MARGARET ALMEIDA & ORS. ETC.
v.
BOMBAY CATHOLIC CO-OPERATIVE HOUSING SOCIETY LTD. & ORS.
(Civil Appeal Nos. 2683-2685 of 2013)

MARCH 22, 2013

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

Interim Relief – Entitlement – Housing Society passes resolution on 25.9.1966 for re-development of the area which was let out to 69 tenant members – As per resolution, after redevelopment, 230 tenements would be constructed out of which 161 were meant for allottee-members and 69 for the tenant-members – The resolution, when challenged by tenant-members u/s.91 of Co-operative Societies Act, attained finality in favour of the Society – 161 beneficiaries also made deposits in the year 1966 to the Society – The tenant-members again challenged the resolution u/s. 18 of the Act seeking bifurcation of the Society, which issue is still pending – The Society by its resolution dated 6.12.2009 gave effect to its earlier resolution dated 25.9.1966 – Consequential conveyance deed dated 7.12.2009 was executed – 15 out of the 69 tenant-members, then filed suits seeking direction to restrain the society from taking steps in furtherance of resolution dated 6.12.2009 and the consequential conveyance deed – Interim relief not granted – In Notice of Motion, Single Judge of High Court granted interim relief and subsequently made the interim order absolute – Division Bench of High Court vacated the interim order – Held: The tenant-members are not entitled to interim relief – By vacating the interim order no irreparable loss is caused to them – They being in minority (initially at the time of filing of suit 15 and when reached this Court reduced to 5) as against 225 members, balance of convenience is in favour of the majority

and not the contesting tenant-members – Their plea to procure a better offer for development than that offered to Society, also shows that they are agreeable to development and the initiation of proceedings for restraining development – lacks bonafide – The tenant-members are also not entitled to the interim relief as they do not have proprietary interest in the subject matter.

The respondent-housing Society developed three blocks of land namely 'Willingdon West', 'Willingdon South' and 'Willingdon East'. It sold 'Willingdon West' area to shareholders on freehold basis and leased out the area in 'Willingdon South' to its shareholders. In the 'Willingdon East' the respondent-Society constructed 25 cottages and the same were let out to tenant-members (including the appellants).

The respondent-Society passed a resolution on 25-9-1966 to redevelop the land in 'Willingdon East' by raising new apartments by demolishing 25 cottages, to house 230 tenements. Out of the 230 tenements, 161 tenements would be meant for allottee-members and the remaining 69 tenements for the tenant-members who were already in occupation of 25 cottages.

The tenant-members assailed the resolution u/s.91 of Co-operative Societies Act. After the same was finally decided against the tenant members, the respondent-Society invited applications for allotment of flats as per the resolution dated 25.9.1966 and collected advance from about 200 members.

The tenant-members again challenged the redevelopment proposal u/s.18 of Co-operative Societies Act, praying for the bifurcation of the Catholic society into two i.e. one comprising of only tenant-members and the other comprising of all non tenant-members. The same

also did not culminate in favour of the tenant-members, as the tenant-members ultimately withdrew their challenge and undertook to co-operate with the respondent-Society for redeveloping the Willingdon East area as envisaged in the resolution of the respondent-Society dated 6.12.2009. In compliance of the resolution dated 6.12.2009, a conveyance dated 7.12.2009 came to be executed.

Some of the tenant-members filed two civil suits praying for direction to the respondent-Society to restrain from taking steps in furtherance of the resolution dated 6.12.2009 and the consequential conveyance deed dated 7.12.2009. As the interim relief was not granted to the tenant-members, they moved Notice of Motion, wherein the Single Judge of High Court granted interim relief. Single Judge by a further order dated 5.5.2011 made the interim order absolute. In appeal, Division Bench of High Court vacated the interim order granted by the Single Judge. Hence the present appeals.

Dismissing the appeals, the Court

HELD: 1. The Catholic Society comprised of about 745 members. Out of these members the strength of the tenant-members at the present juncture is 69. The relief sought in the two suits is a claim for rights, on account of being tenant-members. The suits were filed by only 15 tenant-members. The suits were not filed in a representative capacity, and as such, it would be incorrect to assume, that the suits can be considered to have been filed by all the 69 tenant-members. The number of tenant-members who were pursuing their remedy through the aforesaid suits, has diminished further before this Court, inasmuch as Special Leave Petition filed by them comprises of eight petitioners only. Further, three of the eight petitioners had prayer for transposing them as respondents, as they did not want to pursue the matter

any further (along with the remaining petitioners). Thus, the strength of the tenant-members who had initiated the civil suits has successively diminished from 15. Keeping in mind, that the total tenant-members are 69, and the relief sought in the suits, and now through the instant petitions/appeals (which are filed on the strength of being tenant-members), has diminished to 5, it would be inappropriate to consider the grant of any interim relief, in the absence of any clear determination, that the claim pressed by the appellants before this Court is at the behest of at least a simple majority of the tenant-members. Therefore, acceptance of the prayer made by the tenant-members for interim directions, would not only be inappropriate but would be unthinkable. [Para 26] [910-B-H; 911-A-E]

2. It cannot be said that the tenant-members would lose their co-operative membership upon implementation of the resolution of the Catholic Society dated 6.12.2009 (and the consequential conveyance deed dated 7.12.2009). All the 69 tenant-members, besides 161 allottee-members would be entitled to occupy the tenements, consequent upon completion of the building project emerging out of the resolution of the Catholic Society dated 6.12.2009 (and the consequential conveyance deed dated 7.12.2009). Thereafter, they would have to be enrolled as members of the Cooperative Society to be formed by the developer, u/s. 10 of the Maharashtra Ownership of Flats (Regulation of the Promotion, Construction, Sale, Management & Transfer) Act, 1963, r/w. Rule 10 of the rules framed thereunder. Thus on the instant aspect of the matter, the petitioners/ appellants will not be subjected to any irreparable loss. [Para 28] [912-B-C, D-E, F-G]

3.1. In the peculiar facts and circumstances of the case, it is not possible for this Court to accede to the

claim of the appellants that their claim for the bifurcation of the Catholic Society under Section 18 of the Cooperative Societies Act would stand frustrated if resolution dated 6.12.2009 is given effect to. The first dispute between the rival parties arose when the Catholic Society resolved to redevelop the land measuring about 5.5 acres, known as 'Willingdon East', by resolution passed on 25.9.1966. The said resolution was assailed by the tenant-members under Section 91 of the Cooperative Societies Act, and the issue attained finality in favour of Catholic Society, after a Division Bench of the High Court dismissed the intra-court appeal preferred by the tenant-members, on 25.7.1972. The aforesaid resolution dated 25.9.1966 (which was declared as legal by the High Court),is sought to be given effect to by the Catholic Society, through its resolution dated 6.12.2009 (and consequential conveyance deed dated 7.12.2009). Five tenant-members are now desirous of stalling the resolution of 25.9.1966, even though about 47 years have gone by since then. Thus the Catholic Society, left to itself, would have commenced the redevelopment of 'Willingdon East', comprising of 230 tenements, more than four and a half decades prior hereto, had the tenant-members allowed the Catholic Society to proceed with the matter in terms of its aforesaid resolution. The instant action of the tenant-members has adversely affected all those who would have been entitled to tenements, had the petitioners/appellants herein not obstructed to the redevelopment resolution of the Catholic Society. Deprivation of the rights of 230 individuals, at the behest of five of them, tilts the balance of convenience in favour of the majority (230 – 5 = 225), and against a miniscule minority of 5 members. In this view of the matter also, the High Court while passing the impugned order dated 9.8.2012 was fully justified, in vacating the interim order(s) passed by the Single Judge. [Paras 29 and 30] [913-A-B, C-H; 914-AB]

3.2. The tenant-members had filed an application under Section 18 of the Co-operative Societies Act, to protect the interest of the tenant-members of the Catholic Society. To achieve the aforesaid objective, it was canvassed, that the Catholic Society should be bifurcated/divided in such a manner, that one of the emerging societies would comprise of only tenant-members. The second resultant society, could cater to all non-tenant members. Inspite of the fact, that the aforesaid process (seeking bifurcation of the Catholic Society) was initiated by the tenant-members in the seventies, and inspite of the fact that about four decades have since elapsed, the tenant-members have failed to obtain a final determination with reference to their prayer for bifurcation/division of the Catholic Society. [Para 31] [914-D-F]

3.3. Merely on account of the said pending claim for bifurcation raised by 69 tenant-members, they have exclusively occupied 5.5 acres of land situated in Santacruz, Mumbai. On the redevelopment of the said land, 230 tenements would be created. The gains to the tenant-members, are clearly incomparable to the loss which has ensued on account of continued *status quo*. 161 beneficiaries, as per the resolution of the Catholic Society dated 25.9.1966 who had made deposits in 1966 (at the asking of the Catholic Society) are still waiting. Thus viewed, even on the aspect of bifurcation/ division of the Catholic Society, there can hardly be any justification in the prayer made by the tenant-members, for an injunction against the resolution of the Catholic Society dated 6.12.2009 (and the consequential conveyance deed dated 7.12.2009). The balance of convenience, is surely not in favour of the tenant-members. [Para 33] [915-G-H; 916-A-C]

4. It has been determined by the High Court that the

petitioners/appellants did not have any proprietary right as tenant-members of the Catholic Society. This determination attained finality between the rival parties. In the impugned order dated 9.8.2012, the Division Bench of the High Court by relying upon the aforesaid determination, further concluded that, the petitioners/ appellants are disentitled in law to claim the relief sought by them. Thus the relief sought by the tenant-members, is a relief which can ordinarily be sought only by individuals/parties who have a proprietary interest, in the subject matter. The Catholic Society has thus made out a *prima facie* case in its favour (the final determination whereof will only be rendered, at the culmination of the proceedings, initiated through the civil suits). Therefore, it would be inappropriate to grant an injunction, restraining all redevelopmental activities, in terms of the prayer made by the petitioners/appellants. [Para 34] [916-D; 918-A-C, D-E]

5. As regards the plea of the tenant-members, that they were able to procure a better offer i.e. 75 crores, for the same developmental project as against the conveyance deed dated 7.12.2009 which contemplated a consideration of Rs.70 crores payable to the Catholic Society, the High Court recorded the finding that the offer of Rs.75 crores can be stated to have been made at the behest of a rival builder who has even paid for the litigation expenses of the tenant-members. The tenant-members readily accepted the offer made by the rival builder, when he proposed before the High Court that he would act in the same manner as the builder who had come forward with proposal of redevelopment contemplated by the resolution of the Catholic Society. Therefore, it can be inferred that the tenant-members are agreeable to the redevelopment of 5.5 acres land comprising of 'Willingdon East' in the manner contemplated by the resolution of the Catholic Society

dated 6.12.2009 (and the consequential conveyance deed dated 7.12.2009), which is impugned in the suits filed by the tenant-members. This also *prima facie* shows that the action of the tenant-members *prima facie* seems to lack *bona fides*. Therefore, this Court affirms the determination rendered by the High Court that it was for the Catholic Society to decide who should be given the redevelopmental rights, and not the tenant-members who are a small minority of 15 persons (the number having now diminished to 5) who have initiated the litigation out of which the present proceedings have arisen. As of now, therefore, it is possible to *prima facie* infer, that the petitioners'/appellants' claim before the High Court does not seem to be *bona fide*. They also do not *prima facie* seem to have genuinely initiated the instant litigation. [Para 35 and 36] [918-F-G; 922-D-H; 923-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2683-2685 of 2013.

From the Judgments & Orders dated 09.08.2012 of the High Court of Judicature at Bombay in Appeal No. 413 of 2011 in Notice of Motion No. 172 of 2010 in Suit No. 144 of 2010, Appeal No. 489 of 2011 in Notice of Motion No. 172 of 2010 in Suit No. 144 of 2010 and Appeal No. 573 of 2011 in Notice of Motion No. 172 of 2010 in Suit No. 144 of 2010.

WITH

C.A. Nos. 2686-2688 & 2689-2690 of 2013.

Mukul Rohtagi, J.J. Bhat, C.A. Sundaram, Vineet B. Naik, Abhinav Vaisht, Rafique Dada, Shyam Divan, L.N. Rao, Shally Bhasin Maheshwari, Purnima Bhat, C.D. Mehta, Nikhil Nayyar, Pritha Srikumar, T.V.S. Raghavendra Sreyas, Lalan Gupta, Bhavik Mehta, Vatsal Merchant, Pratap Venugopal, Varun Singh, K.J. John & Co., Aman Vachher, Ashutosh Dubey, Harsh Sharma Vriti Anand, P.N. Puri, P.S. Sudheer, Abu John Mathew, Rishi Maheshwari, Garima Prashad, Ranjeeta Rohtagi

for the appearing parties.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Leave granted in all matters.

2. Through the instant common judgment, we propose to dispose of the following matters which came to be filed in this Court assailing the order passed by a Division Bench of the High Court of Judicature at Bombay (hereinafter referred to as 'the High Court') in Appeal Nos.489 of 2011, 413 of 2011 and 573 of 2011 :

(i) Margaret Almeida & Ors. vs. Bombay Catholic Co-operative Housing Society & Ors., Civil Appeals arising out of SLP (C) Nos. 30847-30849 of 2012),

(ii) Priti Mungrey & Ors. v. The Bombay Catholic Co-operative Housing Society Ltd. & Ors., Civil Appeals arising out of SLP (C) Nos.30867-30869 of 2012), and

(iii) Anthony D'Sa v. The Bombay Catholic Co-operative Housing Society Ltd. Civil Appeals & Ors. (arising out of SLP (C) Nos.28256-28257 of 2012).

During the Course of hearing, Civil Appeals (arising out of Special Leave Petition no.30847-30849 of 2012) were treated as the lead case. We will, therefore, mainly rely on the pleadings thereof, for narrating the factual controversy. Reference will be made to pleadings in the other connected matters only for recording submissions based thereon, advanced during the course of hearing.

3. The following letter was addressed by the counsel for Margaret Almeida (a respondent in Appeal no.413 of 2011 before the High Court) intimating her of the outcome of the aforesaid appeal, and the steps taken by him on her behalf :

"Amardev J. Uniyal,
Advocate High Court

13th August 2012

Margaret Almeida & Ors.,

Madam/Sirs,

Re : Appeal Nos.413 of 2011, 489 of 2011 and 573 of 2011 filed in Bombay High Court.

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1. This is to inform you that the hearing in the aforesaid matters concluded on 9th august 2012. The Hon'ble Court pronounced the operative part of the Order directing that the aforesaid appeals are allowed and interim order dated 5th May 2011 stood vacated. The Counsel appearing on your behalf immediately requested the Hon'ble Court to stay the operation and effect of the said order for a reasonable time to allow the matter to be tested in Appeal.

2. However, the Hon'ble Court did not allow the said application and inter alia directed that the Sumer Associates Builders (Appellants in Appeal No.413 of 2011) shall not demolish the structures in which our clients reside upto 30th September 2012. I have made an application for the certified copy of the said order and same shall forward the same on its receipt. In the circumstances, you are advised to kindly file your Special Leave Petition before the Hon'ble Supreme Court and request for stay of the effect and implementation of the order dated 9th August 2012 at the earliest.

Yours faithfully,
Sd/-
for (Amardev J. Uniyal)"

The aforesaid letter was filed before this Court by the appellant Margaret Almeida by referring to it as the impugned order. When the matter came up for hearing on 14.8.2012, this Court passed the following order :

> "As and when the petitioners file the authenticated copy of the impugned order, list these special leave petitions before the appropriate bench."

The matter was repeatedly listed thereafter, but was not taken up for consideration. On 14.9.2012, while directing the listing of the lead matter (along with other matters) for preliminary hearing on 21.9.2012, this Court extended, at the asking of the appellants, the interim protection which had remained in place during the pendency of the instant litigation before the Division Bench of the High Court (vide its order dated 9.8.2012). The aforesaid interim protection was extended from time to time (and continued till the final hearing of these appeals). On 1.10.2012, notice came to be issued to the respondents, after the impugned order passed by the High Court dated 9.8.2012 was placed on the record of the case pending before this Court. On completion of pleadings, the matter was heard for final disposal.

4. We shall first narrate the sequence of facts out of which the present controversy has arisen.

5. The Bombay Catholic Co-operative Housing Society Limited (hereinafter referred to as "the Catholic Society") was incorporated and registered in 1914. In 1917 the Catholic Society was registered under the Central Cooperative Societies Act, 1912. The objects of the Catholic Society, as per its bye-laws, were to carry on buying, selling, hiring, letting and developing land. It was also the object of the Catholic Society to carry on the activity of building, besides such like allied activities.

6. For the aforesaid objectives, in the first instance at its

inception, the Catholic Society purchased 6 acres of undeveloped land from private parties. The Catholic Society then purchased another 11 acres of such land in 1918. Eventually, the Catholic Society acquired ownership of approximately 34.24 acres of land to carry out the objectives defined in the bye-laws. The land in question was situated in Santacruz. The estate of Catholic Society was named after Lord Willingdon, the then Governor of Bombay. Since the aforestated land holding of the Catholic Society was comprised of three different blocks of land, the blocks came to be referred to as Willingdon West, Willingdon East and Willingdon South. The area in Willingdon West measuring about 17.12 acres was sold to shareholders on freehold basis. These owners were referred to as owner members. The area in Willingdon South measuring about 11.63 acres was leased to shareholders for 998 years. These members were referred to as lessee members. The subject matter of the present controversy relates to Willingdon East measuring approximately 5.5 acres.

7. In the land measuring 5.5 acres known as Willingdon East, the Catholic Society constructed 25 cottages. These cottages were let out during 1940-45 on a monthly rental basis. Out of the 73 tenements in the aforestated 25 cottages, 54 were allotted to members of the Catholic Society. These tenants were referred to as tenant-members. 15 of the tenements were assigned to tenants simplicitor. These 15 tenants were not members of the Catholic Society.

8. After coming into force of the Maharashtra Cooperative Societies Act, 1960 (hereinafter referred to as "the Cooperative Societies Act"), all the tenants in Willingdon East became members of the Catholic Society, for which fresh shares were issued, at the face value of Rs.50/- per share. Therefore, all the tenants in Willingdon East, became tenant-members. The instant controversy relates to a dispute between the Catholic Society on the one hand; and the tenant-members on the other hand. The Catholic Society is the respondent

herein, whereas, some of the tenant-members are the contesting appellants.

9. The first dispute between the rival parties arose when the Catholic Society resolved to re-develop the land measuring 5.5 acres known as Willingdon East. The decision to re-develop the land in question was taken on account of the fact, that the 25 cottages constructed thereon, were scattered all over the land. It was felt that by redevelopment, the said land would be effectively utilised for the benefit of a larger number of persons. To give effect to the aforesaid determination, the Catholic Society passed a resolution on 25.9.1966, wherein it was resolved to provide for 161 apartment-allotments in the buildings proposed to be raised in the land known as Willingdon East. It would be relevant to mention, that the reconstruction contemplated in the redevelopment of Willingdon East contemplated the raising of new buildings to house 230 tenements. Of these, 161 tenements were meant for allottee-members and the remaining 69 for the tenant-members already in occupation of the existing 25 cottages as tenants. The process of redevelopment included demolition of the existing 25 cottages, and raising of new buildings in their place. The average estimated cost of each apartment was assessed at Rs.55,000/-, out of which allottee-members for the 161 apartment-allotments were required to deposit Rs.15,000/- each with the Catholic Society. The average estimated cost was determined in 1966, it must obviously be much higher now. The aforesaid resolution dated 25.9.1966 was assailed by seeking recourse to the remedies available under the Co-operative Societies Act. All the efforts made by the tenant-members, however, proved futile. It would be relevant to mention, that the aforesaid dispute raised by the tenant-members under Section 91 of the Cooperative Societies Act was finally dismissed on 5.3.1971. The said order dated 5.3.1971 was passed on an appeal preferred by the tenant-members before the Maharashtra State Cooperative Tribunal. The resolution dated 25.9.1966 and order dated 5.3.1971 (passed by the

Maharashtra State Cooperative Tribunal) were challenged by the tenant-members by filing Misc. Petition no.250 of 1972 before the High Court. A learned Single Judge of the High Court dismissed the aforesaid petition on 17.4.1972. An intra-court appeal, preferred by the tenant-members was dismissed by a Division Bench of the High Court on 25.7.1972. The said order attained finality between the rival parties. In view of the aforesaid factual position it became open to the Catholic Society to give effect to its resolution dated 25.9.1966, whereby, it had decided to re-develop about 5.5 acres of land known as Willingdon East, to provide for 161 apartment-tenements by raising fresh construction, in place of the existing 25 cottages scattered all over the said land.

10. After the said dispute under Section 91 of the Cooperative Societies Act challenging the resolution dated 25.9.1966 attained finality, the Catholic Society invited applications from its members (holding at least 5 shares) for allotment of flats in the proposed buildings to be constructed under the new building scheme. In this behalf the Catholic Society also submitted, for approval and sanction, building plans to the Bombay Municipal Corporation. Having shortlisted the successful allottees, the Catholic Society required the selected allottees to deposit Rs.15,000/- each, towards part payment of the price of the said flats. About 200 members made advance payment of Rs.15,000/- each. As such, the Catholic Society collected Rs.30 lakhs for implementing its redevelopment project, based on the resolution dated 25.9.1966.

11. The tenants in the 25 cottages at Willingdon East again felt threatened. They accordingly, raised a joint challenge, to the proposed action of redevelopment referred to above. On this occasion, the tenant-members filed an application under Section 18 of the Cooperative Societies Act before the District Deputy Registrar, Cooperative Societies, Mumbai, praying for the bifurcation of Willingdon East. The foundation of the

aforesaid claim was based on the fact that the interest of the tenant-members was not being adequately protected as they constituted a miniscule minority amongst the members of the Catholic Society. In this behalf it was asserted at the hands of the tenant-members, that there were about 745 members of the Catholic Society, out of which an overwhelming 685 members were not tenant-members. It was also pointed out by the tenant-members, that the Managing Committee of the Catholic Society is comprised of 11 members, out of which only two members represented the tenant-members. As such, it was asserted, that the interest of the tenant-members was not adequately protected, even at the level of the Managing Committee. The prayer made by the tenant-members before the District Deputy Registrar, Cooperative Societies was, that the Catholic Society should be bifurcated into two societies. Factually, the instant bifurcation would apply to on 5.5. acres of land known as Willingdon East. Because entire land holding comprising of Willingdon West had been sold to owner members on freehold basis, and the entire land holding comprising of Willingdon South had been leased to lessee-members on lease for a term of 998 years. Thereupon, the Catholic Society was only managing the affairs of 5.5 acres of land known as Willingdon East. One of the bifurcated societies, according to their prayer, should comprise of only tenant-members. And, the other bifurcated society should comprise of all non tenant-members.

12. On the receipt of the aforesaid application filed by the tenant-members under Section 18 of the Cooperative Societies Act, the District Deputy Registrar, Cooperative Societies consulted the Federal Society, i.e., the Bombay-Thane District Cooperative Housing Society Limited. Having consulted the Federal Society, the District Deputy Registrar, Cooperative Societies issued a draft order dated 6.9.1979 recording a tentative satisfaction for the bifurcation of the Catholic Society into two societies. Based thereon, a notice was issued to the Catholic Society seeking its objections, if any, to the tentative satisfaction recorded by the District Deputy Registrar,

Cooperative Societies. To consider its course of action, the Catholic Society convened an annual general body meeting. The same was actually held on 16.12.1979. In its annual general body meeting, the Catholic Society passed a resolution, disapproving and rejecting the proposed bifurcation of the Willingdon East, in terms of the draft order of the District Deputy Registrar, Cooperative Societies dated 6.9.1979.

13. In addition to the response filed by the Catholic Society referred to in the foregoing paragraph, the Catholic Society also took up the matter with the Federal Society, i.e., the Bombay-Thane District Cooperative Housing Society Limited. The Federal Society thereupon re-examined the matter. On such re-examination it prepared a report dated 7.6.1980, wherein, it was concluded that there was no justification for the bifurcation/division of the Catholic Society. The aforesaid report was forwarded by the Federal Society to the District Deputy Registrar, Cooperative Societies. The District Deputy Registrar, Cooperative Societies then reconsidered the draft order dated 6.9.1979 by taking into consideration the aforesaid report dated 7.6.1980. During the course of such reconsideration, the District Deputy Registrar, Cooperative Societies personally visited Willingdon East and also personally examined the records of the Catholic Society. On such reconsideration, the District Deputy Registrar, Cooperative Societies, passed an order dated 27.6.1980 by which the draft order dated 6.9.1979 proposing bifurcation/division of the Catholic Society, was withdrawn.

14. The tenant-members assailed the order dated 27.6.1980 withdrawing the draft order proposing bifurcation/division of the Catholic Society, by preferring an appeal. The Divisional Joint Registrar, Cooperative Societies, accepted the appeal, and set aside the order dated 27.6.1980. The appellate order required the District Deputy Registrar, Cooperative Societies, to reconsider the issue of bifurcation/division of the Catholic Society.

15. The Catholic Society assailed the order of the Divisional Joint Registrar, Cooperative Societies dated 12.12.1980 by preferring a Revision Petition before the State Government. The challenge raised by the appellant-society (the Catholic Society) to the aforesaid order dated 12.12.1980, was allowed, inasmuch as the order passed by the Divisional Joint Registrar, Cooperative Societies was set aside. The revisional authority remanded the matter to the Divisional Joint Registrar, Co-operative Societies, for passing a fresh order (in appeal) after hearing the rival parties. After its remand the Divisional Joint Registrar, Cooperative Societies again allowed the appeal, by an order dated 15.6.1982. By the aforesaid appellate order, the order of the District Deputy Registrar, Cooperative Societies (dated 27.6.1980) was set aside. Consequently, a direction was issued by the appellate authority, to the Assistant Registrar, Cooperative Societies, to proceed with the matter, from the stage of the passing of the draft bifurcation order (dated 6.9.1979).

16. The Catholic Society again assailed the order of the Divisional Joint Registrar, Cooperative Societies dated 15.6.1982 by preferring a revision petition before the State Government. Since the Catholic Society was not granted any interim order during the pendency of the revision petition, the Assistant Registrar, Cooperative Societies, Mumbai, proceeded with the matter from the stage of the draft order. By an order dated 22.3.1983 the Assistant Registrar, Cooperative Societies, Mumbai, ordered the bifurcation/division of the Catholic Society by creating the following two societies :

(i) The Bombay Catholic Cooperative Housing Society Ltd., and

(ii) The Bombay Catholic Cooperative (Tenants) Housing Society Ltd.

The society at (i) above, would be comprised of lessee-

members, freehold land owners and others, whereas the society at (ii) would be comprised of tenant-members only.

17. The order passed by the Assistant Registrar, Cooperative Societies, Mumbai dated 22.3.1983 was challenged by the Catholic Society by preferring an appeal before the Divisional Joint Registrar, Cooperative Societies. The aforesaid appeal was dismissed by an order dated 19.9.1989, whereupon, the Catholic Society preferred a revision petition before the State Government. The said revision petition was also dismissed on 24.6.1991. The orders passed by the Assistant Registrar, Cooperative Societies, Mumbai (dated 22.3.1983), the Divisional Joint Registrar, Cooperative Societies, Mumbai (dated 19.9.1989) and the State Government (dated 24.6.1991) were challenged by the Catholic Society by filing Writ Petition no.2328 of 1991. A learned Single Judge of the High Court dismissed the aforesaid writ petition by an order dated 21/22.10.1999. The reasons which weighed with the learned Single Judge of the High Court in dismissing the writ petition, were summarised in paragraph 19 of the aforesaid judgment, which is being extracted hereunder:

> "The facts which I have already noted above which need not to be repeated, would rather show that the order passed by the Assistant Registrar for bifurcation of the society is not at all harsh or arbitrary or oppressive to the shareholder members. As a matter of fact, it is the tenant members who have been oppressed and this class of members have suffered at the hands of the majority members who have no longer sufficient or substantial interest in the objectives of the society. The Assistant Registrar has made it clear that the society formed of the tenants viz. Bombay Catholic Cooperative (Tenants) Housing Society Ltd., shall offer the tenements occupied by the tenant members in the capacity of tenants in terms of Bombay Rent Act, to the same occupant tenant members on ownership basis if desired by the concerned

tenant members against payment of reasonable consideration as may be fixed by the said society in consultation with the Cooperative Department and till that time, the status of the tenancy shall not be disturbed. The said direction indicates that there is no undue favour to the tenant members and a balance has been struck by the Assistant Registrar by providing clause 7 in the operative order. So far as the shareholder members are concerned, the Assistant Registrar in its operative order has clearly set out that the admission of non-accommodated shareholders to membership of the newly created society viz., Bombay Catholic Cooperative (tenants) Housing Society Ltd., shall be strictly according to the chronological order and shall be gradual as and when tenements get ready for occupation. The Assistant Registrar further directed that while accommodating such persons to the membership, it shall be ensured that these members really intended to secure tenements of the society at the time of acquiring shares and not for investment or any other purpose other than residential. He also directed that it would also be ensured that these persons (shareholders members) are eligible to become members under the revised Bye-laws, rules and the Act and they are willing and are in a position to contribute and possess the new tenements. The Assistant Registrar, therefore, has taken sufficient care in ensuring that no injustice is occasioned to non-accommodated shareholders who are genuinely interested in accommodation and are eligible in securing residential accommodation. The shareholders who are eligible to become members under the revised Bye-laws and who genuinely were interested in getting the residential accommodation, according to their seniority shall get the accommodation as and when tenements would be ready for occupation. With this arrangement having been made by the Assistant Registrar how it can be said that the order of bifurcation shall oppress the class of shareholders or is detrimental to the interest of this clear. Obviously, the

shareholder members who were only interested investment while becoming member of the society should be weeded out, because it would not be in the interest of cooperative movement and for the well-being of the society. Thus, the contention of the learned counsel for the shareholder members that the order of bifurcation is oppressive or harsh to this class of society is unfounded and appears to be at the behest of the petitioner society. As a matter of fact, the appellate authority has considered the matter extensively and it cannot be said to have erred when it affirmed the order of Assistant Registrar, so far as revisional authority is concerned, the matter having been examined at quite length by the appellate authority, the revisional authority rightly did not go into the matter in details in its revisional jurisdiction and cannot be said to have erred in affirming the order of the Assistant Registrar and the appellate authority."

18. The Catholic Society preferred an intra court appeal to assail the order passed by the learned Single Judge of the High Court dated 21/22.10.1999 (whereby writ petition no.2328 of 1991 was allowed, in favour of the tenant-members). A Division Bench of the High Court allowed appeal No.20 of 2000 (arising out of writ petition 2328 of 1991) on 4.8.2007. By the aforesaid order, the Division Bench set aside the earlier determinations rendered by the Co-operative authorities, as also, the judgment rendered by the learned Single Judge. While doing so, the Division Bench remanded the matter to the authorities (under the provisions of the Co-operative Societies Act), for reconsidering the issue of bifurcation raised by the tenant-members. The operative part of the order passed by the Division Bench brining out the effect of the appellate order is being reproduced hereunder :

> "..... In our opinion, therefore, in order to comply with the mandatory requirement of consultation which is incorporated under sub-section (1) of Section 18 of the

Act, it was necessary for the Deputy Registrar not only to take into consideration the opinion expressed by the federation but in order to show that he has complied with the mandatory requirements of consultation and the order that he made should also have shown that he has applied his mind to the opinion expressed by the federation. The requirement of the order made by the authority indicating on the face of it that the authority has applied its mind to the opinion submitted by the federation, will have to read into the provisions in order to make the requirement of consultation effective and meaningful. In the present case, admittedly, the opinion expressed by the federation has not been considered by the Deputy Registrar while deciding to make the order of bifurcation. It therefore, suffers from violation of mandatory requirement of consultation with the federal society, and therefore, we have no alternative but to set aside that order. But because the proposal had been submitted as far back as in the year 1979 and the final decision in that regard has not yet been taken, we propose to issue directions to the authority so that a decision can be made by the authority as expeditiously as possible.

5. In the result, therefore, the appeal succeeds and is allowed. The order dated 22.2.1983 passed by the Deputy Registrar, Co-operative Societies directing bifurcation of the petitioner-society is set aside. The orders passed by the Authorities under the Maharashtra Co-operative Societies Act and the learned Single Judge confirming that order are also set aside. The proceedings are remitted back to the Deputy Registrar. The parties shall appear before the Deputy Registrar on 27.8.2007 with a copy of this order. The petitioner shall also serve a notice on the federation with a copy of this order informing the federation that if it is so advised it may appear before the Deputy Registrar on 27.8.2007. the Deputy Registrar shall thereafter permit the parties to file any additional affidavits and documents that they may want to file and then proceed

to pass final order in the matter in accordance with law. The Registrar shall proceed as expeditiously as possible, and the final order shall be made by him in any case within a period of Eight weeks from 27.8.2007. It is directed that in case the Registrar decides to make the order of bifurcation, the Registrar shall provide in the order that the order shall not take effect for a period of four week from the date of making of the order."

19. In compliance with the directions issued by the Division Bench of the High Court on 4.8.2007, the issue of bifurcation of the Catholic Society came to be placed before the Deputy Registrar, Co-operative Societies, Mumbai. Having heard the submissions advanced on behalf of the rival parties, the Deputy Registrar, Co-operative Societies, allowed the claim of the tenant-members, vide an order dated 28.11.2007. By the aforesaid order dated 28.11.2007, the Catholic Society was ordered to be bifurcated/divided into two societies. The manner of giving effect to the aforesaid bifurcation, emerges from the order of the Deputy Registrar, Co-operative Societies, Mumbai dated 28.11.2007. The same is being extracted hereunder :

"ORDER

I, Dr. P.I. Khandgale, the Deputy Registrar, Co-operative Societies, H (W), Ward, Mumbai, under the powers conferred upon me under Section 18(1) of Maharashtra Co-operative Societies Act 1960 and Rule 17(2) of the Maharashtra Co-operative Societies Act, 1961 in the interest of smooth working, administration and in the interest of members and also in view of public interest make division of "The Bombay Catholic Co-op Hsg, Society Ltd., S.V. Road, Santacruz (West), Mumbai – 400 054.

And de-register the society viz. The Bombay Catholic Co-op Housing Society Ltd. S.V. Road, Santacruz (W),

Mumbai – 400 054, having Registration No.1412 of 1917, as per Section 21 of Maharashtra Co-operative Societies Act, 1960 from the date 28/11/2007.

As referred under Section 9(1) of Maharashtra Co-operative Societies Act, 1960, after division, two separate Housing societies are being registeredunder registration numbers as mentioned hereunder :

Sr. No.	Name and address of society	Members	Registration number and date
1	The Bombay Catholic (Leasehold, Free--hold and others) Co-operative Housing Society Ltd. S.V. Road, Santacruz (West), Mumbai-54.	Freeholders, Leaseholders and others.	MUM/WHW/H S.G./(TC)/ 14007/2007-08, YEAR 2007 DATED 28/11/ 2007
2.	The Bombay Catholic (Tenants and Allottee) Coop. Hsg. Society Ltd., 24, Willingdon East, Santacruz (W), Mmbai-400054	Tenant Members and allottee members	MUM/WHW/H S.G./(TC)/14008 /2007-08, YEAR 2007 DATED 28/11/2007

Since above mentioned separate societies are registered, two separate Managing Committees should be formed and I direct to divide the property and debts as under :

(As per balance sheet by the end of 31/3/2007)

(1) Share Capital — To divide the same as collected from the Members

(2) Sinking Fund — As per shares actually held by the members.

(3) Reserved Fund — As per shares actually held by the members.

(4) Other reserved fund — As per shares actually held by the members

(5) Amount of deposits — As collected from the members.

(6) Amount in balance — As collected from the members.

(7) Societies dues payable and receivable — Shall be made according to the members and the office bearers of the society shall take decision as regards arrears.

(8) By laws of the society — It shall be mandatory for new societies to adopt by-laws of the Bombay Catholic (Leasehold, Freehold and others) Co-operative Housing Society Ltd.

(9) Societies old office — It shall remain at the earlier place where earlier office situated and the secretaries of both the society shall remain custodian of this office and the records therein shall be remained available for members of both the societies and the same shall remain in the possession of the members in whole societies compound it remains.

(10) Land of the Society

(i) The Bombay Catholic — The land of Willingdon South and

	(Leasehold, Freehold and others) Co-op. Housing Society Ltd.	Willingdon South and Willingdon
	(ii) The Bombay Catholic (Tenant and Allottee) Co-op. Housing Society Ltd.	5 ½ acres land of Willingdon East together with 25 t cottage and one shed therein
(11)	Staff	The existing members shall remain in the Bombay Catholic (Leasehold, Freehold and others). The Bombay Catholic (Tenants and allottee) co-op hsg. Society Ltd. shall make arrangement for their own staff. After division both registered societies shall take their own decisions as regards fixing salaries and other allowances the managing committee and the respective societies shall of frame their own rules regarding service as per provisions of Maharashtra Co-operative Societies Act, 1960 and Rule 1961
(12)	Tenants	The tenants residing in the premises of the Bombay Catholic (Tenants and Allottee) Coop. Hsg. Society Ltd. shall be tenants of the society and their tenancy rights shall be protected.

(13) In order to look after the daily affairs of the two societies formed after division of the original

society, society wise Board of Administrators is being appointed.

1. Following persons shall be the members of the managing committee of the Bombay Catholic (Leasehold, Freehold and others) co-operative Housing Society Ltd., Santacruz (West), Mumbai – 54, to llok after its affairs.

   (a) Shri A.F.E. D'costa, Chairman, managing Committee.

   (b) Shri F.J. Naronna, Committee Members, Managing Committee.

   (c) Shri Leo Rodrigues, Committee Members, Managing Committee

   (d) Shri B. Pulgado, Committee Members, Managing Committee

   (e) Captain F.S. Vittal, Committee Members, Managing Committee

2. Following persons shall be the member of Managing Committee to look after the affairs of The Bombay Catholic (Tenant/Allottee) Co-op. Housing Society Ltd., Santacruz (West), Mumbai – 54.

   (a) Smt. C. Castaleno, Chairman, Managing Committee.

   (b) Shri J. Rodrigues, Committee members, Managing Committee.

   (c) Shri Francis Philips, Committee members, Managing Committee.

(d) Shri Anthoni Disa, Committee members, Managing Committee.

(e) Smt. A. Fernandes, Committee members, Managing Committee.

This order is issued on this day, the date 28.11.2007, under my signature and seal of this office. This order shall be executed after one month from the date 28.11.2007."

20. The Catholic Society raised a challenge to the order passed by the Deputy Registrar, Co-operative Societies, Mumbai, by filing an appeal before the Joint Registrar, Co-operative Societies, Mumbai. In fact, a separate appeal was also filed by the tenant-members to assail the order passed by the Deputy Registrar, Co-operative Societies dated 28.11.2007. The Divisional Joint Registrar, Co-operative Societies, Mumbai disposed of appeal no.246 of 2007 (filed by the Catholic Society) and Appeal no.27 of 2008 (filed by the tenant-members) by a common order dated 29.9.2009. The operative part of the aforesaid appellate order is being extracted hereunder :

"ORDER

(1) The Appeal No.246/2007 & Appeal No.27/2008 are disposed of.

(2) The impugned order dated 28.11.2007 passed by the Respondent Deputy Registrar, C.S.H./West Ward, Mumbai under Sec.18(1) of the M.C.S. Act, 1960 read with Rule 17 of the M.C.S. Rules, 1961 is hereby quashed and set aside.

(3) The case is remanded back to the Respondent Deputy Registrar C.S.H./W Ward, Mumbai for afresh consideration and decide the case in the light of the observations made herein above.

(4) This order would not come into effect for a period of 4 weeks as directed by the Hon'ble High Court in order dated 6.3.2009 in Writ Petition No.2808 of 2009.

(5) No order as cost."

A perusal of the operative part of the order extracted hereinabove reveals, that the order passed by the Deputy Registrar, Co-operative Societies, Mumbai under Section 18(1) of the Co-operative Societies Act (whereby the Catholic Society was bifurcated/ divided into two societies) was quashed and set aside. All the same, yet again, the issue of bifurcation was remanded back for redetermination at the hands of the Deputy Registrar, Co-operative Societies, Mumbai.

21. It would be pertinent to mention, that a challenge to the appellate order passed by the Divisional Joint Registrar, Co-operative Societies, Mumbai, is permissible through a revision petition before the competent authority of the State Government. The tenant-members availed of the aforesaid remedy and by preferring Revision Application no.713 of 2009 before the State Government, wherein the aforesaid order dated 29.9.2009 passed by the Divisional Joint Registrar, Co-operative Societies, Mumbai was assailed. It is however, relevant to notice, that the aforesaid challenge raised by the tenant-members, through the aforesaid revision petition was withdrawn. This is apparent from the operative part of the order passed by the State Government disposing of Revision Application no.713 of 2009 which is being extracted herein :

"ORDER

1. Applicant is allowed to withdraw Revision Application No.713/2009.

2. Order dt.29.9.2009 of the Defendant No.1 Divisional Joint Registrar, Co-operative Societies, Mumbai Division, Mumbai quashing the order of division of Defendant No.2 Society, of the Deputy Registrar, Co-opertive Societies, H/West Ward, Mumbai dt. 28.11.2007 is hereby confirmed.

3. Order of the Divisional Joint Registrar, Co-operative Societies, Mumbai Division, Mumbai dt. 29.01.2009 to the extent of issuing directions to the Deputy Registrar, Co-operative Societies, H/West Ward, Mumbai, for giving re-hearing afresh again, is hereby quashed.

4. No Order as to the costs."

It would also be relevant to mention that while withdrawing Revision Application no.713 of 2009, the applicant undertook to co-operate with the Catholic Society, for the redevelopment of 5.5 acres of land known as Willingdon East. It would also be pertinent to mention, that while withdrawing Revision Application no.713 of 2009, the tenant-members undertook to support the implementation of the Catholic Society's resolution dated 6.12.2009. In sum and substance, therefore, the State Government disposed of the revision petition by quashing the bifurcation proceedings. The order passed by the State Government dated 6.12.2009, brought to an end the claim raised by the tenant-members under Section 18 of the Co-operative Societies Act, praying for the bifurcation of the Catholic Society, with reference to the property known as Willingdon East.

22. In order to understand the effect of the resolution passed by the Catholic Society on 6.12.2009, it is necessary to extract herein the Catholic Society's Resolution dated 6.12.2009. A relevant part of the aforesaid resolution is being reproduced hereunder :

"RESOLUTION PASSED AT THE SPECIAL GENERAL MEETING HELD ON 6TH DECEMBER, 2009 AT 4.30 P.M. AT SAINT TERESA'S CONVENT HIGH SCHOOL HALL, SANTA CRUZ (WEST), MUMBAI – 400054

RESOLVED to accept the proposal of M/s. Sumer Associates as nominee of M/s. Robin Home Developers Pvt. Ltd. on the following terms and conditions:

(1) Only the land admeasuring 21,774.10 sq. mtrs. Out of the Willingdon Estate and also known as Willingdon Colony (Willingdon East) bearing CTS Nos. H/401, H/402, H/415 to H/438 (hereinafter called the said land) would be sold to M/s. Sumer Associates as nominee of Robin Home Developers Pvt. Ltd. for the net price of Rs.70,00,00,000/- (Rupees Seventy Crores) payable in one lump-sum. The consideration of Rs.70.00 crores is fixed irrespective of any charge in Development Control Regulations or any other applicable rules and regulations or subsequent rulings by any authority or body (i.e. Heritage Authority, etf.) and subject to all other conditions agreed upon.

(2) The sale of the said land will be on 'as is where is' basis.

(3) All 161 allottee members and 69 tenants/occupants of the Society shall be attorned to M/s. Sumer Associates. The Society shall issue a certified list of 161 allottee members and 69 tenants/occupants as on 17.09.2009to M/s. Sumer Associates which shall form part of the final conveyance.

(4) M/s. Sumer Associates shall all its own costs, charges and expenses construct on the said land an aggregate of at least 230 tenements of which 161 tenements, each admeasuring 600 sq. ft.

(carpet area) shall be sold on ownership basis under MOFA, unless otherwise mutually decided, to the 161 allottee members at a price of Rs.1800/- per sq.ft. (carpet area) provided that each of the said 161 allottee members surrender their respective Share Certificate of the Society for cancellation and proof of relinquishing their rights as members in the Society.

