid Act, the learned counsel submitted that the arbitration shall be deemed to have commenced on the date on which a request for that dispute referred to arbitration is received by the respondent. The petitioner having sent the first notice on 14th November, 2008, the arbitration petition ought to have been filed after the expiry of 30 days therefrom. Learned counsel relies on the Constitution Bench of this Court in *SBP & Co. Vs. Patel Engineering Ltd. & Anr.* (2005) 8 SCC 618, in support of the submission that the present petition is barred by

limitation. He relies on para 39 of the judgment, which reads as under:

> "**39.** It is necessary to define what exactly the Chief Justice, approached with an application under Section 11 of the Act, is to decide at that stage. Obviously, he has to decide his own jurisdiction in the sense whether the party making the motion has approached the right High Court. He has to decide whether there is an arbitration agreement, as defined in the Act and whether the person who has made the request before him, is a party to such an agreement. *It is necessary to indicate that he can also decide the question whether the claim was a dead one; or a long-barred claim that was sought to be resurrected* and whether the parties have concluded the transaction by recording satisfaction of their mutual rights and obligations or by receiving the final payment without objection. It may not be possible at that stage, to decide whether a live claim made, is one which comes within the purview of the arbitration clause. It will be appropriate to leave that question to be decided by the Arbitral Tribunal on taking evidence, along with the merits of the claims involved in the arbitration. The Chief Justice has to decide whether the applicant has satisfied the conditions for appointing an arbitrator under Section 11(6) of the Act. For the purpose of taking a decision on these aspects, the Chief Justice can either proceed on the basis of affidavits and the documents produced or take such evidence or get such evidence recorded, as may be necessary. We think that adoption of this procedure in the context of the Act would best serve the purpose sought to be achieved by the Act of expediting the process of arbitration, without too many approaches to the court at various stages of the proceedings before the Arbitral Tribunal."

13. Relying on the aforesaid observations, the learned senior counsel has submitted that this Court would have to

decide as to whether the petition is liable to be dismissed on the ground of limitation as it raises dead claims. It would not be necessary for this Court to leave the matter to be decided by the Arbitral Tribunal.

14. On the other hand, Mr. Sanjiv Puri, learned senior counsel appearing for the petitioner submits that the limitation stops running from the date mentioned in the notice invoking arbitration and in the present case, the notice invoking arbitration was sent on 14th November, 2008. Learned counsel also relied on Section 3 of the Arbitration and Conciliation Act, 1996 in support of the submission that the notice is deemed to have been received by respondent as it was delivered to the addresses mentioned in the contract. In any event, the learned counsel submitted that the petitioner had sent the final notice on 9th January, 2012 and the respondent had denied the claim through its letter dated 29th February, 2012. The disputes clearly arose only w.e.f. 29th February, 2012. Therefore, the preliminary objection raised by the respondent deserves to be rejected.

15. In any event, learned senior counsel submitted that this Court in the case of *Indian Oil Corporation Ltd. Vs. SPS Engineering Ltd.* (2011) 3 SCC 507 has considered and explained the observations made by the Constitution Bench in *SBP & Company's* case (supra). It is submitted that on the question of limitation, this Court had categorically held that the matter will be left to the decision of the Tribunal to decide whether the claim made is barred by limitation or not.

16. I have considered the submissions made by the learned counsel for the parties. A bare perusal of the observations made by this Court in paragraph 39 of the judgment in *SBP & Co.* (supra) makes it clear that the Chief Justice or the designated Judge can *also* decide whether the claim was dead one or a long-barred claim. But it is not imperative for the Chief Justice or his designate to decide the questions at the threshold. It can be left to be decided by the

Arbitral Tribunal. The observations made in *SBP & Co.* (supra) were explained by this Court in *Indian Oil Co. Ltd.* (supra), which are as under:

> "**14.** To find out whether a claim is barred by res judicata, or whether a claim is "mala fide", it will be necessary to examine the facts and relevant documents. What is to be decided in an application under Section 11 of the Act is whether there is an arbitration agreement between the parties. The Chief Justice or his designate is not expected to go into the merits of the claim or examine the tenability of the claim, in an application under Section 11 of the Act. *The Chief Justice or his designate may however choose to decide whether the claim is a dead (long-barred) claim* or whether the parties have, by recording satisfaction, exhausted all rights, obligations and remedies under the contract, so that neither the contract nor the arbitration agreement survived. *When it is said that the Chief Justice or his designate may choose to decide whether the claim is a dead claim, it is implied that he will do so only when the claim is evidently and patently a long time-barred claim and there is no need for any detailed consideration of evidence.* We may elucidate by an illustration: if the contractor makes a claim a decade or so after completion of the work without referring to any acknowledgment of a liability or other factors that kept the claim alive in law, and the claim is patently long time-barred, the Chief Justice or his designate will examine whether the claim is a dead claim (that is, a long time-barred claim). On the other hand, if the contractor makes a claim for payment, beyond three years of completing of the work but say within five years of completion of work, and alleges that the final bill was drawn up and payments were made within three years before the claim, the Court will not enter into a disputed question whether the claim was barred by limitation or not. The Court will leave the matter to the decision of the Tribunal. If the distinction between apparent and obvious

dead claims, and claims involving disputed issues of limitation is not kept in view, the Chief Justice or his designate will end up deciding the question of limitation in all applications under Section 11 of the Act.

These observations make it clear that it is optional for the Chief Justice or his designate to decide whether the claim is dead (long-barred). It is also made clear by this Court that the Chief Justice or his designate would do so only when the claim is *evidently* and *patently* a long time-barred claim. The claim could be said to be patently long time-barred, if the contractor makes it a decade or so after completion of the work without referring to any acknowledgment of a liability or other factors that kept the claim alive in law. On the other hand, if the contractor makes a claim, which is slightly beyond the period of three years of completing the work say within five years of completion, the Court will not enter into disputed questions of fact as to whether the claim was barred by limitation or not. The judgment further makes it clear that there is no need for any detailed consideration of evidence.

17. In the present case, there is a dispute as to whether the repeated notices sent by the petitioner to the respondents were ever received. There are further disputes (even if the notices were received by ONGC) as to whether they were actually received in the correct section of ONGC. These are matters of evidence which are normally best left to be decided by the Arbitral Tribunal.

18. In my opinion, it would be appropriate for this Court to constitute the entire Arbitral Tribunal in exercise of my powers under Section 11(6) of the Arbitration and Conciliation Act, 1996. In exercise of the aforesaid powers, I nominate Justice V.N. Khare, Former Chief Justice of India as the Chairman and Justice D.P. Wadhwa and Justice S.N. Variava, former Judges of this Court as Arbitrators to adjudicate the disputes that have arisen between the parties. The arbitrators shall fix their own remuneration in consultation with the parties.

19. The Registry is directed to communicate this order to the Chairman of the Arbitral Tribunal, as well as to the other Arbitrators, so that they can enter upon reference, as soon as possible.

20. With these observations, the Arbitration Petition is allowed with no order as to costs.

B.B.B. Arbitration Petition allowed.

CHRISTIAN MEDICAL COLLEGE VELLORE & ORS
v.
UNION OF INDIA AND ORS.
(T.C.(C) NO.98 OF 2012)

MAY 13, 2013

[ALTAMAS KABIR, CJI, ANIL R. DAVE AND VIKRAMAJIT SEN. JJ.]

Education – Admission – Medical Courses – Notification published on 27th December, 2010, being No. MCI-81(1)/ 2010-MED/49070 dated 21st December, 2010, issued by the Medical Council of India (MCI), notifying a National Eligibility Entrance Test (NEET) – Competence of the MCI to introduce such a test which denudes different medical colleges from having any control over their entrance examinations and admissions on the basis thereof – On 13th December, 2012, Supreme Court posted the matters for final hearing on 15th, 16th and 17th January, 2013, and allowed the respective entrance examinations, which had already been notified, to be held, while the hearing progressed but directed that results of the examinations were not to be declared until further orders of the Court – However, hearing could not be concluded within 17th January, 2013 – Held: On account of the delay in completion of the hearing and the prospect of the students losing a year on account thereof, students hoping to gain admission on the strength of the results of the examinations, which have already been held and for which they had appeared, should not be denied such opportunity, at least for this year – Without fresh entrants into the Post-Graduate courses, even for a year, the hospitals are likely to be adversely affected – Besides, the students have been caught in the legal tangle for no fault of theirs and are the victims of policy decisions – In order to safeguard their interests, as also the interest of the hospitals, the bar imposed on 13th

December, 2012, for this year's entrance examinations is lifted and, to that extent, order of 13th December, 2012 modified – Results of the examinations already conducted allowed to be declared to enable the students to take advantage of the same for the current year – Indian Medical Council Act, 1956 – s.3.

CIVIL ORIGINAL JURISDICTION : Transfer Case (Civil) No. 98 of 2012 etc.

Under Article 139 of the Constitution of India.

WITH

WITH T.C.(C) NO.99, 101, 100, 102, 103, 104, 105, 105, 108, 110, 132-134, 117-118, 115-116, 125-127, 113-114, 128-130, 121-122, 131, 123-124, 111, 120, 119, 135-137, 138-139, 142 144 and 145 of 2012.