(5) The remaining 69 tenements (out of 230 tenements) to be constructed by M/s. Sumer Associates, on the said land shall be sold and/or conveyed by M/s. Sumer Associates to the said 69 tenants/occupants either against making payment or free of cost. The obligation, if any of the said 69 tenants to pay for acquiring their flats is recorded in the Consent Terms/MOU/Agreement between some tenants and the Society. So far as remaining tenants out of the said 69 tenants are concerned, those covered by Undertakings given in Court or by Decrees, will not be required to pay any amount to M/s. Sumer Associates for acquiring the flats. The Society shall give certified true copies of the Undertakings/ Consent Terms/Agreements, which have been already entered into between the Society and some of the tenants out of the said 69 tenants. M/s. Sumer Associates shall enter into agreements with the tenants who are members only upon their surrendering their respective shares to the Society for cancellation and relinquishing their rights as a tenant and/or member in the Society.

(6) The Allottee and Tenant members immediately on execution of the Conveyance of the said land by the Society shall be deemed to have ceased to be members of the Society in lieu of their right of allotment and right of acquiring accommodation on

the said land as provided under the said Conveyance.

(7) M/s. Sumer Associates shall part with possession of the new premises in the 161 allottee members and 69 tenants/occupants simultaneously with giving possession to any other purchasers to whom premises are sold.

(8) Upon completion of construction of first five buildings in all aspects, M/s. Sumer association shall at its own costs charges and expenses provide one office unit admeasuring 300 sq. ft. (carpet area) to the Society in the newly constructed building on the said land or they shall otherwise provide suitable alternate accommodation for the Society's office in Santa Cruz (West), provided that only the Stamp Duty and Registration charges on which shall be paid by the Society.

(9) M/s. Sumer Associates has deposited in escrow the said sum of Rs.70.00 crores with M/s. Dhruve Liladhar & Co., Advocates, Solicitors & Notary for the Society with clear instructions that, on and against execution of Conveyance or within thirty days from the date of the approval of the settlement/ transaction by the Society at an (Extraordinary_ Special General Meeting the said Advocates & Solicitors shall, without recourse to M/s. Sumer Associates, release and/or pay the said sum of Rs.70.00 crores to the Society without claiming any costs or lien.

(10) All members who have not been accommodated on the said land or on the Society's property shall be compensated on pro-rata basis according to number of shares held by dividing equally the consideration received net of tax, legal and other

expenses but after concealing by process of legal expenses those members who are untraceable for over 15 years.

(11) M/s. Sumer Associates shall at its own costs, charges and expenses ensure that, neither the Chavan-Meredia Combine nor Charisma Builders or the Bawa Group nor Robin Home developers Pvt. Ltd. or other such party shall make any claim against the society. All of them shall be settled and/or compromised by M/s. Sumer Associates at its own costs. Charges and expenses.

(12) Undertakings given to the Hon'ble Courts in the proceedings initiated against some of the tenants and Consent Terms filed in some of the said proceedings and MOU's shall be honoured by M/s. Sumer Associates and they shall be totally and strictly adhered to by them and the Society shall not be liable for the same. Where applicable M/s. Sumer Associates will have to make efforts to modify and/or get released from the said Undertaking and/or Consent Terms as may be advised. All undertakings to various Courts given by the Society shall be observed and fulfilled by M/s. Sumer Associates, and they shall keep the Society indemnified from and against all the costs and consequences arising from the same.

(13) The Conveyance should sufficiently indemnify the Society, its Committee and its members against all liabilities, claims costs and consequences as a result of this sale and the redevelopment of the property and for any delay or non-performance of any kind.

(14) To ensure against litigation of any kind these terms can be presented before the appropriate Court for

confirmation or as Consent Terms/Settlement Terms as may be legally advised.

The aforesaid is without prejudice to the rights and contentions of the Society including in the pending Appeal before the Ministry of Co-operation, Maharashtra. All reference to M/s. Sumer Associates and/or Robin Home Developers Pvt. Ltd. shall include their/his partners, directors or successors as applicable from the context."

FURTHER RESOLVED that by virtue of the amendment of the Bye Laws of the Society by insertion of Article 10 as regards the membership eligibility of a Building Sub-Society by insertion of Article 10 as regards the membership eligibility of a building Sub-Society as a member of the Society and consequent changes in the structure of the membership in the Society, the following covenants to be observed and performed by the Lessees as presently mentioned in the indenture of Lease executed between the members and the Society shall stand deleted:

1. Clause 4. That the Lessees will not make any excavation upon any part of the demised plot nor remove any stone, sand, gravel, clay or earth therefrom except for the purpose of forming foundations of buildings.

2. Clause 5. That the Lessees will use the demised plot and premises for the purpose of a private residence only and not without the license in writing of the Lessor first had and obtained to do or permit any trade or business in any building or upon any part of the demised plot and premises.

3. Clause 6. That the Lessees will not do or suffer anything to be done on the demised plot

or premises which may cause damage nuisance or inconvenience to the occupiers of adjacent houses, the Society or the neighbourhood.

4. Clause 7. That the Lessees will not assign, underlet, for a period exceeding 3 years or part with possession of the demised lands hereditaments and premises or of any part thereof to any person without the written consent of the Society such consent not to be unreasonably withheld when the proposed assignee or tenant is a member of the Society and holding five fully paid shares of the Society.

5. Clause 8. That the Lessees will not make any assignment or other disposition of the demised premises or part thereof (which shall have the effect of vesting the demised premises for the said term or any part thereof in other than one and the same party or parties at one time).

6. Clause 10. That the Lessee shall submit the plans of this building privy cess-pools and compounds, wall or fence for the approval of the Society and shall not start the construction without such approval.

RESOLVED FURTHER that the status of the leasehold plots which are under indenture for tenures of 998 years with members be converted to freehold status at and on the request of the individual members.

RESOLVED FURTHER that the Managing Committee of the Society is authorized to approve, execute and register individual Agreements or Indenture or other documents and

do such other necessarty acts, deeds and things as may be requested to effect the above.

RESOLVED THAT the approval for sale and transfer of the property of the Society known as Willindgon Colony in village bandra, Mumbai Suburban District bearing CTS Nos. H/401, H/402, H/415 to H/438 also called Willingdon East located at S.V. Road, Santa Cruz (West(Mumbai – 400 054, and admeasuring 25040 sq. yards equivalent to 21,774 ___ sq. mtrs. Together with structures standing thereon ("the said Property") on "as is where is" basis subject to the rights of 69 tenants and 161 allottee members lumpsum consideration of Rs.70,00,00,000/- (Rulees Seventy Crores only) in favour of Messrs. Sumer Associates ("Sumer"), a nominee of Robin Home Developers Private Limited ('RHDPL') is hereby granted.

RESOLVED FURTHER THAT the Managing Committee of the Society authorized to approve, execute and register conveyance and other documents of the said Property in favour of Sumer as nominees of RHDPL and do such other necessary acts, deed and things as may be required to effect the above."

In compliance with the resolution of the Catholic Society dated 6.12.2009, a conveyance dated 7.12.2009 came to be executed.

23. Even though all challenges raised by the tenant-members against the resolution of the Catholic Society dated 25.9.1966 had attained finality, and even though the prayer made by the tenant-members of the Catholic Society seeking the bifurcation/division of the Catholic Society, has not culminated in favour of the tenant-members in spite of the initiation of the proceedings in connection therewith in the seventies, yet the entire matter was sought to be reopened by raising a challenge through Civil Suit nos.144 and 145 of 2010, which were filed by some tenant-members, wherein the main

prayer was, that the Catholic Society should be restrained from taking steps in furtherance of the resolution passed by the Catholic Society dated 6.12.2009 (as also, the consequential conveyance deed dated 7.12.2009).

24. In order to understand the nature of relief, sought by the tenant-members in the civil suits filed by them, it would be appropriate to extract hereunder the prayers made in Suit no.144 of 2010:

"The plaintiffs therefore pray:

(a) for a declaration that the said Resolution dated 6th December, 2009 (Exhibit 'K' hereto) and the said Conveyance dated 7th December, 2009 (Exhibit 'M' hereto) are invalid, illegal and void ab initio and/or the same are voidable as against the plaintiffs and the Tenant members of Defendant No.17 Association. That this Hon'ble Court be pleased to pass order declaring section 164 of Maharashtra Co-operative Societies Act, as violation of Article 14 of the Constitution of India and the same ought to be struck down;

(b) for a Judgment and Decree directing Defendant No.20 herein to deliver up the Conveyance dated 7th December, 2009 Exhibit 'M' hereto for cancellation;

(c) that, pending the hearing and final disposal of the present suit, this Hon'ble Court be pleased to issue an Order and Injunction restraining the Defendant Nos.1 to 17 and Defendant No.20 from taking any steps in furtherance of the said purported Resolution dated 6th December, 2009 and/or Conveyance dated 7th December, 2009. (ii) to issue an Order and Injunction directing Defendant Nos.1 to 16 to deposit in this Hon'ble Court the sum of Rs.70 crores received from Defendant No.20 under the Resolution dated 6th December, 2009 and under the Conveyance dated 7th December, 2009;

(d) for ad-interim reliefs in terms of prayer clause (c) above;

(e) for the costs of the present suit;

(f) for such other and further reliefs as the nature and circumstances of the present case may require."

Since the interim prayers, as had been sought in the suits filed by the tenant-members, were not granted to them, they preferred Notice of Motion no.172 of 2010 (arising out of Suit no.144 of 2010) before the High Court. By an order dated 11.1.2010, a learned Single Judge of the High Court found favour with the prayer made by the tenant-members. The operative part of the order granting interim relief to the tenant-members is being extracted hereunder:

"47. Resultantly the following ad-interim order:

ORDER

(i) No further steps be taken by the concerned parties based upon the Conveyance dated 07/12/2009.

(ii) The parties to maintain status-quo with respect to the property in question i.e., Willingdon East.

(iii) The earlier statements already recorded in the order dated 24th December, 2009 to continue till further order.

(iv) Reply/rejoinder, if any to be filed within two weeks.

(v) S.O. to 25/1/2010, for hearing. However, the liberty is granted to the parties to settle the matter also.

48. The learned counsel Mr.Chetan Kapadia, appearing for some of the Defendants, makes statement that 18 tenant/members have already surrendered possession and the tenancy to defendant No.72. However, in view of the above common order, it is made clear that parties to

maintain status-quo will cover any further steps to these suits."

It would also be relevant to mention that the High Court also passed a common order dated 5.5.2011 in Writ Petition no.1769 of 2010, Chamber Summons no.748 of 2011 and Notice of Motion no.172 of 2010 (arising out of Suit no.144 of 2010) and in Suit no.144 of 2010. Thereby, the Notice of Motion was disposed of by making absolute the interim order earlier granted (on 11.1.2010) in favour of the tenant-members. Relevant extract of the order dated 5.5.2011 in the aforesaid matters is being reproduced hereunder:

"112. In the circumstances, the Notice of Motion is disposed of by making the same absolute in terms of prayer (a)(i) and by directing all the parties to maintain status quo in respect of the suit property pending the hearing and final disposal of the suit. There, however, shall be no order as to costs."

Even though the controversy, in the manner in which it has been dealt with hereinabove, seems to be in the nature of final determination between the parties, yet the instant order, is only a determination of the validity of the interim relief sought by the tenant-members. In so far as the instant aspect of the matter is concerned, it would be relevant to mention, that the order extracted above, dated 5.5.2011, was assailed by the Catholic Society before a Division Bench of the High Court by filing Appeal no.413 of 2011 (in Notice of Motion no.172 of 2010, in Suit no.144 of 2010). The aforesaid appeal was disposed of by a Division Bench of the High Court on 7.9.2012. By the aforesaid order, the interim protection afforded to the tenant-members on 5.5.2001, by a learned Single Judge of the High Court, was ordered to be vacated. It is the instant order dated 7.9.2012, which is the subject matter of challenge (at the hands of the tenant-members), before us.

25. While adjudicating upon the controversy in hand, and

while determining the validity of the impugned order passed by the Division Bench of the High Court dated 7.9.2012, we shall apply ourselves to issues relevant for granting or denying interim prayers, while disposing of the instant appeals.

26. As noticed above, the Catholic Society comprises of about 745 members. Out of these members there were originally 54 tenant-members and 15 tenants simplicitor (the tenants simplicitor, were not members of the Catholic Society). After the coming into force of the Cooperative Societies Act, all the tenants (including the tenant-members, as also, the tenants simplicitor) became members of the Catholic Society. It is therefore, that the strength of the tenant-members at the present juncture is 69. The relief sought in the two suits (i.e. Suit no.144 of 2010 and Suit no.145 of 2010) is a claim for rights,on account of being tenant-members. It is important to point out, that the aforesaid suits were filed by only 15 tenant-members. It is these 15 tenant-members, who had pursued their prayer for interim relief, before the High Court. It is not a matter of dispute, that the suits referred to above, were not filed in a representative capacity, and as such, it would be incorrect to assume, that the aforesaid suits can be considered to have been filed by all the 69 tenant-members. The correct factual position is, that out of 69 tenant-members only 15 tenant-members had filed the aforesaid suits. The number of tenant-members who were pursuing their remedy through the aforesaid suits, has diminished further before this Court, inasmuch as Special Leave Petition (C) nos.30847-49 of 2012 comprises of 8 petitioners only. It is therefore apparent, that 7 of the plaintiffs in the suits, have now not joined hands with those who have approached this Court, (and are now appellants, before this Court). The instant factual narration however proceeds further, inasmuch as, IA nos.17-19 of 2012 (arising out of SLP (C) nos.30847-49 of 2012) have been filed by three of the petitioners (now appellants) i.e., petitioner/ appellant nos.2, 3 and 4, i.e., Jennifer Pegado, Elwyn D'cruz and Don Donato D'Silva, with a prayer for transposing them

as respondents, as they do not want to pursue the matter any further (along with the remaining petitioners). In view of the prayer made in the aforesaid interlocutory application, it is apparent, that the strength of the tenant-members who had initiated the civil suits, referred to above, has successively diminished from 15 in the civil suits, to 8 at the special leave petition stage, and further to 5 at the appellate stage (after three of the petitioners have prayed for transposing them as respondents). Keeping in mind, that the total tenant-members are 69, and the relief sought in the suits, and now through the instant petitions/appeals (which are filed on the strength of being tenant-members), has diminished to 5, it would be inappropriate to consider the grant of any interim relief, in the absence of any clear determination, that the claim pressed by the appellants before us, is at the behest of at least a simple majority of the tenant-members. Out of 69 tenant-members 35 would constitute a simple majority. The instant petitions/appeals are now being pursued by only 5 tenant-members. In the aforesaid view of the matter, the acceptance of the prayer made by the tenant-members for interim directions, would not only be inappropriate but would be unthinkable.

27. Secondly, the principal contention advanced at the hands of the learned counsel for the petitioners/appellants before the High Court was, that after the resolution of the Catholic Society dated 6.12.2009 (and the consequential conveyance deed dated 7.12.2009) is implemented, the petitioners/appellants would lose their primary membership with the Catholic Society. This, according to the learned counsel for the petitioners/appellants, would be violative of Section 35 of the Cooperative Societies Act, for the simple reason, that the tenant-members cannot be compelled to lose their membership of the Cooperative-Society, without the approval of the Registrar, Cooperative Societies. Based on the aforesaid reasoning, it was submitted, that the resolution dated 6.12.2009 (and the consequential conveyance deed dated 7.12.2009) run counter to the cooperative principles enshrined in the

Cooperative Societies Act.

28. While determining the aforesaid claim canvassed at the hands of the tenant-members, the Division Bench of the High Court, in the impugned order dated 9.8.2012, had clearly recorded that there was no question of the tenant-members losing their cooperative membership. In this behalf it was pointed out, that all the 69 tenant-members, besides 161 allottee-members would be entitled to occupy the tenements, consequent upon completion of the building project emerging out of the resolution of the Catholic Society dated 6.12.2009 (and the consequential conveyance deed dated 7.12.2009). Accordingly, the High Court while accepting the plea advanced at the hands of the Catholic Society, expressed the view, that after the construction of the new tenements at Willingdon East, they would be occupied by the allottee-members and the tenant-members. Thereafter, they would have to be enrolled as members of the Cooperative Society to be formed by the developer, under Section 10 of the Maharashtra Ownership of Flats (Regulation of the Promotion, Construction, Sale, Management & Transfer) Act, 1963, read with Rule 10 of the rules framed thereunder. Since the aforesaid factual/legal position was not disputed before us, during the course of hearing, we have no alternative but to accept the same. Thus viewed, it is not possible for us to conclude that the tenant-members shall lose their cooperative membership upon the implementation of the resolution of the Catholic Society dated 6.12.2009 (and the consequential conveyance deed dated 7.12.2009). We are therefore satisfied, that on the instant aspect of the matter, the petitioners/appellants before us, will not be subjected to any irreparable loss.

29. The third contention advanced at the hands of the learned counsel for the petitioners/appellants, was again on the aspect of irreparable loss. It was sought to be canvassed at the hands of the appellants, that once the resolution of the Catholic Society dated 6.12.2009 (and the consequential

conveyance deed dated 7.12.2009) is given effect to, the claim made by the tenant-members for the bifurcation of the Catholic Society under Section 18 of the Cooperative Societies Act will stand frustrated. It was submitted, that the position would be irreversible, and as such, it is imperative to injunct the Catholic Society, from giving effect to the resolution dated 6.12.2009 and the conveyance deed dated 7.12.2009.

30. Even though there may be some truth in the third submissions canvassed at the hands of the petitioners/ appellants (as has been noticed in the foregoing paragraph), it is not possible for us to accede to the claim of the petitioners/ appellants, in the peculiar facts and circumstances of this case. In so far as the instant aspect of the matter is concerned, it would be relevant to mention, that the first dispute between the rival parties arose when the Catholic Society resolved to redevelop the land measuring about 5.5 acres, known as Willingdon East. The aforesaid resolution was passed as far back as on 25.9.1966. The said resolution was assailed by the tenant-members under Section 91 of the Cooperative Societies Act. The issue attained finality in favour of Catholic Society, after a Division Bench of the High Court dismissed the intra-court appeal preferred by the tenant-members, on 25.7.1972. The aforesaid resolution dated 25.9.1966 (which was declared as legal by the High Court),is sought to be given effect to by the Catholic Society, through its resolution dated 6.12.2009 (and consequential conveyance deed dated 7.12.2009). Five tenant-members are now desirous of stalling the resolution of 25.9.1966, even though about 47 years have gone by since then. The narration of the factual position recorded above reveals that the Catholic Society, left to itself, would have commenced the redevelopment of Willingdon East, comprising of 230 tenements, more than four and a half decades prior hereto, had the tenant-members allowed the Catholic Society to proceed with the matter in terms of its aforesaid resolution. The instant action of the tenant-members has adversely affected all those who would have been entitled to tenements, had the

petitioners/appellants herein not obstructed to the redevelopment resolution of the Catholic Society. Deprivation of the rights of 230 individuals, at the behest of five of them, tilts the balance of convenience in favour of the majority (230 – 5 = 225), and against a miniscule minority of 5 members. In this view of the matter also, we are of the view that the High Court while passing the impugned order dated 9.8.2012 was fully justified,in vacating the interim order(s) passed by the learned Single Judge (dated 11.1.2010 and 5.5.2011).

31. The main contention advanced at the hands of the learned counsel for the petitioners/appellants, is based on a plea canvassed at the hands of the tenant-members for the bifurcation/division of the Catholic Society. Unless the aforesaid issue is examined objectively, the issue in hand cannot be treated to have been appropriately deal with. In this behalf, it would be pertinent to mention, that the tenant-members had filed an application under Section 18 of the Cooperative Societies Act, to protect the interest of the tenant-members of the Catholic Society. To achieve the aforesaid objective, it was canvassed, that the Catholic Society should be bifurcated/divided in such a manner, that one of the emerging societies would comprise of only tenant-members. The second resultant society, could cater to all non-tenant members. Inspite of the fact, that the aforesaid process (seeking bifurcation of the Catholic Society) was initiated by the tenant-members in the seventies, and inspite of the fact that about four decades have since elapsed, the tenant-members have failed to obtain a final determination with reference to their prayer for bifurcation/division of the Catholic Society.

32. All the same, we have independently considered the plea of bifurcation/division raised by the petitioners/appellants noticed above. Even though the Deputy Registrar, Cooperative Societies, Mumbai vide an order dated 28.11.2007, had allowed the prayer made by the tenant-members for bifurcating/ dividing the Catholic Society, yet the aforesaid order dated

28.11.2007 was quashed by the Divisional Joint Registrar, Cooperative Societies, Mumbai, while disposing of an appeal preferred by the Catholic Society, on 29.9.2009. As of now, the tenant-members have not obtained any order for bifurcating/ dividing the Catholic Society. However, what needs to be considered at the present juncture is, that even the Federal Society, i.e., the Bombay-Thane District Cooperative Housing Society Limited in its report dated 7.6.1980, had concluded that there was no justification for the bifurcation/division of the Catholic Society. Furthermore, tenant-members had filed Revision Application no.713 of 2009 before the State Government, to assail the order passed by the Divisional Joint Registrar, Co-operative Societies, Mumbai dated 29.9.2009. It would be relevant to mention, that the Deputy Registrar, Co-operative Societies, Mumbai, had ordered the bifurcation/ division of the Catholic Society vide an order dated 28.11.2007. The Divisional Joint Registrar, Co-operative Societies had set aside the aforesaid bifurcation order on 29.9.2009. The Revision Application no.713 of 2009, filed to challenge the quashing order, was withdrawn by the tenant-members. The tenant-members must, therefore be deemed to have acquiesced to the order dated 29.9.2009. In a sense, therefore, the plea for bifurcation may reasonably be taken as having been not pressed, specially when, remand proceedings are not shown to have proceeded further. Accordingly, it is natural to infer, that the objective of the tenant-members, for seeking the bifurcation/division of the Catholic Society, is not being seriously pursued. Even though the matter has not attained finality as of now, yet it is not possible for us at this juncture, to record a prima facie finding in favour of the tenant-members. What needs to be kept in mind, is the effect of the pending consideration.

33. Merely on account of the said pending claim for bifurcation raised by 69 tenant-members, they have exclusively occupied 5.5 acres of land situated in Santacruz, Mumbai. On the redevelopment of the said land, 230 tenements will be

created. The gains to the tenant-members, are clearly incomparable to the loss which has ensued on account of continued status quo. 161 beneficiaries, as per the resolution of the Catholic Society dated 25.9.1966 who had made deposits in 1966 (at the asking of the Catholic Society) are still waiting. Thus viewed, even on the aspect of bifurcation/ division of the Catholic Society, there can hardly be any justification in the prayer made by the tenant-members, for an injunction against the resolution of the Catholic Society dated 6.12.2009 (and the consequential conveyance deed dated 7.12.2009). The balance of convenience, is surely not in favour of the tenant-members.

34. While we are also satisfied, that the Division Bench of the High Court in the impugned order dated 9.8.2012 has correctly evaluated the rights of the petitioners/appellants in their capacity as tenant-members. In so far as the instant aspect of the matter is concerned, it would be pertinent to mention, that on the issue whether the tenant-members had a separate identity and right (as against the other members of the Catholic Society) came to be considered by a learned Single Judge of the High Court in Misc. Petition no.252 of 1972. The plaintiffs in the present suits (Suit no.144 of 2010, and Suit no.145 of 2010) are admittedly the same as the petitioners in Misc. Petition no.252 of 1972. The High Court having considered the aforesaid issue, namely, whether the petitioners/appellants had any proprietary right as tenant-members of the Catholic Society, it held as under:

> "This is an entire frivolous petition by the members of a co-operative society for writs and order under Art.226 of the Constitution quashing the orders passed by the respondents. The effect of the impugned orders was that the suit filed by the present petitioners for declarations that the Resolutions passed at the annual general meeting of the first respondent society were illegal, void and inoperative in law and that the present petitioners to quiet

and peaceful enjoyment of their respective tenements, stood dismissed by the appropriate authorities under the Maharashtra Cooperative Societies Act, 1960. In challenging the said orders by the present petition, the petitioners have raised various contentions, but I need refer to only three of them and they are as follows:

> (1) that the general body of the first respondent society has no power to deprive the petitioners of their tenements;
>
> .....

In support of the first proposition Mr.B.R. Nayak has relied on the decision of the Full Bench of this Court in the case of Manohar vs. Konkan Co.op Housing Society (63 Bom. L.R. 1001 at 1006), but I am afraid the said decision instead of helping Mr.Nayak on the point, is against him in so far as it lays down in unmistakable terms that it is the society alone which is the absolute owner of the property and the members of the society have merely the rights and obligations conferred by the various provisions of the statute itself. It is, therefore, quite clear that it is the society that, as the absolute owner of the property, would have all the rights which any other owner of the property has, and that the petitioners have no proprietary interest at all in their tenements. Under the circumstances, the petitioners do not have even a prima facie case on the point that the first respondent society has no right to depirve them of their tenements."

The applicants in Misc. Petition no.252 of 1972, assailed the order dated 17.4.1972 (extracted above), by filing Appeal no.74 of 1972. Appeal no. 74 of 1972, was dismissed by a Division Bench of the High Court, on 25.7.1972. The aforesaid determination attained finality between the rival parties. In the impugned order dated 9.8.2012, the Division Bench of the High Court by relying upon the aforesaid determination, further

concluded that, the petitioners/appellants are disentitled in law to claim the relief sought by them. It is apparent, that the relief sought by the tenant-members, is a relief which can ordinarily be sought only by individuals/parties who have a proprietary interest, in the subject matter. While we concur with the Division Bench, to the effect that the tenant-members have no proprietary interest in the subject matter of the controversy, it is necessary for us to refrain from further determining, whether or not the petitioners/appellants in their capacity as tenant-members having no proprietary interest can still claim an exclusive right to redevelop a part of 5.5 acres of land constituting Willingdon East, (even if it is assumed, that they do not have a right to redevelop, the entire land of Willingdon East), by seeking a bifurcation of the Catholic Society. Be that as it may, the Catholic Society has undoubtedly, on the basis of the instant consideration, made out a prima facie case in its favour (the final determination whereof will only be rendered, at the culmination of the proceedings, initiated through the civil suits referred to above). In view of the deliberations recorded hereinabove, yet again it would be inappropriate to grant an injunction, restraining all redevelopmental activities, in terms of the prayer made by the petitioners/appellants.

35. In the background of the conclusions drawn by us hereinabove, it is no longer necessary to examine the matter under any other parameter(s). Be that as it may, we wish to consider the claim raised by the tenant-members, i.e., the petitioners/appellants before us, on the basis of their contention that whilst the conveyance deed dated 7.12.2009 contemplates a consideration of Rs.70 crores payable to the Catholic Society, the tenant-members had been able to procure a better offer, wherein, for the same developmental project the consideration offered was of Rs.75 crores.

36. The instant issue has been examined minutely by the High Court in the impugned order dated 9.8.2012. While doing so, the High Court has drawn the following conclusions. Firstly,

that only M/s. Robin Home Developers Pvt. Ltd. (M/s. Sumer Associates) had come forward with a proposal of redevelopment of Willingdon East. Due to the pending litigation, no recognized builder was prepared to make an unconditional offer on "as is where is" basis. Most of the builders wanted the Catholic Society to settle the pending litigation. Since the litigation had been pending for the last more than four decades, the Catholic Society was not in a position to abide by the pre-condition canvassed at the behest of the recognized builders. Secondly, the Catholic Society at the time of the general body meeting held on 6.12.2009, had only one proposal, namely, the proposal of M/s. Sumer Associates. Thirdly, M/s. Sumer Associates had assured the Catholic Society of a sum of Rs.70 crores. In fact, the aforesaid amount of Rs.70 crores was kept in escrow by M/s. Sumer Associates. Fourthly, during the general body meeting of the Catholic Society, some of the tenant-members orally made an offer of Rs.75 crores without depositing a single paisa as against the concrete proposal of M/s. Sumer Associates. Fifthly, based on the documents placed on the record, it was clear, that the offer of Rs.75 crores made by the tenant-members, was in fact made by a rival builder, namely, Mr. B.Y. Chavan (who was duly impleaded before the High Court). It is therefore, that the Division Bench of the High Court in the impugned order dated 9.8.2012, made the following observations:-

> "33. It was urged by the learned counsel for the appellants that Mr. Chavan is instigating the plaintiffs to carry on the litigation. Bills submitted by the Attorneys have been placed on record, to show that Mr. Chavan has been actively instrumental in giving instructions to the solicitors/counsels for the plaintiffs. The correspondence is placed on record to demonstrate that the offer of Rs.75 crore has been made at the behest of Mr. Chavan. Mr. Chavan is a party to the proceeding and his right, if any, is based on the MOU executed in his favour

by only 8 tenant-members. Mr. Chavan was present at the conferences held by the plaintiff' solicitors as evidenced from the bills sent by the solicitors for the conferences held on 29 September 2009, 4 December 2009, 5 December 2009 and 12 December 2009 regarding writ petitions/suits filed by the plaintiffs against the Society. Having seen the conduct of the said developer-Mr. Chavan, the Society had no confidence in him and his associates and has expressed confidence in the M/s. Sumer Associates. It is for the Society to decide who should be given the development rights and not for a small minority of 15 persons like the plaintiffs. The plaintiffs urged at length before us that the course adopted by the Sumer Associates is inequitable and bad in law. However, when the counsel for Mr. Chavan at the end of the hearing made an offer for higher figure and act exactly in the same manner as M/s. Sumer Associates, no objection was raised by the plaintiffs. No contention was then raised that development through Mr. Chavan in the same manner as M/s. Sumer Associates will affect the claim of plaintiffs of bifurcation of the Society. Thus upon offer of Mr. Chavan, all arguments of the plaintiffs based on law and equity vanished. This conduct of the plaintiffs is relevant when the Court considers passing equitable orders. Such conduct of the plaintiffs themselves is against the spirit of co-operative movement and there can be no other higher breach of principles of co-operative movement when a small minority of members stall the decision of overwhelming majority of members and deprive the members of their legitimate claim. The Court proceedings cannot be used as an instrument of harassment and extortion. Prima facie, we find substance in the contention of the Society that Mr.

Chavan is using the plaintiffs as a tool to block the redevelopment of the Society."

The aforesaid conclusion drawn by the High Court is sought to be reiterated by the applicants in Interlocutory Application nos. 17-19 of 2012. As already noticed hereinabove, the instant interlocutory applications have been filed by three of the petitioners/appellants, namely, Jennifer Pegado, Elwyn D Cruz and Don Donato D'Silva. In paragraph 2 of their aforesaid applications, it was sought to be averred as under:-

"2. That the above petition was filed by these petitioners at the instance of B.Y. Chavan and Sagar Builders & Developers i.e. respondent nos. 17 and 18 in the above petition and who have been instigating the tenants in the property to pursue a Bifurcation Application and stall the re-development of the Willingdon (East) property which has been sold by the respondent no. 1-Society to the respondent no. 20. The said respondent nos. 17 and 18 have been spending the entire litigation expenses for the last number of years as also in respect of the present petition with a view to obstruct re-development of the Willingdon (East) property in view of they being unsuccessful in acquiring the same by causing a bifurcation of the Society. These petitioners have now realized that the above petition being prosecuted is only in the interest of B.Y. Chavan and Sagar Builders & Developers, the respondent nos. 17 and 18 in the above matter and therefore having settled their differences with the respondent no. 1 and respondent no. 2 have addressed letters to Advocates Shally Bhasin Maheshwari, who has been engaged by the respondent nos. 17 and 18 on behalf of the petitioners calling upon the said Advocates to forthwith withdraw the above Special

Leave Petition. However, notwithstanding the said instructions the said Advocates have failed to withdraw the petition and now instead of withdrawing the petition seek to continue with this Special Leave Petition by merely dropping these petitioners as petitioners. The petitioner no. 6 Martin James Michael has also settled his differences with respondent nos. 1 and 20 and his siblings and has also instructed Advocate Shally Bhasin Maheshwari to withdraw the petition, however, since then he has sometime in the past few weeks passed away and therefore he may be dropped as petitioner."

Based on the factual position noticed by three of the petitioners/appellants in I.A. nos. 17-19 of 2012, the finding recorded by the High Court in respect of the offer of Rs.75 crores can be stated to have been made at the behest of a rival builder Mr. B.Y. Chavan. Mr. B.Y. Chavan has even paid for the litigation expenses of the tenant-members. The tenant-members readily accepted the offer made by Mr. B.Y. Chavan, when he proposed before the High Court that he would act in the same manner as M/s. Sumer Associates. It is therefore natural to infer, that the tenant-members are agreeable to the redevelopment of 5.5 acres land comprising of Willingdon East in the manner contemplated by the resolution of the Catholic Society dated 6.12.2009 (and the consequential conveyance deed dated 7.12.2009), which is impugned in the suits filed by the tenant-members. This also prima facie shows that the action of the tenant-members prima facie seems to lack bona fides. We therefore affirm the determination rendered by the High Court in the impugned order, that it was for the Catholic Society to decide who should be given the redevelopmental rights, and not the tenant-members who are a small minority of 15 persons (the number having now diminished to 5) who have initiated the litigation out of which the present proceedings have arisen. As of now, therefore, it is possible to prima facie infer, that the

petitioners'/appellants' claim before the High Court does not seem to be bona fide. They also do not prima facie seem to have genuinely initiated the instant litigation. In the above view of the matter, the opinion recorded by the High Court, that all arguments of the plaintiff based on law and equity vanished, upon the offer made by Mr. B.Y. Chavan, cannot be stated to be unjustified.

37. For all the reasons recorded hereinabove, we find no merit in the instant Civil Appeals. The same are accordingly hereby dismissed.

K.K.T. Appeals dismissed.

SUNIL KUNDU AND ANR.
v.
STATE OF JHARKHAND
(Criminal Appeal No. 1073 of 2008)

APRIL 9, 2013.

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Penal Code, 1860 – s. 302/34 – Murder – Prosecution for – Conviction by Courts below – Held: In view of serious lapses in the case, prosecution case not proved beyond reasonable doubt – Hence, the accused are liable to be acquitted.

Criminal Jurisprudence – Prosecution must stand or fall on its own – If it has not proved its case beyond reasonable doubt, it cannot draw support from weakness of the defence case.

Investigation – Defective investigation – Effect of – Held: Lapses and irregularities in investigation, if they do not go to the root of the matter, if they do not dislodge the substratum of prosecution case, they can be ignored – In the present case, lapses, being serious, cannot be ignored.

Witness – Interested witness – Evidentiary value – Held: Evidence of interested witness, if consistent, can be relied upon and not to be mechanically over-looked – In the present case, the interested witnesses, not being truthful, their presence itself being doubtful, cannot be relied upon.

Criminal Trial – Direct evidence and medical evidence – Inconsistency between – Effect of – Held: Where eye-witness is cogent, medical evidence recedes in background – But when eye-witness account is totally inconsistent with medical evidence, there is reason to believe that improvements are

made in the Court to bring the prosecution case in conformity with the post-mortem report – In the present case, eye-witness account is inconsistent with medical evidence as regards firearm injury, hence not credible.

The appellants-accused were prosecuted for murder of one person. The prosecution case is mainly supported by three eye-witnesses namely PWs 4, 5 and 6. Another eye-witness (PW3) turned hostile during trial. Trial court convicted all the accused u/s. 302/34 IPC and sentenced them to life imprisonment. High Court confirmed their conviction. Hence the present appeals.

Allowing the appeals, the Court

HELD: 1. In the present case, there is a major lacuna in the prosecution story. It has been alleged that at least two of the accused were carrying pistols; the deceased was fired at and he was injured. This case is not borne out by the medical evidence. No bullets or empty cartridges have been recovered from the scene of offence. In view of this major lacuna of the prosecution story and the inconsistencies in the evidence of the prosecution witnesses, it would not be possible to term them as minor inconsistencies or variations which should be ignored. Besides, all the three important prosecution witnesses namely, PWs 4, 5 and 6 are related to the deceased and, therefore, are interested witnesses. The evidence of an interested witness is not to be mechanically overlooked. If it is consistent, it can be relied upon and conviction can be based on it because, an interested witness is not likely to leave out the real culprit. But in the present case, the interested witnesses are not truthful. Their presence itself is doubtful. According to PW-6, they were present at the scene of offence, but their names are not mentioned in the FIR. The genesis of the prosecution case is suppressed. Moreover, admittedly, there is deep rooted enmity

between the accused and the deceased. Though enmity is a double edged weapon, but possibility of false involvement because of deep rooted enmity also cannot be ruled out. [Para 15] [939-G-H; 940-A-D]

2. Use of firearms by the accused is not proved. There are no firearm injuries on the deceased. When there is cogent eye-witness account, the medical evidence recedes in the background. However, when the eye-witness account is totally inconsistent with the medical evidence and there is reason to believe that improvements are made in the court to bring the prosecution case in conformity with the post-mortem notes, it is a cause for concern. In such a situation, the tainted eye-witness' account cannot be believed keeping aside the medical evidence. Tainted eye-witness account which is glaringly inconsistent with the medical evidence as regards firearm injury has shaken the credibility of the prosecution case. [Para 16] [940-E-G; 941-C, G-H]

Mani Ram and Ors. vs. State of U.P. **1994 Supp. (2) SCC 289: 1994(1) Suppl. SCR 63;** *Kapildeo Mandal and Ors. vs. State of Bihar* **(2008) 16 SCC 99: 2007 (12) SCR 668;** *Anjani Chaudhary vs. State of Bihar* **(2011) 2 SCC 747: 2010 (13) SCR 227;** *Sahebrao Mohan Berad vs. State of Maharashtra* **(2011) 4 SCC 249;** *Sk. Yusuf vs. State of West Bengal* **(2011) 11 SCC 754: 2011 (8) SCR 83 – relied on.**

3. Another very important lacuna in the prosecution case is that sanha entry made by the police on the information of PW6, was purposely suppressed by the prosecution, as it did not contain the names of the accused. This is evident from the fact that when the trial court directed the prosecution to produce the relevant Sanha Entries, the officer-in-charge of the Police Station sent a report along with the register containing sanha entries stating that the original sanha entries were not

available. This Court found that the pages containing the relevant Sanha Entries were torn and missing. When confronted with this, the investigating officer, PW-7 at one stage denied this allegation. Later on, he stated that he does not remember whether any sanha entry was made. When it was suggested to him that in the sanha entry, no names of the accused were mentioned and it was removed from the record to falsely implicate the accused, he said that it is a matter for investigation. This casts a shadow of doubt on the credibility of the prosecution story. [Para 17] [842-A-E, F-H]

4. It is not correct to say that adverse inference needs to be drawn against the accused as they were absconding. Absconding by itself does not prove the guilt of a person. A person may run away due to fear of false implication or arrest. When the prosecution is not able to prove its case beyond reasonable doubt, it cannot take advantage of the fact that the accused have not been able to probablise their defence. The prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt. [Para 18] [943-A-B, C-D]

5.1. The investigation of the present case was defective. It is true that acquitting the accused merely on the ground of lapses or irregularities in the investigation of a case would amount to putting premium on the deprecable conduct of an incompetent investigating agency at the cost of the victims which may lead to encouraging perpetrators of crimes. The lapses or irregularities in the investigation could be ignored subject to a rider. They can be ignored only if despite their existence, the evidence on record bears out the case of the prosecution and the evidence is of sterling quality. If the lapses or irregularities do not go to the root

of the matter, if they do not dislodge the substratum of the prosecution case, they can be ignored. [Para 19] [943-D-G]

5.2. In the present case, the lapses in investigation are very serious. PW-5 is a pancha to the seizure panchnama under which weapons and other articles were seized from the scene of offence and also to the inquest panchnama. Independent panchas have not been examined. The investigating officer has stated in his evidence that the seized articles were not sent to the court along with the charge-sheet. They were kept in the Malkhana of the police station. He has admitted that the seized articles were not sent to the Forensic Science Laboratory. No explanation is offered by him about the missing sanha entries. His evidence on that aspect is evasive. Clothes of the deceased were not sent to the Forensic Science Laboratory. The investigating officer admitted that no seizure list of the clothes of the deceased was made. Blood group of the deceased was not ascertained. No link is established between the blood found on the seized articles and the blood of the deceased. It is difficult to make allowance for such gross lapses. Besides, the evidence of eye-witnesses does not inspire confidence. Undoubtedly, a grave suspicion is created about the involvement of the accused in the offence of murder. Suspicion, however strong, cannot take the place of proof. In such a case, benefit of doubt must go to the accused. [Para 19] [943-G-H; 944-A-D]

Case Law Reference:

1994 (1) Suppl. SCR 63	**relied on**	**Para 7**
2007 (12) SCR 668	**relied on**	**Para 7**
2010 (13) SCR 227	**relied on**	**Para 7**
(2011) 4 SCC 249	**relied on**	**Para 7**

2011 (8) SCR 83 relied on Para 18

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1073 of 2008.

From the Judgment & Order dated 20.08.2007 of the High Court of Jharkhand, Ranchi in Criminal Appeal No. 1762 of 2004.

WITH

Crl. Appeal No. 1419 of 2008, 1512 of 2009

S.B. Sanyal, Nagendra Rai, Subhro Sanyal, Kumar Rajeev, Shantanu Sagar, Smarhar Singh, Gopi Raman, Vishnu Sharma for the Appellants.

Ratan Kumar Choudhuri, Amrendra Kr. Choubey, Krishnanand Pandey for the Respondent.

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. The appellants Sunil Kundu, Bablu Kundu, Nageshwar Sah and Hira Lal Yadav (**'A1-Sunil', 'A2-Bablu', 'A3-Nageshwar' and 'A4-Hiralal',** for convenience) were tried for offences punishable under Section 302 read with Section 34 and Section 201 read with Section 34 of the Indian Penal Code (for short, **'the IPC'**) and Section 27 of the Arms Act, 1959 (for short **'the Arms Act'**). The Sessions Court by its judgment and order dated 15-17/09/2004 acquitted them of charges under Section 201 read with Section 34 of the IPC and Section 27 of the Arms Act. They were, however, convicted for offence punishable under Section 302 read with Section 34 of the IPC and sentenced to life imprisonment and to pay fine of Rs.5,000/- each. They carried appeals to the High Court of Jharkhand, Ranchi. The High Court confirmed their conviction and sentence. Hence, these appeals by special leave.

2. This case is a glaring example of how cause of justice can be defeated by inefficient, lackadaisical and incompetent investigating agency. As we go ahead, the reasons for these observations would be clear.

3. At the trial, the case of the prosecution, in short, was that on 29/01/1996 at about 5.00 p.m. deceased Suresh Yadav (for convenience, "**the deceased**") reached near the shop of Bijan Kaur situated in Refugee Colony, Jamtara, Mihijam Pitch Road by a motorcycle driven by him. PW-3 Basudeo Mallick was sitting in the middle of the seat and PW-6 Narendra Yadav was sitting behind him. When they reached near the shop of Bijan Kaur, they saw A1-Sunil, A2-Bablu, A3-Nageshwar and A4-Hiralal standing there. The accused started pelting stones on them, resulting in imbalance of the motorcycle. The motorcycle fell down. All the accused attacked the deceased with knife and bhujali. They resorted to blank firing to scare the people. The deceased started running towards the southern side of the railway line but he collapsed in the field. PW-3 Basudeo Mallick was assaulted with an iron rod. PW-6 Narendra Yadav, who is an advocate by profession, somehow managed to escape. He ran to Mihijam Police Station and informed about the incident. Along with the police, he came to the scene of offence. They shifted the deceased to the Chittaranjan Railway Hospital. At the hospital, PW-6 Narendra Yadav's statement was recorded by the investigating officer - PW-7 Girish Prasad Mishra. It was treated as FIR. On the basis of the FIR, investigation was conducted and upon completion of investigation the accused came to be charged as aforesaid.

4. In support of its case, the prosecution examined nine witnesses. The prosecution story rests on the evidence of PW-4 Shankar Yadav, PW-5 Jaldhari Yadav and PW-6 Narendra Yadav. The accused pleaded not guilty to the charge. They contended that they were falsely involved in this case out of previous enmity. They pleaded defence of alibi and examined 21 witnesses in support of their case. Their plea of alibi was rejected and they were convicted as aforesaid.