T.C.(C) Nos. 1, 14-15, 76, 12-13, 4, 11, 21-22, 5, 60, 2, 8, 3, 9, 17, 10, 7, 18, 75, 19, 20, 59, 53, 25, 23-24, 58, 72, 16, 61, 73, 62, 28-29, 30, 31-32, 33-36, 37-38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 63-65, 66-69, 70-71 of 2013.

W.P.(C) NO.480, 468, 467, 478, 481, 464, 495, 511, 512, 514, 516, 519, 535, 544, 546, 547, 483, 501, 502, 504 and 507 of 2012.

W.P.(C) Nos. 2, 1, 13, 15, 16, 20, 24, 26, 47, 66, 76, 74, 41 and 228 of 2013 T.P. (C) Nos. 31 and 79 of 2013.

Sidharth Luthra, ASG, L. Nageshwara Rao, A.K. Panda, Harish N. Salve, K. Parasaran, P. Vishwanatha Shetty, R. Venkataramani, Anoop George, Chaudhuri, June Chaudhuri, Nidhesh Gupta, T.R. Andhiyarujina, Mukul Gupta, K.K. Venugopal, Madhu R. Naik, S. Gurukrishna Kumar, V. Giri, Ajit Kumar Sinha, K. Radhakrishna, Uday U. Lalit, Subramonium Prasad, Dr. Manish Singhvi, AAg, Allanki Ramesh, G. Madhavi, Y. Rajesh Kumar, D. Geetha, Manju, C.S.N. Mohan Rao,

Lingaraj Sarangi, Satyajit Bahera, Pravin H. Parekh, E.R. Kumar, Aparajita Singh Gayatri Goswami, Geethi Ara, Chetna, R. Bobde, Ritika Sethi, Vishal Prasad (for Parekh & Co.), G.N. Reddy, Sanjay Misra, Sangita Chauhan, Rakesh K. Sharma, Senthil Jagadeesan, K.K. Mani, Neeraj Shekhar, Ashutosh Thakur, Sadique Mohd., Sanjay R. Hegde, S. Nithin, Amit Kumar Mishra, G. Umapathy, Satish Parasaran, M.A. Venkatasubranian, R. Mekhale, Amit Kumar, Meenakshi Arora, A. Ramesh, Y. Rajesh Kumar, Manju Jana, Shilpi, Lokesh Kumar Sharma, B. Balaji, Dr. Sushil Balwada, Shashi Kiran Shetty, Sharan Thakur, S. Udaya Kumar Sagar, Bina Madhavan, Praseena E. Joseph, Shivendra Singh (for Lawywer's Knit & Co.), R. Jagannath G., E.R. Sumathy, Naveen R. Nath, L.M. Bhat, Hetu Arora, Amrita Sharma, Darpan K.M., Rameshwar Prasad Goyal, Dharmendra Kumar Sinha, Jayanth Muth Raj, Malavika J.,Sureshan P., Radha Shyam Jena, Rajiv Yadav, Amit Anand Tiwari, Ashwarya Sinha, Jayesh Gaurav, Ambhoj Kumar Sinha, Ambar Qamaruddin, G.S. Kannur, Rajesh Kumar, Savita Danda, Lokesh Kumar, Nirada Das, Vaijayanthi Girish, P. George, Gaurav Sharma, Surbi Mehta, Naveen Prakash, S. Chandra Shekhar, V.G. Pragasam, S.J. Aristotle, S. Prabu Ramasubramanian, Supriya Garg, Neelam Singh, Shodhan Babu, E.C. Agrawala, Abhijat P. Medh,V. Balachandran, Gopal BalwantSathe, G. Umapathy, S. Gowthaman, Ranjith B., Shivaji M. Jadhav, Prity Kunwar, A. Venayagam Balan, K.K. Trivedi, Priyanka Adyaru, Rameshwar Prasad Goyal. K.V. Sreekumar, R.P. Goyal, K. Rajeev, L.R. Singh, Namita Choudhary, E.M.S. Anam, Dushyant Parashar, Ravindra Keshavrao Adsure, Shakil Ahmed Syed, Mohd. Parvez Dabas, S.A. Saud, Amit Kumar, Atul Kumar, Rekha Bakshi, Ashish Kumar, Ankit Rajagaria, Supriya Juneja, Gargi Khanna, Arjun Diwan, Akansha Tandan, V. Prabhakar, R. Candrachud, Jyoti Prashar, Tara Chandra Sharma, Neelam Sharma, Rajeev Sharma, Ajay Sharma, Rupesh Kumar, G.S. Kannur, Vaijayanthi Girish, Ravi Shah, Rudreshwar Singh, Rakesh Gosain, Kaushik Poddar, Garvesh Kabra, Y. Raja Gopala Rao, B. Balaji, R. Rakesh Sharma, Suruchi Aggarwal,