5. We will first begin with the FIR lodged by PW-6 Narendra Yadav because it is not consistent with the prosecution case which was developed in the court. According to PW-6 Narendra Yadav, on 29/1/1996, at about 5.00 p.m., the deceased reached near the shop of Bijan Kaur situated in Refugee Colony, Jamtara, Mihijam Pitch Road by a motorcycle driven by him. PW-3 Basudeo was sitting in the middle of the seat and he was sitting behind PW-3 Basudeo. When they reached near the shop of Bijan Kaur, they saw A1-Sunil, A2-Bablu, A3-Nageshwar and A4-Hiralal standing there. The accused started pelting stones on them, resulting in imbalance of the motorcycle. A2-Bablu gave a blow with rod and the motorcycle fell down. Thereafter, A1-Sunil fired at the deceased and the deceased got injured. A3-Nageshwar stabbed the deceased with knife all over his body. A4-Hiralal fired at the deceased with a pistol and injured him. They also assaulted PW-3 Basudeo Mallik with an iron rod. Thereafter, he ran to Mihijam Police Station and brought the police to the scene of offence. They shifted the deceased to the Anupam Seva Sadan. On the doctor's advise, the deceased was shifted to the Chittaranjan Railway Hospital where he was declared dead. The incident had occurred due to previous enmity between the deceased on the one hand and A3-Nageshwar and A4-Hiralal on the other hand. He did not refer to the presence of PW-4 Shankar Yadav and PW-5 Jaldhari Yadav in the FIR.

6. We have heard Mr. Sanyal, senior advocate appearing for A1-Sunil and A2-Bablu and, Mr. Nagendra Rai, senior advocate appearing for A3-Nageshwar and A4-Hiralal. So far as the genesis of the case and the alleged unreliability of the evidence of PW-4 Shankar Yadav and PW-5 Jaldhari Yadav is concerned, Mr. Sanyal stated that he was adopting the submissions of Mr. Nagendra Rai. We have also heard Mr. Ratan Kumar Choudhari learned counsel appearing for the State of Jharkhand. We have perused their written submissions.

7. Mr. Sanyal, senior advocate submitted that A1-Sunil is said to have fired at the deceased with a pistol. He is, however, acquitted of offence under Section 27 of the Arms Act. Besides, PW-1 Dr. Chakravorty stated in his evidence that there was no firearm injury on the deceased. Counsel submitted that the State's submission that the firearm was used only to frighten people is not borne out by the evidence of witnesses. Besides, no bullets or empty cartridges were seized from the scene of offence. So far as A2-Bablu is concerned, counsel pointed out that while PW-6 Narendra Yadav stated in the FIR that A2-Bablu hit the deceased with iron rod, in the court he stated that he was holding knife. This was done to bring his evidence in conformity with postmortem notes. PW-1 Dr. Chakravorty stated that he did not find any iron rod injury on the deceased. The prosecution story is, therefore, untrue. Relying on *Mani Ram & Ors. v. State of U.P.*[1], counsel submitted that if the oral evidence is inconsistent with the medical evidence, it is a fundamental defect which discredits the prosecution case. Drawing our attention to *Kapildeo Mandal & Ors. v. State of Bihar*[2], counsel submitted that the accused are entitled to benefit of doubt where oral evidence is inconsistent with medical evidence. He further submitted that when medical evidence does not support the presence of the accused, his presence is ruled out. (See *Anjani Chaudhary v. State of Bihar*[3]). Counsel also relied on *Sahebrao Mohan Berad v. State of Maharashtra*[4].

8. Mr. Nagendra Rai, learned senior advocate submitted that the evidence of the prosecution witnesses is inconsistent with and belied by the medical evidence. He pointed out that PW-5 Jaldhari Yadav deposed that he and PW-6 Narendra Yadav, the first informant took the dead body to the hospital and

1. 1994 Supp. (2) SCC 289.
2. (2008) 16 SCC 99.
3. (2011) 2 SCC 747.
4. (2011) 4 SCC 249.

gave statement leading to registration of the FIR. This shows that it was recorded at the Chittaranjan Railway Hospital. Earlier statement made before the police has been suppressed. In the FIR and also in the court, PW-6 Narendra Yadav alleged that two persons had fired at the deceased, but no firearm injury was found on the deceased. There is a variance between the FIR and the evidence of PW-6 Narendra Yadav. PW-4 Shankar Yadav and PW-5 Jaldhari Yadav have improved their versions in the court. These two witnesses have stated that when they went to the hospital, PW-6 Narendra Yadav was present. But, their names are not mentioned in the FIR. According to the defence, S.D.E. No.473 dated 29/1/1996 was recorded at 5.55 p.m. when PW-6 Narendra Yadav had gone to the police station to inform the police about the occurrence, but no names were disclosed and hence, no names are mentioned therein. Sanha Entry No.473 is missing. Thus the earlier version recorded by the police has been suppressed by the prosecution. Evidence of PW-4 Shankar Yadav is of no use to the prosecution as he clearly stated that the accused were not known to him and he had heard about them from others. Counsel submitted that the place of occurrence is a busy place. No independent witness has been examined by the prosecution. Admittedly, there is enmity between the two sides. Medical evidence does not support the prosecution case. The prosecution has, therefore, failed to prove its case beyond reasonable doubt. Counsel submitted that the accused must, therefore, be acquitted.

9. Mr. Ratan Kumar Choudhary, learned counsel for the State, on the other hand, submitted that so far as the manner in which the incident took place is concerned, there is no variation in the evidence of PW-4 Shankar Yadav, PW-5 Jaldhari Yadav and PW-6 Narendra Yadav. There may be minor variations which do not affect the substratum of the prosecution case. Merely because the names of PW-4 Shankar Yadav and PW-5 Jaldhari Yadav are not mentioned in the FIR, it cannot be said that they were not present. It is true that PW-4 Shankar Yadav stated that he did not know the names of the accused,

but he stated that he got to know the names at the scene of offence and he identified the accused in the court. Counsel pointed out that the investigating officer stated in his evidence that due to terror created by the accused, no one came forward to give statement. The accused have criminal history and, therefore, non-examination of independent witnesses does not affect the prosecution case. Counsel submitted that the medical evidence supports the prosecution case. Counsel submitted that the story about Sanah Entry No.473 is concocted to create doubt about the prosecution story. There is no such sanha entry. Counsel submitted that conviction of the accused is perfectly legal and justified. The appeals, therefore, deserve to be dismissed.

10. Before going to the evidence of eye-witnesses, we shall advert to the post-mortem notes because while it is alleged that the accused used firearms, the post-mortem notes do not show that the deceased had received any firearm injury. As per the post-mortem notes, there were 24 incised wounds and multiple abrasions of varying sizes over both knee joints of the dead body. Cause of death is stated to be "*due to profuse heamorrhage and shock as a result of ante mortem injury Nos.(i) and (xv) caused by sharp cutting weapon*". They could be caused by a bhujali or chhura (knife). Injury Nos.(1) and (xv) are incised wounds. The post-mortem notes further state that injury No.(xxiii) can be caused by iron rod. Injury No.(xxiii) is described as "*multiple abrasions of varying sizes over both knee joints*". PW-1 Dr. Chakraborty who conducted the post-mortem, reiterated the findings recorded in the post-mortem notes and stated that there was no firearm injury on the deceased. He denied that multiple abrasions found on both the knee joints could be caused by a fall.

11. The main plank of the argument of learned counsel for the accused is that since there is no firearm injury on the deceased, the entire prosecution story must fall to the ground. Therefore, we must now turn to the evidence of PW-6 Narendra

Yadav. PW-6 Narendra Yadav is the first informant. His presence at the scene of offence cannot be doubted because all the witnesses including PW-3 Basudeo Mallik who turned hostile stated that he was sitting on the motorcycle which was being driven by the deceased. Besides, during this incident, he received injuries due to fall of the motorcycle. PW-2 Dr. Mishra stated in his evidence that on the date of incident i.e. on 29/1/1996 he examined PW-6 Narendra Yadav. He described the nature of injuries suffered by this witness and produced injury certificate which is at Ex-21. His evidence is consistent with the evidence of other witnesses only to the extent that when the motorcycle reached near the shop of Bijan Kaur, all the accused had assembled there; they started pelting stones and A3-Nageshwar hit with a rod and that the motorcycle fell down. After this, his evidence is inconsistent with the evidence of other witnesses. He stated that the deceased ran to the railway line towards the south. A1-Sunil fired at him with a pistol. A2-Bablu who was armed with a chhura inflicted injuries at many places on the body of the deceased. A3-Nageshwar beat the deceased with a rod. A4-Hiralal fired at the deceased with a pistol. PW3-Basudeo Mallik was beaten by A3-Nageshwar with rod. Then, he went to the police station and gave intimation regarding the incident. He brought the police to the scene of offence. The deceased was lying in unconscious condition. They shifted the deceased to Anupam Seva Sadan for treatment. On the advice of the doctor, the deceased was taken to the Chittaranjan Railway Hospital where he was declared dead. He stated that at the Chittaranajan Railway Hospital, his statement was recorded. He made a mistake in identifying of A2-Bablu in the court. The case of this witness that A1-Sunil and A4-Hiralal had pistols in their hands and they fired at the deceased which resulted in the firearm injury being caused to him is belied by the post-mortem notes. Admittedly, the postmortem notes do not indicate that the deceased had suffered any firearm injury. It is pertinent to note that no bullets or empty cartridges were recovered from the scene of offence. Therefore, this witness has obviously not

come out with the truth. It must also be borne in mind that he ran to the police station after the deceased fell down and the alleged cutting of throat of the deceased by the accused is not witnessed by him. He has also not witnessed the alleged blank firing resorted to by the accused while running away. It would not be out of place to mention here that he admitted in his cross-examination that the deceased was living in the house of his maternal uncle and he is his relation. He stated that he was also staying with the deceased. He stated that after the police came to the scene of offence, they seized the articles lying on the scene of offence whereas PW-5 Jaldhari Yadav stated that the seizure panchanama was prepared in the evening at 8.00 p.m. after the police came back to the scene of offence from the hospital. We find it difficult to place reliance on this witness.

12. Statement of PW-3 Basudeo Mallick, who was also sitting on the motorcycle driven by the deceased was recorded by PW-8 Satish Chandra Singh, Judicial Magistrate, under Section 164 of the Code of Criminal Procedure. However, he turned hostile. The prosecution could draw support from his evidence only to the extent that he, PW-6 Narendra Yadav and the deceased reached Refugee Colony at 5.30 p.m. on the date of the incident; that he was hit with a hard object on his head and he fell down. PW-2 Dr. S.K. Mishra, who had examined him on 29/1/1996 has described injuries suffered by him and produced injury report (Ex-2). Thus, his presence and the fact that some incident took place on that day at Refugee Colony are established. But, his evidence is of no further use to the prosecution because on the major aspect of the prosecution story, he has not supported it.

13. PW-4 Shankar Yadav is admittedly related to the deceased. It must be noted that this witness is a chance witness. He is the resident of Mouza Kush Bediya. He stated that he was coming from Kanboe to his house. He admitted that from the place of incident, his house is about one mile away. He really had no reason to be there. He has not explained

why he was at the scene of offence on that day. He stated that he saw the accused standing near a grill making shop. The deceased came there. The accused started throwing stones on the deceased's motorcycle. He was hit by rod. He lost grip of the handle. The motorcycle fell down. The deceased started running away. The accused chased him and caught him. A1-Sunil fired. Because of the firing, people who had assembled there started running away. All the four accused started assaulting the deceased with bhujali and knife. When he fell down, A4-Hiralal Yadav cut his throat. According to this witness, PW-5 Jaldhari Yadav was present. After that, all the accused fled away. It is pertinent to note that he admitted that he did not know the names of the accused and he got to know the names of the accused from the people who had assembled there. He admitted that the deceased and his brother were accused in some other sessions case and the accused are witnesses in a criminal case where his brother is involved. Faced with the case set out in the FIR that the deceased was fired at by the accused and was injured, which is contrary to the post-mortem notes, this witness has tried to bring his evidence in conformity with the post-mortem notes. He stated that A1-Sunil fired but avoided to say that he fired at the deceased. He suggested that firing was merely done to scare people. This attempt has proved to be unsuccessful because the police have not recovered a single bullet or empty cartridge from the scene of offence.

14. PW-5 Jaldhari Yadav is also related to the deceased. He is a chance witness. According to him, on the date of incident, he had gone to the station to buy cattle feed. He stated that the place of occurrence would be less than a mile from the station. Before he could enter the shop, the members of the deceased's family came there and asked him to search for the deceased, but they did not tell him how far he should go to look for him. According to him, he did not ask them as to where the deceased had gone or at what time he used to return home. This story does not stand to reason. It is not understood how

the members of the deceased's family would know that this witness would be in the market at the relevant time so that they could contact him and ask him to search for the deceased. It is not understood how without any particulars being furnished to him, he embarked on the task and went to the scene of offence, which was less than a mile away from the station. In any case, his evidence does not inspire confidence. He stated that on the date of incident when he was at Bijan Kaur's shop situated on Pitch Road, he saw motorcycle of the deceased. PW-3 Basudeo Mallik was lying on the ground. A1-Sunil, A2-Bablu, A3-Nageshwar and A4-Hiralal were beating the deceased with rod, bhujali and knife. PW-4 Shankar Yadav came there and started shouting '*Maar Diya; Maar Diya'*. About 20 to 25 stab injuries were inflicted on the deceased. According to him, A1-Sunil and A2-Bablu fired in the air. People got scared and they ran helter-skelter. He further stated that A3-Nageshwar and A4-Hiralal cut the throat of the deceased and all of them fled away. According to him, treating the deceased as dead, while running away, the accused resorted to blank firing. Just like PW-4 Shankar Yadav, this witness has also tried to bring his evidence in conformity with the post-mortem notes which do not show any firearm injury. It bears repetition to state that not a single bullet or empty cartridge was recovered from the scene of offence. The use of firearm by the accused is not supported by any evidence. He claims to have lifted the dead body, but he stated that his clothes were not smeared with blood. The police have not seized his clothes, which creates suspicion about the prosecution case. Moreover, from his evidence, it appears that PW-4 Shankar Yadav came after the deceased was assaulted, whereas PW-4 Shankar Yadav claims that he was there right from the beginning.

15. Having dealt with the evidence of these three important witnesses, we would like to focuss on the inconsistencies in their evidence. PW-4 Shankar Yadav stated that A1-Sunil fired and due to the firing, people got scared. PW-5 Jaldhari Yadav

stated that A1-Sunil and A2-Bablu fired in air to scare the people. He further stated that treating the deceased as dead, they resorted to blank firing. PW-6 Narendra Yadav stated that A1-Sunil and A4-Hiralal fired and injured the deceased. Thus, there are three different versions given by three witnesses. According to PW-4 Shankar Yadav, only A1 Sunil was carrying the pistol. According to PW-5 Jaldhari Yadav, A1-Sunil and A2-Bablu had pistols and they fired in the air to scare the people. PW-6 Narendra Yadav goes a step further and says that A1-Sunil and A4-Hiralal fired and injured the deceased. Neither PW-4 Shankar Yadav nor PW-5 Jaldhari Yadav stated that A4-Hiralal had a pistol in his hand. There is no firearm injury on the deceased. PW-4 Shankar Yadav stated that A4-Hiralal cut the throat of the deceased whereas PW-5 Jaldhari Yadav stated that A3-Nageshwar and A4-Hiralal cut the throat of the deceased. According to PW-6 Narendra Yadav, A3-Nageshwar had a rod in his hand and he had attacked the deceased with the rod. He had also dealt a rod blow on the motorcycle. This is not consistent with PW-5 Jaldhari Yadav's case that A3-Nageshwar cut the throat of the deceased. This would mean that A3-Nageshwar was carrying a bhujali or knife. PW-6 Narendra Yadav stated that A2-Bablu gave several knife blows on the deceased but PW-5 Jaldhari Yadav stated that he fired in the air meaning thereby he had a pistol in his hand. It was argued by Mr. Ratan Kumar Choudhary, learned counsel for the State that different persons react differently to a particular situation and as such there may be minor variations in their statements. He submitted that minor contradictions and inconsistencies which do not go to the root of the prosecution version need to be ignored. In this case, it is not possible for us to adopt such an approach because there is a major lacuna in the prosecution story. It has been alleged that at least two of the accused were carrying pistols; the deceased was fired at and he was injured. This case is not borne out by the medical evidence. At the cost of repetition, we must state that no bullets or empty cartridges have been recovered from the scene of offence. If we keep this major lacuna of the prosecution story

in mind and consider the abovementioned inconsistencies in the evidence of the prosecution witnesses, it would not be possible to term them as minor inconsistencies or variations which should be ignored. Besides, all the three important prosecution witnesses are related to the deceased and, therefore, are interested witnesses. We are aware that the evidence of an interested witness is not to be mechanically overlooked. If it is consistent, it can be relied upon and conviction can be based on it because, an interested witness is not likely to leave out the real culprit. But in this case, the interested witnesses are not truthful. Their presence itself is doubtful. According to PW-6 Narendra Yadav, they were present at the scene of offence, but their names are not mentioned in the FIR. The genesis of the prosecution case is suppressed. Moreover, admittedly, there is deep rooted enmity between the accused and the deceased to which we have made reference earlier. We are mindful of the fact that enmity is a double edged weapon but possibility of false involvement because of deep rooted enmity also cannot be ruled out.

16. As we have already stated the major lacuna in this case is that use of firearms by the accused is not proved. There are no firearm injuries on the deceased. It is true that when there is cogent eye-witness account, the medical evidence recedes in the background. However, when the eye-witness account is totally inconsistent with the medical evidence and there is reason to believe that improvements are made in the court to bring the prosecution case in conformity with the post-mortem notes, it is a cause for concern. In such a situation, it is difficult to say that one must believe the tainted eye-witness' account and keep the medical evidence aside. In this connection, we may usefully refer to the judgment in *Sahebrao* where this Court observed that when the doctor's experience has not been questioned, he is the only competent person to opine on the nature of injuries and cause of death. We may also refer to the judgment of this Court in *Anjani Chaudhary*, where the medical evidence did not support the appellant's presence as there was

no injury on the deceased which could be caused by a lathi and the appellant was stated to be carrying a lathi. Since the eye-witnesses therein were not found to be reliable, this Court acquitted the appellant therein. In *Kapildeo Mandal*, all the eye-witnesses had categorically stated that the deceased was injured by the use of firearm, whereas the medical evidence specifically indicated that no firearm injury was found on the deceased. This Court held that while appreciating variance between medical evidence and ocular evidence, oral evidence of eye-witnesses has to get priority as medical evidence is basically opinionative. But, when the evidence of the eye-witnesses is totally inconsistent with the evidence given by the medical experts then evidence is appreciated in a different perspective by the courts. It was observed that when medical evidence specifically rules out the injury claimed to have been inflicted as per the eye-witnesses' version, then the court can draw adverse inference that the prosecution version is not trustworthy. This judgment is clearly attracted to the present case. In ***Mani Ram***, PW-2 the only sole eye-witness therein stated that the two appellants therein chased deceased-Basdeo and both of them fired at him from the kattas while he was running. However, according to the postmortem report, injury No.7, which was caused by a firearm, was situated on the right shoulder and front of upper arm and outer part. There was no injury either on the back or anywhere behind the shoulder. Since the prosecution case was that the deceased was fired at while he was running, firearm injuries should have been there on his back. In view of this discrepancy, this Court observed that where the direct evidence is not supported by the expert evidence then the evidence is wanting in the most material part of the prosecution case and, therefore, it would be difficult to convict the accused on the basis of such evidence. We feel that the accused can draw support from this case also. Tainted eye-witness account which is glaringly inconsistent with the medical evidence as regards firearm injury has shaken the credibility of the prosecution case.

17. There is yet another very important and distressing lacuna in the prosecution case. Learned counsel for the accused submitted that PW-6 Narendra Yadav went to the police station and informed the police about the incident in question. A sanha entry was made. However, PW-6 Narendra Yadav did not name the accused. It was submitted that this sanha entry was purposely suppressed by the prosecution as it did not contain the names of the accused. It was suggested that the FIR of PW-6 Narendra Yadav is a doctored document and the names of the accused were subsequently added at the hospital. In order to examine whether there is any substance in this submission, we carefully examined the record. We found that after recording the above submissions of the defence counsel, the trial court by its order dated 23/10/2003 directed the prosecution to produce Sanha Entry Nos.465 to 476 dated 29/1/1996 i.e. the date of incident. The officer-in-charge of Mihijam Police Station sent a report dated 4/11/2003 along with the register containing sanha entries stating that the original sanha entries of 29/1/1996 are not available. The said report is at Ex-O. Along with the said letter, the relevant register is produced. In order to find out whether really the sanha entries dated 29/1/1993 are missing, we went through the said register carefully and we found that the pages containing Sanha Entry Nos.465 to 476 dated 29/1/1996 are torn and missing. This appears to support the case of the accused that the sanha entries dated 29/1/1996 were purposely not produced because they contained information of the occurrence communicated by PW-6 Narendra Yadav first in point of time and the names of the accused were not mentioned therein. When confronted with this, the investigating officer, PW-7 Girish Mishra at one stage denied this allegation. Later on, he stated that he does not remember whether any sanha entry was made. When it was suggested to him that in the sanha entry, no names of the accused were mentioned and it was removed from the record to falsely implicate the accused, he said that it is a matter for investigation. This casts a shadow of doubt on the credibility of the prosecution story.

18. It was argued that the accused were absconding and, therefore, adverse inference needs to be drawn against them. It is well settled that absconding by itself does not prove the guilt of a person. A person may run away due to fear of false implication or arrest. (See *Sk. Yusuf v. State of West Bengal*[5]). It is also true that the plea of alibi taken by the accused has failed. The defence witnesses examined by them have been disbelieved. It was urged that adverse inference should be drawn from this. We reject this submission. When the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probablise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt.

19. We began by commenting on the unhappy conduct of the investigating agency. We conclude by reaffirming our view. We are distressed at the way in which the investigation of this case was carried out. It is true that acquitting the accused merely on the ground of lapses or irregularities in the investigation of a case would amount to putting premium on the deprecable conduct of an incompetent investigating agency at the cost of the victims which may lead to encouraging perpetrators of crimes. This Court has laid down that the lapses or irregularities in the investigation could be ignored subject to a rider. They can be ignored only if despite their existence, the evidence on record bears out the case of the prosecution and the evidence is of sterling quality. If the lapses or irregularities do not go to the root of the matter, if they do not dislodge the substratum of the prosecution case, they can be ignored. In this case, the lapses are very serious. PW-5 Jaldhari Yadav is a pancha to the seizure panchnama under which weapons and other articles were seized from the scene of offence and also to the inquest panchnama. Independent panchas have not been

5. (2011) 11 SCC 754.

examined. The investigating officer has stated in his evidence that the seized articles were not sent to the court along with the charge-sheet. They were kept in the Malkhana of the police station. He has admitted that the seized articles were not sent to the Forensic Science Laboratory. No explanation is offered by him about the missing sanha entries. His evidence on that aspect is evasive. Clothes of the deceased were not sent to the Forensic Science Laboratory. The investigating officer admitted that no seizure list of the clothes of the deceased was made. Blood group of the deceased was not ascertained. No link is established between the blood found on the seized articles and the blood of the deceased. It is difficult to make allowance for such gross lapses. Besides, the evidence of eye-witnesses does not inspire confidence. Undoubtedly, a grave suspicion is created about the involvement of the accused in the offence of murder. It is well settled that suspicion, however strong, cannot take the place of proof. In such a case, benefit of doubt must go to the accused. In the circumstances, we quash and set aside the impugned judgment and order. The appellants-accused are in jail. We direct that the appellants – A1-Sunil Kundu, A2-Bablu Kundu, A3-Nageshwar Prasad Sah and A4-Hira Lal Yadav be released forthwith unless otherwise required in any other case.

20. The appeals are disposed of in the aforestated terms.

K.K.T. Appeals allowed.

NEW OKHLA INDUSTRIAL DEVELOPMENT AUTHORITY
v.
SARVPRIYA SEHKARI AVAS SAMITI LTD. AND ANR.
(Civil Appeal No. 3265 of 2013)

APRIL 11, 2013

[CHANDRAMAULI KR. PRASAD AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Urban Development – Land purchased by co-operative housing societies – Subsequently declared as industrial development area under Industrial Area Development Act – High Court held that the societies are entitled to suitable alternative developed land on the basis of recommendations in Khodaiji Committee Report and as per the order dated 22.10.2002 passed by the State under Urban Planning and Development Act – Held: Recommendations in Khodaiji Committee Report, on facts would not enure to the benefit of the societies – Order dated 12.10.2002 is also not applicable to the appellant- Authority – Appeals allowed.

Uttar Pradesh Urban Planning and Development Act, 1973 - s.41 – Provision under – Incorporated in Uttar Pradesh Industrial Area Development Act, 1976 by virtue of s.12 thereof – Order passed under s.41 of 1973 Act, whether applicable to the authorities under 1976 Act – Held: Power exercised u/s.41 shall not be applicable to the authorities under 1976 Act merely because s.41 was included in 1976 Act by incorporation – The decision taken by one administrative department, shall not apply to the authorities within administrative control of another department, unless conscious decision is taken to apply the same to both the categories of authorities.

Legislation – Legislation by incorporation – Effect of – Provisions, of earlier Act incorporated in the later Act,

become part and parcel of the later Act – the device of legislation by incorporation is adopted for the sake of convenience.

The respondent-Co-operative housing society in appeal No.3265 of 2013 purchased lands from land-holders in the years 1981-1985. The lay-out plan of the society was approved by the then competent authority and as per the agreement between the District Magistrate and the Society, the Society carried out development activities. During pendency of the development activities, the State Government in exercise of its power u/s. 2(d) of U.P. Industrial Area Development Act, 1976 declared certain area, including the land belonging to the Society, as industrial development area which would form part of New Okhla Industrial Development Area (NOIDA). They society was asked by NOIDA to stop the development work. The Society from time to time demanded a suitable altenative developed piece of plot relying on the recommendation of Khaoaiji Committee and also an order of the state Government in the Department of Housing dated 22.10.2002. On the direction of the High Court NOIDA authorities considered the representation of the Society and rejected the same. Writ petition against the rejection order was allowed holding that the society was entitled to benefit of the recommendations of the *Khodaiji Committee* Report and the Government Order dated 22.10.2002. The Court directed NOIDA to give the benefit of Government Order dated 22.10.2002.

The respondent Co-operative Housing Society in Civil Appal No. 3266 of 2013, had purchased the bonds between the years 1990-1996. In this case, High Court had directed the Government to consider its claim observing that the order dated 22.10.2002 would be applicable to NOIDA.

In appeals to this Court, the questions for

consideration were whether the cases of two respondent societies are covered by *Khodaiji* Committee's Report and whether NOIDA is bound by the Government Order dated 22.10.2002.

Allowing the appeals, the Court

HELD: 1. It is evident from the relevant recommendation in the report of Khodaiji Committee, that the Committee made recommendation for allotment of one plot per member to the members of sixteen specified co-operative housing societies and, while doing so, it further observed that only those members shall be entitled to get plots who were *bonafide* members as on 1st of May, 1976. Both the societies in the present appeals do not find place in the recommendation of the Khodaiji Committee and further, it is not their case that they were even existing on 1st of May, 1976. Thus, the recommendation of Khodaiji Committee shall not enure to the benefit of the two societies. Hence, the High Court erred in holding that the denial of benefit of Khodaiji Committee's Report is arbitrary and discriminatory. [Para 14] [956-A-C, E-F]

2.1. Uttar Pradesh Urban Planning and Development Act, 1973 is an earlier Act whereas Uttar Pradesh Industrial Area Development Act, 1976 is a later Act. Incorporation of the provisions of the earlier Act into a later Act is a legislative device adopted for the sake of convenience and in order to avoid verbatim reproduction of the provisions of the earlier Act into the later Act. When such a legislation is made by incorporation, the provisions so incorporated become part and parcel of the later Act. Thus, those provisions are considered bodily transposed into it. Its legal effect is that those sections which have been incorporated in the later Act had been actually written in it with pen. Therefore, Section 41 of

1973 Act shall be deemed to have been incorporated in 1976 Act with adaptation and the authority constituted under 1973 Act shall be deemed to be in reference to an authority constituted under 1976 Act and the Vice-Chairman of the authority under 1973 Act would be the Chief Executive Officer of the Authority under the 1976 Act. [Para 17] [959-B-E]

2.2. But the power exercised under Section 41 of 1973 Act shall not be deemed to be an order under Section 12 of the 1976 Act, merely on the ground that Section 41 has been included in the Act by incorporation, which is a device adopted for the sake of convenience. The order dated 22nd of October, 2002 was issued by the Housing Department of the State Government and it has been addressed to Housing Commissioner, U.P. Awas Vikas Parishad, Vice-Chairman of all Development Authorities and Managing Director of the U.P. Cooperative Awas Sangh but not addressed to the Industrial Development Authorities. The Vice-Chairman of the Development Authorities cannot be read to mean the Chief Executive Officer of the Industrial Development Authority constituted under 1976 Act. Such an order can be passed in respect of the Industrial Development Authority in view of Section 12 of 1976 Act by such Departments of the State Government which have administrative control over the Industrial Development Authority. However, in case such a power is exercised by such a Department of the State Government, it shall have no bearing on the Development Authorities constituted under the 1973 Act. The decision taken by one administrative department concerned with Industrial Development Authority shall not apply to the Development Authorities within administrative control of another Department of the State Government or *vice versa* unless a conscious decision is taken to apply the same to both the categories of authorities in case the

rules of executive business of the State so permits. Hence, the Government Order dated 22nd October, 2002 shall not be applicable to the appellant authority. [Paras 17 and 18] [959-F-H; 960-A-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3265 of 2013.

From the Judgment & Order dated 20.06.2008 of the High Court of Judicature at Allahabad in CMWP No. 41065 of 2003.

WITH

C.A. No. 3266 of 2013.

L.N. Rao, A.K. Ganguli, S.R. Singh, Ravindra Kumar, Dhiraj K. Agrawal, Mridula Ray Bharadwaj, Dr. Sumant Bharadwaj, Ram Kishor Singh Yadav, Anuvrat Sharma, Gunnam Venkateswara Rao, Jitendra Mohan Sharma, Harsh Surana, Deepali Surana, O.P. Gaggar for the appearing parties.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. New Okhla Industrial Development Authority, hereinafter referred to as "NOIDA", in these special leave petitions filed under Article 136 of the Constitution of India impugns the order dated 20th of June, 2008 passed by the Allahabad High Court in Civil Misc. Writ Petition No. 41065 of 2003 (*Sarvpriya Sahakari Avas Samiti Limited v. State of U.P. through Special Secretary & Anr.*) and order dated 15th of July, 2010 passed in Civil Misc. Writ Petition No. 67362 of 2005 (*Shivalik Sahakari Avas Samiti through Secretary v. State of U.P. through Principal Secretary & Ors.*). By those orders NOIDA has been directed to give benefit of Government Order dated 22nd of October, 2002 to each of the writ petitioners, respondent no. 1 herein i.e. Sarvpriya Sahakari Avas Samiti Limited, hereinafter referred to as "Sarvpriya" and Shivalik Sahakari Avas Samiti, hereinafter referred to as "Shivalik".

2. Leave granted.

3. As direction given in both the appeals is identical and facts are similar, both have been heard together and are being disposed of by this common judgment.

4. For the purpose of these appeals we have taken the facts from the appeal arising out of Special Leave Petition No. 1343 of 2009. Sarvpriya is a registered Housing Cooperative Society and its claim is that most of its members are from the Indian Army, Border Security Force, Air Force, Central Reserve Police Force, Delhi Police and other Government Departments. The object of the Sarvpriya is to provide residential accommodation to its members. It was registered in the year 1981. Sarvpriya purchased land from the land holders during the period 1981 to 1985 in the Village Wazidpur within Tehsil Dadri in the District of Ghaziabad from the funds contributed by its members. During that period neither Ghaziabad Development Authority nor NOIDA were in existence and, as such, the layout plan prepared by Sarvpriya was approved on 3rd of December, 1982 by the Chief Town and Country Planner. Later, an agreement was entered into between Sarvpriya and the District Magistrate, Ghaziabad, whereby Sarvpriya was allowed to carry out the development activities as per the layout plan within a period of two years.

5. While the aforesaid development activities were going on, the State Government, in exercise of its power under Clause (d) of Section 2 of the U.P. Industrial Area Development Act, 1976 declared an area of 748 acres of land in Village Wazidpur as industrial development area, which was to form part of the New Okhla Industrial Development Area. It included land belonging to Sarvpriya. But, it seems that despite the aforesaid area having been declared as an industrial development area, Sarvpriya continued to carry on the activities of colonization and illegal plotting. Accordingly, by notice dated 21st of September, 1994, NOIDA called upon Sarvpriya to remove the unauthorized construction within a stipulated time. Sarvpriya replied to the

aforesaid notice inter alia stating that it had developed the land and asserted its right for further development on the basis of the sanction order and terms of agreement between it and the District Magistrate. Sarvpriya also chose to challenge the aforesaid notice in a writ petition filed before the High Court but the challenge has ultimately failed.

6. Sarvpriya thereafter wrote to the State Government to either permit it to develop residential plots or to allot a suitable developed plot. Sarvpriya also resorted to a proceeding before the Monopoly Restrictive Trade Practices Commission but the same was dismissed. While the request of Sarvpriya for allotment of a suitable developed plot was pending, in response to a notice dated 24th of July, 1999, Sarvpriya by its representation dated 28th of July, 1999 requested to settle the dispute outside the court by either allowing it to retain the present site or to allot a suitable alternative developed piece of land to enable its members to raise housing colony for their residence. It seems that thereafter Sarvpriya wrote to NOIDA, from time to time, for allotment of a suitable alternative developed piece of plot relying on the recommendation of a Committee known as Khodaiji Committee as also the order of the State Government in the Department of Housing dated 22nd of October, 2002. When all these did not yield any result, it filed CMWP No.45613 of 2002 (Sarvpriya Sahakari Avas Samiti Ltd. v. Chairman, NOIDA Authority) and the High Court by its order dated 25th of October, 2002 directed NOIDA to dispose of its representation within a stipulated time. The NOIDA by its order dated 4th of July, 2003 rejected Sarvpriya's representation and, while doing so, observed that it had purchased the land in the year 1981-1982 and on the recommendation of Khodaiji Committee lands were allotted to societies which were in existence till the year 1976 in the area and, accordingly, it was observed that the recommendation made by the Khodaiji Committee shall not be applicable to Sarvpriya.

7. Being unsuccessful in persuading the NOIDA to provide it alternative suitable plot, it filed a writ petition, which has given rise to the impugned order, for quashing the order dated 4th of July, 2003 and further for the issuance of a writ in the nature of mandamus commanding NOIDA to allot 40% of the land acquired from Sarvpriya to it in Sector Nos. 134-135 or in any nearby sector of NOIDA.

8. NOIDA contested the claim of Sarvpriya inter alia stating that the benefit of Government Order dated 22nd of October, 2002 applies to Avas Vikas Parishad and Development Authority constituted under the provisions of U.P. Urban Planning and Development Act, 1973. It was further pointed out that the NOIDA has been constituted under the provisions of U.P. Industrial Area Development Act, 1976 and, hence the Government Order referred to above shall not enure to the benefit of Sarvpriya. The submission of NOIDA did not find favour and the High Court by the impugned order in the case of Sarvpriya quashed the order dated 4th of July, 2003 and remitted the matter back to NOIDA with direction to give the benefit of the Government Order dated 22nd of October, 2002 to Sarvpriya within a stipulated time. While doing so, the High Court observed as follows:

> ".....The further explanation of the respondents are that Khodaiji Committee, which is constituted for the purpose, submitted the report that the benefit of re-allotment or fresh allotment of the land to such societies will be available to the societies which were registered before 1976. The argument is that benefit of Khodaiji Committee report, which is otherwise available to the Co-operative Housing Societies, cannot be given to the petitioner-society only because the petitioner-society is not registered before 1976. We have gone through the report of Khodaiji Committee and we do not find any such observation as is attributed by the respondent to the aforesaid report. The report simply talks about the Co-operative Housing

Societies irrespective of the year of registration. The petitioner's society is definitely a registered Housing Co-operative Society. Therefore, the denial of benefit of Khodaiji Committee report to the petitioner is wholly arbitrary and discriminatory in as much as the benefit of this report have been extended by the respondent to other Housing Co-operative Societies……"

9. Shivalik claims to have been registered as Housing Cooperative Society on 24th March, 1982. It asserts that it had purchased the land by registered sale deeds between the years 1990 to 1996 in Village Chhajarsi within Tehsil Dadri in the District Of Gautam Budh Nagar.

10. In the case of Shivalik, the High Court directed to consider its claim observing that the Government Order dated 22nd of October, 2002 shall be applicable to NOIDA. While doing so, it observed as follows:

"A perusal of Section 12 aforesaid shows that Section 41 has been adopted in toto and adoption of Section is by incorporation. Clause (c) of Section 12 clarifies that in a reference to the Vice-Chairman of the authority shall be deemed to be a reference to the Chief Executive officer of the authority (created under the U.P. Area Development Act). The impugned Government Order dated 22.10.2002 has been issued after the enforcement of both the above Acts. The Government Order has been addressed to the Vice-Chairman of the Development Authorities U.P. That will mean that the reference is itself also addressed to the Chief Executive Officer of the New Okhla Industrial Development Authority by virtue of clause (c) of Section 12 of U.P. Industrial Area Development Act, 1976. Thus it is beyond doubt that the Government Order is applicable to the New Okhla Industrial Development Authority. The Government Order in which various reasons have been given for holding that the Government Order is not applicable to New Okhla Industrial Development

Authority is contrary to the provisions of clause (c) of Section 12 of the U.P. Industrial Area Development Act, 1976. Therefore, the order dated 14/8/2005 is quashed. The Government Order dated 22.10.2002 is held to be applicable on the New Okhla Industrial Development Authority, created under the U.P. Industrial Area Development Act if it is subsisting……."

(underlining ours)

11. As regards claim of Sarvpriya and Shivalik that Government Order dated 22nd of October, 2002 shall also govern their case, the plea of the State Government is that there are two kinds of authorities which are constituted under two different enactments, namely, the U.P. Urban Planning and Development Act, 1973 and the U.P. Industrial Area Development Act, 1976. According to the State Government, the authorities constituted under U.P. Urban Planning and Development Act function under the overall administrative control of the Department of Housing and Urban Planning whereas the Industrial Development Authorities like NOIDA are constituted under the U.P. Industrial Area Development and it is not within administrative control of the Department of Housing and Urban Development. In fact, the Industrial Development Department of the State Government is its administrative department.

12. Mr. L.N. Rao, Senior Advocate appearing on behalf of the appellant submits that neither Khodaiji Committee's recommendation nor the order of the State Government dated 22nd of October, 2002 govern the case of Sarvpriya and Shivalik and, therefore, the order passed by the High Court is vulnerable. Mr. A.K. Ganguli, Senior Advocate, Mr. Jitendra Mohan Sharma, Advocate representing Sarvpriya and Shivalik respectively, however, contend that the functions of the Development Authority and the Industrial Development Authority being the same, the notification of the State Government in the Department of Housing dated 22nd of October, 2002 shall also

apply to NOIDA and the High Court did not commit any illegality by directing for consideration of their case in the light of the aforesaid order. They also submit that there is no justification to deny the benefit of Khodaiji Committee's recommendation to both the societies. Mr. S.R. Singh, Senior Advocate appearing on behalf of the State of U.P. is emphatic that neither Khodaiji Committee's recommendation nor the Government Order dated 22nd of October, 2002 issued by the Housing Department shall have any bearing for deciding the claim of both the societies.

13. In view of the rival submissions, the first question falling for our determination is as to whether the Khodaiji Committee's Report covers the case of the two societies herein. It seems that various cooperative housing societies which had purchased land falling in the industrial development area of NOIDA represented for allotment of land. NOIDA in its 15th Meeting held on 19th June, 1977 resolved to constitute a sub-Committee to negotiate with the representatives of the various cooperative housing societies. Mr. B.J. Khodaiji, the then Commissioner and Secretary, Housing and Urban Development Department of the State Government besides other officers constituted the said Committee. The report of the Khodaiji Committee has been placed before us. From the report, it appears that sub-Committee held several meetings and made various recommendations including the following, with which we are concerned in the present appeals. The recommendations so made read as follows:

> "2. Only one plot per member should be given to members of these sixteen Cooperative Housing Societies.
>
> 3. Only those members of Cooperative Housing Societies will be entitled to get plots in NOIDA who were bonafide members as on 1.5.1976 which shall be duly certified by a competent Authority in this respect i.e. Dy. Registrar, Co-operative Housing Societies, Meerut Division."

14. From the aforesaid it is evident that the Committee made recommendation for allotment of one plot per member to the members of sixteen specified cooperative housing societies and, while doing so, it further observed that only those members shall be entitled to get plots who were bonafide members as on 1st of May, 1976. Both the societies with which we are concerned in the present appeals do not find place in the recommendation of the Khodaiji Committee and further, it is not their case that they were even existing on 1st of May, 1976. It seems that the attention of the High Court was not drawn to the aforesaid paragraphs of the Report of the Khodaiji Committee and, therefore, the High Court fell into error in observing that the "report simply talks about the Cooperative Housing Societies irrespective of the year of registration". The passage from Khodaiji Committee Report quoted above makes it abundantly clear that "only those members of Cooperative Housing Societies will be entitled to get plots in NOIDA who were bonafide members as on 1.5.1976". If the society did not exist on that date there is no question of their being members of the society on the date specified. In that view of the matter, there is no escape from the conclusion that the recommendation of Khodaiji Committee shall not enure to the benefit of the two societies. Hence, we are of the opinion that the High Court erred in holding that the denial of benefit of Khodaiji Committee's Report to Sarvpriya is arbitrary and discriminatory. We, thus, have no option but to disapprove this line of reasoning of the High Court.

15. Now we proceed to consider the second question required to be answered in these appeals i.e. whether NOIDA is bound by the Government Order dated 22nd of October, 2002. To answer this question it shall be appropriate to examine the scheme of Uttar Pradesh Urban Planning and Development Act, 1973 (President's Act No. 11 of 1973) and Uttar Pradesh Industrial Area Development Act, 1976 (U.P. Act No. 6 of 1976). NOIDA is an industrial development authority constituted by the State Government of Uttar Pradesh in exercise of its

powers under Section 3 of U.P. Act No. 6 of 1976. Authority under this Act can be constituted for any industrial development area and such areas would be those which have been declared as such by notification by the State Government. The object of the industrial development authority, as is evident from Section 6 of the Act, is to secure planned development of the industrial development areas. Its functions include providing infrastructure for industrial, commercial or residential purposes as also to allocate and transfer either by way of sale or lease or otherwise, plots of land for the aforesaid purposes. President's Act No. 11 of 1973 is another Act aimed to provide for the planned development of certain areas of the State and Section 3 and 4 thereof confer power on the State Government to declare an area to be developed as a development area and constitute development authority for that area. Section 41 of this Act vests power on the State Government to issue direction for "efficient administration of the Act" and casts duty upon the development authority, its Chairman or the Vice-Chairman to carry out such direction. It reads as follows:

> "**41. Control by State Government.-**(1) The Authority, the Chairman or the Vice-Chairman shall carry out such directions as may be issued to it from time to time by the State Government for the efficient administration of this Act.
>
> (2) If in, or in connection with, the exercise of its powers and discharge of its functions by the Authority, the Chairman or the Vice-Chairman under this Act any dispute arises between the Authority, the Chairman or the Vice-Chairman and the State Government, the decision of the State Government on such dispute shall be final.
>
> (3) The State Government may, at any time, either on its own motion or on application made to it in this behalf, call for the records of any case disposed of or order passed by the Authority or Chairman for the purpose of satisfying itself as to the legality or propriety of any order passed or

> direction issued and may pass such order or issue such direction in relation thereto as it may think fit:
>
> Provided that the State Government shall not pass an order prejudicial to any person without affording such person a reasonable opportunity of being heard.
>
> (4) Every order of the State Government made in exercise of the powers conferred by this Act shall be final and shall not be called in question in any court."

16. Section 12 of U.P. Act No. 6 of 1976 provides for application of certain provisions of President's Act No. 11 of 1973, including Section 41 and same reads as follows:

> "**12.Applications of certain provisions of President's Act XI of 1973.**- The provision of Chapter VII and Sections 30, 32, 40, 41, 42, 43, 44, 45, 46, 47, 49, 50, 51, 53 and 58 of the Uttar Pradesh Urban Planning and Development Act, 1973 as re-enacted and modified by the Uttar Pradesh President's Act (Re-enactment with Modifications) Act, 1974, shall *mutatis mutandis* apply to the Authority with adaptation that-
>
> (a) any reference to the aforesaid Act shall be deemed to be a reference to this Act;
>
> (b) any reference to the Authority constituted under the aforesaid Act shall be deemed to be a reference to the Authority constituted under this Act; and
>
> (c) any reference to the Vice-Chairman of the Authority shall be deemed to be a reference to the Chief Executive Officer of the Authority."

17. It is relevant here to state that in order to come to the conclusion that the order of the State Government in the Housing Department dated 22nd of October, 2002 would apply to the NOIDA, it has been observed that such an order has

been passed by the Housing Department in exercise of the power under Section 41 of the President's Act No. 11 of 1973 and in view of its adaption by section 12 of U.P. Act No. 6 of 1976, the Government Order shall apply to NOIDA. President's Act No. 11 of 1973 is an earlier Act whereas U.P. Act No. 6 of 1976 is a later Act. As is well known, incorporation of the provisions of the earlier Act into a later Act is a legislative device adopted for the sake of convenience and in order to avoid verbatim reproduction of the provisions of the earlier Act into the later Act. When such a legislation is made by incorporation, the provisions so incorporated become part and parcel of the later Act. In other words, those provisions are considered bodily transposed into it. Its legal effect is that those sections which have been incorporated in the later Act had been actually written in it with pen. In view of the aforesaid, Section 41 of President's Act No. 11 of 1973 shall be deemed to have been incorporated in U.P. Act No. 6 of 1976 with adaptation and the authority constituted under President's Act No. 11 of 1973 shall be deemed to be in reference to an authority constituted under U.P. Act No. 6 of 1976 and the Vice-Chairman of the authority under President's Act No. 11 of 1973 would be the Chief Executive Officer of the Authority under the U.P. Act No. 6 of 1976. But will that mean that the order of the State Government in exercise of the power under Section 41 of President's Act No. 11 of 1973 shall apply to the Industrial Development Authorities constituted under Section 6 of U.P. Act No. 6 of 1976? In our opinion, the power exercised under Section 41 of President's Act No. 11 of 1973 shall not be deemed to be an order under Section 12 of the U.P. Act No. 6 of 1976 merely on the ground that Section 41 has been included in the Act by incorporation which, as observed earlier, is a device adopted for the sake of convenience. The order dated 22nd of October, 2002 has been issued by the Housing Department of the State Government and it has been addressed to Housing Commissioner, U.P. Awas Vikas Parishad, Vice-Chairman of all Development Authorities and

Managing Director of the U.P. Cooperative Awas Sangh but not addressed to the Industrial Development Authorities. The Vice-Chairman of the Development Authorities cannot be read to mean the Chief Executive Officer of the Industrial Development Authority constituted under U.P. Act No. 6 of 1976. It needs no emphasis that such an order can be passed in respect of the Industrial Development Authority in view of Section 12 of U.P. Act No. 6 of 1976 by such Departments of the State Government which have administrative control over the Industrial Development Authority. However, we hasten to add that in case such a power is exercised by such a Department of the State Government it shall have no bearing on the Development Authorities constituted under the President's Act No. 11 of 1973. The decision taken by one administrative department concerned with Industrial Development Authority shall not apply to the Development Authorities within administrative control of another Department of the State Government or vice versa unless a conscious decision is taken to apply the same to both the categories of authorities in case the rules of executive business of the State so permits.

18. In view of what we have observed above there is no doubt in our mind that the Government Order referred to above shall not be applicable to the appellant authority.

19. Both the grounds given by the High Court while issuing the impugned direction, in our opinion, being unsustainable in law, same can not be allowed to stand.

20. In the result, we allow these appeals, set aside the impugned judgments and orders of the High Court and dismiss the writ petitions, but without any order as to costs.

K.K.T. Appeals allowed.

RAJESH & OTHERS
v.
RAJBIR SINGH & OTHERS
(Civil Appeal No. 3860 of 2013)

APRIL 12, 2013

[G.S. SINGHVI, KURIAN JOSEPH AND SHARAD ARVIND BOBDE, JJ.]

Motor Vehicles Act, 1988 – s.166 – Fatal accident – Compensation – Grant of – Addition to actual income of the deceased towards future prospects – Norms laid down with regard to salaried persons in Sarla Verma case – Further explained in Santosh Devi case, and also made applicable to self-employed and persons on fixed wages – Clarification now given in regard to self-employed and persons on fixed wages with reference to their age – Held: In case the deceased victim was below 40 years, there must be an addition of 50% to the actual income of the deceased while computing future prospects – Addition should be 30% in case the deceased was in the age group of 40 to 50 years – Since in case of those self-employed or on fixed wages, there is normally no age of superannuation, it will only be just and equitable to provide an addition of 15% in the case where the victim was between the age group of 50 to 60 years – There should normally be no addition thereafter.

Motor Vehicles Act, 1988 – s.166 – Fatal accident – Grant of compensation – Loss of consortium to the spouse – Held: The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately – On facts, it would only be just and reasonable that the courts award at least Rs. 1 lakh for loss of consortium.

Motor Vehicles Act, 1988 – s.166 – Fatal accident – Grant of compensation – 'Funeral Expenses' – Held:

Tribunals have been quite frugal with regard to award of compensation under the head 'Funeral Expenses' – 'Price Index' has gone up in that regard also – On facts, it will be just, fair and equitable, under the head of 'Funeral Expenses', in the absence of evidence to the contrary for higher expenses, to award at least an amount of Rs.25,000/.

Motor Vehicles Act, 1988 – s.166 – Fatal accident – Deceased aged 33 years – Earning salary of Rs.9,520/- per month – Compensation – Grant of – Held: 50% salary added as future prospects –1/4th deducted as personal expenses of the deceased – Multiplier of 16 applied – Rs.1 lakh awarded towards loss of consortium and further Rs.1 lakh towards loss of care and guidance for minor children – Rs.25,000/- awarded towards funeral expenses – Total compensation awarded amounting to Rs.22,81,320/-.

Motor Vehicles Act, 1988 – s.166 – Just compensation – Meaning of – Held: 'Just Compensation' is adequate compensation which is fair and equitable, on the facts and circumstances of the case, to make good the loss suffered as a result of the wrong, as far as money can do so, by applying the well-settled principles relating to award of compensation.

Motor Vehicles Act, 1988 – s.166 – Compensation – Duty of the Court – To fix just compensation, irrespective of the claim – Held: The Court should not succumb to niceties or technicalities, in matters relating to compensation – Attempt of the Court should be to equate, as far as possible, the misery on account of the accident with the compensation so that the injured/the dependants should not face the vagaries of life on account of the discontinuance of the income earned by the victim – Tribunal/Court has a duty, irrespective of the claims made in the Application, if any, to properly award a just, equitable, fair and reasonable compensation, if necessary, ignoring the claim made in the application for compensation.

Words and Phrases –'Consortium' – Meaning of.

A 33 year old person died in an accident. The deceased was drawing a monthly salary of Rs.6,926/-. His dependants claimed compensation before the Motor Accident Claims Tribunal. The Claims Tribunal deducted 1/3rd towards personal expenses, applied multiplier of 16 and further awarded an amount of Rs.10,000/- towards all other conventional heads and the compensation was rounded off to Rs.8,96,500/- with interest @ 7.5% from the date of the filing of the petition.

The High Court, following *Sarla Verma* case, modified the award holding that only 1/4th should have been deducted from the income. An amount of Rs.10,000/- was also awarded for loss of consortium in addition to Rs.10,000/- already granted by the Tribunal on other conventional heads and, thus, it was held that the total compensation would be Rs.10,17,000/- with interest @ 7.5%. Still not satisfied, the widow and the children of the deceased filed appeal before this Court.

Allowing the appeal, the Court

HELD: 1.1. The expression 'just compensation' has been explained in *Sarla Verma's* case, holding that the compensation awarded by a Tribunal does not become just compensation merely because the Tribunal considered it to be just. 'Just Compensation' is adequate compensation which is fair and equitable, on the facts and circumstances of the case, to make good the loss suffered as a result of the wrong, as far as money can do so, by applying the well-settled principles relating to award of compensation. [Para 7] [969-G-H; 970-A-B]

1.2. The duty of the Court is to fix a just compensation and it has now become settled law that the Court should not succumb to niceties or technicalities, in such matters.

Attempt of the Court should be to equate, as far as possible, the misery on account of the accident with the compensation so that the injured/the dependants should not face the vagaries of life on account of the discontinuance of the income earned by the victim. [Para 15] [974-C-D]

1.3. The Court should award proper compensation irrespective of the claim and, if required, even in excess of the claim. The Tribunal/Court has a duty, irrespective of the claims made in the Application, if any, to properly award a just, equitable, fair and reasonable compensation, if necessary, ignoring the claim made in the application for compensation. [Paras 16, 19] [974-D-E; 975-G]

Sarla Verma (Smt) and others vs. Delhi Transport Corporation and another **(2009) 6 SCC 121: 2009 (5) SCR 1098;** *Santosh Devi vs. National Insurance Company Limited and others* **(2012) 6 SCC 421: 2012 (3) SCR 1178 – explained.**

Nagappa vs. Gurudayal Singh and Others **AIR 2003 SC 674: 2002 (4) Suppl. SCR 499;** *Oriental Insurance Company Limited vs. Mohd. Nasir and another* **AIR 2009 SC 1219: 2009 (1) SCR 14 and** *Ningamma and another vs. United Indian Insurance Company Limited* **(2009) 13 SCC 710: 2009 (8) SCR 683 – relied on.**

2.1. In *Sarla Verma's* case, after surveying almost all the previous decisions, the Supreme Court almost standardized the norms for the assessment of damages in Motor Accident Claims. It held that "where the deceased had a permanent job and was below 40 years, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects", should be adopted. "The addition should be only 30% if the age of the deceased was 40 to 50 years. There should

be no addition, where the age of deceased is more than 50 years." "Where the deceased was self-employed or was on a fixed salary (without provision for annual increments etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances." [Paras 7, 8] [970-B, D-E, F-G]

2.2. In a recent decision in *Santosh Devi*, *Sarla Verma's* case was further explained with regard to the settled norms and it was held that it cannot be said that "in Sarla Verma's judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is self-employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30 per cent increase in his total income over a period of time and if he/she becomes victim of accident then the same formula deserves to be applied for calculating the amount of compensation." [Paras 9, 10] [970-G-H; 792-G-H, 973-A]

3.1. Since, the Court in *Santosh Devi's* case actually intended to follow the principle in the case of salaried persons as laid in *Sarla Verma's* case and to make it applicable also to the self-employed and persons on fixed wages, it is clarified that the increase in the case of those groups is not 30% always; it will also have a reference to the age. In other words, in the case of self-employed or persons with fixed wages, in case, the deceased victim was below 40 years, there must be an addition of 50% to the actual income of the deceased while computing future prospects. Needless to say that the actual income should be income after paying the tax, if any. Addition should be 30% in case the deceased was in the age group of 40 to 50 years. [Para 11] [973-B-D]

3.2. In *Sarla Verma's* case, it has been stated that in the case of those above 50 years, there shall be no addition. Having regard to the fact that in the case of those self-employed or on fixed wages, where there is normally no age of superannuation, it will only be just and equitable to provide an addition of 15% in the case where the victim is between the age group of 50 to 60 years so as to make the compensation just, equitable, fair and reasonable. There shall normally be no addition thereafter. [Para 12] [973-D-F]

4.1. There is a need to revisit the practice of awarding compensation under conventional heads: loss of consortium to the spouse, loss of love, care and guidance to children and funeral expenses. The sum of Rs.2,500/- to Rs.10,000/- in those heads was fixed several decades ago and having regard to inflation factor, the same needs to be increased. In *Sarla Verma's* case, it was held that compensation for loss of consortium should be in the range of Rs.5,000/- to Rs.10,000/-. In legal parlance, 'consortium' is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our Courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English Courts have also recognized the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike

the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium. [Para 20] [976-B-G]

4.2. The Tribunals have been quite frugal with regard to award of compensation under the head 'Funeral Expenses'. The 'Price Index', it is a fact has gone up in that regard also. The head 'Funeral Expenses' does not mean the fee paid in the crematorium or fee paid for the use of space in the cemetery. There are many other expenses in connection with funeral and, if the deceased is follower of any particular religion, there are several religious practices and conventions pursuant to death in a family. All those are quite expensive. Therefore, it will be just, fair and equitable, under the head of 'Funeral Expenses', in the absence of evidence to the contrary for higher expenses, to award at least an amount of Rs.25,000/. [Para 21] [976-H; 977-A-C]

5. In the instant case, the appellants have produced before this Court salary certificate of the deceased which shows that after the revision of the salary by the Sixth Pay Commission with effect from 01.01.2006, the deceased had a monthly salary of Rs.9,520/-. Applying the principles in *Sarla Verma's* case as explained in *Santosh Devi's* case, and in the instant case, the compensation is re-assessed at Rs.22,81,320/-.The amount will carry interest @ 7.5% as awarded by the Tribunal from the date of the filing of the petition till realization. [Paras 22, 23] [977-D, E; 978-C-D]

Case Law Reference:

2002 (4) Suppl. SCR 499	**relied on**	**Para 3, 13**

2009 (5) SCR 1098	**explained**	**Paras 5,7, 9,11,12, 20,22**
2012 (3) SCR 1178	**explained**	**Para 9, 11, 20**
2009 (1) SCR 14	**relied on**	**Para 14**
2009 (8) SCR 683	**relied on**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3860 of 2013.

From the Judgment & Order dated 29.01.2010 of the High Court of Punjab & Haryana at Chandigarh in FAO No. 2816 of 2009.

Gagan Gupta for the Appellants.

S. Gowthaman for the Respondents.

The Judgment of the Court was delivered by

KURIAN , J. 1. Leave granted.

2. Compensation which appears to it to be just, has to be assessed and awarded by the Claims Tribunal set up under Section 168 of the Motor Vehicles Act, 1988 (for short, 'the Act'), on an application under Section 166 of the Act.

3. In *Nagappa vs. Gurudayal Singh and Others*[1], it has been held by this Court that the main guiding principle for determining the compensation is that it must be just. It has also been held that the award must be reasonable. Some of the relevant parameters in that regard arise for consideration in this case.

4. Petitioners are the widow (Smt. Rajesh) and three minor

1. AIR 2003 SC 674

children of late Bijender Singh-deceased victim. At the time of accident, the deceased was around 33 years. The fatal accident was on 05.10.2007. The deceased was working as clerk in a school under the education department in the State of Haryana. The salary certificate, Exhibit-P3, filed along with Claim Petition filed on 26.11.2007, showed that the deceased was drawing a monthly salary of Rs.6,926/-. The Tribunal deducted 1/3rd towards personal expenses, applied multiplier of 16 and further awarded an amount of Rs.10,000/- towards all other conventional heads and the compensation was rounded off to Rs.8,96,500/- with interest @ 7.5% from the date of the filing of the petition. It was also held that 60% of the compensation awarded would go to the widow and the remaining 40% to be equally shared by the minor children and mother. The share of the minor children was directed to be deposited in their name in a nationalized bank till they attained majority.

5. Dissatisfied, the Claim Petitioners except the mother approached the High Court of Punjab and Haryana. The mother was made a proforma respondent. High Court, following *Sarla Verma (Smt) and others vs. Delhi Transport Corporation and another*[2], modified the award holding that only 1/4th should have been deducted from the income. An amount of Rs.10,000/- was also awarded for loss of consortium in addition to Rs.10,000/- already granted by the Tribunal on other conventional heads and, thus, it was held that the total compensation would be Rs.10,17,000/- with interest @ 7.5%.

6. Still not satisfied, the widow and the children have approached this Court.

7. The expression 'just compensation' has been explained in *Sarla Verma's* case (supra), holding that the compensation awarded by a Tribunal does not become just compensation merely because the Tribunal considered it to be just. 'Just Compensation' is adequate compensation which is fair and

2. (2009) 6 SCC 121.

equitable, on the facts and circumstances of the case, to make good the loss suffered as a result of the wrong, as far as money can do so, by applying the well-settled principles relating to award of compensation. After surveying almost all the previous decisions, the Court almost standardized the norms for the assessment of damages in Motor Accident Claims.

8. At paragraph 24, it has been held as follows: -

"24. In *Susamma Thomas,* this Court increased the income by nearly 100%, in Sarla Dixit, the income was increased only by 50% and in *Abati Bezbaruah* the income was increased by a mere 7%. In view of imponderables and uncertainties, we are in favour of adopting as a rule of thumb, an addition of 50% of actual salary to the actual salary income of the deceased towards future prospects, where the deceased had a permanent job and was below 40 years. (Where the annual income is in the taxable range, the words 'actual salary' should be read as 'actual salary less tax'). The addition should be only 30% if the age of the deceased was 40 to 50 years. There should be no addition, where the age of deceased is more than 50 years. Though the evidence may indicate a different percentage of increase, it is necessary to standardize the addition to avoid different yardsticks being applied or different methods of calculations being adopted. Where the deceased was self-employed or was on a fixed salary (without provision for annual increments etc.), the courts will usually take only the actual income at the time of death. A departure therefrom should be made only in rare and exceptional cases involving special circumstances."

9. In a recent decision, in *Santosh Devi vs. National Insurance Company Limited and others*[3], authored by one of us (G. S. Singhvi, J.), *Sarla Verma's case* (supra) has further been explained with regard to the settled norms. It has been held in Paragraph 11 as follows:

3. (2012) 6 SCC 421.

"11. We have considered the respective arguments. Although, the legal jurisprudence developed in the country in last five decades is somewhat precedent-centric, the judgments which have bearing on socio-economic conditions of the citizens and issues relating to compensation payable to the victims of motor accidents, those who are deprived of their land and similar matters needs to be frequently revisited keeping in view the fast-changing societal values, the effect of globalisation on the economy of the nation and their impact on the life of the people."

10. Consequently, it has been held at Paragraphs 14 to 18, as follows:-

"14. We find it extremely difficult to fathom any rationale for the observation made in paragraph 24 of the judgment in Sarla Verma's case that where the deceased was self-employed or was on a fixed salary without provision for annual increment, etc., the Courts will usually take only the actual income at the time of death and a departure from this rule should be made only in rare and exceptional cases involving special circumstances. In our view, it will be nave to say that the wages or total emoluments/income of a person who is self-employed or who is employed on a fixed salary without provision for annual increment, etc., would remain the same throughout his life.

15. The rise in the cost of living affects everyone across the board. It does not make any distinction between rich and poor. As a matter of fact, the effect of rise in prices which directly impacts the cost of living is minimal on the rich and maximum on those who are self-employed or who get fixed income/emoluments. They are the worst affected people. Therefore, they put in extra efforts to generate additional income necessary for sustaining their families.

16. The salaries of those employed under the Central and

State Governments and their agencies/ instrumentalities have been revised from time to time to provide a cushion against the rising prices and provisions have been made for providing security to the families of the deceased employees. The salaries of those employed in private sectors have also increased manifold. Till about two decades ago, nobody could have imagined that salary of Class IV employee of the Government would be in five figures and total emoluments of those in higher echelons of service will cross the figure of rupees one lakh.

17. Although, the wages/income of those employed in unorganized sectors has not registered a corresponding increase and has not kept pace with the increase in the salaries of the Government employees and those employed in private sectors but it cannot be denied that there has been incremental enhancement in the income of those who are self-employed and even those engaged on daily basis, monthly basis or even seasonal basis. We can take judicial notice of the fact that with a view to meet the challenges posed by high cost of living, the persons falling in the latter category periodically increase the cost of their labour. In this context, it may be useful to give an example of a tailor who earns his livelihood by stitching cloths. If the cost of living increases and the prices of essentials go up, it is but natural for him to increase the cost of his labour. So will be the cases of ordinary skilled and unskilled labour, like, barber, blacksmith, cobbler, mason etc.

18. Therefore, we do not think that while making the observations in the last three lines of paragraph 24 of Sarla Verma's judgment, the Court had intended to lay down an absolute rule that there will be no addition in the income of a person who is self-employed or who is paid fixed wages. Rather, it would be reasonable to say that a person who is self-employed or is engaged on fixed wages will also get 30 per cent increase in his total income over

a period of time and if he/she becomes victim of accident then the same formula deserves to be applied for calculating the amount of compensation."

11. Since, the Court in *Santosh Devi's* case (supra) actually intended to follow the principle in the case of salaried persons as laid in *Sarla Verma's* case (supra) and to make it applicable also to the self-employed and persons on fixed wages, it is clarified that the increase in the case of those groups is not 30% always; it will also have a reference to the age. In other words, in the case of self-employed or persons with fixed wages, in case, the deceased victim was below 40 years, there must be an addition of 50% to the actual income of the deceased while computing future prospects. Needless to say that the actual income should be income after paying the tax, if any. Addition should be 30% in case the deceased was in the age group of 40 to 50 years.

12. In *Sarla Verma's* **case** (supra), it has been stated that in the case of those above 50 years, there shall be no addition. Having regard to the fact that in the case of those self-employed or on fixed wages, where there is normally no age of superannuation, we are of the view that it will only be just and equitable to provide an addition of 15% in the case where the victim is between the age group of 50 to 60 years so as to make the compensation just, equitable, fair and reasonable. There shall normally be no addition thereafter.

13. Whether the Tribunal is competent to award compensation in excess of what is claimed in the Application under Section 166 of the Motor Vehicles Act, 1988, is another issue arising for consideration in this case. At Paragraph 10 of *Nagappa's* case (supra), it was held as follows:-

"10. Thereafter, Section 168 empowers the Claims Tribunal to "make an award determining the amount of compensation which appears to it to be just". Therefore, only requirement for determining the compensation is that

it must be 'just'. There is no other limitation or restriction on its power for awarding just compensation.**"**

14. The principle was followed in the later decisions in *Oriental Insurance Company Limited vs. Mohd. Nasir and another*[4] and **in** *Ningamma and another vs. United Indian Insurance Company Limited*[5]*.*

15. Underlying principle discussed in the above decisions is with regard to the duty of the Court to fix a just compensation and it has now become settled law that the Court should not succumb to niceties or technicalities, in such matters. Attempt of the Court should be to equate, as far as possible, the misery on account of the accident with the compensation so that the injured/the dependants should not face the vagaries of life on account of the discontinuance of the income earned by the victim.

16. There is another reason why the Court should award proper compensation irrespective of the claim and, if required, even in excess of the claim. After the amendment of the Act by Act No. 54 of 1994 with effect from 14.11.1994, the Report on motor vehicle accident prepared by the police officer and forwarded to the Claims Tribunal under sub-Section (6) of Section 158 has to be treated as an Application for Compensation. Section 158 (6) of the Act reads as follows:

"**158. Production of certain certificates, licence and permit in certain cases.**-

(1) to (5) xxx xxx xxx

(6) As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, the officer-in-charge of the police station shall forward a

4. AIR 2009 SC 1219.

5. (2009) 13 SCC 710.

copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the Claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and, where a copy is made available to the owner, he shall also within thirty days of receipt of such report, forward the same to such Claims Tribunal and insurer."

17. Section 166 (4) of the Act reads as follows: -

"166(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of section 158 as an application for compensation under this Act."

18. Prior to the amendment in 1994, it was left to the discretion of the Tribunal as to whether the report be treated as an application or not. The pre-amended position under sub-Section (4) of Section 166 of the Act, read as under:

"(4) Where a police officer has filed a copy of the report regarding an accident to a Claims Tribunal under this Act, the Claims Tribunal may, if it thinks it necessary so to do, treat the report as if it were an application for compensation under this Act."

19. In a report on accident, there is no question of any reference to any claim for damages, different heads of damages or such other details. It is the duty of the Tribunal to build on that report and award just, equitable, fair and reasonable compensation with reference to the settled principles on assessment of damages. Thus, on that ground also we hold that the Tribunal/Court has a duty, irrespective of the claims made in the Application, if any, to properly award a just, equitable, fair and reasonable compensation, if necessary, ignoring the claim made in the application for compensation.

20. The ratio of a decision of this Court, on a legal issue is a precedent. But an observation made by this Court, mainly

to achieve uniformity and consistency on a socio-economic issue, as contrasted from a legal principle, though a precedent, can be, and in fact ought to be periodically revisited, as observed in **Santhosh Devi** (supra). We may therefore, revisit the practice of awarding compensation under conventional heads: loss of consortium to the spouse, loss of love, care and guidance to children and funeral expenses. It may be noted that the sum of Rs.2,500/- to Rs.10,000/- in those heads was fixed several decades ago and having regard to inflation factor, the same needs to be increased. In **Sarla Verma's case** (supra), it was held that compensation for loss of consortium should be in the range of Rs.5,000/- to Rs.10,000/-. In legal parlance, 'consortium' is the right of the spouse to the company, care, help, comfort, guidance, society, solace, affection and sexual relations with his or her mate. That non-pecuniary head of damages has not been properly understood by our Courts. The loss of companionship, love, care and protection, etc., the spouse is entitled to get, has to be compensated appropriately. The concept of non-pecuniary damage for loss of consortium is one of the major heads of award of compensation in other parts of the world more particularly in the United States of America, Australia, etc. English Courts have also recognized the right of a spouse to get compensation even during the period of temporary disablement. By loss of consortium, the courts have made an attempt to compensate the loss of spouse's affection, comfort, solace, companionship, society, assistance, protection, care and sexual relations during the future years. Unlike the compensation awarded in other countries and other jurisdictions, since the legal heirs are otherwise adequately compensated for the pecuniary loss, it would not be proper to award a major amount under this head. Hence, we are of the view that it would only be just and reasonable that the courts award at least rupees one lakh for loss of consortium.

21. We may also take judicial notice of the fact that the Tribunals have been quite frugal with regard to award of

compensation under the head 'Funeral Expenses'. The 'Price Index', it is a fact has gone up in that regard also. The head 'Funeral Expenses' does not mean the fee paid in the crematorium or fee paid for the use of space in the cemetery. There are many other expenses in connection with funeral and, if the deceased is follower of any particular religion, there are several religious practices and conventions pursuant to death in a family. All those are quite expensive. Therefore, we are of the view that it will be just, fair and equitable, under the head of 'Funeral Expenses', in the absence of evidence to the contrary for higher expenses, to award at least an amount of Rs.25,000/-.

22. Petitioners have produced before this Court Annexure-P4 salary certificate of the deceased Bijender Singh which shows that after the revision of the salary by the Sixth Pay Commission with effect from 01.01.2006, the deceased had a monthly salary of Rs.9,520/-. It is submitted that since the Sixth Pay Commission benefits were announced only subsequently making it to operate retrospectively from 01.01.2006, the salary certificate could not be produced before the Tribunal or the High Court. Applying the principles in **Sarla Verma's case** (supra) as explained in **Santosh Devi's case**, and in the instant case, the compensation has to be re-assessed as follows:

Sl. No.	**HEADS**	**CALCULATION**
(i)	Salary	**Rs.9,520.00 per month.**
(ii)	50% of (i) above to be added as future prospects =	[Rs.9,520.00 **+** Rs.4,760.00]= **Rs.14,280.00 per month**
(iii)	1/4th of (ii) deducted as personal expenses of the deceased =	[Rs.14,280.00 **—** Rs.3,570.00]**=** **Rs.10,710.00 per month**

(iv)	Compensation after multiplier of 16 is applied=	[Rs.10,710.00 **x** 12 **x** 16] **=Rs.20,56,320.00**
(v)	Loss of consortium =	**Rs.1,00,000.00**
(vi)	Loss of care and guidance for minor children =	**Rs.1,00,000.00**
(vii)	Funeral expenses =	**Rs.25,000.00**
	TOTAL COMPENSATION AWARDED =	**Rs.22,81,320.00**

23. The amount will carry interest @ 7.5% as awarded by the Tribunal from the date of the filing of the petition, viz., 26.11.2007 till realization.

24. In the result, the Appeal is allowed, the impugned Judgment as also the Award of the Tribunal are set aside. The claimant shall be entitled to a total compensation of Rs. 22,81,320/- with interest @ 7.5% p.a. from 26.11.2007 till realization. The 3rd Respondent-Insurance Company is directed to pay the 50% of the enhanced compensation by getting prepared a demand draft in her name which shall be delivered at the address given by her in the Claim Petition within three months. Demand drafts for the balance amount in equal proportion, after deducting the amount, if any, already paid, shall be prepared in the name of the three minor children and the mother and the same shall also be delivered to the parties at the respective addresses given in the Claim Petition within three months. The amounts in the share of the minor children shall be deposited in the nationalized bank where the amounts as awarded by the Tribunal have already been deposited, till they attain majority.

25. There is no order as to costs.

B.B.B. Appeal allowed.

HAZARA SINGH

v.

RAJ KUMAR AND ORS.

(Criminal Appeal Nos. 603-604 of 2013)

APRIL 18, 2013

[P. SATHASIVAM, M.Y. EQBAL AND A.K. SIKRI, JJ.]

Penal code, 1860 – s.307 – Conviction under – Trial court sentenced two accused to 5 years RI and another two accused to 3 years RI – High Court in appeal upheld the conviction, but reduced the sentence to the period already undergone – Held: conviction upheld – Reduction of sentence by High Court without appreciating the nature of offence, grievous injuries of witnesses/Victims, is unsustainable.

Sentence/Sentencing – Sentencing policy – It is duty of the court to consider all the relevant factors to impose an appropriate sentence – The punishment awarded should be directly proportionate to the nature and magnitude of the offence – Undue sympathy to impose inadequate sentence would do more harm to the Justice system and undermine the public confidence in the efficacy of law.

Respondents (the 4 accused persons) were prosecuted for attempting murder of 3 persons, including the appellant-complaint. They were charged u/s 148, 149, 323, 324, 435, 447 and 307 IPC. The trial court convicted them. For the offence punishable u/s 307 IPC, accused 'P'and 'B' were sentenced to undergo RI for 5 years and accused 'K' and 'L' were sentenced to undergo RI for 3 years. All the accused were imposed with a fine of Rs. 10,000/- with default clause. The accused persons preferred criminal appeal, whereas the appellant-complainant preferred Criminal Revision for

enhancement of sentence.

High Court dismissed the revision, but partly allowed the appeal of the accused person by reducing their sentence to already undergone. Hence the present appeal by one of the complainants.

The question for consideration before this court was whether the High Court was justified in reducing the sentence awarded by trial court , to already undergone.

Allowing the appeal, the Court

HELD: 1.1. The maximum punishment provided u/s. 307 IPC is imprisonment for life or a term which may extend to 10 years. Although Section 307 does not expressly state the minimum sentence to be imposed, it is the duty of the courts to consider all the relevant factors to impose an appropriate sentence. The legislature has bestowed upon the judiciary this enormous discretion in the sentencing policy, which must be exercised with utmost care and caution. The punishment awarded should be directly proportionate to the nature and the magnitude of the offence. The benchmark of proportionate sentencing can assist the judges in arriving at a fair and impartial verdict. [Para 6] [986-F-H]

1.2. In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the

public confidence in the efficacy of law. It is duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The Court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment. [Para 13] [990-E-G]

Shailesh Jasvantbhai and Anr. vs. State of Gujarat and Ors. **(2006) 2 SCC 359: 2006 (1) SCR 477;** *Ahmed Hussein Vali Mohammed Saiyed and Anr. vs. State of Gujarat* **(2009) 7 SCC 254: 2009 (8) SCR 719;** *Jameel vs. State of Uttar Pradesh* **(2010) 12 SCC 532: 2009 (15) SCR 712;** *Guru Basavaraj @ Benne Settapa vs. State of Karnataka* **(2012) 8 SCC 734: 2012 (8) SCR 189;** *Gopal Singh vs. State of Uttarakhand* **JT 2013 (3) SC 444 – relied on.**

2. The reduction of sentence passed by the High Court without appreciating the nature of offence, grievous injuries of witnesses/victims, is unsustainable. The High Court failed to take note of the fact that as per the medical evidence, Injury No.1 shown in supplement MLR on the person of appellant-complainant was found to be grievous. Injury No.2 on the person of complainant 'P' was also found to be grievous whereas Injury Nos. 1 and 2 caused to complainant 'M' one was declared as dangerous to life and it is also on record that injured complainant 'M' had also lost his speech. From the statements of eye-witnesses coupled with the medical evidence, it is proved that the accused caused injuries in the manner as propounded by the prosecution. While dismissing the revision for enhancement of sentence at the instance of the appellant-Complainant and ordering reduction of sentence, the High Court has assigned only two reasons, viz., (1) if the accused are sent behind bars, it will revive the old enmity between the parties in the village and (2), the accused also suffered agony of long

trial/appeal for the last 14 years. The courts cannot let the accused go scot-free on mere suspicion of eruption of enmity between the families. This ground is irrelevant for the purpose of determining the sentence to be awarded to the accused. High Court also failed to appreciate that the reduction of sentence merely on the ground of long pending trial is not justifiable. The High Court has failed to take note of a very relevant fact that with regard to the offence u/s. 307 IPC, appellant-accused 'R' has been charge sheeted individually for causing grievous injury on the head of the complainant 'M' with an intention or knowledge and under such circumstances, if by that act, he had caused death of 'M', he would have been guilty of murder. Therefore, the sentence imposed by the High Court is set aside and the sentence imposed by the trial court is restored. [Paras 19, 20, 21, 23, 24, 25 and 26] [999-C-G; 1002-C-D, G-H; 1003-B]

Sadha Singh and Anr. vs. State of Punjab **(1985) 3 SCC 225;** *State ofU.P. vs. Nankau Prasad Misra and Ors.* **(2005) 10 SCC 503 – relied on.**

Case Law Reference:

2006 (1) SCR 477	**relied on**	**Para 8**
2009 (8) SCR 719	**relied on**	**Para 9**
2009 (15) SCR 712	**relied on**	**Para 10**
2012 (8) SCR 189	**relied on**	**Para 11**
JT 2013 (3) SC 444	**relied on**	**Para 12**
(1985) 3 SCC 225	**relied on**	**Para 21**
(2005) 10 SCC 503	**relied on**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 603-604 of 2013.

From the Judgment & Order dated 03.11.2008 of the High Court of Punjab & Haryana at Chandigarh in Crl. Revision No. 416 of 1997 & Crl. Appeal No. 4-SB of 1997.

R.C. Kohli, S.S. Shamshery, Shubhashis R. Soren, V.M. Vishnu, Bharat Sood, Asha Kochhar for the Appellant.

Naresh Bakshi, Ashwani Antil, Sanjay Kumar Tyagi for the Respondents.

The Judgment of the Court was delivered by

P.SATHASIVAM, J. 1. Leave granted.

2. These appeals are directed against the common final judgment and order dated 03.11.2008 passed by the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 4-SB of 1997 and Criminal Revision No. 416 of 1997, whereby the High Court partly allowed the appeal filed by the respondents herein by reducing the sentence awarded to them to the period already undergone and dismissed the revision preferred by the appellant herein.

3. Brief facts:

(a) According to the prosecution, on 25.04.1994, Dr. P. Aggarwal, Medical Officer, C.H.C. Ladwa, sent a ruqa to the Police Station informing that Mehma Singh, Piara Singh and Hazara Singh have been admitted to the hospital after allegedly having received injuries in a fight. Mehma Singh was serious and had been referred to the L.N.J.P. Hospital, Kurukshetra. After receipt of the said ruqa, on 26.04.1994, Raj Pal Singh, S.I., In-charge Police Station, Babain, went to the hospital and recorded the statements of the injured.

(b) Hazara Singh, in his statement, alleged that he was a resident of village Kassithal and was an agriculturist. That about 6/7 years back, he had purchased 6 kanals of disputed agricultural land in village Rampura from one Sat Pal, possession of which was delivered to him. He along with his

family members harvested wheat crop from that land and had kept it in their adjoining field.

(c) On 25.04.1994, at about 6.30 p.m., his brother Piara Singh was ploughing the above said land, with the help of a tractor, while he along with his father was collecting the harvested wheat crop in the adjoining field. At that time, they suddenly, heard the noise of "bachao bachao" from his brother Piara Singh. Thereafter, he noticed Piara Singh jumping from the tractor and raising alarm coming towards them and Kesho Ram and his brother, along with 5/6 persons, were lifting the harvested wheat crop and placing it on the tractor. Raj Kumar was pouring diesel on the tractor out of the can held by him. Then Kesho Ram lit the fire on the tractor and Lal Chand and Bhag Singh ran after his brother Piara Singh and encircled him. They started inflicting lathi blows to his brother. He along with his father went near their brother by raising alarm. When they reached near their brother, Kesho Ram inflicted gandasi blow over his head but he rescued it by lifting his right hand which resulted in an injury in the middle of the right thumb and fingers. Simultaneously, Annu and Tinna started inflicting lathi blows upon him. In the meanwhile, Lal Chand, Raj Kumar and Bhag Singh started inflicting injuries on his father and caused grievous injuries. On hearing their alarm, Lachman Singh and Bhagat Singh were attracted from the nearby fields. On seeing them, all the accused with their respective weapons, i.e., lathis and gandasis ran away. All three of them became unconscious due to the said injuries. When he regained consciousness, he found himself in the hospital, Ladwa.

(d) Upon this information, an FIR under Sections 148, 149, 323, 324, 435 and 447 of the Indian Penal Code, 1860 (in short "IPC") was registered. After receipt of the opinion of the doctor that the injuries sustained were dangerous to life, an offence under Section 307 IPC was also added.

(e) After obtaining medical reports and completion of investigation, all the accused were arrested and on their

disclosure statements, weapons of offence were recovered and the case was committed to the Court of Sessions. After hearing the parties, all the accused totaling six were charge sheeted for the above-said offences. Out of the six accused, two were held to be minors and were directed to be tried by the Juvenile Court. The remaining four accused (respondent Nos. 1 to 4 herein) pleaded not guilty and claimed trial.

(f) The Additional Sessions Judge, Kurukshetra, by order dated 21.12.1996, in Sessions Case No. 44 of 1994 convicted all the accused persons, namely, Raj Kumar, Bhag Singh, Kesho Ram and Lal Chand for the offence punishable under Section 307 IPC and sentenced Raj Kumar and Bhag Singh to undergo RI for 5 years and a fine of Rs.10,000/-, in default, to further undergo RI for 1 year, whereas Kesho Ram and Lal Chand to undergo RI for 3 years and a fine of Rs. 10,000/-, in default, to further undergo RI for 9 months. In addition to the above, all the accused persons were convicted and sentenced under different heads.

(g) Aggrieved by the said order of conviction and sentence, the accused-respondents preferred Criminal Appeal No. 4-SB of 1997 whereas the appellant preferred Criminal Revision No. 416 of 1997 for enhancement of sentence before the High Court of Punjab and Haryana at Chandigarh.

(h) The High Court, by impugned order dated 03.11.2008, dismissed the revision filed by the appellant and partly allowed the appeal filed by the accused by reducing the sentence to the period already undergone.

(i) Being dis-satisfied with the judgment of the High Court, the appellant has preferred these appeals by way of special leave before this Court.

4. Heard Mr. R.C. Kohli, learned counsel for the appellant, Ms. Naresh Bakshi, learned counsel for the State of Haryana

and Mr. Ashwani Antil, learned counsel for respondent Nos. 1 to 4.

5. The only point for consideration in these appeals is whether the High Court is justified in reducing the sentence awarded to the accused persons to the period already undergone. In view of the limited question relating to sentence alone urged before the High Court, there is no difficulty in confirming the conviction under Section 307 IPC, accordingly, we do so.

6. In order to understand the reasoning of the High Court for reduction of sentence, it is but proper to refer Section 307 IPC which reads thus:

> **"307. Attempt to murder.-** Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinabove mentioned."

From the above, it is clear that the maximum punishment provided therein is imprisonment for life or a term which may extend to 10 years. Although Section 307 does not expressly state the minimum sentence to be imposed, it is the duty of the Courts to consider all the relevant factors to impose an appropriate sentence. The legislature has bestowed upon the judiciary this enormous discretion in the sentencing policy, which must be exercised with utmost care and caution. The punishment awarded should be directly proportionate to the nature and the magnitude of the offence. The benchmark of proportionate sentencing can assist the judges in arriving at a fair and impartial verdict.

Sentencing Policy:

7. The cardinal principle of sentencing policy is that the sentence imposed on an offender should reflect the crime he has committed and it should be proportionate to the gravity of the offence. This Court has repeatedly stressed the central role of proportionality in sentencing of offenders in numerous cases.

8. The factual matrix of this case is similar to the facts and circumstances of the case in *Shailesh Jasvantbhai and Another vs. State of Gujarat and others,* (2006) 2 SCC 359, wherein the accused was convicted under Section 307/114 IPC and for the same the trial Court sentenced the accused for 10 years. However, the High Court, in its appellate jurisdiction, reduced the sentence to the period already undergone. In this case, this Court held that the sentence imposed is not proportionate to the offence committed, hence not sustainable in the eyes of law. This Court, observed thus:

> "7. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross-cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law, which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of "order" should meet the challenges confronting the society. Friedman in his Law in Changing Society stated that: "State of criminal law continues to be - as it should be -a decisive reflection of social consciousness of society." Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing

> process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.
>
> 8. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."

9. This position was reiterated by a three-Judge Bench of this Court in *Ahmed Hussein Vali Mohammed Saiyed and Anr. vs. State of Gujarat,* (2009) 7 SCC 254, wherein it was observed as follows:-

> "99.….The object of awarding appropriate sentence should be to protect the society and to deter the criminal from achieving the avowed object to law by imposing appropriate sentence. It is expected that the courts would operate the sentencing system so as to impose such sentence, which reflects the conscience of the society and the sentencing process has to be stern where it should be. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against the interest of society which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.
>
> 100. Justice demands that courts should impose

punishment befitting the crime so that the courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment. The court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which both the criminal and the victim belong."

In this case, the court further goes to state that meager sentence imposed solely on account of lapse of time without considering the degree of the offence will be counter productive in the long run and against the interest of society.

10. In *Jameel vs. State of Uttar Pradesh* (2010) 12 SCC 532, this Court reiterated the principle by stating that the punishment must be appropriate and proportional to the gravity of the offence committed. Speaking about the concept of sentencing, this Court observed thus: -

"15. In operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration.

16. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence."

11. In *Guru Basavaraj @ Benne Settapa vs. State of Karnataka,* (2012) 8 SCC 734, while discussing the concept of appropriate sentence, this Court expressed that:

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

12. Recently, this Court in *Gopal Singh vs. State of Uttarakhand* JT 2013 (3) SC 444 held as under:-

"18. Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence….."

13. We reiterate that in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. We also reiterate that undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law. It is the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed. The Court must not only keep in view the rights of the victim of the crime but also the society at large while considering the imposition of appropriate punishment.

14. With these principles, let us consider whether the

reasons rendered by the impugned judgment falls within the parameter of the established principles. The relevant paragraph in the impugned judgment are as under:-

> "……Stress is that Raj Kumar has undergone 14 months of sentence and so as Bhag Singh six months of sentence whereas Kehso Ram and Lal Chand have undergone two months' sentence each and they are facing the agony of trial since 1994. The purpose of criminal law justice is to bring discipline, peace and harmony in the society and also to give an opportunity to an erring individual to reform himself. In appropriate cases, leniency be shown and opportunity is required to be given to the accused to reform themselves by adopting reformative approach. It is not in dispute that the parties are co-villagers. It has also not been indicated that during all these years, they had any further tiff among themselves. If the appellants are sent behind bars, it will revive the old enmity between the parties in the village. They have already suffered agony of long trial/appeal for the last 14 years. Therefore it would be expedient in the interest of justice to take a lenient view that the sentence awarded to he accused deserves to be modified and the injured complainants can be granted compensation"

15. Now, let us analyze the reasoning mentioned in the impugned judgment for reduction of sentence. It was mentioned before the High Court that Raj Kumar has undergone 14 months of sentence, Bhag Singh has undergone six months of sentence, Kesho Ram and Lal Chand have undergone two months of sentence each. It was also noted by the High Court that they were facing the agony of trial since 1994. In addition to the same, the High Court has noted that both the parties are co-villagers and during pendency of these proceedings, they had no further tiff among themselves. If the accused are sent behind bars, it will revive the old enmity between the accused and the victim's family. Mentioning these facts, the High Court has concluded that in the interest of justice, it is but proper to

take a lenient view and that the sentence awarded to the accused deserves to be modified and the injured complainants be granted compensation. By saying so, the High Court reduced the sentence to the period already undergone by them and directed the accused to pay a sum of Rs.25,000/- each as compensation to all the three injured persons, namely, Mehma Singh, Piara Singh and Hazara Singh within three months from the date of its order, failing which the appeal filed by them shall be treated as dismissed.

16. For the reasons best known to it, the State has not challenged the said order of the High Court before this Court. On the other hand, one of the complainants', namely, Hazara Singh has filed the present appeals by way of special leave petitions. We have already concluded that the conviction relating to the offence punishable under Section 307 is confirmed, in fact, it was not at all challenged. In the present appeals, learned counsel appearing for the appellant pointed out that considering the serious nature of the injuries, period of treatment, agony undergone, reduction of sentence to the period already undergone i.e. for a period of few months is not justifiable and the decision of the High Court is to be set aside and the order of the trial Court is to be restored.