Anjali Chauhan, Rishab Kaushik, Nandini Gupta, Hemantika Wahi, G.N. Reddy, B. Debojit,Shasank Babu, Sodhan Babu, Neelam Singh, Supriya Garg, Amitesh Kumar, Ravi Kant, C.S. Singh, Gopal Singh, Abhigya, Abhay Singh Kushwaha, Pradeep Kumar Dubey, Sarthak Mehrotra, Navin Chawala, Bina Gupta, Amit Anand Tiwari, Tejveer Singh Bhatia, Prathibha M. Singh, Surbhi Mehta, Gaurav Sharma, Farah Fathima (for Lawyers Knit & Co.), Arputham Aruna & Co., Abdhesh Choudhary, Rajni Ranjan Dwivedi, Bhavanishnkar V. Gadnis, Sunita B. Rao, K.H. Nobin Singh, Sapam Biswajit Meitie, Irshad Ahmad for the appearing parties.

The Order of the Court was delivered by

O R D E R

ALTAMAS KABIR, CJI. 1. In all these 115 matters, which include writ petitions filed in this Court and in different High Courts, which have been transferred to this Court for decision, the subject matter of challenge is a notification published on 27th December, 2010, being No. MCI-81(1)/2010-MED/49070 dated 21st December, 2010, issued by the Medical Council of India, notifying a National Eligibility Entrance Test (NEET) for admission to Post-Graduate Medical Courses conducted in colleges all across the country.

2. The challenge to the said notification gave rise to a wide range of submissions involving the competence of the Medical Council of India, constituted under Section 3 of the Indian Medical Council Act, 1956, to introduce such a test which denudes the different medical colleges across the country from having any control over their entrance examinations and admissions on the basis thereof.

3. On 13th December, 2012, when the matters were taken up for consideration, we decided to post the matters for final hearing on 15th, 16th and 17th January, 2013, and allowed the respective entrance examinations, which had already been

notified, to be held, while the hearing progressed. Such examinations included the National Eligibility Entrance Test(NEET) for both MBBS and Post-Graduate courses in different disciplines, as also the BDS and MDS examinations. Presuming that the hearing would be completed on the dates indicated, we had directed that the Medical Council of India, the Dental Council of India, as well as the States and Universities and other institutions, would be entitled to conduct their respective examinations for the MBBS, BDS and Post-Graduate courses, but the results of the examinations were not to be declared until further orders of the Court. Consequently, although, the examinations have been held, the results have been withheld and have not been declared, on account of the interim order passed by us.

4. The hearing could not be concluded within 17th January, 2013, as we had hoped, on account of the enlargement of the scope of the hearing and the large number of parties who had to be heard in the matter. In fact, the matters were last heard on 30th April, 2013, and it has, therefore, not been possible to pronounce judgment before the Supreme Court closed for the summer vacations on 10th May, 2013.

5. While the matters were being heard, we had been informed by the learned senior counsel appearing for the Christian Medical College, Vellore, and the Karnataka Pvt. Medical & Dental College, that a large number of students would be adversely affected and would stand to lose a year, if the bar on the declaration of their results was not lifted. Although, initially, we had declined to entertain such prayer, on account of the delay in completion of the hearing and the prospect of the students losing a year on account thereof, we feel that students hoping to gain admission in the MBBS as well as Post-Graduate courses on the strength of the results of the examinations, which have already been held and for which they had appeared, should not be denied such opportunity, at least for this year. We are also alive to the fact that it is the Post-

Graduate students in the medical colleges, who take charge of the medical treatment of patients in the hospitals. Without fresh entrants into the Post-Graduate courses, even for a year, the hospitals are likely to be adversely affected on account of lack of doctors to directly take care of the patients in the hospitals.

6. Apart from the above, the students, who aspire to gain entry into the medical colleges at the MBBS and BDS and the Post-Graduate levels, have been caught in the legal tangle for no fault of theirs and are the victims of policy decisions. In order to safeguard their interests, as also the interest of the hospitals, we consider it just and equitable to lift the bar imposed by us on 13th December, 2012, for this year's entrance examinations and, to that extent, we modify our order of 13th December, 2012, and allow the results of the examinations already conducted to be declared to enable the students to take advantage of the same for the current year.

B.B.B. Matters disposed of.