17. It is not in dispute that three persons were injured at the hands of the accused persons and all of them were examined by the doctors. Their injuries were evidenced by certificates issued by the doctors, who treated them, which read thus:

> "PW-1 is Dr. K.K. Chawla, Medical Officer, L.N.J.P. Hospital, Kurukshetra, who has proved x-ray report Ex.PA with regard to Hazara Singh and has opined that as per x-ray of left knee, it showed fracture of patilla left with regard to remaining 5 injuries, i.e. X-ray of skull, left thigh, left forearm, right hand and left shoulder of the injured, he has stated that no bonny injury was found. With regard to injured Piara Singh, he has stated that X-ray skull showed no

bonny injury. Simultaneously, x-ray chest right forearm and left ankle showed no bonny injury. However, there was fracture of left scapula as per x-ray of left shoulder. The report in this behalf is Ex.PB.

PW-2, Dr. P. Aggarwal, Medical Officer, C.H.C. Ladwa, has examined Mehma Singh on 25.04.1994 at 9.25 p.m. and found the following injuires on his person:-

1. Lacerated wound 1-1/2 cm x ½ cm x bone deep on the left parietal region, 3 cm posterior to anterior hair line. Surrounding parts in diameter of 8 cm was swollen. Swelling was boggy in nature. X-ray and surgeon's opinion was advised.

2. Left eye was swollen and reddish blue in colour. Both lids were swollen. Swelling was extending upto forehead. X-ray and eye surgeon's opinion was advised.

3. Contusion 10 cm x 1 cm each two in number on back of left side of chest situated perpendicular on each other. X-ray was advised.

4. Contusion 12 cm x 2 cm on outer side of left side of abdomen x-ray and surgeon's opinion was advised.

5. Lower half of left fore-arm was swollen. Crepitus was present. X-ray was advised.

6. Two contusions on left buttock, surrounding parts swollen, x-ray was advised.

7. Abrasion 1 cm x ½ cm on right side of nose bridge. X-ray was advised.

He also examined Hazara Singh, son of Mehma Singh at 9.50 p.m. and found the following injuries on his person:

1. Lacerated wound 3 cm x ½ cm into bone deep on left parietal region situated anterior posteriorily, 3 cm posterior to anterior hair line. Fresh bleeding was present. X-ray and surgeon's opinion was advised.

2. Contusion 12 cm x 3 cm on antro lateral side of middle of left thigh. Surrounding parts were swollen. X-ray was advised.

3. Swelling was present on middle half of left fore-arm. X-ray was advised.

4. Incised wound 1 cm x ½ cm, x muscle deep on outer side of right palm in between index finger and thumb. Margins were cleancut. Fresh bleeding was present. X-ray was advised.

5. Abrasions 2 cm x 1 cm x 1 cm on back of right shoulder. Movements were painful. X-ray was advised.

6. Lacerated wound 1 cm x ½ cm x skin deep on right sole near base of second toe.

That during examination of the patient routine checking on 26.04.1994, he found one more injury on the person of Hazara Singh as under:-

"There was faint reddish swelling, diffused all around the left knee. Patient was complaining of severe pain. Injury was tender to touch. Movements were painful and restricted. X-ray left knee was advised."

All the injuries on the person of Mehma Singh were found to have been caused by blunt weapon. All the injuries except injury No.4 on the person of Hazara Singh was found to have been caused by blunt weapon. Injury No.4 was caused by sharp weapon.

That this doctor witness also examined Piara Singh at 10.05 p.m. and found the following 6 injuries on his person:-

1. Lacerated wound 1-1/2 cm x ½ cm x bone deep on middle of scalp with fresh bleeding situated 12 cm posterior to anterial hair-line. X-ray and surgeon's opinion was advised.

2. Reddish swelling, diffused on back of left shoulder. Movements of shoulder were very painful. Tenderness was present. X-ray was advised.

3. Contusion 18 cm x 2 cm on lateral side of left side of chest and abdomen situated vertically.

4. Abrasion 4 cm x 1 cm on back of right side of chest surrounding parts were swollen. X-ray was advised.

5. Swelling diffused present on lower 3rd of right forearm. X-ray was advised.

6. Diffused swelling near left medial mallelous was present. Movement at ankle joint was painful. X-ray was advised.

All the injuries were caused by blunt weapon. Medical Report in this behalf is Ex. PE and diagram showing seat of injuries in this behalf is Ex. PE/1.

This witness has further proved his report Ex. PG to the effect that the injury No.1 shown in supplementary M.L.R. i.e. Ex. PH on the person of Hazara Singh was found to be grievous. He also proved report Ex. PK to the effect that injury No.2 on the person of Piara Singh, was also grievous and rest were simple. He has also stated that on 28.04.1994, he received operation note of Mehma Singh from P.G.I. Chandigarh, whereupon, he sent intimation Ex. PL to the Police and declared injuries No.1 and 2 as dangerous to life.

That PW-3 Dr. P. Vara Prasad, S.M.O., Casualty, P.G.I. Chandigarh has proved his endorsement Ex. PM/1 and Ex. PM/3 to the effect that on 02.06.1994 and 22.07.1994, when the police wanted his opinion, Mehma Singh injured was unfit for statement.

That PW-15, Hazara Singh injured, PW-16 Jaspal Singh, eye-witness, PW-17 Piara Singh injured and PW-19, Mehma Singh injured, have broadly supported the case of the prosecution."

After analyzing the above injuries with reference to the specific evidence by the doctors concerned and the certificates issued, the trial Court came to the following conclusion:-

"a) In the present case, the prosecution has been able to show that the witness was unable to speak during investigation. Even, Dr. Ashwani Kumar Chaudhary, while appearing in the witness box as PW-18, on 02.04.1996, has stated after examining the witness orally in the Court, that his speech was blurred. When Mehma Singh appeared as PW-19, he was feeling difficulty in speaking but since he could be understood, what he wanted to say, his statement was recorded. The perusal of his statement further shows that during his examination, he was feeling difficulty in speaking the name of the accused and he was allowed to touch their person to depose about the part played by each of the accused. As per the case of the prosecution, the witness was injured in the occurrence and as such no prejudice was caused to the accused in examining the witness for the first time in Court.

(b) That in view of the statements of these eye-witnesses coupled with the medical evidence, it is proved that the accused caused injuries in the manner propounded by the prosecution. Although, the prosecution has discharged its onus in proving its case, yet, to analyze the defence, at this

stage, would be relevant for the purpose of deciding the complicity.

(c) Resultantly, thus, I hold that on the date of occurrence, the injured party were in possession of the disputed land. The occurrence took place in the manner propounded by the prosecution and further that the accused have not acted in the right of private defence and property.

(d) In this view of the matter, and the fact that all the accused formed an unlawful assembly and entered into the field belonging to the injured and being in their possession, they have committed an offence punishable under Sections 148 and 447 of the Indian Penal Code.

(e) The version of burning of the tractor by the accused in furtherance of their common object of the assembly, has been found proved and as such, they have also committed an offence punishable under Section 435 read with 149 of the Indian Penal Code.

(f) It is proved that Bhag Singh inflicted injury with blunt weapon on the left shoulder of Piara Singh. Copy of X-ray report in this behalf is Ex. PB which shows fracture of bone. He has thus committed an offence punishable under Section 325 and the other accused are also liable for an offence under Section 325 read with 149 of the Indian Penal Code.

(g) In view of the M.L.R. of Hazara Singh, injury No. 4 was caused by sharp edged weapon i.e. gandasi by Kesho Ram and he himself has held liable for an offence under Section 324 of IPC and the other accused being members of an unlawful assembly are liable for an offence under Section 324 read with Section 149 of the Indian Penal Code.

(h) It is also proved that all the accused voluntarily caused simple hurt to Mehma Singh, Piara Singh and Hazara

Singh and held themselves liable for an offence under Section 323 read with Section 149 of the Indian Penal Code.

(i) With regard to the offence under Section 307 IPC, Raj Kumar accused has been charge-sheeted individually, for causing the injury on the head of Mehma Singh with an intention or knowledge and under such circumstances, that if by that act, he had caused death of said Mehma Singh, he would have been guilty of murder. The other accused have been charge-sheeted with the aid of Section 149 of IPC Bhag Singh accused, was also individually charged for offence under Section 307 IPC and other accused were also charged with the aid of Section 149 IPC for the act of Bhag Singh.

18. The trial Court, after detailed analysis of the evidence of doctors and the certificates issued, convicted the above accused persons and passed the following sentence:

"a) Accused Raj Kumar U/s 307 IPC – RI for 5 years and fine of Rs.10,000/- in default further RI of 1 year.

(b) Accused Bhag Singh U/s 307 IPC – RI for 5 years and fine of Rs.10,000/- in default further RI for 1 year.

(c) Accused Kesho Ram U/s 307 IPC – RI of 3 years and fine of Rs.10,000/- in default further RI for 9 months

(d) Accused Lal Chand U/s 307 IPC – RI of 3 years and fine of Rs.10,000/- in default further RI for 9 months.

Addition to the above all accused respondents were awarded following sentence:-

U/s 325 IPC – RI for 2 years and a fine of Rs.2,000/- in default further sentence for 6 months RI.

U/s 324 IPC – RI for 1 year

U/s 447 IPC – RI for 1 month

U/s 323 IPC – RI for 6 months.

U/s 148 IPC – RI for one year.

U/s 435 IPC – RI for 2 years with fine of Rs.10,000/- each in default further sentence of RI for 6 months."

19. It is clear that the High Court failed to take note of the fact that as per the medical evidence, Injury No.1 shown in supplement MLR on the person of Hazara Singh was found to be grievous. Injury No.2 on the person of Piara Singh was also found to be grievous whereas Injury Nos. 1 and 2 caused to Mehma Singh one was declared as dangerous to life and it is also on record that injured Mehma Singh had also lost his speech.

20. As rightly pointed out by learned counsel for the appellant, the High Court failed to appreciate that the trial Court has come to the conclusion that in view of the statement of injured eye-witnesses coupled with medical evidence, it is proved that the accused caused injuries in the manner explained by the prosecution and passed appropriate sentence to the accused respondents. We have already stated that while dismissing the revision for enhancement of sentence at the instance of the present appellant and partly allowing the order of reduction of sentence, the High Court has assigned only two reasons, viz., **"one, if the accused are sent behind bars, it will revive the old enmity between the parties in the village and secondly, the accused also suffered agony of long trial/appeal for the last 14 years."**

21. It is unfortunate that the High Court failed to appreciate that the reduction of sentence merely on the ground of long pending trial is not justifiable. In *Sadha Singh and Another vs. State of Punjab,* (1985) 3 SCC 225, a three Judge Bench of this Court, while considering the identical issue which also arose for an offence under Section 307 and reduction of

substantive sentence by the High Court, held as under:-

"5. … We must confess that what ought to be the proper sentence in a given case is left to the discretion of the trial court, which discretion has to be exercised on sound judicial principles. Various relevant circumstances which have a bearing on the question of sentence have to be kept in view. Before deciding the quantum of sentence the learned Sessions Judge has to hear both the sides as required by the relevant provision of the Code of Criminal Procedure.

6. In an appeal against the conviction, it is open to the High Court to alter or modify or reduce the sentence after confirming conviction. If the High Court is of the opinion that the sentence is heavy or unduly harsh or requires to be modified, the same must be done on well recognised judicial dicta. Therefore, we may first notice the reasons which appealed to the learned Judge to reduce the substantive sentence awarded to the appellants to sentences undergone."

While rejecting the similar reasons as stated by the High Court in the present case, the following conclusion arrived at by this Court are relevant:

"7. …. The learned Judge then took notice of the fact that three co-accused of the appellants were given benefit of doubt by the trial court and acquitted them although they were also attributed causing of some injuries. If acquittal of some co-accused casts a cloud of doubt over the entire prosecution case, the whole case may be rejected. But we fail to understand how acquittal of some of the accused can have any relevance to the question of sentence awarded to those who are convicted. In this case the prosecution submitted that these two appellants alone were armed with guns. Then the learned Judge observes that no useful purpose, will be served by sending the

appellants to prison again to undergo the unexpired period of their sentence. We repeatedly asked why this indulgence and waited for answer in vain. If someone is enlarged on bail during the pendency of appeal and when the appeal is dismissed sending him back to jail is going to raise qualms of conscience in the Judge, granting of bail pending appeal would be counter-productive. One can pre-empt or forestall the decision by obtaining an order of bail.

8. If the learned Judge had in mind the provisions of Section 360 of CrPC so as to extend the benefit of treatment reserved for first offenders, these appellants hardly deserve the same. Admittedly, both the appellants were above the age of 21 years on the date of committing the offence. They have wielded dangerous weapons like firearms. Four shots were fired. The only fortunate part of the occurrence is that the victim escaped death. The offence committed by the appellants is proved to be one under Section 307 of IPC punishable with imprisonment for life. We were told that the appellants had hardly suffered imprisonment for three months. If the offence is under Section 307 IPC i.e. attempt to commit murder which is punishable with imprisonment for life and the sentence to be awarded is imprisonment for three months, it is better not to award substantive sentence as it makes mockery of justice. Mr Jain said that the High Court has enhanced the fine and compensated the injured and, therefore, we should not enhance the sentence. Accepting such a submission would mean that if your pockets can afford, commit serious crime, offer to pay heavy fine and escape tentacles of law. Power of wealth need not extend to overawe court processes. Thus it appears that the High Court wrongly interfered with the order of sentence on wholly untenable and irrelevant grounds some of them not borne out by the record. In order, therefore, to avoid miscarriage of justice we must interfere and set aside the sentence imposed by the High Court and restore the

sentence imposed by the learned Sessions Judge which we hereby order. Both the appellants shall be taken into custody forthwith to suffer their sentence."

22. Applying the same principles in *State of U.P. vs. Nankau Prasad Misra and Others,* (2005) 10 SCC 503, this Court set aside the judgment of the High Court reducing the sentence without adequate reasons.

23. The second ground relied on by the High Court is that it will further the enmity between the families of victim and the accused. In our considered view, this ground is irrelevant for the purpose of determining the sentence to be awarded to the accused. The Courts cannot let the accused go scot-free on mere suspicion of eruption of enmity between the families.

24. In our view, the reduction of sentence passed by the High Court without appreciating the nature of offence, grievous injuries of witnesses/victims, is unsustainable.

25. In addition to the factual matrix discussed in the earlier paras, Dr. Ashwani Kumar Chaudhary (PW-18), after examining the witness Mehma Singh, (PW-19), has stated that his speech was blurred and he was feeling difficulty in speaking. We are satisfied that from the statements of eye-witnesses coupled with the medical evidence, it is proved that the accused caused injuries in the manner as propounded by the prosecution. It is also proved that Bhag Singh inflicted injury with a blunt weapon on the left shoulder of Piara Singh. Likewise, the M.L.R. of Hazara Singh proves that the injury was caused by a sharp-edged weapon i.e. gandasa by Kesho Ram. The High Court has failed to take note of a very relevant fact that with regard to the offence under Section 307 IPC, Raj Kumar has been charge sheeted individually for causing grievous injury on the head of Mehma Singh with an intention or knowledge and under such circumstances, if by that act, he had caused death of the said Mehma Singh, he would have been guilty of murder.

26. Under these circumstances, we hold that the High Court has wrongly interfered with the order of sentence on wholly untenable and irrelevant grounds, some of them even not borne out on record. To avoid miscarriage of justice, we must interfere and accordingly, we set aside the sentence imposed by the High Court and restore the sentence imposed by the trial Court. All the respondents-accused, namely, Raj Kumar, Keshav Ram, Lal Chand and Bhag Singh shall be taken into custody forthwith to serve the remaining period of sentence as ordered by the trial Court. The appeals are allowed.

K.K.T. Appeals allowed.

SUKHDEV SINGH

v.

UNION OF INDIA AND ORS.

(Civil Appeal No.5892 of 2006)

APRIL 23, 2013

[R.M. LODHA, MADAN B. LOKUR AND KURIAN JOSEPH, JJ.]

Service Law:

*Annual Confidential Repot (ACR) – Communication of the entry therein – To the Public servant (other than military service) – Matter referred by Division Bench of Supreme court to Three Judge Bench, finding inconsistency as regards the law laid down on the issue, by the judgments passed in *U.P. Jal Nigam case and **Major Bahadur Singh case – Subsequently, Supreme Court, in ***Dev Dutt case held that every entry in ACR of a public servant must be communicated to him/her within a reasonable period – Held: The view taken in Dev Dutt case is leally sound and thus approved – Therefore, every entry in ACR whether it be poor, fair, average, good or very good, must be communicated to the public servant within a reasonable period.*

****Dev Dutt vs. Union of India and Ors.* **(2008) 8 SCC 725: 2008 (8) SCR 174 – approved.**

Abhijit Ghosh Dastidar vs. Union of India and Ors. **(2009) 16 SCC 146 – relied on.**

Satya Narain Shukla vs. Union of India and Ors. **2006 (9) SC 69: 2006 (2) Suppl. SCR 275;** *K.M. Misra vs. Central Bank of India and Ors.* **2008 (9) SCC 120: 2008 (13) SCR 534 – disapproved.**

U.P. Jal Nigam and others vs. Prabhat Chandra Jain and Ors.* **1996 (2) SCC 363: 1996 (1) SCR 1118; ***Union of India and Anr. vs. Major Bahadur Singh* **(2006) 1 SCC 368:**

2005 (5) Suppl. SCR 385; *A.K. Praipak vs. Union of India* **(1969) 2 SCC 262: 1970 (1) SCR 457;** *Maneka Gandhi vs. Union of India* **(1978) 1 SCC 248: 1978 (2) SCR 621;** *Union of India vs. Tulsi Ram Patel* **(1985) 3 SCC 398: 1985 (2) Suppl. SCR 131;** *Canara Bank vs. V.K. Awasthy* **(2005) 6 SCC 321: 2005 (3) SCR 81;** *State of Maharashtra vs. Public Concern for Governance Trust* **(2007) 3 SCC 587: 2007 (1) SCR 87 – referred to.**

Case Law Reference:

1996 (1) SCR 1118	**referred to**	**Para 1**
2005 (5) Suppl. SCR 385	**referred to**	**Para 1**
2008 (8) SCR 174	**approved**	**Para 3**
1970 (1) SCR 457	**referred to**	**Para 3**
1978 (2) SCR 621	**referred to**	**Para 3**
1985 (2) Suppl. SCR 131	**referred to**	**Para 3**
2005 (3) SCR 81	**referred to**	**Para 3**
2007 (1) SCR 87	**referred to**	**Para 3**
(2009) 16 SCC 146	**relied on**	**Para 7**
2006 (2) Suppl. SCR 275	**disapproved**	**Para 9**
2008 (13) SCR 534	**disapproved**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5892 of 2006.

From the Judgment & Order dated 04.07.2005 of the High Court of Punjab and Haryana in CWP No. 6620 CAT of 2003.

Ansar Ahmad Chaudhary for the Appellant.

Mohan Parasaran, SG, D.L. Chidananda, Asha G Nair, S.N. Terdal, Harinder Mohan Singh, Shabana for the Respondents.

The following order of the Court was delivered

O R D E R

1. While granting leave on December 12, 2006, a two Judge Bench (S.B. Sinha and Markandey Katju, JJ.) felt that

there was inconsistency in the decisions of this Court in *U.P. Jal Nigam and others vs. Prabhat Chandra Jain and others*[1], and *Union of India and another vs. Major Bahadur Singh*[2] and consequently, opined that the matter should be heard by a larger Bench. This is how the matter has come up for consideration before us.

2. The referral order dated December 12, 2006 reads as follows:

> "The appellant herein was appointed as Deputy Director of Training on or about 13.11.1992. He attended a training programme on Computer Applied Technology. He was sent on deputation on various occasions in 1997,1998 and yet again in 2000. Indisputably, remarks in his Annual Confidential Reports throughout had been "Outstanding" or "Very good". He, however, in two years i.e. 2000-2001 and 2001-2002 obtained only "Good" remark in his Annual Confidential Report. The effect of such a downgrading falls for our consideration. The Union of India issued a Office Memorandum on 8.2.2002 wherein the Bench mark for promotion was directed to be "Very Good"in terms of clause 3.2 thereof. It is also not in dispute that Guidelines for the Departmental Promotion Committees had been issued by the Union of India wherein, inter alia, it was directed as follows:
>
> ".....6.2.1(b) The DPC should assess the suitability of the employees for promotion on the basis of their Service Records and with particular reference to the CRs for five preceding years irrespective of the qualifying service prescribed in the Service/Recruitment Rules. The 'preceding five years' for the aforesaid purpose shall be decided as per the guidelines contained in the DoP & T O.M No.22011/9/98-Estt.(D), dated 8.9.1998, which prescribe the Model Calendar for DPC read with OM of even number, dated 16.6.2000.(If more than one CR have

1. (1996) 2 SCC 363.
2. (2006) 1 SCC 368.

been written for a particular year, all the CRs for the relevant years shall be considered together as the CR for one year}."

The question as to whether such a downgradation of Annual Confidential Report would amount to adverse remark and thus it would be required to be communicated or not fell for consideration before this Court in *U.P. Jal Nigam and Ors. Vs. Prabhat Chandra Jain and Ors.* - (1996) 2 SCC 363 in the following terms:

" We need to explain these observations of the High Court. The Nigam has rules, whereunder an adverse entry is required to be communicated to the employee concerned, but not downgrading of an entry. It has been urged on behalf of the Nigam that when the nature of the entry does not reflect any adverseness that is not required to be communicated. As we view it the extreme illustration given by the High Court may reflect an adverse element compulsorily communicable, but if the graded entry is of going a step down like falling from 'very good' to 'good' that may not ordinarily be an adverse entry since both have a positive grading. All that is required by the authority recording confidentials in the situation is to record reasons for such downgrading on the personal file of the officer concerned and inform him of the change in the form of an advice. If the variation warranted be not permissible, then the very purpose of writing annual confidential reports would be frustrated. Having achieved an optimum level the employee on his part may slacken in his work, relaxing secure by his one-time achievement. This would be an undesirable situation. All the same the sting of adverseness must, in all events, not be reflected in such variations, as otherwise, they shall be communicated as such. It may be emphasised that even a positive confidential entry in a given case can perilously be adverse and to say that an adverse entry should always be qualitatively damaging may not be true. In the instant case

we have seen the service record of the first respondent. No reason for the change is mentioned. The downgrading is reflected by comparison. This cannot sustain. Having explained in this manner the case of the first respondent and the system that should prevail in the Jal Nigam we do not find any difficulty in accepting the ultimate result arrived at by the High Court."

Several High Courts as also the Central Administrative Tribunal in their various judgments followed the decision of this Court in *U.P. Jal Nigam* (supra), inter alia, to hold that in the event the said adverse remarks are not communicated causing deprivation to the employee to make an effective representation there against, thus should be ignored. Reference may be made to 2003(1) ATJ 130, *Smt. T.K.Aryaveer Vs.Union of India & Ors,* 2005(2) ATJ, Page 12, 2005(1) ATJ 509-*A.B. Gupta Vs. Union of India & Ors.* and 2003(2) SCT 514- *Bahadur Singh Vs. Union of India & Ors.*

Our attention, however, has been drawn by the learned Additional Solicitor General appearing for the respondents to a recent decision of this Court in *Union of India & Anr. Vs. Major Bahadur Singh* - (2006) 1 SCC 368 where a Division Bench of this Court sought to distinguish the U.P. Jal Nigam(supra) stating as follows:

"8. As has been rightly submitted by learned counsel for the appellants U.P. Jal Nigam case has no universal application. The judgment itself shows that it was intended to be meant only for the employees of *U.P.Jal Nigam* only."

With utmost respect, we are of the opinion that the judgment of *U.P.Jal* Nigam(supra) cannot held to be applicable only to its own employees. It has laid down a preposition of law. Its applicability may depend upon the rules entirely in the field but by it cannot be said that no law has been laid down therein. We, therefore, are of the opinion that the matter should be heard by a larger Bench.

3. Subsequent to the above two decisions, in the case of

Dev Dutt vs. Union of India and others[3], this Court had an occasion to consider the question about the communication of the entry in the ACR of a public servant (other than military service). A two Judge Bench on elaborate and detailed consideration of the matter and also after taking into consideration the decision of this Court in *U.P. Jal Nigam*[1] and principles of natural justice exposited by this Court from time to time particularly in *A.K. Praipak vs. Union of India*[4]; *Maneka Gandhi vs. Union of India*[5]; *Union of India vs. Tulsi Ram Patel*[6]; *Canara Bank vs. V.K. Awasthy*[7] and *State of Maharashtra vs. Public Concern for Governance Trust*[8] concluded that every entry in the ACR of a public service must be communicated to him within a reasonable period whether it is poor, fair, average, good or very good entry. This is what this Court in paragraphs 17 & 18 of the report in Dev Dutt3 at page 733:

> "In our opinion, every entry in the A.C.R. of a public servant must be communicated to him within a reasonable period, whether it is a poor, fair, average, good or very good entry. This is because non-communication of such an entry may adversely affect the employee in two ways : (1) Had the entry been communicated to him he would know about the assessment of his work and conduct by his superiors, which would enable him to improve his work in future (2) He would have an opportunity of making a representation against the entry if he feels it is unjustified, and pray for its upgradation. Hence non-communication of an entry is arbitrary, and it has been held by the Constitution Bench decision of this Court in *Maneka Gandhi vs. Union of India* (supra) that arbitrariness violates Article 14 of the

3. (2008) 8 SCC 725.
4. (1969) 2 SCC 262.
5. (1978) 1 SCC 248.
6. (1985) 3 SCC 398.
7. (2005) 6 SCC 321.
8. (2007) 3 SCC 587.

> Constitution.
>
> Thus it is not only when there is a benchmark but in all cases that an entry (whether it is poor, fair, average, good or very good) must be communicated to a public servant, otherwise there is violation of the principle of fairness, which is the soul of natural justice. Even an outstanding entry should be communicated since that would boost the morale of the employee and make him work harder."

4. Then in paragraph 22 at page 734 of the report, this Court made the following weighty observations:

> "It may be mentioned that communication of entries and giving opportunity to represent against them is particularly important on higher posts which are in a pyramidical structure where often the principle of elimination is followed in selection for promotion, and even a single entry can destroy the career of an officer which has otherwise been outstanding throughout. This often results in grave injustice and heart-burning, and may shatter the morale of many good officers who are superseded due to this arbitrariness, while officers of inferior merit may be promoted."

5. In paragraphs 37 & 41 of the report, this Court then observed as follows:

> "We further hold that when the entry is communicated to him the public servant should have a right to make a representation against the entry to the concerned authority, and the concerned authority must decide the representation in a fair manner and within a reasonable period. We also hold that the representation must be decided by an authority higher than the one who gave the entry, otherwise the likelihood is that the representation will be summarily rejected without adequate consideration as it would be an appeal from Caesar to Caesar. All this would be conducive to fairness and transparency in public administration, and would result in fairness to public servants. The State must be a model employer, and must

act fairly towards its employees. Only then would good governance be possible.

In our opinion, non-communication of entries in the Annual Confidential Report of a public servant, whether he is in civil, judicial, police or any other service (other than the military), certainly has civil consequences because it may affect his chances for promotion or get other benefits (as already discussed above). Hence, such non-communication would be arbitrary, and as such violative of Article 14 of the Constitution."

6. We are in complete agreement with the view in Dev Dutt3 particularly paragraphs 17, 18, 22, 37 & 41 as quoted above. We approve the same.

7. A three Judge Bench of this Court in *Abhijit Ghosh Dastidar vs. Union of India and others*[9] followed Dev Dutt3. In paragraph 8 of the Report, this Court with reference to the case under consideration held as under:

"Coming to the second aspect, that though the benchmark "very good" is required for being considered for promotion admittedly the entry of "good" was not communicated to the appellant. The entry of 'good' should have been communicated to him as he was having "very good" in the previous year. In those circumstances, in our opinion, non-communication of entries in the ACR of a public servant whether he is in civil, judicial, police or any other service (other than the armed forces), it has civil consequences because it may affect his chances for promotion or get other benefits. Hence, such non-communication would be arbitrary and as such violative of Article 14 of the Constitution. The same view has been reiterated in the above referred decision relied on by the appellant. Therefore, the entries "good" if at all granted to the appellant, the same should not have been taken into consideration for being considered for promotion to the higher grade. The respondent has no case that the

9. (2009) 16 SCC 146.

appellant had ever been informed of the nature of the grading given to him."

8. In our opinion, the view taken in Dev Dutt that every entry in ACR of a public servant must be communicated to him/her within a reasonable period is legally sound and helps in achieving threefold objectives. First, the communication of every entry in the ACR to a public servant helps him/her to work harder and achieve more that helps him in improving his work and give better results. Second and equally important, on being made aware of the entry in the ACR, the public servant may feel dissatisfied with the same. Communication of the entry enables him/her to make representation for upgradation of the remarks entered in the ACR. Third, communication of every entry in the ACR brings transparency in recording the remarks relating to a public servant and the system becomes more conforming to the principles of natural justice. We, accordingly, hold that every entry in ACR – poor, fair, average, good or very good – must be communicated to him/her within a reasonable period.

9. The decisions of this Court in *Satya Narain Shukla vs. Union of India and others*[10] and *K.M. Mishra vs. Central Bank of India and others*[11] and the other decisions of this Court taking a contrary view are declared to be not laying down a good law.

10. Insofar as the present case is concerned, we are informed that the appellant has already been promoted. In view thereof, nothing more is required to be done. Civil Appeal is disposed of with no order as to costs. However, it will be open to the appellant to make a representation to the concerned authorities for retrospective promotion in view of the legal position stated by us. If such a representation is made by the appellant, the same shall be considered by the concerned authorities appropriately in accordance with law.

11. I.A. No. 3 of 2011 for intervention is rejected. It will be open to the applicant to pursue his legal remedy in accordance with law.

K.K.T. Appeal disposed of.

10. (2006) 9 SCC 69.

11. (2008) 9 SCC 120.

BHARAT BHUSHAN
v.
STATE OF HIMACHAL PRADESH
(Criminal Appeal Nos. 628-629 of 2013)

APRIL 26, 2013

[T.S. THAKUR AND DIPAK MISRA, JJ.]

Penal Code, 1860 –s.376 – Rape of about 11 years old girl – Acquittal by trial court – Conviction by High Court relying on the evidence of witnesses and medical evidence – Awarded sentence of 5 years and fine with default clause – Held: Conviction by High Court is justified – But since the accused was a juvenile under Juvenile Justice Act, 2000, High Court was not right in awarding sentence – High Court should have referred the case to Juvenile Justice Board for sentence – However, in view of the facts that on the date of the present judgment, the accused was 36 years old, having family and has already undergone 3 years sentence, it would not be appropriate to refer the case to Juvenile Justice Board – Therefore, direction issued to release the accused from custody – Juvenile Justice (Care and Protection of Children) Act, 2000 – ss.2(k), 2(l), 7-A, 20 and 49 – Juvenile Justice (Care and Protection of Children) Rules, 2007 – rr.12 and 98.

Juvenile Justice (Care and Protection of Children) Act, 2000 – s.20 – Applicability – Scope of – Held: As regards proceedings pending against a juvenile on the date the Act came into force, Court can record a finding regarding culpability of the accused, but cannot pass order on sentence – For passing the sentence, the case should be referred to the Juvenile Board.

Appellant-accused alongwith another co-accused was prosecuted for having committed offence of rape upon a girl of about 11 years. Trial court acquitted both

the accused. In appeal, High Court after appreciation of the evidence acquitted the co-accused. But found the appellant-accused guilty of the offence punishable u/s.376 IPC. While passing sentence, the High Court rejected the plea of the accused that he was entitled to benefit of provisions of s.20 of Juvenile Justice (Care and Protection of Children) Act, 2000, as he was below 18 years on the date of incident, and sentenced him to imprisonment of five years and fine of Rs.50,000/- with default clause. Hence the present appeals by the appellant-accused against the conviction order as well as order of sentence.

Dismissing the appeal challenging the conviction order and allowing that challenging the order of sentence, the Court

HELD: 1. On the date, the offence was committed, the appellant was admittedly a juvenile having regard to the provisions of Sections 2(k), 2(l), 7-A, 20 and 49 Juvenile Justice (Care and Protection of Children) Act, 2000 read with Rules 12 and 98 of the Rules framed under the Act. He was, therefore, entitled to the benefit of the said provision. [Para 10] [1022-C-E]

Hari Ram vs. State of Rajasthan **(2009) 13 SCC 211: 2009 (7) SCR 623;** *Raju and Anr. vs. State of Haryana* **(2010) 3 SCC 235: 2010 (2) SCR 574;** *Dharambir vs. State (NCT of Delhi) and Anr.* **(2010) 5 SCC 344: 2010 (5) SCR 137;** *Mohan Mali and Anr. vs. State of M.P.* **(2010) 6 SCC 669;** *Jitendra Singh @ Babboo Singh and Anr. vs. State of U.P.* **(2010) 13 SCC 523: 2010 (13) SCR 879;** *Daya Nand vs. State of Haryana* **(2011) 2 SCC 224: 2011 (1) SCR 173;** *Shah Nawaz vs. State of U.P. and Anr.* **(2011) 13 SCC 751: 2011 (9) SCR 859;** *Amit Singh vs. State of Maharashtra and Anr.* **(2011) 13 SCC 744: 2011 (9) SCR 890 – relied on.**

Pratap Singh vs. State of Jharkhand and Anr. **(2005) 3**

SCC 551: 2005 (1) SCR 1019; *Jameel vs. State of Maharashtra* **(2007) 11 SCC 420: 2007 (1) SCR 946;** *Ranjit Singh vs. State of Haryana* **(2008) 9 SCC 453: 2008 (13) SCR 332 – referred to.**

2.1. As per s.20 of the 2000 Act, the proceedings pending against a juvenile in any Court as on the date the 2000 Act came into force, had to continue as if the 2000 Act had not been enacted. Section 20 obliges the Court concerned to record a finding whether the juvenile has committed any offence. If the Court finds the juvenile guilty, it is required under the above provision to forward the juvenile to the Juvenile Board which would then pass an order in accordance with the provisions of the Act as if it had been satisfied on enquiry under the Act that the juvenile had committed an offence. [Para 12] [1023-E-F]

2.2. In the present case, the appellant was not a juvenile under the 1986 Act as he had crossed the age of 16 years on the date of occurrence. However, the case was pending before the High Court in appeal on the date the 2000 Act came into force and had, therefore, to be dealt with under Section 20 of the 2000 Act, which required the High Court to record a finding about the guilt of the accused but stop short of passing an order of sentence against him. Inasmuch as the High Court convicted the appellant, it did not commit any mistake, for the power to do so was clearly available to the High Court under the provisions of Section 20. But it was not permissible to pass a sentence for which purpose the High Court was required to forward the juvenile to the Juvenile Board constituted under the Act. The order of sentence is, therefore, unsustainable. [Para 17] [1026-H; 1027-A-C]

Bijender Singh vs. State of Haryana and Anr. **(2005) 3 SCC 685: 2005 (2) SCR 1131;** *Dharambir vs. State (NCT of Delhi)* **(2010) 5 SCC 344: 2010 (5) SCR 137;** *Daya Nand vs.*

State of Haryana **(2011) 2 SCC 224: 2011 (1) SCR 173;** *Kalu @ Amit vs. State of Haryana* **(2012) 8 SCC 34 – relied on.**

3.1. The conviction recorded by the High Court was justified on merits. It would not be appropriate to refer the appellant to the Juvenile Justice Board at this stage. The High Court properly appreciated the evidence on record especially the deposition of the prosecutrix, her companion PW-2 and her aunt PW-3 as also her parents. The High Court also correctly appreciated the medical evidence available on record. The prosecutrix was between 9 to 12 years according to the deposition of doctor (PW-9) and deposition of PW-13 who proved her date of birth to be 13th April, 1982. The presence of human blood on the cap with which the appellant appears to have wiped the blood after the sexual assault, is also an incriminating circumstance which the High Court has rightly taken into consideration while finding the appellant guilty. [Para 18 and 19] [1027-D-F; 1028-A-B]

3.2. Reference of the appellant to the Juvenile Justice Board is unnecessary at this distant point of time. The appellant is nearly 36 years old by now and a father of three children. He has already undergone nearly three years of imprisonment awarded to him by the High Court. In the circumstances, reference to the Juvenile Justice Board at this stage of his life would serve no purpose. The only option available is to direct his release from custody. [Para 20] [1028-C-D]

Case Law Reference:

2005 (1) SCR 1019	**referred to**	**Para 6**
	relied on	**Para 13**
2007 (1) SCR 946	**referred to**	**Para 7**
2008 (13) SCR 332	**referred to**	**Para 7**

2009 (7) SCR 623	**relied on**	**Para 8**
2010 (2) SCR 574	**relied on**	**Para 9**
2010 (5) SCR 137	**relied on**	**Para 9**
(2010) 6 SCC 669	**relied on**	**Para 9**
2010 (13) SCR 879	**relied on**	**Para 9**
2011 (1) SCR 173	**relied on**	**Para 9**
2011 (9) SCR 859	**relied on**	**Para 9**
2011 (9) SCR 890	**relied on**	**Para 9**
2005 (2) SCR 1131	**relied on**	**Para 14**
2010 (5) SCR 137	**relied on**	**Para 15**
2011 (1) SCR 173	**relied on**	**Para 16**
(2012) 8 SCC 34	**relied on**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 628-629 of 2013.

From the Judgment & order dated 08.04.2010 and 30.04.2010 of the High Court of H.P. at Shimla in Criminal Appeal No. 406 of 1995.

Shovan Mishra, Milind Kumar for the Appellant.

Suryanaryana Singh, AAG, Pragati Neekhra for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Delay condoned.

2. Leave granted.

3. These appeals arise out of judgments and orders dated 8th April, 2010 and 30th April, 2010 passed by the High Court

of Himachal Pradesh at Shimla whereby Criminal Appeal No.406 of 1995 has been allowed, the order of acquittal passed by the trial Court set aside, the appellant convicted for an offence punishable under Section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of five years besides a fine of Rs.50,000/-. In default of payment of fine, the appellant has been directed to undergo further imprisonment for a period of one year.

4. The appellant was charged with commission of an offence of rape upon a girl hardly 11 years old while she was working in the fields along with another girl aged around 10 years in Village Kanda, District Shimla, Himachal Pradesh. At the trial, the prosecution examined not only the prosecutrix who supported the charge but also other witnesses including PW-2-her companion whose name is withheld to protect her identity and who had escaped an attempted assault by the co-accused, Dinesh Kumar. An alarm raised by PW-2 appears to have attracted the attention of PW-3-Piar Devi, mother of PW-2, who had rushed to the spot to rescue the girls, whereupon both the accused appears to have fled away. PW-5-Misru-the father of the prosecutrix and PWs-7, 8 and 9 namely Dr. Ajay Negi, Dr. Suresh Bansal and Dr. D.C. Negi were also examined at the trial all of whom have supported the prosecution case in their respective depositions. The trial Court, however, came to the conclusion that the prosecution had failed to prove its case against the appellant, the deposition of the witnesses mentioned above notwithstanding and, accordingly, acquitted both the accused persons of the charges framed against them.

5. Criminal Appeal No.406 of 1995 was then filed by the State of Himachal Pradesh against the order of acquittal to assail the view taken by the trial Court *qua* the appellant as also his companion Dinesh Kumar. The High Court has by its judgment and order dated 8th April, 2010 allowed the appeal in part, reversed the view taken by the trial Court and convicted the appellant for rape, punishable under Section 376 of the

Indian Penal Code. As regards Dinesh Kumar, the High Court was of the view that the order of acquittal passed in his favour was justified. The High Court was of the view that the prosecution story was reliable and inspired confidence not only because of the inherent worth of the deposition of the prosecutrix but also because of the fact that her story was fully corroborated by PW-2, the other girl who escaped from the clutches of Dinesh Kumar, the co-accused and that of PW-3 Piar Devi who had rushed to the place of occurrence to rescue the victim after hearing an alarm raised by her daughter. More importantly, the High Court found that the deposition of Dr. Suresh Bansal who had examined the prosecutrix establish the commission of rape upon the victim. The appellant was on such re-appraisal of evidence convicted under Section 376 of the Indian Penal Code.

6. The High Court next examined the question of sentence to be awarded to the appellant and by separate order dated 30th April, 2010 sentenced the appellant to rigorous imprisonment for five years and a fine of Rs.50,000/- and a default sentence of one year as already noticed above. What is important is that while doing so the High Court noticed and rejected the contention urged on behalf of the appellant that he was only 16 years and 4 months old at the time offence was committed, hence, entitled to the benefit of provisions of Section 20 of the *Juvenile Justice (Care and Protection of Children) Act, 2000.* Relying upon the decision of a Constitution Bench of this Court in *Pratap Singh v. State of Jharkhand and Anr. (2005) 3 SCC 551*, the High Court held that the benefit of the Act was not legally available to the petitioner.

7. The High Court also relied upon the decisions of this Court in *Jameel v. State of Maharashtra (2007) 11 SCC 420*, where this Court held that since the appellant in that case had completed 16 years of age as on the date of the occurrence, the *Juvenile Justice (Care and Protection of Children) Act, 2000,* Act had no application. Reliance was also placed by the

High Court upon the decision of this Court in *Ranjit Singh v. State of Haryana (2008) 9 SCC 453* where this Court had relying upon the Judgment in *Jameel's* case (supra) rejected the contention that the petitioner was entitled to the benefit of *Juvenile Justice (Care and Protection of Children) Act, 2000,* since he was below 18 years as on the date of the commission of the offence. In conclusion, the High Court held that Section 20 of the 2000 Act was inapplicable since the accused was over 16 years of age at the time of commission of the offence i.e. 22nd June, 1993 and over 18 years of age on 01-04-2001, the date when the 2000 Act came into force. The present appeal filed by the appellant assails the correctness of the above two orders as already noticed earlier.

8. We have heard learned Counsel for the parties at some length. The legal position regarding the entitlement of the appellant who was more than 16 years but less than 18 years of age as on the date of commission of the offence on 22nd June, 1993, is in our view settled by the decision of this Court in *Hari Ram v. State of Rajasthan (2009) 13 SCC 211*. This Court has in that case traced the history of the legislation and reviewed the entire case law on the subject. Relying upon the decision of the Constitution Bench of this Court in *Pratap Singh's* case (supra), this Court in *Hari Ram's* case (supra) reiterated that the question of juvenility of a person in conflict with law has to be determined by reference to the date of the incident and not the date on which cognizance is taken by the Magistrate. Having said that, this Court held that the effect of the pronouncement in *Pratap Singh's* case (supra) on the second question, viz. whether the 2000 Act was applicable in a case where the proceedings were initiated under the 1986 Act and were pending when the 2000 Act came into force, stood neutralised by the amendments to *Juvenile Justice (Care and Protection of Children) Act, 2000*, by Act 33 of 2006. The amendments made the provisions of the Act applicable even to juveniles who had not completed the age of 18 years on the date of the commission of offence said this Court. Speaking

for the Court Altamas Kabir, J. (as His Lordship then was) observed:

> *"58. Of the two main questions decided in Pratap Singh case, one point is now well established that the juvenility of a person in conflict with law has to be reckoned from the date of the incident and not from the date on which cognizance was taken by the Magistrate. The effect of the other part of the decision was, however, neutralised by virtue of the amendments to the Juvenile Justice Act, 2000, by Act 33 of 2006, whereunder the provisions of the Act were also made applicable to juveniles who had not completed eighteen years of age on the date of commission of the offence.*
>
> *59. The law as now crystallised on a conjoint reading of Sections 2(k), 2(l), 7-A, 20 and 49 read with Rules 12 and 98, places beyond all doubt that all persons who were below the age of 18 years on the date of commission of the offence even prior to 1-4-2001, would be treated as juveniles, even if the claim of juvenility was raised after they had attained the age of 18 years on or before the date of commencement of the Act and were undergoing sentence upon being convicted.*
>
> *xxxxxxxxx*
>
> *xxxxxxxxx*
>
> *68. Accordingly, a juvenile who had not completed eighteen years on the date of commission of the offence was also entitled to the benefits of the Juvenile Justice Act, 2000, as if the provisions of Section 2(k) had always been in existence even during the operation of the 1986 Act."*

9. These decisions have been followed in several other subsequent pronouncements of this Court including the

decisions of this Court in *Raju and Anr. v. State of Haryana (2010) 3 SCC 235, Dharambir v. State (NCT of Delhi) and Anr. (2010) 5 SCC 344, Mohan Mali and Anr. v. State of M.P. (2010) 6 SCC 669, Jitendra Singh @ Babboo Singh and Anr. v. State of U.P. (2010) 13 SCC 523, Daya Nand v. State of Haryana (2011) 2 SCC 224, Shah Nawaz v. State of U.P. and Anr. (2011) 13 SCC 751* and *Amit Singh v. State of Maharashtra and Anr. (2011) 13 SCC 744*.

10. The attention of the High Court was, it is obvious, not drawn to the decision in *Hari Ram's* case (supra), although the same was pronounced on 5th May, 2009 i.e. almost a year earlier to the pronouncement of the impugned judgment in this case. Be that as it may, as on the date the offence was committed the appellant was admittedly a juvenile having regard to the provisions of Sections 2(k), 2(l), 7-A, 20 and 49 read with Rules 12 and 98 of the Rules framed under the *Juvenile Justice (Care and Protection of Children) Act, 2000*. He was, therefore, entitled to the benefit of the said provision, which benefit, it is evident, has been wrongly denied by the High Court only because the High Court remained oblivious of the pronouncement of this Court in *Hari Ram's* case (supra).

11. The question then is whether the High Court could have at all recorded a conviction against the appellant who as seen above was a juvenile on the date of the commission of the offence. The answer to that question, in our opinion, lies in Section 20 of the 2000 Act which reads as under:

> ***"20. Special provision in respect of pending cases.-*** *Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board*

which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence.

Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.

Explanation.- In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of Clause (1) of Section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed."

12. The above makes it manifest that proceedings pending against a juvenile in any Court as on the date the 2000 Act came into force had to continue as if the 2000 Act had not been enacted. More importantly Section 20 (supra) obliges the Court concerned to record a finding whether the juvenile has committed any offence. If the Court finds the juvenile guilty, it is required under the above provision to forward the juvenile to the Board which would then pass an order in accordance with the provisions of the Act as if it had been satisfied on enquiry under the Act that the juvenile had committed an offence.

13. Even in *Pratap Singh's* case (supra), this Court had interpreted Section 20 of the 2000 Act, and held that Section 20 was attracted to cases where the person, if male, had ceased to be a juvenile under the 1986 Act being more than 16 years of age but had not yet crossed the age of 18 years. This Court declared that it was only in such cases that Section 20 was attracted and the Court required to record its conclusion

as to the guilt or innocence of the accused. This Court observed:

"*31. Section 20 of the Act as quoted above deals with the special provision in respect of pending cases and begins with non-obstante clause. The sentence "Notwithstanding anything contained in this Act all proceedings in respect of a juvenile pending in any Court in any area on date of which this Act came into force" has great significance. The proceedings in respect of a juvenile pending in any court referred to in Section 20 of the Act is relatable to proceedings initiated before the 2000 Act came into force and which are pending when the 2000 Act came into force. The term "any court" would include even ordinary criminal courts. If the person was a "juvenile" under the 1986 Act the proceedings would not be pending in criminal courts. They would be pending in criminal courts only if the boy had crossed 16 years or girl had crossed 18 years. This shows that Section 20 refers to cases where a person had ceased to be a juvenile under the 1986 Act but had not yet crossed the age of 18 years then the pending case shall continue in that Court as if the 2000 Act has not been passed and if the Court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, shall forward the juvenile to the Board which shall pass orders in respect of that juvenile.*"

(emphasis supplied)

14. Reference may also be made to the decision of this Court in *Bijender Singh v. State of Haryana and Anr. (2005) 3 SCC 685,* where this Court reiterated the legal position while interpreting the provisions of the Act and said:

"8. One of the basic distinctions between the 1986 Act and the 2000 Act relates to age of males and females. Under the 1986 Act, a juvenile means a male juvenile who has

not attained the age of 16 years, and a female juvenile who has not attained the age of 18 years. In the 2000 Act, the distinction between male and female juveniles on the basis of age has not been maintained. The age-limit is 18 years for both males and females.

9. A person above 16 years in terms of the 1986 Act was not a juvenile. In that view of the matter the question whether a person above 16 years becomes "juvenile" within the purview of the 2000 Act must be answered having regard to the object and purport thereof.

10. In terms of the 1986 Act, a person who was not juvenile could be tried in any court. Section 20 of the 2000 Act takes care of such a situation stating that despite the same the trial shall continue in that court as if that Act has not been passed and in the event, he is found to be guilty of commission of an offence, a finding to that effect shall be recorded in the judgment of conviction, if any, but instead of passing any sentence in relation to the juvenile, he would be forwarded to the Juvenile Justice Board (in short the 'Board') which shall pass orders in accordance with the provisions of the Act as if it has been satisfied on inquiry that a juvenile has committed the offence. A legal fiction has, thus, been created in the said provision...

xx xx xx

12. Thus, by reason of legal fiction, a person, although not a juvenile, has to be treated to be one by the Board for the purpose of sentencing which takes care of a situation that the person although not a juvenile in terms of the 1986 Act but still would be treated as such under the 2000 Act for the said limited purpose."

(emphasis supplied)

15. Section 20 of the 2000 Act fell for interpretation even in *Dharambir v. State (NCT of Delhi) (2010) 5 SCC 344*, where too this Court held that the explanation appended to the same enables the Court to determine the juvenility of the accused even after conviction and that the Court can while maintaining the conviction set aside the sentence imposed upon him and to forward the case to the Board for passing an appropriate order under the Act. This Court observed:

"11. It is plain from the language of the Explanation to Section 20 that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, etc., the determination of juvenility of a juvenile has to be in terms of Clause (l) of Section 2, even if the juvenile ceases to be a juvenile on or before 1st April, 2001, when the Act of 2000 came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. Clause (l) of Section 2 of the Act of 2000 provides that "juvenile in conflict with law" means a "juvenile" who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence. Section 20 also enables the Court to consider and determine the juvenility of a person even after conviction by the regular Court and also empowers the Court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Act of 2000."

16. The above position was restated in *Daya Nand v. State of Haryana* (2011) 2 SCC 224 and *Kalu @ Amit v. State of Haryana* (2012) 8 SCC 34.

17. In the present case, the appellant was not a juvenile under the 1986 Act as he had crossed the age of 16 years.

This case was, however, pending before the High Court in appeal on the date the 2000 Act came into force and had, therefore, to be dealt with under Section 20 of the Act which required the High Court to record a finding about the guilt of the accused but stop short of passing an order of sentence against him. Inasmuch as the High Court convicted the appellant, it did not commit any mistake for the power to do so was clearly available to the High Court under the provisions of Section 20. What was not permissible was passing of a sentence for which purpose the High Court was required to forward the juvenile to the Juvenile Board constituted under the Act. The order of sentence is, therefore, unsustainable and shall have to be set aside.

18. The next question then is whether the conviction recorded by the High Court was justified on merits and, if it was, whether we ought to refer the appellant to the Juvenile Justice Board at this stage. Our answer is in the affirmative *qua* the first part and negative *qua* the second. The High Court has, in our opinion, properly appreciated the evidence on record especially the deposition of the prosecutrix, her companion PW-2 and her aunt Piar Devi-PW-3 as also her parents. The High Court has also correctly appreciated the medical evidence available on record especially the deposition and the report of PW-8-Dr. Suresh Bansal, the relevant portion of whose report reads as under:

> *"...On examination I found that the female child had not started menstruating. There was painful separation of thighs. No marks of violence were present. Clotted blood was present on labia majora and on thighs. Secondary sexual characters were developed. Breasts were developed according to age. Pubic and axillary hairs were present but were scanty. Hymen was freshly fractured. Posterior fourchette was torn. The chid admitted one little finger with pain. The vagina was congested..... Injury mentioned in MLC Ext. PW-8/C appeared on the prosecutrix was subject to sexual intercourse..."*

19. The prosecutrix was between 9 to 12 years according to the deposition of PW-9-Dr. D.C. Negi and deposition of PW-13 who proved her date of birth to be 13th April, 1982. The presence of human blood on the cap with which the appellant appears to have wiped the blood after the sexual assault is also an incriminating circumstance which the High Court has rightly taken into consideration while finding the appellant guilty. We, therefore, see no reason to interfere with the order of conviction as recorded by High Court on merits.

20. Coming then to the question of reference to the Juvenile Justice Board, we are of the view that such a reference is unnecessary at this distant point of time. The appellant is nearly 36 years old by now and a father of three children. He has already undergone nearly three years of imprisonment awarded to him by the High Court. In the circumstances, reference to the Juvenile Justice Board at this stage of his life would, in our opinion, serve no purpose. The only option available is to direct his release from custody.

21. In the result, we dismiss criminal appeal arising out of SLP (Crl.) No.5059 of 2012 directed against the order of the High Court dated 8th April, 2010 and uphold the conviction of the appellant for the offence under Section 376 IPC. Criminal appeal arising out of SLP (Crl.) No.5060 of 2012 is, however, allowed and the order dated 30th April, 2010 passed by the High Court is set aside with a direction that the appellant shall be released from custody unless he is required in connection with any other case.

K.K.T. Appeals disposed of.

HARI DASS SHARMA
v.
VIKAS SOOD & ORS.
(Civil Appeal No. 4127 of 2013)

APRIL 29, 2013

[A.K. PATNAIK AND GYAN SUDHA MISRA, JJ.]

Rent Control – H.P. Urban Rent Control Act, 1987 – s.14(3)(c) & 14(4) – Eviction order passed by Rent Controller – On ground that appellant-landlord bona fide required the tenanted building for purposes of addition and alteration of the building or re-building – Eviction order maintained by High Court – But direction passed by High Court that only on the valid revised/renewed building plan being sanctioned by the competent authority, such eviction order shall be available for execution and thereafter the executing court shall allow reasonable time to the respondents-tenants for vacating the property and delivering possession to appellant-landlord – Propriety – Held: Once High Court maintained the order of eviction, the tenants were obliged to give vacant possession of the building to the landlord and could only ask for reasonable time to deliver vacant possession to the landlord – s.14(3)(c) does not require that building plans should be sanctioned by the local authorities as a condition precedent to the entitlement of the landlord for eviction of the tenant – Direction of the High Court that the order of eviction could only be executed on the revised plan of the building being approved clearly contrary to s.14(4) and the proviso thereto – Time granted to respondents to vacate the building within 3 months – Respondents can apply for re-entry into the building in accordance with the proviso to clause (c) of s.14(3) of the Act introduced by the Himachal Pradesh Urban Rent Control (Amendment) Act, 2009.

The appellant-landlord filed applications under

Section 14 of the H.P. Urban Rent Control Act, 1987 for eviction of respondents-tenants on grounds that he bona fide required the tenanted building for purposes of addition and alteration of the building or re-building. The Rent Controller allowed the applications. The order of Controller was upheld by the Appellate Authority.

The respondents filed Revision petitions before the High Court which maintained the orders of eviction but directed that only on the valid revised/renewed building plan being sanctioned by the competent authority, the order of eviction shall be available for execution. The High Court further directed that the valid revised/renewed sanctioned or approved building plan shall be produced before the executing court whereupon the executing court shall allow reasonable time to the respondents-tenants for vacating the property and delivering possession to the appellant-landlord. The directions passed by the High Court were challenged in the instant appeals.

Allowing the appeals, the Court

HELD: 1.1. A reading of clause (c) of sub-section (3) of Section 14 of the H.P. Urban Rent Control Act, 1987 would show that a landlord may apply to the Controller for an order directing the tenant to put the landlord in possession in case of any building if it is required bona fide by him for the purpose of building or rebuilding or making thereto any substantial additions or alterations and that such building or rebuilding or addition or alteration cannot be carried out without the building being vacated. Section 14(3)(c) does not require that the building plans should have been duly sanctioned by the local authorities as a condition precedent to the entitlement of the landlord for eviction of the tenant. The availability of building plans duly sanctioned by the local authorities is not an ingredient of Section 14(3)(c) of the

Act and, therefore, could not be a condition precedent to the entitlement of the landlord for eviction of the tenant, but depending on the facts and circumstances of each case, the Court may look into the availability of building plans duly sanctioned by the local authorities for the purpose of determining the bonafides of the landlord. [Para 8] [1037-G-H; 1038-A-B, F-G]

1.2. Once the High Court maintained the order of eviction passed by the Controller under Section 14(4) of the Act, the tenants were obliged to give vacant possession of the building to the landlord and could only ask for reasonable time to deliver vacant possession of the building to the landlord and hence the direction of the High Court that the order of eviction could only be executed on the revised plan of the building being approved was clearly contrary to the provisions of Section 14(4) of the Act and the proviso thereto. The directions in the impugned judgment of the High Court are set aside, but time granted to the respondents to vacate the building within three months. It will be open for the respondents to apply for re-entry into the building in accordance with the proviso to clause (c) of Section 14(3) of the Act introduced by the Himachal Pradesh Urban Rent Control (Amendment) Act, 2009. [Paras 11, 12] [1041-D-G]

Harrington House School v. *S.M. Ispahani & Anr.* **(2002) 5 SCC 229: 2002 (3) SCR 929 – distinguished.**

Jagat Pal Dhawan v. Kahan Singh (dead) by L.Rs. & Ors. **(2003) 1 SCC 191: 2002 (4) Suppl. SCR 301 – relied on.**

Shri Balaganesan Metals v. M.N. Shanmugham Chetty & Ors. **(1987) 2 SCC 707: 1987 (2) SCR 1173;** *J. Jermons v. Aliammal & Ors*. **(1999) 7 SCC 382: 1999 (1) Suppl. SCR 467 – cited.**

Case Law Reference:

2002 (3) SCR 929	**distinguished**	**Para 4, 5, 6,11**
1987 (2) SCR 1173	**cited**	**Para 5**
1999 (1) Suppl. SCR 467	**cited**	**Para 5, 8**
2002 (4) Suppl. SCR 301	**relied on**	**Para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4127 of 2013.

From the Judgment & Order dated 02.09.2011 of the High Court of H.P. at Shimla in CR No. 179 of 2008.

WITH

C.A. Nos. 4128 and 4129 of 2013.

Nidhesh Gupta, Rishi Malhotra for the Appellant.

Dhruv Mehta, Seema S., Manik Karanjawala, Akhil Sachar, Saurabh Seth (for Karanjawala & Co.) for the Respondents.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. Leave granted.

2. These are appeals against the common order dated 02.09.2011 of the High Court of Himachal Pradesh in Civil Revision Nos.179, 180 and 181 of 2008.

3. The facts very briefly are that the appellant let out shops in premises No.5 Cart Road, Shimla (for short "the building") to the respondents. The appellant filed applications under Section 14 of the H.P. Urban Rent Control Act, 1987 (for short "the Act") before the Rent Controller, Shimla, for eviction of the respondents from the building on grounds *inter alia* that he bona fide required the building for purposes of addition and alteration

of the building or rebuilding. The respondents filed their replies before the Rent Controller denying that the appellant required the building for additions and alterations or rebuilding. The Rent Controller framed an issue as to whether the building was required bona fide by the appellant for rebuilding or reconstruction. The appellant examined an official of the Municipal Corporation, Shimla, in support of his case that a plan for rebuilding/ reconstruction had been sanctioned and also a Civil Engineer in support of his case that the building was in dilapidated condition and required to be reconstructed. The Rent Controller after considering the oral and documentary evidence on record held that though the sanction plan of the building was not a requirement of the Act, it is a circumstance to establish the bonafide of the appellant to seek eviction for the purpose of rebuilding or reconstruction and also held that the building was old and the appellant was in the occupation of second floor of the building and for rebuilding or reconstruction, the respondents have to vacate the building and accordingly allowed the applications of the appellant for eviction of the respondents from the building. The respondents filed appeals before the Appellate Authority, Shimla against the order of eviction but the Appellate Authority dismissed the appeals.

4. The respondents then filed the Civil Revisions before the High Court and by the impugned common order maintained the orders of eviction but relying on the decision of this Court in *Harrington House School* v. *S.M. Ispahani & Anr.* [(2002) 5 SCC 229] directed that only on the valid revised/renewed building plan being sanctioned by the competent authority, the order of eviction shall be available for execution. The High Court further directed in the impugned order that the valid revised/ renewed sanctioned or approved building plan shall be produced before the executing court whereupon the executing court shall allow a reasonable time to the tenants for vacating the property and delivering possession to the landlord and till then the tenant shall remain liable to pay charges for use and occupation of the premises at the rate at which they were being

paid earlier. Aggrieved, the appellant has filed these appeals.

5. Mr. Nidesh Gupta, learned counsel appearing for the appellant, submitted that Section 14(4) of the Act provides that if the Controller is satisfied that the claim of the landlord is bonafide, he shall make an order directing the tenant to put the landlord in possession of the building on such date as may be specified by the Controller and the proviso to Section 14(4) of the Act says that the Controller may give the tenant a reasonable time for putting the landlord in possession of the building and may extend such time not exceeding three months in the aggregate. He submitted that Section 14(4) of the Act thus makes it clear that the order of eviction once passed by the Controller will have to be executed and that the direction of the High Court in the impugned order that the order of eviction will not be executed till such time as the building plan is sanctioned for rebuilding or reconstruction of the tenanted building is contrary to the bare provision in Section 14(4) of the Act. He submitted that in *Harrington House School* v. *S.M. Ispahani & Anr.* (supra), on which the High Court has relied on in the impugned judgment, this Court decided the dispute between the landlord and the tenant under the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 and it had not considered the effect of the proviso to Section 14(4) of the Act whereunder the Controller had the power to grant in the aggregate three months time to put the landlord in possession of the tenanted premises. He cited the decision of this Court in *Shri Balaganesan Metals v. M.N. Shanmugham Chetty & Ors*. [1987) 2 SCC 707], wherein this Court, while considering the proviso to Section 10(3)(c) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960, similar to the proviso to Section 14(4) of the Act, held that the proviso empowers the Controller to grant adequate time to the tenant upto a maximum of three months to vacate the building and secure accommodation elsewhere. He also relied on the decision of this Court in *J. Jermons v. Aliammal & Ors*. [(1999) 7 SCC 382] in which it has been similarly held that a tenant is

entitled under Section 10(3)(c) of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 to be granted reasonable time for putting the landlord in possession of the building, which may be extended from time to time upto the maximum period of three months.

6. In reply, Mr. Dhruv Mehta, learned counsel appearing for the respondents, submitted that the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act, 1960 as well as the provisions of the H.P. Urban Rent Control Act, 1987 ("the Act") are analogous and, therefore, the decision of this Court in *Harrington House School* v. *S.M. Ispahani & Anr.* (supra) will apply to a case arising under the Act and the High Court rightly relied on the decision in *Harrington House School* v. *S.M. Ispahani & Anr.* (supra) in which this Court directed that the order of eviction will not be executed until the plan for the building was sanctioned. He further submitted that in any case under the proviso to Section 14(4) of the Act the Controller has power to give to the tenant a 'reasonable time' for putting the landlord in possession of the building and it is only on expiry of such reasonable time that the Controller may extend the time not exceeding three months in any case. He submitted that the power of the Controller to grant reasonable time to the tenant for putting the landlord in possession of the building is different from the power of the Controller to extend such time not exceeding three months. He submitted that the expression 'reasonable time' to be given to the tenant for putting the landlord in possession of the building will depend upon the facts of each case and in the facts of the present case, the High Court has granted time upto the time of sanction of the plan for rebuilding or reconstruction of the building. In this context, he submitted that the sanctioned plan for reconstruction of the building has lapsed and as the building regulations for areas within the city limits of Shimla have undergone drastic changes, it is not permissible for the appellant to reconstruct the building as per the sanction originally granted. He submitted that in *Jagat Pal Dhawan v. Kahan Singh (dead) by L.Rs. & Ors*. [(2003) 1 SCC 191] this Court, while interpreting clause (c) of

sub-section (3) of Section 14 of the Act, has observed that while adjudicating an eviction petition on the ground that the building is bona fide required by the landlord for reconstruction, the Court may look into the condition of building, availability of necessary funds and whether building plans have been sanctioned by the local authority in order to assess the bona fide of the landlord, even if the Act does not require these aspects to be considered. He submitted that, therefore, unless the appellant produces the revised sanctioned plan before the executing court, the order of eviction cannot be executed as rightly directed by the High Court and this is not a case for interference with the impugned order of the High Court. He finally submitted that by the Himachal Pradesh Urban Rent Control (Amendment) Act, 2009 (for short 'the Amendment Act, 2009') a new proviso has been added in clause (c) of Section 14(3) stating that the tenant evicted under clause (c) of Section 14(3) of the Act shall have the right to re-enter on new terms of tenancy, on the basis of mutual agreement between the landlord and the tenant, to the premises in the rebuilt building equivalent in area to the original premises for which he was a tenant. He submitted that since the eviction orders passed by the Controller in this case are under Section 14(3)(c) of the Act, the respondents are entitled to re-entry as per this proviso inserted by the Amendment Act, 2009.

7. Before considering the submissions of the learned counsel for the parties, we may have a look at clause (c) of sub-section (3) and sub-section (4) of Section 14 of the Act. These provisions, as they stood before the Amendment Act, 2009, when the Controller passed the orders of eviction, are extracted hereinbelow:

"**14. Eviction of tenants** –

(1) ……

(2) ……

(3) A landlord may apply to the Controller for an order directing the tenant to put the landlord in possession:

(a) ……

(b) ……

(c) in the case of any building or rented land, if he requires it to carry out any building work at the instance of the Government or local authority or any Improvement Trust under some improvement or development scheme or if it has become unsafe or unfit for human habitation or is required bona fide by him for carrying out repairs which cannot be carried out without the building or rented land being vacated or that the building or rented land is required bona fide by him for the purpose of building or re-building or making thereto any substantial additions or alterations and that such building or re-building or addition or alteration cannot be carried out without the building or rented land being vacated.

(4) The Controller shall, if he is satisfied that the claim of the landlord is bona fide, make an order directing the tenant to put the landlord in possession of the building or rented land on such date as may be specified by the Controller and if the Controller is not so satisfied he shall make an order rejecting the application:

Provided that the Controller may give the tenant a reasonable time for putting the landlord in possession of the building or rented land and may extend such time not exceeding three months in the aggregate."

8. A reading of clause (c) of sub-section (3) of Section 14 of the Act would show that a landlord may apply to the Controller for an order directing the tenant to put the landlord in possession in case of any building if it is required bona fide by him for the purpose of building or rebuilding or making thereto any substantial additions or alterations and that such building or rebuilding or addition or alteration cannot be carried out without the building being vacated. In *Jagat Pal Dhawan v.*

Kahan Singh (dead) by L.Rs. & Ors. (supra), this Court had the occasion to consider the provisions of Section 14(3)(c) of the Act and R.C. Lahoti J. writing the judgment for the Court held that Section 14(3)(c) does not require that the building plans should have been duly sanctioned by the local authorities as a condition precedent to the entitlement of the landlord for eviction of the tenant. To quote from the judgment of this Court in *Jagat Pal Dhawan v. Kahan Singh (dead) by L.Rs. & Ors*. (supra):

"The provision also does not lay down that the availability of requisite funds and availability of building plans duly sanctioned by the local authority must be proved by the landlord as an ingredient of the provision or as a condition precedent to his entitlement to eviction of the tenant. However still, suffice it to observe, depending on the facts and circumstances of a given case, the court may look into such facts as relevant, though not specifically mentioned as ingredient of the ground for eviction, for the purpose of determining the bona fides of the landlord. If a building, as proposed, cannot be constructed or if the landlord does not have means for carrying out the construction or reconstruction obviously his requirement would remain a mere wish and would not be bona fide."

It will be clear from the aforesaid passage that this Court has held that availability of building plans duly sanctioned by the local authorities is not an ingredient of Section 14(3)(c) of the Act and, therefore, could not be a condition precedent to the entitlement of the landlord for eviction of the tenant, but depending on the facts and circumstances of each case, the Court may look into the availability of building plans duly sanctioned by the local authorities for the purpose of determining the bonafides of the landlord.

9. In the present case, the Controller has held in the orders of eviction that the appellant had admittedly obtained sanction from the Municipal Corporation, Shimla and that the building was an old one and that the appellant was occupying the

second floor of the building and that rebuilding or reconstruction cannot be carried out without the building being vacated by the respondents. The Controller has accordingly arrived at a satisfaction that the appellant bonafide requires the building for the purpose of building or rebuilding and has accordingly issued the direction in terms of sub-section (4) read with clause (c) of sub-section (3) of Section 14 of the Act to the respondents to put the appellant in possession of the building. This order of the Controller was challenged by the respondents in appeal but the Appellate Authority has dismissed the appeal. Thereafter, the respondents filed the Civil Revisions before the High Court challenging the orders of the Controller and the orders of the Appellate Authority, and the High Court has in the impugned common order maintained the orders passed by the Controller and the Appellate Authority subject to the modifications mentioned in para 27 of its order. Para 27 of the impugned order of the High Court is quoted hereinbelow:

> "Accordingly, in view of the observations and discussions made hereinabove, there is no merit in the petition and the same is dismissed. However, in the interest of justice, in view of the judgment rendered by their Lordships of the Hon'ble Supreme Court in *Harrington House School* v. *S.M. Ispahani & Another* (2002) 5 SCC 229, though the orders passed by both the authorities are upheld/ sustained, however, it is directed that only on the valid revised/ renewed building plan being sanctioned by the competent authority, the order of eviction shall be available for execution. The valid revised/ renewed sanctioned or approved building plan shall be produced before the executing court whereupon the executing court shall allow a reasonable time to the tenants for vacating the property and delivering possession to the landlord. Till then the tenant shall remain liable to pay charges for use and occupation of the premises at the same rate at which they are being paid earlier. Subject to these modifications, the orders passed by both the authorities below are maintained. No costs."

10. We also find that the respondents challenged the impugned order of the High Court separately in Special Leave Petition (Civil) Nos. 14028 and 2971 of 2012, but this Court dismissed the Special Leave Petitions of the respondents. The result is that the findings of the Controller regarding the claim of the appellants for eviction of the respondents on the ground that the appellant bonafide requires the building for rebuilding or reconstruction as affirmed by the appellate authority and the High Court have become final could not be reopened on any ground whatsoever and the respondents cannot now contend that the appellant cannot any longer construct or reconstruct the building on account of drastic changes in the building regulations within the city limits of Shimla.

11. In fact, the only question that we have to decide in this appeal filed by the appellant is whether the High Court could have directed that only on the valid revised/renewed building plant being sanctioned by the competent authority, the order of eviction shall be available for execution. The High Court has relied on the decision of this Court in *Harrington House School* v. *S.M. Ispahani & Anr.* (supra) and we find in that case that the landlords were builders by profession and they needed the suit premises for the immediate purpose of demolition so as to construct a multi-storey complex and the tenants were running a school in the tenanted building in which about 200 students were studying and 15 members of the teaching staff and 8 members of the non-teaching staff were employed and the school was catering to the needs of children of non-resident Indians. This Court found that although the plans of the proposed construction were ready and had been tendered in evidence, the plans had not been submitted to the local authorities for approval and on these facts, R.C. Lahoti, J, writing the judgment for the Court, while refusing to interfere with the judgment of the High Court and affirming the eviction order passed by the Controller, directed that the landlords shall submit the plans of reconstruction for approval of the local authorities and only on

the plans being sanctioned by the local authorities, a decree for eviction shall be available for execution and further that such sanctioned plan or approved building plan shall be produced before the executing court whereupon the executing court shall allow a reasonable time to the tenant for vacating the property and delivering the possession to the landlord and till then the tenants shall remain liable to pay charges for use and occupation of the said premises at the same rate at which they are being paid. In the present case, on the other hand, as we have noted, the Rent Controller while determining the bonafides of the appellant-landlord has recorded the finding that the landlord had admittedly obtained the sanction from the Municipal Corporation, Shimla, and has accordingly passed the order of eviction and this order of eviction has not been disturbed either by the Appellate Authority or by the High Court as the Revision Authority. In our considered opinion, once the High Court maintained the order of eviction passed by the Controller under Section 14(4) of the Act, the tenants were obliged to give vacant possession of the building to the landlord and could only ask for reasonable time to deliver vacant possession of the building to the landlord and hence the direction of the High Court that the order of eviction could only be executed on the revised plan of the building being approved was clearly contrary to the provisions of Section 14(4) of the Act and the proviso thereto.

12. We accordingly allow the appeals, set aside the directions in Para 27 of the impugned judgment of the High Court, but grant time to the respondents to vacate the building within three months from today. We make it clear that it will be open for the respondents to apply for re-entry into the building in accordance with the proviso to clause (c) of Section 14(3) of the Act introduced by the Amendment Act, 2009. Considering, however, the peculiar facts and circumstances of the cases, there shall be no order as to costs.

B.B.B. Appeals allowed.

GURU GRANTH SAHEB STHAN MEERGHAT VANARAS
v.
VED PRAKASH AND ORS.
(Civil Appeal No. 4166 of 2013)

MAY 1, 2013

[R.M. LODHA AND SHARAD ARVIND BOBDE, JJ.]

Evidence Act, 1872 – ss.40 to 43 – Simultaneous proceedings in Criminal as well as civil court between same parties and in respect of same property – Stay of the proceedings in civil court, during pendency of the trial – Held: Grant of stay was not correct – Even in case of conflicting decisions in civil and criminal courts, such an eventuality cannot be taken as a relevant consideration – In the facts of the case also there is no likelihood of any embarrassment to defendants and the outcome of civil court will also not prejudice their defence in criminal case.

Appellant filed FIR against respondent Nos. 1 to 4, alleging that they had executed a false, forged and fabricated Will and on the basis thereof, obtained mutation order. While the trial was pending against the respondents, appellants filed civil suit against the respondents, praying for decree for declaration of title, perpetual injunction and possession in respect of disputed lands above-mentioned.

Respondents-defendants filed application for staying the proceedings in the suit, during pendency of the criminal trial. Trial Court dismissed the application. Respondents-defendants when approached High Court, the Court stayed the proceedings in the suit. Hence, the present appeal.

Allowing the appeal, the Court

HELD: : 1. If the criminal case and civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of Sections 40 to 43 of the Evidence Act are satisfied, but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein. Moreover, the judgment, order or decree passed in previous civil proceedings, if relevant, as provided under Sections 40 and 42 or other provisions of the Evidence Act, then in each case, the court has to decide to what extent it is binding or conclusive with regard to the matters decided therein. In each and every case, the first question which would require consideration is, whether judgment, order or decree is relevant; if relevant, its effect. This would depend upon the facts of each case. No hard and fast rule can be laid down and that possibility of conflicting decision in civil and criminal courts is not a relevant consideration. [Paras 14 and 19] [1049-F-G; 1051-D-G]

K.G. Premshanker vs. Inspector of Police and Anr. **(2002) 8 SCC 87: 2002 (2) Suppl. SCR 350 – relied on.**

2. Therefore, the High Court was not justified in staying the proceedings in the civil suit till the decision of criminal case. Firstly, because even if there is possibility of conflicting decisions in the civil and criminal courts, such an eventuality cannot be taken as a relevant consideration. Secondly, in the facts of the present case, there is no likelihood of any embarrassment to the defendants (respondent Nos. 1 to 4), as they had already filed the written statement in the civil suit and based on the pleadings of the parties, the issues have been framed. In this view of the matter, the outcome and/or findings that may be arrived at by the civil court will not at all prejudice the defence(s) of the respondent Nos.1 to 4 in the criminal proceedings. [Para 20] [1051-H; 1052-A-C]

M.S. Sheriff and Anr. vs. State of Madras and Ors. **AIR 1954 SC 397: 1954 SCR 1229 – followed.**

M/s. Karam Chand Ganga Prasad and Anr. etc. vs. Union of India andOrs. **1970 (3) SCC 694;** *V.M. Shah vs. State of Maharashtra and Anr.* **(1995) 5 SCC 767: 1995 (3) Suppl. SCR 79;** *State of Rajasthan vs. Kalyan Sundaram Cement Industries Ltd. and Ors.* **(1996) 3 SCC 87: 1996 (2) SCR 463 – referred to.**

Case Law Reference:

1970 (3) SCC 694	**referred to**	**Para 10**
1995 (3) Suppl. SCR 79	**referred to**	**Para 11**
1996 (2) SCR 463	**referred to**	**Para 13**
2002 (2) Suppl. SCR 350	**relied on**	**Para 14**
1954 SCR 1229	**followed**	**Para14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4166 of 2013.

From the Judgment & Order dated 24.11.2008 of the High Court of Judicature at Jabalpur, Madhya Pradesh in Writ Petition No. 5836 of 2008.

Nagendra Rai, Smarhar Singh, Gopi Raman, Priti Resham (For T. Mahipal) for the Appellant.

Vineet Bhagat, Divya Shukla for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted.

2. The short question for consideration in this appeal by special leave is whether High Court was justified in staying the proceedings in civil suit till the decision in criminal case.

3. It is not necessary to narrate the facts in detail. Suffice it to say that the appellant filed an FIR (P.S. Case No. 8 of 2003) at Dharampura Police Station against respondent nos. 1 to 4 for commission of the offences under Sections 420, 467, 468 and 120B, IPC alleging that they had executed a false, forged and fabricated will on 02.07.1997 in the name of late Devkinandan Sahay with the intention to grab his property. It was further alleged that based on the fabricated will, these respondents had obtained a mutation order dated 24.11.1999 from the Tehsildar, Ajaygarh. On completion of investigation in the above F.I.R., the challan has been filed against the above respondents and trial against them is going on in the Court of Judicial Magistrate, First Class, Ajaygarh, Panna (M.P.).

4. On 09.02.2004, the appellant brought legal action in representative capacity against the respondents nos. 1 to 4 by way of a civil suit in the Court of District Judge, Panna (M.P.) praying for a decree for declaration of title, perpetual injunction and possession in respect of disputed lands and for annulling the sale deed dated 14.08.2003 and the mutation order dated 24.11.1999. In the suit, reference of will forged by the respondent nos. 1 to 4 has been made. The said suit has been transferred to the Court of Additional District Judge, Panna and bears Civil Suit No. 10A of 2006. The respondent nos. 1 to 4, who are defendants in the suit, have filed their written statement on 19.06.2006. The trial court has framed issues on the basis of the pleadings of the parties on 21.09.2007. On 21.04.2008, the defendants (respondent nos. 1 to 4 herein) filed an application under Section 10 read with Section 151, CPC for staying the proceedings in the civil suit during the pendency of above-referred criminal case.

5. The Additional District Judge, Panna, by his order dated 21.04.2008 dismissed the application for staying the proceedings in the suit.

6. The respondent nos. 1 to 4 herein challenged the order of the Additional District Judge in the High Court in a writ

petition under Article 227 of the Constitution of India. The Division Bench of the Madhya Pradesh High Court by the impugned order has set aside the order of the Additional District Judge and, as noted above, has stayed the proceedings in Civil Suit till the decision of criminal case. It is from this order that the present civil appeal, by special leave, has arisen.

7. We have heard Mr. Nagendra Rai, learned senior counsel for the appellant, and Mr. K.G. Bhagat, learned counsel for respondent nos. 1 to 4.

8. A Constitution Bench of this Court in *M.S. Sheriff & Anr. v. State of Madras & Ors*[1]. has considered the question of simultaneous prosecution of the criminal proceedings with the civil suit. In paragraphs 14,15 and 16 (Pg. 399) of the Report, this Court stated as follows:

> "14. . . . . It was said that the simultaneous prosecution of these matters will embarrass the accused. . . . . but we can see that the simultaneous prosecution of the present criminal proceedings out of which this appeal arises and the civil suits will embarrass the accused. We have therefore to determine which should be stayed.
>
> 15. As between the civil and the criminal proceedings we are of the opinion that the criminal matters should be given precedence. There is some difference of opinion in the High Courts of India on this point. No hard and fast rule can be laid down but we do not consider that the possibility of conflicting decisions in the civil and criminal Courts is a relevant consideration. The law envisages such an eventuality when it expressly refrains from making the decision of one Court binding on the other, or even relevant, except for certain limited purposes, such as sentence or damages. The only relevant consideration here is the likelihood of embarrassment.

1. AIR 1954 SC 397.

16. Another factor which weighs with us is that a civil suit often drags on for years and it is undesirable that a criminal prosecution should wait till everybody concerned has forgotten all about the crime. The public interests demand that criminal justice should be swift and sure; that the guilty should be punished while the events are still fresh in the public mind and that the innocent should be absolved as early as is consistent with a fair and impartial trial. Another reason is that it is undesirable to let things slide till memories have grown too dim to trust. This, however, is not a hard and fast rule. Special considerations obtaining in any particular case might make some other course more expedient and just. For example, the civil case or the other criminal proceeding may be so near its end as to make it inexpedient to stay it in order to give precedence to a prosecution ordered under S. 476. But in this case we are of the view that the civil suits should be stayed till the criminal proceedings have finished."

9. The ratio of the decision in *M.S. Sheriff*1 is that no hard and fast rule can be laid down as to which of the proceedings – civil or criminal – must be stayed. It was held that possibility of conflicting decisions in the civil and criminal courts cannot be considered as a relevant consideration for stay of the proceedings as law envisaged such an eventuality. Embarrassment was considered to be a relevant aspect and having regard to certain factors, this Court found expedient in *M.S. Sheriff1* to stay the civil proceedings. The Court made it very clear that this, however, was not hard and fast rule; special considerations obtaining in any particular case might make some other course more expedient and just. *M.S. Sheriff1* does not lay down an invariable rule that simultaneous prosecution of criminal proceedings and civil suit will embarrass the accused or that invariably the proceedings in the civil suit should be stayed until disposal of criminal case.

10. In *M/s. Karam Chand Ganga Prasad and Another etc.*

v. Union of India and Others[2], this Court in paragraph 4 of the Report (Pg. 695) made the following general observations, "it is a well established principle of law that the decisions of the civil courts are binding on the criminal courts. The converse is not true." This statement has been held to be confined to the facts of that case in a later decision in *K.G. Premshanker v. Inspector of Police and Another*[3], to which we shall refer to a little later.

11. In *V.M. Shah v. State of Maharashtra and Another*[4], while dealing with the question whether the conviction under Section 630 of the Companies Act was sustainable, this Court, while noticing the decision in *M.S. Sheriff1* in para 11 (pg. 770) of the Report, held as under:

> "11. As seen that the civil court after full-dressed trial recorded the finding that the appellant had not come into possession through the Company but had independent tenancy rights from the principal landlord and, therefore, the decree for eviction was negatived. Until that finding is duly considered by the appellate court after weighing the evidence afresh and if it so warranted reversed, the findings bind the parties. The findings, recorded by the criminal court, stand superseded by the findings recorded by the civil court. Thereby, the findings of the civil court get precedence over the findings recorded by the trial court, in particular, in summary trial for offences like Section 630. The mere pendency of the appeal does not have the effect of suspending the operation of the decree of the trial court and neither the finding of the civil court gets nor the decree becomes inoperative."

12. The statement of law in *V.M. Shah*[4], as quoted above, has been expressly held to be not a good law in *K.G. Premshanker*[3] .

2. 1970 (3) SCC 694.
3. (2002) 8 SCC 87.
4. (1995) 5 SCC 767.

13. In *State of Rajasthan v. Kalyan Sundaram Cement Industries Ltd. and Others*[5], this Court made the following statement in paragraph 3 (pgs. 87-88):

> "3. It is settled law that pendency of the criminal matters would not be an impediment to proceed with the civil suits. The criminal court would deal with the offence punishable under the Act. On the other hand, the courts rarely stay the criminal cases and only when the compelling circumstances require the exercise of their power. We have never come across stay of any civil suits by the courts so far. The High Court of Rajasthan is only an exception to pass such orders. The High Court proceeded on a wrong premise that the accused would be expected to disclose their defence in the criminal case by asking them to proceed with the trial of the suit. It is not a correct principle of law. Even otherwise, it no longer subsists, since many of them have filed their defences in the civil suit. On principle of law, we hold that the approach adopted by the High Court is not correct. But since the defence has already been filed nothing survives in this matter."

14. We may now refer to a three-Judge Bench decision of this Court in *K.G. Premshanker*[3]. The three-Judge Bench took into consideration Sections 40, 41, 42 and 43 of the Evidence Act, 1872 and also the decision of this Court in *M.S. Sheriff*[1] and observed in paragraph 32 of the Report that the decision rendered by the Constitution Bench in *M.S. Sheriff* case1 would be binding wherein it has been specifically held that no hard and fast rule can be laid down and that possibility of conflicting decision in civil and criminal courts is not a relevant consideration.

15. Section 40 of the Evidence Act makes it plain that the existence of any judgment, order or decree which by law prevents any Courts from taking cognizance of a suit or holding

5. (1996) 3 SCC 87.

a trial is a relevant fact when the question is whether such Court ought to take cognizance of such suit, or to hold such trial.

16. Section 41 provides for relevancy of judgments passed in the exercise of probate, matrimonial admiralty or insolvency jurisdiction by the Competent Court. It reads as follows :

> "S. 41. Relevancy of certain judgments in probate, etc., jurisdiction.—A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial admiralty or insolvency jurisdiction which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant.
>
> Such judgment, order or decree is conclusive proof—
>
> that any legal character, which it confers accrued at the time when such judgment, order or decree came into operation;
>
> that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, order or decree declares it to have accrued to that person;
>
> that any legal character which it takes away from any such person ceased at the time from which such judgment, order or decree declared that it had ceased or should cease;
>
> and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, order or decree declares that it had been or should be his property."

17. Section 42 deals with relevancy and effect of judgments, orders or decrees, other than those mentioned in Section 41. It reads as under:

> "S.42. Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41.— Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a public nature relevant to the enquiry; but such judgments, orders or decrees are not conclusive proof of that which they state."

18. Section 43 provides that the judgments, orders or decrees other than those mentioned in Sections 40, 41 and 42 are irrelevant unless the existence of such judgment, order or decree is a fact in issue or is relevant under some other provisions of the Evidence Act.

19. In *K.G. Premshanker*[3], the effect of the above provisions (Sections 40 to 43 of the Evidence Act) has been broadly noted thus: if the criminal case and civil proceedings are for the same cause, judgment of the civil court would be relevant if conditions of any of Sections 40 to 43 are satisfied but it cannot be said that the same would be conclusive except as provided in Section 41. Section 41 provides which judgment would be conclusive proof of what is stated therein. Moreover, the judgment, order or decree passed in previous civil proceedings, if relevant, as provided under Sections 40 and 42 or other provisions of the Evidence Act then in each case the Court has to decide to what extent it is binding or conclusive with regard to the matters decided therein. In each and every case the first question which would require consideration is, whether judgment, order or decree is relevant; if relevant, its effect. This would depend upon the facts of each case.

20. In light of the above legal position, it may be immediately observed that the High Court was not at all justified in staying the proceedings in the civil suit till the decision of

criminal case. Firstly, because even if there is possibility of conflicting decisions in the civil and criminal courts, such an eventuality cannot be taken as a relevant consideration. Secondly, in the facts of the present case there is no likelihood of any embarrassment to the defendants (respondent nos. 1 to 4 herein) as they had already filed the written statement in the civil suit and based on the pleadings of the parties the issues have been framed. In this view of the matter, the outcome and/or findings that may be arrived at by the civil court will not at all prejudice the defence(s) of the respondent nos. 1 to 4 in the criminal proceedings.

21. For the above reasons, appeal is allowed. The impugned order dated 24.11.2008 passed by the Division Bench of the Madhya Pradesh High Court is set aside. The proceedings in the civil suit shall now proceed further in accordance with law. The parties shall bear their own costs.

K.K.T. Appeal allowed.

MAHENDRA NATH DAS
v.
UNION OF INDIA AND OTHERS
(Criminal Appeal No. 677 of 2013)

MAY 1, 2013

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

Constitution of India, 1950 – Article 72 – Murder – Accused-appellant convicted and sentenced to death – He submitted mercy petition to the President under Article 72 of the Constitution and prayed for commutation of the death sentence into life imprisonment – Petition rejected after 12 years – Propriety of – Held: Not proper – 12 years delay in disposal of the mercy petition sufficient for commutation of the sentence of death into life imprisonment – Sentence of death awarded to appellant accordingly commuted into life imprisonment – Sentence / Sentencing – Commutation of sentence.

The appellant was convicted by the trial Court and sentenced to death on the premise that he committed the murder of a person in a most foul and gruesome manner. The conviction and sentence was confirmed by the High Court as also this Court.

Thereafter, the appellant submitted a mercy petition to the President under Article 72 of the Constitution and prayed for commutation of the sentence of death into life imprisonment. The petition was rejected after 12 years. Writ petition filed by the appellant questioning the rejection of his mercy petition was dismissed by the High Court.

The question which arose for consideration in the

instant appeal was whether 12 years delay in the disposal of the mercy petition filed by the appellant under Article 72 of the Constitution was sufficient for commutation of the sentence of death into life imprisonment and the High Court committed an error by dismissing the writ petition filed by him.

Allowing the appeal, the Court

HELD: 1. In the appellant's case, there was a long time gap of 12 years between the submission of the petition under Article 72 of the Constitution and rejection thereof. The Union of India has tried to explain this time gap by citing correspondence between the Central Government and the Government of Assam, consideration of the matter in different levels in the Ministry of Home Affairs etc. However, no explanation has been given for the time gap of three years between 20.6.2001, i.e., the date on which the then Home Minister made recommendation for rejection of the mercy petition filed by the appellant, and September, 2004, when the file again started moving within the Ministry and five years between 30.9.2005, i.e., the date on which the President opined that the mercy petition of the appellant be accepted and September, 2010, when the file was actually summoned back by the Ministry of Home Affairs. That apart, what is most intriguing is that even though in note dated 5.10.2010 prepared by the Joint Secretary, Ministry of Home Affairs, a reference was made to note dated 30.9.2005 of the then President Dr. A.P.J. Abdul Kalam, while making recommendation on 12.10.2010 to the successor in the office of the President that the appellant's mercy petition be rejected, the Home Minister did not even make a mention of note dated 30.9.2005. In the summary prepared by the Home Ministry for the President's consideration, which was signed by the Home Minister on 18.10.2010, also no reference was made

to the order and note dated 30.9.2005 of the then President. Why this was done has not been explained by the respondents. Though, the file containing the petition filed by the appellant and various notings recorded therein must have been place before the President, omission to make a mention of the order passed by her predecessor and note dated 30.9.2005 from the summary prepared for her consideration leads to an inference that the President was kept in dark about the view expressed by her predecessor and was deprived of an opportunity to objectively consider the entire matter. [Para 20] [1072-A-F]

1.2. It is neither the pleaded case of the respondents nor any material has been produced before this Court to show that the Government of India had placed the file before the then President for review of the order recorded by him on 30.9.2005 or the President who finally decided the appellant's petition on 8.5.2011 was requested to reconsider the decision of her predecessor. Therefore, it must be held that the President was not properly advised and assisted in the disposal of the petition filed by the appellant. [Para 21] [1072-G-H; 1073-A]

1.3. The High Court did not have the benefit of going through the record/files maintained by the Ministry of Home Affairs and this is the reason why the impugned order does not contain any reference to the order passed by the President on 30.9.2005 and the note recorded by him for the consideration of the Home Minster. [Para 22] [1073-A-B]

1.4. In the above backdrop, 12 years delay in the disposal of the appellant's mercy petition was sufficient for commutation of the sentence of death and the High Court committed serious error by dismissing the writ petition solely on the ground that he was found guilty of committing heinous crime. In the result, the rejection of

the appellant's mercy petition is declared illegal and quashed and the sentence of death awarded to him by the trial Court, which has been confirmed by the High Court and this Court is commuted into life imprisonment. [Paras 23, 24] [1073-C-D; 1075-G-H]

Daya Singh v. Union of India **(1991) 3 SCC 61: 1991 (2) SCR 462 – held applicable.**

Mahendra Nath Das v. State of Assam **(1999) 5 SCC 102: 1999 (3) SCR 729;** *Jagmohan Singh v. State of U.P.* **(1973) 1 SCC 20: 1973 (2) SCR 541;** *Rajendra Prasad v. State of U.P.* **(1979) 3 SCC 464;** *Bachan Singh v. State of Punjab* **(1980) 2 SCC 684;** *T.V. Vatheeswaran v. State of Tamil Nadu* **(1983) 2 SCC 68;** *Sher Singh v. State of Punjab* **(1983) 2 SCC 344;** *Javed Ahmed Pawala v. State of Maharashtra* **(1985) 1 SCC 275: 1985 (2) SCR 8;** *Mahesh v. State of M.P.* **(1987) 3 SCC 80: 1987 (2) SCR 710;** *Triveniben v. State of Gujarat* **(1989) 1 SCC 678: 1989 (1) SCR 509;** *Madhu Mehta v. Union of India* **(1989) 3 SCR 775;** *Sevaka Perumal v. State of T.N.* **(1991) 3 SCC 471: 1991 (2) SCR 711;** *Dhananjoy Chatterjee v. State of W.B.* **(1994) 2 SCC 220: 1994 (1) SCR 37;** *Jashubha Bharatsinh Gohil v. State of Gujarat* **(1994) 4 SCC 353;** *Ravji v. State of Rajasthan* **(1996) 2 SCC 175: 1995 (6) Suppl. SCR 195;** *State of Madhya Pradesh v. Munna Choubey* **(2005) 2 SCC 710: 2005 (1) SCR 781;** *Swamy Shraddananda v. State of Karnataka* **(2008) 13 SCC 767: 2008 (11) SCR 93;** *Vivian Rodrick v. State of West Bengal* **(1971) 1 SCC 468: 1971 (3) SCR 546;** *Shivaji Jaising Babar v. State of Maharashtra* **(1991) 4 SCC 375;** *Devinder Pal Singh Bhullar v. State of N.C.T of Delhi* **[Judgment dated 12th April, 2013 by Supreme Court];** *Maru Ram v. Union of India* **(1981) 1 SCC 107;** *Machhi Singh v. State of Punjab* **(1983) 3 SCC 470: 1983 (3) SCR 413;** *Ediga Anamma v. State of A.P.* **(1974) 4 SCC 443: 1974 (3) SCR 329 and** *Epuru Sudhakar v. Government of A.P.* **(2006) 8 SCC 161: 2006 (7) Suppl. SCR 81 – referred to.**

Case Law Reference:

1999 (3) SCR 729	**referred to**	**Para 6**
1973 (2) SCR 541	**referred to**	**Para 12**
(1979) 3 SCC 464	**referred to**	**Para 12**
(1980) 2 SCC 684	**referred to**	**Para 12**
(1983) 2 SCC 68	**referred to**	**Para 12**
(1983) 2 SCC 344	**referred to**	**Para 12**
1985 (2) SCR 8	**referred to**	**Para 12**
1987 (2) SCR 710	**referred to**	**Para 12**
1989 (1) SCR 509	**referred to**	**Para 12**
(1989) 3 SCR 775	**referred to**	**Para 12**
1991 (2) SCR 711	**referred to**	**Para 12**
1994 (1) SCR 37	**referred to**	**Para 12**
(1994) 4 SCC 353	**referred to**	**Para 12**
1995 (6) Suppl. SCR 195	**referred to**	**Para 12**
2005 (1) SCR 781	**referred to**	**Para 12**
2008 (11) SCR 93	**referred to**	**Para 12**
1971 (3) SCR 546	**referred to**	**Para 13**
1991 (2) SCR 462	**held applicable**	**Para 13**
(1991) 4 SCC 375	**referred to**	**Para 13**
(1981) 1 SCC 107	**referred to**	**Para 16**
1983 (3) SCR 413	**referred to**	**Para 16**
1974 (3) SCR 329	**referred to**	**Para 16**
2006 (7) Suppl. SCR 81	**referred to**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 677 of 2013.

From the Judgment & Order dated 30.01.2012 of the High Court of Guwahati in WP (Crl) No. 35 of 2011.

Shyam Divan, P.S. Sudheer, Avijit Roy, T.A. Khan for the appearing parties.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Leave granted.

2. The question which arises for consideration in this appeal is whether 12 years delay in the disposal of the petition filed by the appellant under Article 72 of the Constitution was sufficient for commutation of the sentence of death into life imprisonment and the Division Bench of the Gauhati High Court committed an error by dismissing the writ petition filed by him.

3. The appellant was prosecuted for an offence under Section 302 of the Indian Penal Code (IPC) on the allegation that he had killed Rajen Das, Secretary of Assam Motor Workers Union on 24.12.1990. He was convicted by Sessions Judge, Kamrup, Guwahati (hereinafter referred to as, 'the trial Court') in Sessions Case No. 80(K) of 1990 vide judgment dated 11.11.1997 and was sentenced to life imprisonment.

4. While he was on bail in Sessions Case No. 80(K) of 1990, the appellant is said to have killed Hare Kanta Das (a truck owner). He was tried in Sessions Case No. 114(K) of 1996 and was convicted by the trial Court and was sentenced to death on the premise that the murder was most foul and gruesome.

5. The appellant challenged the judgments of the trial Court in Appeal Nos. 254(J) of 1997 and 2(J) of 1998. Both the appeals were dismissed by the High Court vide judgments

dated 3.2.1998 and 12.12.1998 and the sentence of death awarded in Sessions Case No. 114(K) of 1996 was confirmed.

6. The appeal filed by the appellant against the confirmation of the sentence of death by the High Court was dismissed by this Court vide judgment – *Mahendra Nath Das v. State of Assam* (1999) 5 SCC 102. While dealing with the appellant's contention that the extreme penalty of death should not have been imposed by the trial Court and confirmed by the High Court, this Court made the following observations:

> "Now coming to the facts of this case, the circumstances of the case unmistakably show that the murder committed was extremely gruesome, heinous, cold-blooded and cruel. The manner in which the murder was committed was atrocious and shocking. After giving blows with a sword to the deceased when he fell down the appellant amputated his hand, severed his head from the body, carried it through the road to the police station (majestically as the trial court puts it) by holding it in one hand and the blood-dripping weapon in the other hand. Does it not depict the extreme depravity of the appellant? In our view it does.
>
> The mitigating circumstances pointed out by the learned counsel for the appellant are, though the appellant himself did not state any mitigating circumstances when enquired about the same by the learned Sessions Judge, that the appellant is a young man of 33 years and having three unmarried sisters and aged parents and he was not well at that time. These circumstances when weighed against the aggravating circumstances leave us in no doubt that this case falls within the category of rarest of rare cases. The trial court has correctly applied the principles in awarding the death sentence and the High Court has committed no error of law in confirming the same.
>
> On these facts, declining to confirm the death sentence will, in our view, stultify the course of law and justice. In G*ovindaswami v. State of T.N.*(1998) 4 SCC 531, Mukherjee, J. speaking for the Court observed, "If, in spite thereof, we commute the death sentence to life imprisonment we will be yielding to spasmodic sentiment, unregulated benevolence and misplaced sympathy."

7. Soon after the judgment of this Court, the appellant submitted a petition to the President under Article 72 of the Constitution and prayed for commutation of the sentence of death into life imprisonment. A similar petition was filed by him under Article 161 of the Constitution. The Governor of Assam rejected his petition vide order dated 7.4.2000. The mercy petition addressed to the President was forwarded by the Government of Assam to the Ministry of Home Affairs sometime in June, 2000. After a lot of correspondence with the State Government, the Ministry of Home Affairs prepared a note suggesting that the petition filed by the appellant may be rejected. On 20.6.2001, the then Home Minister recommended to the President that the mercy petition of the appellant should be rejected.

8. The record produced by the learned Additional Solicitor General does not show as to what happened in the next three years, but consideration of the appellant's petition again started in September, 2004. After the file was processed at various levels in the Ministry of Home Affairs, the case was submitted to the President on 19.4.2005 with the recommendation of the Home Minister that the mercy petition of the appellant may be rejected

9. The President considered the mercy petition in the light of the recommendation made by the Home Minister and passed order dated 30.9.2005, which reads as under:

> "I have carefully studied the mercy petition proposal sent for my consideration in respect of Mahendra Nath Das. I find that though the crime committed was of a gruesome

nature, yet the conduct of the accused does not show trace of pre-meditated murder. The crime can well be attributed to a gross lack of mental equanimity on his part. In such circumstances, his mercy petition in my view, be accepted and his death sentence commuted to life-long imprisonment (i.e. for the rest of his life). During his further incarceration in prison, he may be given periodic counseling by spiritualist and moral leaders which could help reform his personality and mental psyche. This may be considered.

A.P.J. Abdul Kalam

PRESIDENT OF INDIA

30/9/2005"

10. On the same day, i.e., 30.9.2005, the President recorded another note for the Home Minister in which he dealt with mercy petitions filed by Sushil Murmu, Santosh Yadav, Molai Ram, Mahendra Nath Das, R. Govindasamy, Piara Singh, Sarabjit Singh, Satnam Singh and Gurdev Singh. As per that note, the mercy petitions of Sushil Murmu, Santosh Yadav and Molai Ram were rejected. As regards Mahendra Nath Das, R. Govindasamy, Piara Singh, Satnam Singh, Sarabjit Singh and Gurdev Singh, the President opined that their mercy petitions be accepted.

11. After receiving the note of the President, the office of the Home Minister asked for the appellant's file. However, requisition for the return of the file was sent to the President's Secretariat only on 7.9.2010. The President's Secretariat returned the file on 24.9.2010. Thereafter, the Ministry of Home Affairs (Judicial Cell) prepared a note of about 6 pages in which the concerned officer recorded the details of the crime committed by the appellant, referred to the judgments of the trial Court, the High Court and this Court and the grounds on which the appellant had sought commutation of the sentence of death

into life imprisonment as also the representations made by some persons including President of the Union and suggested that the mercy petition may be rejected. The Home Minister referred to the observations made by this Court and recommended that the mercy petition may be rejected because there was no mitigating circumstance. The recommendations made by the Home Minister on 18.10.2010 were approved by the President on 8.5.2011. Thereafter, the appellant was informed about rejection of his petition.

12. The writ petition filed by the appellant questioning the rejection of his mercy petition was dismissed by the Division Bench of the High Court, which referred to the judgments of this Court in *Jagmohan Singh v. State of U.P.* (1973) 1 SCC 20, *Rajendra Prasad v. State of U.P.* (1979) 3 SCC 464, *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, *T.V. Vatheeswaran v. State of Tamil Nadu* (1983) 2 SCC 68, *Sher Singh v. State of Punjab* (1983) 2 SCC 344, *Javed Ahmed Pawala v. State of Maharashtra* (1985) 1 SCC 275, *Mahesh v. State of M.P.* (1987) 3 SCC 80, *Triveniben v. State of Gujarat* (1989) 1 SCC 678, *Madhu Mehta v. Union of India* (1989) 3 SCR 775, *Sevaka Perumal v. State of T.N.* (1991) 3 SCC 471, *Dhananjoy Chatterjee v. State of W.B.* (1994) 2 SCC 220, *Jashubha Bharatsinh Gohil v. State of Gujarat* (1994) 4 SCC 353, *Ravji v. State of Rajasthan* (1996) 2 SCC 175, *State of Madhya Pradesh v. Munna Choubey* (2005) 2 SCC 710, *Swamy Shraddananda v. State of Karnataka* (2008) 13 SCC 767 and observed:

> "32. We may now come to the last and the crucial question whether or not in the facts and circumstances of the present case, the prayer for commuting the death sentence to the life imprisonment can be accepted. We have already noted the stand of the State that till decision on mercy petition, the petitioner had never been kept in the condemned cell which was in compliance with law laid down in Sunil Batra. The said stand has not been rebutted in any manner. Though delay in deciding the mercy petition

does appear to be unexplained and if delay alone is a conclusive factor, the death sentence may be liable to be set aside but in view of law laid down by Constitution Bench in Triveniben, delay is a factor which has to be seen in the light of subsequent circumstances, coupled with the nature of offence and circumstances in which the offence was committed, as already found by the competent court while passing the final verdict. At this stage, the correctness of the final verdict is not in issue as held in Triveniben (particularly in paragraph 22 and 76). Beyond delay, there is no subsequent circumstance showing any adverse effect on the petitioner on that court. Throughout he has continued to live as normal prisoner with other prisoners. If delay is considered along with dastardly and diabolical circumstances of the crime, in absence of any further supervening circumstances in favour of the petitioner, no case is made out for vacating the death sentence. Thus while delay has furnished cause of action to the writ petitioner to seek altering of death sentence, in absence of any other subsequent circumstances necessitating vacation of death sentence, and taking into account the circumstances for which the death sentence was awarded, there is no ground to vacate the sentence so awarded. As held in Sher Singh (last portion of paragraph 19 and 20), while death sentence should not, as far as possible, be imposed but in rare and exceptional class of cases where sentence is held to be valid, the same cannot be allowed to be defeated by applying any rule of thumb. We have already noticed reasons for which retention of death sentence was upheld by the Hon'ble Supreme Court in Jagmohan Singh and Bachan Singh by distinguishing the American Judgments and taking into account the study conducted by the Law Commission of India in its 35th Report and conditions prevailing in the Country. It was noted that in the perspective of prevailing condition of India, the Parliament has repeatedly rejected all attempts to abolish death sentence. We have also referred to judgment

of the Hon'ble Supreme Court in Munna Choubey wherein after punishment may harm the justice system and undermine the public confidence in efficacy of law, there was need to maintain proportion in punishment and crime and to protect the society, adequate punishment was necessary. Thus, mere delay is a significant factor, cannot itself be a ground for commuting the death sentence to life imprisonment in absence of any further circumstance justifying such a course when offence and circumstances are rarest of rare.

33. We have analysed the principle of law laid down in Triveniben and not found any ground for vacating the death sentence. Judgments in Madhu Mehta and Daya Singh do not lay down any further principle as precedent and appear to in exercise of the jurisdiction of the Hon'ble Supreme Court under Article 142 of the Constitution. We are also not persuaded to follow the view taken by the High Courts of Madras, Rajasthan and Bombay that delay alone was conclusive for commuting death sentence to life. In our view, this interpretation is contrary to law laid in Triveniben for the reasons already discussed."

13. The arguments in this case were heard along with W.P. (Crl.) D.No.16039 of 2011, W.P. (Crl.) No. 146 of 2011 and W.P. (Crl.) No.86 of 2011, which were finally disposed of on 12.4.2013. Therein, we have noticed in detail the arguments of Shri Shyam Divan, learned senior counsel for the petitioner, Shri K. V. Viswanathan, learned senior counsel for the intervener (PUDR) and the learned Additional Solicitor General Harin P. Raval. In nutshell, the argument of Shri Divan is that even though the appellant's conviction has become final, 12 years delay in the disposal of the mercy petition was sufficient for commutation of the sentence of death into life imprisonment and the High Court committed grave error by refusing to do so. He relied upon the judgments in *Vivian Rodrick v. State of West Bengal* (1971) 1 SCC 468, *Madhu Mehta v. Union of India*

(supra), *Daya Singh v. Union of India* (1991) 3 SCC 61 and *Shivaji Jaising Babar v. State of Maharashtra* (1991) 4 SCC 375 and submitted that the High Court misunderstood the ratio of judgments in *Madhu Mehta's* case and Daya Singh's case and erroneously held that the principle laid down in Triveniben's case cannot be invoked in the appellant's case for commutation of the sentence of death into life imprisonment.

14. Shri K.V. Viswanathan, learned senior counsel appearing for the intervener (PUDR) made detailed submissions in support of his argument that the delay of over one decade in the disposal of the mercy petition by the President is sufficient for commutation of the sentence of death into life imprisonment.

15. Shri Harin P Raval, learned Additional Solicitor General emphasised that the second murder committed by the appellant was gruesome and barbaric and, therefore, this Court should not exercise power under Article 136 of the Constitution and order commutation of the sentence of death into life imprisonment simply because there was long time gap between filing of the mercy petition and disposal thereof. Shri Raval argued that even though in September, 2005 the then President had opined that the sentence of death awarded to the appellant may be commuted into life long imprisonment, the final decision taken by the President on 8.5.2011 cannot be faulted on the ground of delay.

16. We have considered the respective submissions. In Devender Pal Singh Bhullar's case, this Court considered the following questions:

> "(a) What is the nature of power vested in the President under Article 72 and the Governor under Article 161 of the Constitution?
>
> (b) Whether delay in deciding a petition filed under Article 72 or 161 of the Constitution is, by itself, sufficient for issue of a judicial fiat for commutation of the sentence of death into life imprisonment irrespective of the nature and magnitude of the crime committed by the convict and the fact that the delay may have been occasioned due to direct or indirect pressure brought upon the Government by the convict through individuals, groups of people and organizations from within or outside the country or failure of the concerned public authorities to perform their duty?
>
> (c) Whether the parameters laid down by the Constitution Bench in Triveniben's case for judging the issue of delay in the disposal of a petition filed under Article 72 or 161 of the Constitution can be applied to the cases in which an accused has been found guilty of committing offences under TADA and other similar statutes?
>
> (d) What is the scope of the Court's power of judicial review of the decision taken by the President under Article 72 and the Governor under Article 161 of the Constitution, as the case may be?"

After noticing the judgments in *Jagmohan Singh's* case, Rajender Prasad's case, *Bachan Singh's* case, *Maru Ram v. Union of India*, (1981) 1 SCC 107, *Machhi Singh v. State of Punjab* (1983) 3 SCC 470, *Ediga Anamma v. State of A.P.* (1974) 4 SCC 443, *T.V. Vatheeswaran's* case, *K.P. Mohd's* case, *Sher Singh's* case, *Javed Ahmed's* case, *Triveniben's* case, *Daya Singh's* case, *Epuru Sudhakar v. Government of A.P.* (2006) 8 SCC 161 and some judgments of other jurisdictions, the Court held:

> "(i) the power vested in the President under Article 72 and the Governor under Article 161 of the Constitution is manifestation of prerogative of the State. It is neither a matter of grace nor a matter of privilege, but is an important constitutional responsibility to be discharged by the highest executive keeping in view the considerations of larger public interest and welfare of the people.

(ii) while exercising power under Article 72, the President is required to act on the aid and advice of the Council of Ministers. In tendering its advice to the President, the Central Government is duty bound to objectively place the case of the convict with a clear indication about the nature and magnitude of the crime committed by him, its impact on the society and all incriminating and extenuating circumstances. The same is true about the State Government, which is required to give advice to the Governor to enable him to exercise power under Article 161 of the Constitution. On receipt of the advice of the Government, the President or the Governor, as the case may be, has to take a final decision in the matter. Although, he/she cannot overturn the final verdict of the Court, but in appropriate case, the President or the Governor, as the case may be, can after scanning the record of the case, form his/her independent opinion whether a case is made out for grant of pardon, reprieve, etc.. In any case, the President or the Governor, as the case may be, has to take cognizance of the relevant facts and then decide whether a case is made out for exercise of power under Article 72 or 161 of the Constitution."

In that case the Court extensively quoted the observations made in Ediga Anamma's case, T.V. Vatheeswaran's case, K.P. Mohd's case, Sher Singh's case, Javed Ahmed's case, Triveniben's case, Madhu Mehta's case, Daya Singh's case and observed:

"38. In the light of the above, we shall now consider the argument of Shri K.T.S. Tulsi, learned senior counsel for the petitioner, and Shri Ram Jethmalani and Shri Andhyarujina, Senior Advocates, who assisted the Court as Amicus, that long delay of 8 years in disposal of the petition filed under Article 72 should be treated as sufficient for commutation of the sentence of death into life imprisonment, more so, because of prolonged detention, the petitioner has become mentally sick. The thrust of the

argument of the learned senior counsel is that inordinate delay in disposal of mercy petition has rendered the sentence of death cruel, inhuman and degrading and this is nothing short of another punishment inflicted upon the condemned prisoner.

39. Though the argument appears attractive, on a deeper consideration of all the facts, we are convinced that the present case is not a fit one for exercise of the power of judicial review for quashing the decision taken by the President not to commute the sentence of death imposed on the petitioner. Time and again, (Machhi Singh's case, Ediga Anamma's case, Sher Singh's case and Triveniben's case), it has been held that while imposing punishment for murder and similar type of offences, the Court is not only entitled, but is duty bound to take into consideration the nature of the crime, the motive for commission of the crime, the magnitude of the crime and its impact on the society, the nature of weapon used for commission of the crime, etc.. If the murder is committed in an extremely brutal or dastardly manner, which gives rise to intense and extreme indignation in the community, the Court may be fully justified in awarding the death penalty. If the murder is committed by burning the bride for the sake of money or satisfaction of other kinds of greed, there will be ample justification for awarding the death penalty. If the enormity of the crime is such that a large number of innocent people are killed without rhyme or reason, then too, award of extreme penalty of death will be justified. All these factors have to be taken into consideration by the President or the Governor, as the case may be, while deciding a petition filed under Article 72 or 161 of the Constitution and the exercise of power by the President or the Governor, as the case may be, not to entertain the prayer for mercy in such cases cannot be characterized as arbitrary or unreasonable and the Court cannot exercise power of judicial review only on the ground of undue delay.

40. We are also of the view that the rule enunciated in Sher Singh's case, Triveniben's case and some other judgments that long delay may be one of the grounds for commutation of the sentence of death into life imprisonment cannot be invoked in cases where a person is convicted for offence under TADA or similar statutes. Such cases stand on an altogether different plane and cannot be compared with murders committed due to personal animosity or over property and personal disputes. The seriousness of the crimes committed by the terrorists can be gauged from the fact that many hundred innocent civilians and men in uniform have lost their lives. At times, their objective is to annihilate their rivals including the political opponents. They use bullets, bombs and other weapons of mass killing for achieving their perverted political and other goals or wage war against the State. While doing so, they do not show any respect for human lives. Before killing the victims, they do not think even for a second about the parents, wives, children and other near and dear ones of the victims. The families of those killed suffer the agony for their entire life, apart from financial and other losses. It is paradoxical that the people who do not show any mercy or compassion for others plead for mercy and project delay in disposal of the petition filed under Article 72 or 161 of the Constitution as a ground for commutation of the sentence of death. Many others join the bandwagon to espouse the cause of terrorists involved in gruesome killing and mass murder of innocent civilians and raise the bogey of human rights."

The Court also dealt with the scope of judicial review in such matters and observed:

"41. While examining challenge to the decision taken by the President under Article 72 or the Governor under Article 161 of the Constitution, as the case may be, the Court's power of judicial review of such decision is very

limited. The Court can neither sit in appeal nor exercise the power of review, but can interfere if it is found that the decision has been taken without application of mind to the relevant factors or the same is founded on the extraneous or irrelevant considerations or is vitiated due to malafides or patent arbitrariness – *Maru Ram v. Union of India,* (1981) 1 SCC 107, *Kehar Singh v. Union of India* (1989) 1 SCC 204, *Swaran Singh v. State of U.P.* (1998) 4 SCC 75, *Satpal v. State of Haryana* (2000) 5 SCC 170, *Bikas Chatterjee v. Union of India* (2004) 7 SCC 634, *Epuru Sudhakar v. Government of A.P.* (2006) 8 SCC 161 and *Narayan Dutt v. State of Punjab* (2011) 4 SCC 353."

17. In *Triveniben's* case, the Constitution Bench considered the conflicting opinions expressed in T.V. Vatheeswaran's case, Sher Singh's case and Javed Ahmed's case and held:

"Undue long delay in execution of the sentence of death will entitle the condemned person to approach this Court under Article 32 but this Court will only examine the nature of delay caused and circumstances that ensued after sentence was finally confirmed by the judicial process and will have no jurisdiction to reopen the conclusions reached by the court while finally maintaining the sentence of death. This Court, however, may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life. No fixed period of delay could be held to make the sentence of death inexecutable and to this extent the decision in Vatheeswaran case cannot be said to lay down the correct law and therefore to that extent stands overruled."

18. In *Madhu Mehta's* case, this Court commuted the sentence of death awarded to one Gyasi Ram, who had killed a Government servant, namely, Bhagwan Singh (Amin), who

had attached his property for recovery of arrears of land revenue. After disposal of the criminal appeal by this Court, the wife of the convict filed a mercy petition in 1981. The same remained pending for 8 years. This Court considered the writ petition filed by the petitioner Madhu Mehta, who was the national convener of Hindustani Andolan, referred to the judgments in T.V. Vatheeswaran's case, Sher Singh's case and Triveniben's case and held that in the absence of sufficient explanation for the inordinate delay in disposal of the mercy petition, the death sentence should be converted into life imprisonment.

19. The facts of Daya Singh's case were that the petitioner had been convicted and sentenced to death for murdering Sardar Pratap Singh Kairon. The sentence was confirmed by the High Court and the special leave petition was dismissed by this Court. After rejection of the review petition, he filed mercy petitions before the Governor and the President of India, which were also rejected. The writ petition filed by his brother Lal Singh was dismissed along with Triveniben's case. Thereafter, he filed another mercy petition before the Governor of Haryana in November, 1988. The matter remained pending for next two years. Finally, he sent a letter from Alipore Central Jail, Calcutta to the Registry of this Court for commutation of the sentence of death into life imprisonment. This Court took cognizance of the fact that the petitioner was in jail since 1972 and substituted the sentence of imprisonment for life in place of the sentence of death.

20. In the appellant's case, there was a long time gap of 12 years between the submission of the petition under Article 72 of the Constitution and rejection thereof. The Union of India has tried to explain this time gap by citing correspondence between the Central Government and the Government of Assam, consideration of the matter in different levels in the Ministry of Home Affairs etc. However, no explanation has been given for the time gap of three years between 20.6.2001, i.e.,

the date on which the then Home Minister made recommendation for rejection of the mercy petition filed by the appellant, and September, 2004, when the file again started moving within the Ministry and five years between 30.9.2005, i.e., the date on which the President opined that the mercy petition of the appellant be accepted and September, 2010, when the file was actually summoned back by the Ministry of Home Affairs. That apart, what is most intriguing is that even though in note dated 5.10.2010 prepared by the Joint Secretary, Ministry of Home Affairs, a reference was made to note dated 30.9.2005 of the then President Dr. A.P.J. Abdul Kalam, while making recommendation on 12.10.2010 to the successor in the office of the President that the appellant's mercy petition be rejected, the Home Minister did not even make a mention of note dated 30.9.2005. In the summary prepared by the Home Ministry for the President's consideration, which was signed by the Home Minister on 18.10.2010, also no reference was made to the order and note dated 30.9.2005 of the then President. Why this was done has not been explained by the respondents. Though, the file containing the petition filed by the appellant and various notings recorded therein must have been place before the President, omission to make a mention of the order passed by her predecessor and note dated 30.9.2005 from the summary prepared for her consideration leads to an inference that the President was kept in dark about the view expressed by her predecessor and was deprived of an opportunity to objectively consider the entire matter.

21. It is neither the pleaded case of the respondents nor any material has been produced before this Court to show that the Government of India had placed the file before the then President for review of the order recorded by him on 30.9.2005 or the President who finally decided the appellant's petition on 8.5.2011 was requested to reconsider the decision of her predecessor. Therefore, it must be held that the President was not properly advised and assisted in the disposal of the petition

filed by the appellant.

22. The Division Bench of the Gauhati High Court did not have the benefit of going through the record/files maintained by the Ministry of Home Affairs and this is the reason why the impugned order does not contain any reference to the order passed by the President on 30.9.2005 and the note recorded by him for the consideration of the Home Minster.

23. In the above backdrop, we are convinced that 12 years delay in the disposal of the appellant's mercy petition was sufficient for commutation of the sentence of death and the Division Bench of the High Court committed serious error by dismissing the writ petition solely on the ground that he was found guilty of committing heinous crime. The Division Bench of the High Court was also not justified in distinguishing the judgment in Daya Singh's case on the assumption that the case appears to have been decided by this Court under Article 142 of the Constitution. A careful reading of that judgment shows that this Court had commuted the sentence of death of Daya Singh into life imprisonment by taking into consideration long time gap of 12 years in the execution of death sentence and the judgment of the Constitution Bench in Triveniben's case. This is evinced from paragraphs 5, 7, 8 and 9 of the judgment, which are extracted below:

> "**5.** Before proceeding further we may refer to the decision in Triveniben case laying down the principle which governs the present petition. Although the cases were disposed of by two judgments, according to the opinion of the bench, which was unanimous, undue delay in execution of the sentence of death entitles the condemned prisoner to approach this Court under Article 32, but this Court will examine only the nature of delay caused and circumstances ensued after the sentence was finally confirmed by the judicial process, and will have no jurisdiction to reopen the conclusions reached by the court while finally maintaining the sentence of death. Further,

> while considering the grievance of inordinate delay this Court may consider all the circumstances of the case for deciding as to whether the sentence of death should be altered into imprisonment for life, and no fixed period of delay could be held to make the sentence of death inexecutable. In the light of these observations the circumstances of the present case are to be examined.
>
> **7.** The initial reason for the further delay has been a fresh mercy petition filed by the petitioner. Does this fact justify keeping him under a sense of anticipation for more than two years? If the prayer was not considered fit to be rejected at once it was certainly appropriate to have stayed the execution, but the matter should have been disposed of expeditiously and not kept in abeyance as has been done. The counter-affidavit filed on behalf of the Union of India states that on the receipt of the last mercy petition the Governor of Haryana immediately made a reference to the President of India seeking enlightenment on the question as to whether the Governor, while dealing with such applications, is bound by the advice of the Chief Minister of the State and whether it is open to the Governor to exercise his constitutional power in a case where an earlier application to the same effect had been rejected by the President. Soon after the receipt of this communication, the matter was referred to the Department of Legal Affairs, Ministry of Law and Justice for advice, and the Ministry suggested that the question should be discussed with the Attorney General of India. Since the matter remained under consideration no reply could be sent to the query and ultimately it was only in March this year, that the reply could be sent in the shape of a directive under Article 257(1) of the Constitution to all the Chief Secretaries of the State Governments and Union territories. The affidavit, however, does not furnish any fact or circumstance in justification of the delay. In absence of any reasonable explanation by the respondents we are of

the view that if the concerned officers had bestowed the necessary attention to the matter and devoted the time its urgency needed, we have no doubt that the entire process of consideration of the questions referred would have been completed within a reasonable period without leaving any yawning gap rightly described by the learned Additional Solicitor General as "embarrassing gap". There has, thus, been an avoidable delay, which is considerable in the totality of circumstances in the present case, for which the condemned prisoner is in no way responsible.

8. As was cautioned by this Court in Triveniben case we are not laying down any rule of general application that the delay of two years will entitle a convict, sentenced to death, to conversion of his sentence into one for life imprisonment, rather we have taken into account the cumulative effect of all the circumstances of the case for considering the prayer of the petitioner. Although the fact that the petitioner has been continuously detained in prison since 1972 was taken into account while rejecting his earlier writ petition, the same is not rendered completely irrelevant for the purpose of the present case and we have taken it into consideration merely as a circumstance assuming significance as a result of the relevant circumstances arising subsequent to the judgment rendered in October 1988.

9. Having regard to all the circumstances of the case, we deem it fit to and accordingly substitute the sentence of imprisonment for life in place of the petitioner's death sentence. The writ petition is accordingly allowed."

24. In the result, the appeal is allowed, the impugned order is set aside. The rejection of the appellant's mercy petition is declared illegal and quashed and the sentence of death awarded to him by the trial Court, which has been confirmed by the High Court and this Court is commuted into life imprisonment.

B.B.B. Appeal allowed.

STATE OF RAJASTHAN
v.
SHRAVAN RAM & ANR.
(Criminal Appeal No. 427 of 2007)

MAY 1, 2013

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

Evidence Act, 1872 – s.32 – Multiple dying declarations – Appreciation of – Held: It is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case – If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration but the statement should be consistent throughout – However, if some inconsistencies are noticed between one dying declaration and the other, the Court has to examine the nature of the inconsistencies, namely, whether they are material or not and while scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances – On facts, there are not only material contradictions in both the dying declarations but also inter-se discrepancies in the depositions of the witnesses as well – Due to discrepancies and contradictions between the two dying declarations and also in the absence of any other reliable evidence, the High Court was justified in reversing the conviction of accused-respondents which calls for no interference by the Supreme Court.

A married woman died due to 99% burn injuries. There is no eye-witness to the occurrence and the entire case hinges upon three alleged dying declarations made by the deceased and circumstantial evidence. The first accused is the father-in-law and second accused is the husband. The three dying declarations are: (i) *Parcha Bayan* of the deceased (P14-A) as recorded by ASI which

was signed by PW13 (SHO) in the presence of the doctor who also signed the same; (ii) Dying declaration stated to have been signed by the Sub-Divisional Magistrate and (iii) Dying declaration, as made by the deceased, before PW3, a neighbour, which finds a place in the statement (Ex. P6) made by him to the police under Section 161 of Cr.P.C. PW3 stated that the deceased had raised hue and cry after the burn injuries and abused her father-in-law.

However, only two dying declarations are on record, the second one mentioned above was not brought out in evidence.

The trial court convicted the accused-respondents under Section 302, IPC and sentenced them for life imprisonment. On appeal, the High Court reversed the conviction and acquitted the respondents, and therefore the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1. It is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration but the statement should be consistent throughout. However, if some inconsistencies are noticed between one dying declaration and the other, the Court has to examine the nature of the inconsistencies, namely, whether they are material or not and while scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances. [Para 18] [1087-C-F]

1.2. In the instant case, there are not only material contradictions in both the dying declarations but also

inter se discrepancies in the depositions of the witnesses as well. In the first dying declaration recorded by ASI, signed by PW13, there is no mention of the names of any of the accused persons and the deceased had stated that she could not recognize the person who set her ablaze even though the declaration was in consonance with Rule 6.22 of the Rajasthan Police Rules, 1965. [Para 21] [1088-D-F]

1.3. So far as the statement of PW3 recorded under Section 161, Cr.P.C. marked as Exh. P6 is concerned, the deceased was only abusing her father in law and that was not even corroborated by PW4 or PW5 and PW3 himself turned hostile. Due to discrepancies and contradictions between the two dying declarations and also in the absence of any other reliable evidence, the High Court is justified in reversing the order of conviction which calls for no interference by this Court. [Para 22] [1088-F-H]

Arvind Singh v. State of Bihar **(2001) 6 SCC 407: 2001 (3) SCR 218;** *Bhajju Alias Karan Singh v. State of Madhya Pradesh* **(2012) 4 SCC 327: 2012 (5) SCR 37;** *Smt. Kamla v. State of Punjab* **(1993) 1 SCC 1;** *Kishan Lal v. State of Rajasthan* **(2000) 1 SCC 310: 1999 (1) Suppl. SCR 517;** *Lella Srinivasa Rao v. State of A.P.* **(2004) 9 SCC 713: 2004 (2) SCR 659;** *Amol Singh v. State of Madhya Pradesh* **(2008) 5 SCC 468: 2008 (8) SCR 956;** *State of Andhra Pradesh v. P. Khaja Hussain* **(2009) 15 SCC 120: 2009 (6) SCR 660 and** *Sharda v. State of Rajasthan* **(2010) 2 SCC 85: 2009 (16) SCR 441 – relied on.**

Case Law Reference:

2001 (3) SCR 218	**relied on**	**Para 9**
2012 (5) SCR 37	**relied on**	**Para 10**
(1993) 1 SCC 1	**relied on**	**Para 15**

1999 (1) Suppl. SCR 517	**relied on**	**Para 16**
2004 (2) SCR 659	**relied on**	**Para 17**
2008 (8) SCR 956	**relied on**	**Para 18**
2009 (6) SCR 660	**relied on**	**Para 19**
2009 (16) SCR 441	**relied on**	**Para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 427 of 2007.

From the Judgment & Order dated 10.05.2006 of the High Court of Judicature for Rajasthan at Jaipur Bench, Jaipur in D.B. Criminal Appeal No. 124 of 2001.

Shoran Mishra, Milind Kumar for the Appellant.

Abhishek Gupta, Pratibha Jain for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. This is an appeal by the State of Rajasthan against the Judgment in D.B. Criminal Appeal No. 124 of 2001 passed by the High Court of Rajasthan. The Additional Sessions Judge convicted the accused persons under Section 302, IPC and sentenced them for life imprisonment with fine which was reversed by the High Court and acquitted the accused persons.

2. The prosecution case is as follows:

Guddi, the deceased, was admitted in the hospital on 11.09.1998 with ninety nine per cent burn injuries. *Parcha Bayan* (Ex.P14A) of the deceased was recorded by ASI, Ram Kishan and signed by SHO Mohan Lal PW13 in the hospital. On the basis of the said *Parcha Bayan*, FIR No. 300/98 was registered at police station Madanganj (Ajmer) against the accused persons under Section 307, IPC. During treatment, Guddi died at about 10AM on the same day and the case was converted into Section 302, IPC. During the course of

investigation, both the accused persons were arrested on 12.09.1998, first accused is the father-in-law and second accused is the husband. The accused persons denied the charges and the case went to trial. On the side of the prosecution 14 witnesses were examined. The Additional Sessions Judge, placed considerable reliance on the dying declaration stated to have been made before PW 3 Prem Chand, a neighbour which find a place in the statement (Ex. P6) made by him to the police under Section 161 of Cr.P.C. PW3 has stated that the deceased had raised hue and cry after the burn injuries and abused the father-in-law - Sharvan Ram and based on the evidence of PW3 and his 161 statement, the Session Court found the accused persons guilty.

3. Following are the circumstances which weighed with the Additional Sessions Judge:

(i) That Smt. Guddi, aged 19 years died after two years of her marriage due to 99% burn injuries after pouring kerosene on her enlightening match stick, therefore the death is homicidal.

(ii) Deceased was in the custody of accused appellants and simply on account of going outside the house were the 'occurrence took place' custody will not be ceased.

(iii) PW1 Nathu Lal (father), PW2 Kailash (uncle) and PW13 Smt. Suraj Devi (mother) of the deceased in their statements have deposed that Smt. Guddi was not allowed by the accused appellants to go to her matrimonial home.

(iv) The version of Prem Chand, PW3 in his statement under Section 161 Cr.P.C. was considered as dying declaration and not the *Parcha Bayan*. Reliance was not placed by Additional Sessions Judge on *Parcha Bayan* of deceased.

(v) That the previous and subsequent conduct of accused appellants was not satisfactorily explained in their statements under Section 313 Cr.P.C as required under Section 8 of the Evidence Act.

(vi) Since the death was caused in the custody of the accused, therefore, the accused were also responsible for proving the fact of burn which was specifically within their knowledge as required under Section 106 of the Indian Evidence Act and further according to Section 114 of the Indian Evidence Act presumption has to be drawn against accused appellants.

4. Shri Abhishek Gupta, learned counsel appearing for the respondents submitted that the High Court has rightly held that it is not safe to base conviction on the statement of PW 3 – Prem Chand recorded under Section 161 Cr.P.C., who was declared hostile. Further, it was also pointed out that in the statement under Section 161 Cr.P.C., PW3 had not named the second accused - Pappu Lal, husband of the deceased. Further, it was also pointed out that PW4 Smt. Choti and PW5 Narayan, who are neighbours, did not disclose the cause of death and have not mentioned the names of any of the accused persons in their evidence. Therefore, the dying declaration made before Prem Chand remained uncorroborated and the High Court has rightly held that no reliance could be placed on uncorroborated dying declaration. Learned counsel, therefore, submitted that the judgment of the High Court calls for no interference.

5. Shri Shoran Mishra, learned counsel appearing for the State submitted that the High Court has committed an error in not placing reliance on the evidence of PW3 and the statement made by him before the Police under Section 161 Cr.P.C., wherein the name of the second accused has been mentioned. Learned counsel also submitted that the High Court has failed to notice the fact that the deceased was in the custody of the

respondents and therefore the burden of explaining the fact of burning is on the accused persons. Further, they have failed to provide any explanation when examined under Section 313 Cr.P.C. Learned counsel also pointed out that the High Court has not properly appreciated the evidence by PW1 - Nathu lal (father of the deceased), PW2 - Kailash (uncle of the deceased) and PW14 – Suraj Devi (mother of the deceased). PW14 in her deposition stated that the deceased father in law used to say that Guddi is his wife and she had deposed that her daughter had told if the above facts were disclosed she would be killed by burning. Learned counsel, therefore, submitted that the evidence of PW1, PW2 and PW14 coupled with the statement made by PW3 would establish the guilt of the respondents and the trial court has rightly convicted them.

6. We notice that there is no eye-witness to the occurrence and the entire case hinges upon few alleged dying declarations made by the deceased and circumstantial evidence. PW11 – Dr. P.C. Patni conducted the autopsy and gave report Ex.P14 in which it is stated that the deceased had 99% burn injuries. Post mortem was conducted by members of the board and in their opinion cause of death was hypovolumic shock as a result of ante-mortem burn and the death had occurred within 24 hours and there was no evidence of suicide or accidental fire and therefore the case was homicidal.

7. We are in this case concerned with three dying declarations which are as follows:

(i) ASI Kishan recorded *Parcha Bayan* of the deceased which was signed by PW13 Mohan Lal in the presence of the doctor who also signed the same. Further, the accused also stated to have affixed his thumb impression.

(ii) Dying declaration stated to have been made on 11.09.1998 , signed by the Sub-Divisional Magistrate but neither the said dying declaration

had been exhibited nor the Sub-Divisional Magistrate had been produced in evidence.

(iii) Dying declaration, as made by the deceased, before PW 3, Prem Chand, which had been stated by him in his statement under Section 161, Cr.P.C.

8. We find only two dying declarations are on record, the second one mentioned above was not brought out in evidence. *Parcha Bayan* of the deceased, based on which the case was registered reads as follows:

> "I stay in Maliyon ki Dhani Madanganj. Today morning at around four-five, I had gone from home to near the drain adjacent Shivji Temple to ease myself and I was easing myself when at that time a person wearing white pant and shirt came. And in his hand there was a kerosene can, and poured over me. And lighting a match poured over me. My terecot clothes immediately caught fire. I fell in the drain and coming out of the drain reached the house being inflamed and narrated the whole incident to the family members. I did not recognize the person. I being inflamed fell in the drain and coming from the drain came being inflamed and narrated the whole incident to the family members, who have brought me to the hospital, my marriage took place two years back."

The third dying declaration stated to have been made by the deceased before PW3 – Prem Chand was referred to in Part A to B of Ex.P6 reads as follows:

> "She was a woman who shouting at the site and was abusing her father in law Shravan Ram that you be doomed you ran away setting me on fire."

9. We may now examine, whether statement of PW3 – Prem Chand recorded under Section 161, Cr.P.C., marked as Ex.P6 could be accepted as a dying declaration, wherein it was stated by him that the deceased was raising hue and cry and

was abusing her father in law for ablazing her. PW3 was declared as hostile. Further, PW4 and PW5, the neighbours, who have stated to have seen the deceased in a burning state and raising hue and cry, neither disclosed the cause of death nor mentioned the names of any of the accused persons. Consequently, the dying declaration made by Prem Chand remained uncorroborated. It is trite law that it is unsafe to base reliance on the statement made under Section 161 Cr.P.C. as dying declaration without any corroboration. Although corroboration as such is not essential but it is expedient to have the same, in order to strengthen the evidentiary value of declaration. This court in *Arvind Singh v. State of Bihar* (2001) 6 SCC 407 while dealing with the case of oral dying declaration stated as follows:

> "Dying declaration shall have to be dealt with care and caution. Corroboration is not essential but it is expedient to have the same, in order to strengthen the evidentiary value of declaration. Independent witnesses may not be available but there should be proper care and caution in the matter of acceptance of such a statement as trustworthy evidence."

10. This Court in *Bhajju Alias Karan Singh v. State of Madhya Pradesh* (2012) 4 SCC 327 while dealing with admissibility of dying declaration held as follows:

> "The law is well settled that a dying declaration is admissible in evidence and the admissibility is founded on the principle of necessity. A dying declaration, if found reliable, can form the basis of a conviction. A court of facts is not excluded from acting upon an uncorroborated dying declaration for finding conviction. The dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in light of the surrounding circumstances and its weight determined by reference to the principle governing the weighing of evidence. If in a given case a

particular dying declaration suffers from any infirmity, either of its own or as disclosed by the other evidence adduced in the case or the circumstances coming to its notice, the court may, as a rule of prudence, look for corroboration and if the infirmities are such as would render a dying declaration so infirm that it pricks the conscience of the court, the same may be refused to be accepted as forming basis of the conviction."

11. Applying the above legal principles and examining the facts on record, we are of the view that no reliance could be placed on the statement made by PW3 – Prem Chand under Section 161 Cr.P.C. before the police in the absence of any corroboration. Over and above, PW3 has himself turned hostile.

12. We will now deal with the question whether the dying declaration stated to have been recorded by ASI Ramkishan, signed by SHO Mohan Lal (PW13) as well as Dr. Anil Kumar Soni would be sufficient to base the conviction.

13. First we will examine whether P14-A, *Parcha Bayan,* which was converted into dying declaration is made in consonance with Rule 6.22 of the Rajasthan Police Rules, 1965. Rule 6.22 of the Rajasthan Police Rules, 1965 reads as follows:

"Dying Declarations – (1) A dying declaration shall, whenever possible, be recorded by a Magistrate.

(2) The person making the declaration shall, if possible, be examined by medical officer with a view to ascertaining that he is sufficiently in possession of his reason to make a lucid statement.

(3) If no Magistrate can be obtained, the declaration shall, when a gazetted police officer is not present, be recorded in the presence of two or more reliable witnesses unconnected with the police department and with the parties concerned in the case.

(4) If no such witnesses can be obtained without risk of the injured person dying before his statement can be recorded, it shall be recorded in the presence of two or more police officers.

(5) A dying declaration made to a police officer should, under Section 162, Code of Criminal Procedure, be signed by the person making it."

14. We notice, in this case, the above mentioned Rule is substantially complied with, still in our view no reliance could be placed due to lack of corroboration over and above the fact that even in Ex. P14-A, the deceased had not named the accused persons. What she stated is that she did not recognize the person who has ablazed her. Therefore, in the absence of any corroboration and also not naming any of the accused persons in Ex.P14A, no reliance could be placed on the same even though the provision of Rule 6.22 of the Rajasthan Police Rules, 1965 has been complied with.

15. This Court had occasion to consider the scope of multiple dying declarations in *Smt. Kamla v. State of Punjab* (1993) 1 SCC 1, this Court held as follows:

"A dying declaration should satisfy all the necessary tests and one such important test is that if there are more than one dying declaration they should be consistent particularly in material particulars."

16. In *Kishan Lal v. State of Rajasthan* (2000) 1 SCC 310, this Court held has follows:

"Examining these two dying declarations, we find not only that they gave two conflicting versions but there is inter se discrepancies in the depositions of the witnesses given in support of the other dying declaration dated 6.11.1976. Finally, in the dying declaration before a Magistrate on which possibly more reliance could have been placed the deceased did not name any of the accused. Thus, we have

no hesitation to hold that these two dying declarations do not bring home the guilt of the appellant. High Court, therefore, erred in placing reliance on it by erroneously evaluating them."

17. In *Lella Srinivasa Rao v. State of A.P.* (2004) 9 SCC 713, this Court had occasion to consider the legality and acceptability of two dying declarations. Noticing the inconsistency between the two dying declarations, the Court held that it is not safe to act solely on the said declarations to convict the accused persons.

18. In *Amol Singh v. State of Madhya Pradesh* (2008) 5 SCC 468, this Court interfered with the order of sentence noticing inconsistencies between the multiple dying declarations. It is not the plurality of the dying declarations but the reliability thereof that adds weight to the prosecution case. If a dying declaration is found to be voluntary, reliable and made in fit mental condition, it can be relied upon without any corroboration but the statement should be consistent throughout. However, if some inconsistencies are noticed between one dying declaration and the other, the Court has to examine the nature of the inconsistencies, namely, whether they are material or not and while scrutinising the contents of various dying declarations, in such a situation, the court has to examine the same in the light of the various surrounding facts and circumstances.

19. In *State of Andhra Pradesh v. P. Khaja Hussain* (2009) 15 SCC 120, this Court rejected the appeal filed against the acquittal holding that it was not a case where the variation between the two dying declarations was trivial in nature.

20. In *Sharda v. State of Rajasthan* (2010) 2 SCC 85, this Court has dealt with three dying declarations. Noticing inconsistencies between dying declarations, this Court set aside the sentence ordered by Sessions Judge as well as High Court and held as follows:

"Though a dying declaration is entitled and is still

recognised by law to be given greater weightage but it has also to be kept in mind that the accused had no chance of cross-examination. Such a right of cross-examination is essential for eliciting the truth as an obligation of oath. This is the reason, generally, the court insists tha the dying declaration should be such which inspires full confidence of the court of its correctness. The court has to be on guard that such statement of the deceased was not as a result of either tutoring, prompting or product of imagination. The court must be further satisfied that the deceased was in a fit state of mind after a clear opportunity to observe and identify the assailants. Once the court is satisfied that the aforesaid requirement and also to the fact that declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration."

21. We have gone through both the dying declarations and there are not only material contradictions in both the declarations but also inter se discrepancies in the depositions of the witnesses as well. In the first dying declaration recorded by ASI, signed by PW13, there is no mention of the names of any of the accused persons and the deceased had stated that she could not recognize the person who set her ablaze even though the declaration was in consonance with Rule 6.22 of the Rajasthan Police Rules, 1965.

22. So far as the statement of PW3 – Prem Chand recorded under Section 161, Cr.P.C. marked as Exh. P6 is concerned, the deceased was only abusing her father in law and that was not even corroborated by PW4 or PW5 and PW3 himself turned hostile. Due to discrepancies and contradictions between the two dying declarations and also in the absence of any other reliable evidence, in our view, the High Court is justified in reversing the order of conviction which calls for no interference by this Court. In view of above, the appeal is, therefore, dismissed.

B.B.B. Appeal dismissed.

SMT. SARITA DOKANIA AND ANR.ETC.
v.
SMT. KRISHNA DEY AND ANR.
(Civil Appeal Nos. 4547-4548 of 2013)

MAY 06, 2013

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

Interest – On earnest money – Suits for specific performance of agreement – Decreed by trial court – Decree modified by High Court declining the relief of specific performance and granting the alternative relief of refund of earnest money – On appeal to Supreme Court notice issued limited on the question of interest on earnest money – Plea of vendor that vendee was not entitled to interest because the vendor had immediately after the agreement had offered to refund the earnest money – Held: Vendor was liable to pay interest on the earnest money from the date of its receipt – The vendors in order to avoid the liability to pay interest, should have deposited the earnest money with the trial court, instead of utilizing the same – Direction to vendor to refund the earnest money alongwith interest at the rate of 9% from the date of receipt of earnest money, till the date of its payment.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4547-4548 of 2013.

From the Judgment & Order dated 04.01.2011 of the High Court of Patna in FA No. 5 and 8 of 2008.

Dhruv Mehta, A.K. Das, Bankey Bihari, Sameer for the Appellants.

Neeraj Shekhar for the Respondents.

The following Order of the Court was delivered

O R D E R

1. We have heard learned counsel for the parties.

2. Leave granted.

3. The appellants impugn the judgments dated 4th January, 2011 rendered by the Patna High Court in First Appeal No. 5 of 2008 and First Appeal No. 8 of 2008. The appellants have filed two suits against the respondents for specific performance of agreements dated 25th July, 1999 and 27th July, 1999. The suits were contested by the respondents on legal issues as well as on facts. It was the specific plea of the respondents that notice dated 4th September, 1999 was sent to the appellants with a request to receive back the earnest money as the legal representatives of the sister were not agreeing to the performance of the Agreement executed by the respondents. The appellants, however, did not accept the aforesaid offer and filed the suit for specific performance.

4. The Trial Court decreed the two suits for specific performance. The respondents challenged the judgment and decree passed by the Trial Court in First Appeal Nos. 5 of 2008 and 8 of 2008.

5. The High Court upheld all the findings recorded by the Trial Court but declined the relief of specific performance and granted the alternative relief for refund of the earnest money deposited by the appellants. The relief of specific performance was denied to the appellants on the ground that specific performance of the contract would cause undue hardship to the respondents. However, on admission that the respondents had received the earnest money, a direction was issued to refund the same. The judgment and decrees passed by the Trial Court was modified accordingly.

6. In the present two appeals, the appellants claim that the

High Court having upheld on facts the agreements entered into between the parties and noticing that the respondents had received the earnest money, wrongly declined to grant relief of specific performance to the appellants.

7. We are not inclined to examine the issue on merits at this stage, even though Mr. Dhruv Mehta, learned senior counsel appearing for the appellants has tried to persuade us to decide the issue on merits. This Court while issuing notice on 9.12.2011 restricted the same as to why the appellants be not granted interest on the earnest money admittedly received by the respondents. Faced with this situation, Mr. Mehta submits that the appellants are entitled to receive interest from the date the respondents received the amount till date. On the other hand, Mr. Neeraj Shekhar, learned counsel for the respondents submits that the appellants had been asked to receive back the earnest money on 27th July, 1999. Therefore, the appellants cannot now, rightly, claim any interest.

8. We have considered the submissions made by the learned counsel for the parties. We are of the opinion that the claim made by the appellants with regard to interest deserves to be accepted. It is not disputed that the respondents had offered to pay back the earnest money. However, the offer was rejected by the appellants and the necessary relief was sought by bringing the two Civil Suits. We are not inclined to accept the submission made by the learned counsel for the respondents that as soon as the respondents had made an offer to return the earnest money, the appellants cannot claim interest on the amount of earnest money, which has still not been returned to the appellants. Undoubtedly, the respondents had shown their bonafide to return the money. However, since the refund was not accepted, the respondents ought to have deposited the earnest money in the Trial Court, where the two suits were pending. There was no impediment in the respondents adopting such a course to avoid the liabilities to pay interest. The net result is that the respondents have utilised

the earnest money ever since it had been received by them. Consequently, in our opinion, the appellants would be entitled to interest on refund of the earnest money.

9. In view of the above, we allow the appeals to this limited extent. The respondents are directed to refund to the appellants the amount of earnest money, which have been indicated by the High Court in paragraph 20(vii) of the judgment, together with interest at the rate of 9% from the date of receipt of the earnest money till payment. Let the amount be paid within three months from the date of receipt of copy of this order.

K.K.T. Appeals partly allowed.

SMT. V. SUDHA
v.
P. GANAPATHI BHAT & ANR.
(Civil Appeal No. 4340 of 2013)

MAY 6, 2013

[G.S. SINGHVI AND H.L. GOKHALE, JJ.]

Motor Vehicles Act, 1988 – ss.168 & 173 – Just Compensation – Grant of – Towards future medical expenses – Appellant, aged about 36 years, hit by motorcycle driven by respondent no.1 – Admitted in Hospital, and treated by PW2, Orthopaedic Surgeon – Serious physical impairment in left leg of appellant – Claim petition by appellant for compensation of Rs.3,50,000/- – MACT awarded amount of Rs.1,94,350/- with interest @ 8% p.a from the date of petition – High Court enhanced the award to Rs.2,65,000/- – Plea of appellant that future medical expenses and necessary treatment were not considered adequately by the High Court – Appellant claimed that she needed to undergo hip replacement surgery which could cost Rs.2 lakhs – Held: Tribunal is required to determine the amount of compensation 'which appears to it to be just' – Compensation should, to the extent possible fully and adequately restore the claimant to the position prior to the accident – On facts, High Court awarded only Rs.15,000/- towards future medical expenses – It lost sight of the statement of PW2 that to minimize persistent disablement, the appellant needed to undergo femoral head excision and Bipolar Hemi-arthoplasty which would cost more than Rs.90,000/- — Corroborative evidence given by PW2 accepted, and amount as reflected in his evidence added – This would add an amount of Rs.75,000/- to the compensation awarded by the High Court which takes it to a figure of Rs.3,40,000/ — Further, since, PW2 said that the expenses could be more than Rs.90,000/- but did not specify

how much would be that amount, further amount of Rs.10,000/- added to make it Rs.3,50,000/- and thus fully allow the claim of the appellant.

The appellant, aged about 36 years sustained grievous injuries in a road accident when a motorcycle driven by respondent no.1 came in a rash and negligent manner at a high speed and dashed against her. The motorcycle was insured with respondent no.2-National Insurance Company. The appellant was admitted in Hospital, where she was treated by PW2, Orthopaedic Surgeon. PW2 opined that there was serious physical impairment in the left leg of the appellant. Referring to the future treatment which was expected for the appellant, PW2 stated that to minimize the persistent disablement, the appellant needed to undergo femoral head excision and Bipolar Hemi-arthoplasty which would cost more than Rs.90,000/-.

The appellant filed petition claiming compensation of Rs.3,50,000/-. Though the appellant had claimed her monthly income in the range of Rs.6000/- to Rs.7000/- but the Motor Accident Claims Tribunal took it as Rs.3000/- and awarded an amount of Rs.1,94,350/- with interest @ 8% per annum from the date of petition. On appeal, the High Court enhanced the amount of compensation to Rs.2,65,000/-.

In the instant appeal, the appellant submitted that the future medical expenses and necessary treatment were not considered adequately by the High Court. The appellant claimed that she needed to undergo hip replacement surgery which could cost Rs.2 lakhs.

Allowing the appeal, the Court

HELD: 1. 1. Under Section 168 of the Motor Vehicle Act, the Tribunal passes its award requires the Tribunal

to determine the amount of compensation 'which appears to it to be just'. The provisions of the Motor Vehicles Act makes it clear that the award must be just, which means that the compensation should, to the extent possible fully and adequately restore the claimant to the position prior to the accident. [Para 13] [1101-D-E; 1101-G-H; 1102-A]

1.2. In the present case, the evidence of the doctor tendered in the Tribunal stated that the future treatment would cost more than Rs.90,000/-. This corroborating evidence has not been contravented. The High Court however awarded only an amount of Rs.15,000/- towards future medical expenses. It lost sight of the statement of the doctor that to minimize the persistent disablement the appellant needed to undergo femoral head excision and Bipolar Hemi-arthoplasty which would cost more than Rs.90,000/-. In view of the same, the corroborative evidence given by the doctor is accepted, and the amount as reflected in the doctor's evidence is added. This would add the remaining amount of Rs.75,000/- to the compensation awarded by the High Court which takes it to a figure of Rs.3,40,000/. Since, the doctor has said that the expenses could be more than Rs.90,000/- but has not specified how much would be that amount, the remaining amount of Rs.10,000/- is added to make it Rs.3,50,000/- and thus fully allow the claim of the appellant. [Paras 11, 14] [1100-F-G; 1103-B-E]

3. The claim petition filed by the appellant stand decreed at Rs.3,50,000/- with interest @ 8% per annum from the date of the petition as awarded by the Tribunal (MACT). The respondent No.2 insurance company is directed to pay the amount as now added with interest at 8% as above. [Para 15] [1103-G]

R.D. Hattangadi Vs. Pest Control (India) Pvt. Ltd. **1995 (1) SCC 551: 1995 (1) SCR 75;** *Arvind Kumar Vs. New India*

Insurance **2010 (10) SCC 254: 2010 (11) SCR 857;** *Raj Kumar Vs. Ajay Kumar* **2011 (1) SCC 343: 2010 (13) SCR 179 and** *Kavita Vs. Deepak* **2012 (8) SCC 604 – relied on.**

Case Law Reference:

1995 (1) SCR 75	**relied on**	**Para 13**
2010 (11) SCR 857	**relied on**	**Para 13**
2010 (13) SCR 179	**relied on**	**Para 13**
2012 (8) SCC 604	**relied on**	**Para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4340 of 2013.

From the Judgment and Order dated 01.02.2011 of the High Court of Karnataka at Bangalore in MFA No. 3356 of 2009.

Kiran Suri, Nakibur Rahman Barbhuiya for the Appellant.

Parmanand Gaur for the Respondents.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. Delay condoned. Leave granted.

2. This appeal by special leave seeks to challenge the judgment and order dated 1.2.2011 rendered by a Single Judge of the Karnataka High Court in MFA No.3356 of 2009 (MV), whereby the learned Single Judge modified the award rendered by the Motor Accident Claims Tribunal ("MACT" for short) Bangalore dated 7.2.2009 in M.V.C. No.7724 of 2007. The High Court by the impugned judgment and order has enhanced the compensation payable to the appellant for the accidental injury suffered by her, though not fully meeting her requirement, and hence this appeal by Special Leave.

Facts leading to this appeal are as follows:-

3. The appellant then aged about 36 years sustained grievous injuries on 11.9.2007 in a road accident which occurred at Mill Road Junction, Cottonpete Main Road, Bangalore. The appellant claims to be doing the business of selling saaris and on that date when she was proceeding on that road at about 3.30 pm, a motorcycle driven by the respondent no.1 bearing registration no.KA-02-ET-8786 came in a rash and negligent manner at a high speed and dashed against her. The appellant sustained grievous injuries and was admitted in Srinivasa Hospital, Bangalore where she was treated by Dr. Avinash s/o B. Parthosarthi, Orthopaedic Surgeon.

4. The appellant was treated for the following injuries:-

(i) Fracture of distal end of left radius (forearm bone)

(ii) Fracture of left neck of femur – (hip bone)

(iii) Abrasions over left elbow

The wound certificate issued by the doctor stated that injury no.1 and 2 above were grievous in nature.

5. As per the medical record the appellant had to be operated for 'close reduction and annulated screw fixation of fractured neck of femur'. 'Close reduction and B/E POP cast was applied for fractured lower end of left radius'. After the discharge from the hospital she continued to suffer pain in left forearm and left hip, and found difficulty in walking. She suffered for inability to stand with full weight in left lower limb, and needed crutches to walk. She could not squat and sit cross legged, had great difficulty in climbing stairs, and could not stand for longer duration.

6. The appellant filed the above referred motor accident claim petition bearing MVC No.7724 of 2007 and claimed the compensation of Rs.3,50,000/-. The respondent no.2-National

Insurance Company with which the motorcycle was insured, filed its written statement and produced the insurance policy which showed that the motorcycle was insured with it on the date of the accident. Respondent no.1 did not file any written statement. The MACT framed two issues, firstly whether the appellant proved that she has sustained grievous injuries in the road accident on that date due to the rash and negligent act of the rider of the concerned motorcycle. The second issue framed was whether the appellant was entitled for compensation, and if so what amount and from whom. The appellant filed her evidence by affidavit and supported her claim with the affidavit of above referred Dr. Avinash dated 3.12.2008.

7. While deciding the first issue, the MACT considered the statement of the appellant in her affidavit about the occurrence of the accident. The Court noted the contents of the FIR, and the chargesheet filed in the Magistrate's Court. The rider of the motorcycle did not file the written statement, nor did he step into the witness box. The Tribunal was therefore, constrained to draw the adverse inference that the respondent No. 1 was responsible for the accident, and that the accident was caused by his rash and negligent driving.

8. Turning to the issue no.2, the MACT considered the evidence produced by the appellant by way of her affidavit, as well as the evidence through the affidavit of Dr. Avinash (PW2) dated 3.12.2008. Dr. Avinash placed on record as to how the appellant was admitted to Srinivasa Hospital, and the treatment given to her. He pointed out that after her discharge from the hospital she continued to come to the hospital with complaints of pain in left forearm and left hip, difficulty in walking, inability to stand with full weight, restriction of the movement, needing the crutches to walk and not being able to sit down with cross legs or to squat. He opined that there was serious physical impairment in her left leg. Its mobility component as well as the stability component had been seriously eroded. Its mobility component was eroded by 16.3% and stability component was eroded by 30%. The doctor assessed the permanent disability

to the left lower limb at 52%, and in relation to the whole body at 17.3%. In his affidavit, the doctor referred to the future treatment which was expected for the appellant. He stated that to minimize the persistent disablement, she needed to undergo femoral head excision and Bipolar Hemi-arthoplasty which would cost more than Rs.90,000/-.

9. The appellant had claimed her monthly income in the range of Rs.6000 to Rs.7000 but the MACT took it as Rs.3000/- and arrived at annual income of Rs.36,000/-. The Tribunal awarded an amount of Rs.1,94,350/- with interest @ 8% per annum from the date of petition till the date of depositing the amount in Court with advocate fee fixed at Rs.500/-. The amount of compensation was arrived at in the following manner:-

1)	Pain and suffering	Rs.30,000/-
2)	Loss of future income & disability	Rs.81,000/-
3)	Loss of amenities	Rs.20,000/-
4)	Loss of expectation of life	Rs.15,000/-
5)	Medical Expenses	Rs.38,346/-
6)	Travelling expenses	Rs.10,000/-
	Total	Rs.1,94,350/-

10. When the appeal filed by the appellant under Section 173 (1) of the Motor Vehicles Act, 1988 (M.V. Act for short) was heard by the High Court, it came to the conclusion that the compensation awarded by the Tribunal under the loss of earning capacity and future loss of earning was on the lower side. The Court noted that the Tribunal had not awarded compensation towards loss of earning, attendants, nourishment and food charges as well as for future medical expenses. The High Court, therefore, modified the award rendered by the MACT and awarded the compensation of Rs.2,65,000/- in the following manner:-

"1)	Pain and suffering	Rs.30,000/-
2)	Medical Expenses	Rs.39,000/-
3)	Loss of earning during laid up Period (Rs.3000 x 6)	Rs.18,000/-
4)	Loss of amenities	Rs.40,000/-
5)	Travelling expenses	Rs.10,000/-
6)	Attendant & nourishing food	Rs.5,000/-
7)	Loss of earning capacity & Future loss of earning (Rs.3000 x 12 x 15 x 0.20)	Rs.1,08,000/-
8)	Future medical expenditure	Rs.15,000/-
	Total	Rs.2,65,000/-"

11. The learned counsel for the appellant criticised the judgment of the High Court principally for accepting the permanent physical disability of the appellant at 17.3% only, and for not considering the supporting medical evidence for future expenses. It was contended that the permanent physical disability was 52%. However, when we see the evidence of the doctor, it is seen that the disability to left lower limb is 52% but the disability to the whole body is 17.3%. However, as far as the award of Rs.15000/- for future medical expenses is concerned, as can be seen the High Court has lost sight of the statement of the doctor that to minimize the persistent disablement the appellant needed to undergo femoral head excision and Bipolar Hemi-arthoplasty which would cost more than Rs.90,000/-.

12. When this special leave petition came for consideration a notice was issued on the prayer of condonation of delay as

also on merits of the appeal. The notice has been served on the respondents. Ms. Kiran Suri has appeared for appellant and Mr. Parmanand Gaur has appeared for the insurance company. Ms. Suri appearing for the appellant has submitted that the future medical expenses and necessary treatment have not been considered adequately by the High Court. In fact now the appellant claims that she needs to undergo hip replacement surgery which could cost Rs.2 lakhs. She has produced a certificate of a consulting orthopedic surgeon of a health centre dated 14.7.2011. (We may however note that the certificate is issued on a date which is even subsequent to the decision of the High Court, and it does not contain the address of the concerned health centre). The counsel for the insurance company has submitted that the compensation has to be in proportion to the injury suffered and not in excess.

13. We have considered the submissions of both the counsel. Section 168 of the Motor Vehicle Act under which the Tribunal passes its award requires the Tribunal to determine the amount of compensation 'which appears to it to be just'. While considering the claim of a injured retired Judge we may note that in *R.D Hattangadi Vs. Pest Control (India) Pvt. Ltd.* reported in 1995 (1) SCC 551 this Court has observed that the determination of compensation involves some hypothetical consideration linked with the nature of the disability, but these factors are required to be considered in an objective manner. In *Arvind Kumar Vs. New India Insurance* reported in 2010 (10) SCC 254, this Court was concerned with the 70% permanent disability suffered by a final year engineering student, and the Court observed that the whole idea in granting the compensation is to put the claimant in the same position as he was in so far as money can. In *Raj Kumar Vs. Ajay Kumar* reported in 2011 (1) SCC 343, this Court observed that the provision of M.V. Act makes it clear that the award must be just, which means that the compensation should, to the extent possible fully and adequately restore the claimant to the

position prior to the accident. With respect to the heads of compensation, the court observed:-

"The heads under which compensation is awarded in personal injury cases are the following:

Pecuniary damages (Special damages)

(i) Expenses relating to treatment, hospitalization, medicines, transportation, nourishing food, and miscellaneous expenditure.

(ii)Loss of earnings (and other gains) which the injured would have made had he not been injured, comprising:

(a) Loss of earning during the period of treatment;

(b) Loss of future earnings on account of permanent disability.

(iii) Future medical expenses.

Non-pecuniary damages (General damages)

(iv) Damages for pain, suffering and trauma as a consequence of the injuries.

(v)Loss of amenities (and/or loss of prospects of marriage).

(vi) Loss of expectation of life (shortening of normal longevity).

In routine personal injury cases, compensation will be awarded only under heads (i), (ii) (a) and (iv). It is only in serious cases of injury, where there is specific medical evidence corroborating the evidence of the claimant, that compensation will be granted under any of the heads (ii) (b), (iii), (v) and (vi) relating to loss of future earnings on account of permanent disability, future medical

expenses, loss of amenities (and/or loss of prospects of marriage) and loss of expectation of life."

14. In the present case, the claim petition filed by the appellant claimed an amount of Rs.3,50,000/-, the Tribunal awarded Rs.1,94,350/- which was enhanced by the High Court to Rs.2,65,000/-. The evidence of the doctor tendered in the Tribunal on 3.12.2008 stated that the future treatment would cost more than Rs.90,000/-. This corroborating evidence has not been contravented. The High Court however awarded only an amount of Rs.15,000/- towards future medical expenses. In view of the dicta in *Raj Kumar Vs. Ajay Kumar* (supra) we accept the corroborative evidence given by the doctor, and add the amount as reflected in the doctor's evidence. A similar view has been taken by a Bench of this Court recently in *Civil Appeal No. 5945 of 2012 Kavita Vs. Deepak,* decided on 22.8.2012 to which one of us (G.S. Singhvi J) was party. This would add the remaining amount of Rs.75,000/- to the compensation awarded by the High Court which takes it to a figure of Rs.3,40,000/. Since, the doctor has said that the expenses could be more than Rs.90,000/- but has not specified how much would be that amount, we add the remaining amount of Rs.10,000/- to make it Rs.3,50,000/- and thus fully allow the claim of the appellant. The amount of Rs.85,000/- thus added, with interest at 8% from the date of the petition (as originally awarded) will give her an added amount in the range of Rs. 1,25,000/. That will meet her requirement as placed before the MACT in her claim petition in its entirety.

15. The appeal is accordingly allowed. The claim petition filed by the appellant will stand decreed at Rs.3,50,000/- with interest @ 8% per annum from the date of the petition as awarded by the MACT. The respondent No.2 insurance company is directed to pay the amount as now added with interest at 8% as above within 8 weeks from today.

B.B.B. Appeal allowed.

SHIVASHARANAPPA AND OTHERS
v.
STATE OF KARNATAKA
(Criminal Appeal No. 1366 of 2007 etc.)

MAY 7, 2013

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

Penal Code, 1860 – ss. 143,147,448,302 and 201 r/w. s. 149 – Prosecution under – Acquittal by trial court on the ground that in view of unnatural behaviour of witnesses, it was not safe to convict the accused on the basis of their evidence – High Court convicted all the accused – Held: Trial court rightly disbelieved the evidence of the witnesses treating their conduct as unnatural – There were no compelling circumstances requiring a reversal of judgment of acquittal – Conviction order passed by High Court set aside.

Appeal – Criminal appeal – Against acquittal – Scope of – Held: Powers of the appellate court in appeal against acquittal are extensive and plenary to review and reconsider the evidence and interfere with acquittal –But such interference should be on the basis of absolute assurance of the guilt, and not on the basis that another possible view or different view could be taken.

Witness :

Child witness – reliance on – Held: Testimony of child witness, if credible, truthful and corroborated, can form basis for conviction – However, corroboration is not mandatory, but should be followed as a rule of prudence.

Behaviour of witness – Relevance of – For reliance on the testimony of the witness – Held : Behaviour of witnesses or their reactions differ from situation to situation and individual

to individual – But if the behaviour is absolutely unnatural, the testimony of witness may not deserve credence and acceptance.

The appellant accused were prosecuted u/ss. 143, 147, 448, 302 and 201 r/w. s. 149 IPC. The prosecution case was that there was dispute, regarding some land, between the deceased and her mother-in-law (accused since deceased).

During night, when the deceased was sleeping with her eleven years old daughter (PW-9) in her father's house, her mother-in-law along with appellants-accused came and forcibly took the deceased along with them and threatened PW-9. After the accused persons had gone away, PW-9 went to her maternal grandmother (PW-7), who was living along with her another daughter at that point of time, and informed her about the incident. PWs 7 and 9 did not tell about the incident to anyone. Dead body of the deceased was discovered in a well after two days of the incident. The trial against mother-in-law of the deceased abated due to her death. Trial court acquitted all the accused *inter alia* holding that in view of unnatural behaviour of PW-7, in not informing about the incident to anyone, the sole testimony of the child witness (PW-9) could not be relied upon. High Court convicted them to life imprisonment. Hence, the present appeal.

Allowing the appeal, the Court

HELD: 1.1. While dealing with an appeal against acquittal, the High Court has a duty to scrutinize the evidence and sometimes it is an obligation on the part of the High Court to do so. The power is not curtailed by any of the provisions of the Code of Criminal Procedure. While reappreciating and reconsidering the evidence upon which the order of acquittal is based, certain other principles pertaining to other facets are to be borne in

mind. The High Court is also required to see that unless there are substantial and compelling circumstances, the order of acquittal is not required to be reversed in appeal. [Para 12] [1114-D-E; 1115-B-C]

Shivaji Sahebrao Bobade and Anr. vs. State of Maharashtra **AIR1973 SC 2622: 1974 (1) SCR 489;** *Girija Prasad (dead) by LRs. vs.State of M. P.* **(2007) 7 SCC 625: 2007 (9) SCR 483;** *State of Goa vs.Sanjay Thakran* **(2007) 3 SCC 755: 2007 (3) SCR 507;** *Chandrappa vs. State of Karnataka* **(2007) 4 SCC 415: 2007 (2) SCR 630;** *State of Rajasthan vs. Shera Ram @ Vishnu Dutta* **(2012) 1 SCC 602: 2011 (15) SCR 485 – relied on.**

1.2. True it is, the powers of the appellate court in an appeal against acquittal are extensive and plenary in nature to review and reconsider the evidence and interfere with the acquittal, but then the court should find an absolute assurance of the guilt on the basis of the evidence on record and not that it can take one more possible or a different view. [Para 20] [1119-E-F]

2. In the present case, the High Court has not accepted the appreciation of evidence made by the trial court pertaining to the testimonies of PWs-7 and 9 and has further based its reasoning on the bedrock that there was a property dispute between the deceased and her mother-in-law which provided motive for commission of the crime. The High Court has also expressed the view that conviction can be recorded on the basis of the sole testimony of a child witness. PW-9 was eleven years old at the time of the occurrence. The High Court has accepted the version of PW-9 (daughter of deceased) and PW-7 (mother of deceased) on two counts, namely, that the daughter was threatened and both of them were in state of fear. The trial court on the contrary, had found the conduct of both the witnesses (in not informing the incident to anyone) to be highly unnatural. The High Court has ascribed the reason

that PW-7 possibly wanted to save the reputation of the deceased-daughter and that is why she did not inform the other daughter and son-in-law. [Paras 13, 17 and 20] [1115-C-E; 1117-D-E; 1119-B-C]

3. The court can rely upon the testimony of a child witness and it can form the basis of conviction if the same is credible, truthful and is corroborated by other evidence brought on record. The corroboration is not a must to record a conviction, but as a rule of prudence, the court thinks it desirable to see the corroboration from other reliable evidence placed on record. The principles that apply for placing reliance on the solitary statement of witness, namely, that the statement is true and correct and is of quality and cannot be discarded solely on the ground of lack of corroboration, applies to a child witness who is competent and whose version is reliable. [Para 16] [1116-D-F]

Dattu Ramrao Sakhare and Ors. vs. State of Maharashtra **(1997) 5SCC 341;** *Panchhi and Ors. vs. State of U.P.* **(1998) 7 SCC 177: 1998(1) Suppl. SCR 40;** *State of U.P. vs. Ashok Dixit and Anr.* **(2000) 3 SCC 70: 2000 (1) SCR 855 – relied on.**

4.1. The behaviour of witnesses or their reactions would differ from situation to situation and individual to individual. Expectation of uniformity in the reaction of witnesses would be unrealistic but the court cannot be oblivious of the fact that even taking into account the unpredictability of human conduct and lack of uniformity in human reaction, whether in the circumstances of the case, the behaviour is acceptably natural allowing the variations. If the behaviour is absolutely unnatural, the testimony of the witness may not deserve credence and acceptance. [Para 20] [1118-F-G]

Gopal Singh and Ors. vs. State of Madhya Pradesh **(2010) 6 SCC407: 2010 (6) SCR 1062;** *Rana Partap and Ors. vs. State of Haryana***(1983) 3 SCC 327;** *State of H.P. vs. Mast Ram* **(2004) 8 SCC 660: 2004 (4) Suppl. SCR 269;** *Lahu Kamlakar Patil and Anr. vs. State ofMaharashtra* **2012 (12) SCALE 710 – relied on.**

4.2. In the present case, there would have been fear because, as alleged, the mother-in-law had forcibly taken away the deceased, but it is totally contrary to normal behaviour that PW-7 (mother of the deceased) would have maintained a sphinx-like silence and not inform others. She did not tell it to anyone for almost two days and it has not been explained why she had thought it apt to search for her daughter without even informing anyone else in the family or in the village or without going to the police station. In view of the fact situation, the trial court was absolutely justified in treating the conduct of the said witnesses unnatural and, therefore, felt that it was unsafe to convict the accused persons on the basis of their testimony. It was a plausible view and there were no compelling circumstances requiring a reversal of the judgment of acquittal. [Para 20] [1119-B-E]

Case Law Reference:

1974 (1) SCR 489	**relied on**	**Para 10**
2007 (9) SCR 483	**relied on**	**Para 11**
2007 (3) SCR 507	**relied on**	**Para 11**
2007 (2) SCR 630	**relied on**	**Para 12**
2011 (15) SCR 485	**relied on**	**Para 12**
(1997) 5 SCC 341	**relied on**	**Para 13**
1998 (1) Suppl. SCR 40	**relied on**	**Para 14**
(1992) 4 SCC 225	**relied on**	**Para 14**

1993 Supp (3) SCC 667	**relied on**	**Para 14**
1996 (1) Suppl. SCR 174	**relied on**	**Para 14**
2000 (1) SCR 855	**relied on**	**Para 15**
2010 (6) SCR 1062	**relied on**	**Para 17**
(1983) 3 SCC 327	**relied on**	**Para 18**
2004 (4) Suppl. SCR 269	**relied on**	**Para 19**
2012 (12) SCALE 710	**relied on**	**Para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1366 of 2007.

From the Judgment and Order dated 28.10.2005 of the High Court of Karnataka in Criminal Appeal No. 937 of 1999.

WITH

Criminal Appeal No. 508 of 2007.

P.R. Ramasesh for the Appellants.

Anitha Shenoy, Vishruti Vijay for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The two appeals have been preferred by the accused- appellants against the common judgment dated 28.10.2005 in Criminal Appeal No. 937/1999 by the High Court of Karnataka at Bangalore whereby the Division Bench has overturned the judgment of acquittal passed by the learned Ist Addl. Sessions Judge, Gulbarga, in S.C. No. 100/1995 acquitting all the accused persons of the offences under Sections 143, 147, 448, 302, 201 read with Section 149 of the Indian Penal Code (for short 'IPC') and convicted the accused-appellants for the said offences. For the offence punishable under Section 302 read with Section 149 of IPC, each of them was sentenced to undergo imprisonment for life, and to pay a fine of Rs.5,000/-, in default of payment of fine, to undergo rigorous imprisonment for a period of one year. In respect of other offences, no separate sentence was imposed by the High Court.

2. Sans unnecessary details, the prosecution case is that the deceased, Karemma, was the wife of Mallinath, son of Ningawwa. After the unfortunate demise of Mallinath, dispute arose between Ningawwa, the mother-in-law of the deceased, and deceased Karemma, relating to certain landed property, which initially stood in the name of Mallinath, and subsequently, the entries were made in name of deceased Karemma as she was in possession. The dispute relating to property which is dear to the human race as it stands in contradistinction to poverty, which is sometimes perceived as a cause of great calamity, eventually led, as alleged by the prosecution, to morbid bitterness. In the intervening night of 12th and 13th June, 1994, accused- Ningawwa, along with her relatives formed an unlawful assembly in front of the house of Shankarappa, father of the deceased, with the common object to commit the murder and in execution of the said common object, they trespassed into the house of Shankarappa during his absence where deceased Karemma was sleeping with her daughter, Jagadevi. After entering into the house, the accused persons assaulted the deceased, threatened the eleven year old girl, Jagadevi, and forcefully took the deceased away. After the mother was forcibly removed from the house, Jagadevi proceeded to inform her grandmother, Chandamma, who, at that juncture, was residing in the house of another daughter. Being informed by the granddaughter, Chandamma came to the house of the deceased, searched for her daughter, but, eventually, it turned to be an exercise in futility.

3. As the prosecution story would further uncurtain, the accused persons committed murder of the deceased Karemma and threw her dead body in a well situate at Benur village. The dead body was found on 15.6.1994 and thereafter, one

Dasharath, PW-10, informed the fact at the concerned police station. On 16.6.1994, the Investigating Officer went near the well, removed the dead body of the deceased from inside the well, held the inquest of the dead body as per Ext. P-7, conducted the spot panchnama vide Ext Nos. 8 and 10, seized certain articles, recorded statements of certain other witnesses and, ultimately, about 8.00 P.M., registered suo motu case forming the subject matter of Crime No. 29/94 at Nelogi Police Station. After completing the investigation, the prosecution submitted the charge-sheet before the competent Court which, in turn, transmitted the same to the Court of Session for trial.

4. The accused persons abjured their guilt on ground of false implication and claimed to be tried.

5. In course of trial, the prosecution examined 17 witnesses, brought on record Exts. P-1 to P-17 and M.Os. 1 to 9. The defence chose not to adduce any evidence, but got certain portion of the statements of PW-7 and PW-10 marked during the cross-examination. During the pendency of the trial, the accused Ningawwa, the mother-in-law of the deceased expired, as a consequence of which, the trial abated against her.

6. The learned trial Judge framed four principal points for consideration, namely, (i) whether the accused persons formed an unlawful assembly with the common object to commit the murder of Karemma; (ii) whether the accused persons had trespassed into the house of Shankarappa; (iii) whether the accused persons had thrown the dead body into the well situate at Benur village for causing disappearance of the evidence; and (iv) whether the accused persons had any motive to commit the murder. After analyzing the evidence on record, the learned trial Judge came to hold that the death was homicidal in nature; that from the complaint Ext. P-6 lodged by PW-10, Dasharath, nothing was relatable how the deceased had fallen into the well; that it was not safe to record a conviction on the sole testimony of Jagadevi, PW-9, since there were number of circumstances

due to which her version could not be given credence to; that the conduct of Chandamma, PW-7, could not be accepted to be in conformity with the expected normal human behaviour and, in fact, was quite unnatural since she did not intimate anyone about the incident after coming to know about it from her granddaughter; and that it was not safe to convict the accused persons for the offences alleged, regard being had to the totality of circumstances and, accordingly, acquitted them of all the charges.

7. The High Court, after entertaining the appeal, opined that there was a property dispute in existence between the deceased and her mother-in-law; that motive for commission of the crime had been brought home by the prosecution; that at the time of occurrence, Jagadevi, daughter of the deceased, was staying with the deceased; that the father of the deceased, Shankarappa, had left the village along with his son and was residing at Sholapur during the relevant time of the incident; that Chandamma, the wife of PW-6, who had been staying in the house of another daughter at the relevant time was informed about the occurrence by PW-9; that the learned trial Judge had erred by discarding the testimony of PW-7 on the ground that she had not informed about the incident to anyone in the village; that at the time when the deceased was removed forcibly from the house, PW-7 could not have anticipated that the deceased would be done to death and, therefore, they kept on searching for the deceased; that PW-9 had the occasion to see the accused persons as there was source of light which had been inappositely disbelieved by the learned trial Judge; that Jagadevi, an eleven year old girl, could not have raised hue and cry because of the threat given by the accused persons; that the evidence of PW-9 deserved to be given total credence and, hence, could safely be relied upon; that there was no reason on the part of PW-9 to falsely implicate the accused persons including her paternal grandmother Ningawwa; that the reactions of PW-7 and PW-9 should not have been regarded as unnatural by the trial Court because every person reacts to

a situation in a different manner, for human behaviour differs and varies from person to person depending upon the situation; that as PW-7 and PW-9 were terrified of the accused persons, they could not lodge the complaint against them and it got support from the fact that only after the recovery of the dead body, the Investigating Officer registered a suo motu case; that though there had been some delay in recording the statements of certain witnesses by the Investigating Officer, yet that should not have been regarded to have created a dent in the prosecution case; and that the appreciation and analysis of the evidence by the learned trial Judge was not correct and the view expressed by him not being a plausible one deserved to be reversed. Being of this view, the High Court unsettled the judgment, convicted the accused-appellants and imposed the sentence as has been stated hereinbefore.

8. We have heard Mr. P.R. Ramasesh, learned counsel for the appellants, and Ms. Anitha Shenoy, learned counsel for the respondent-State.

9. The first submission of Mr. Ramasesh, learned counsel for the appellants, is that the High Court has erroneously unsettled the decision of the trial court by holding that the view expressed by the learned trial Judge is unreasonable. It is his further submission that the High Court has reviewed the entire evidence in an unusual manner which is impermissible. Ms. Anita Shenoy, learned counsel for the State, would contend that the appellate power of the High Court against a judgment of acquittal cannot be curtailed if the finding based on appreciation of evidence is totally perverse. It is urged by her that the evidence of the sole eye witness, Jagadevi, PW-9, has been rightly relied upon by the High Court.

10. At this juncture, we may refer with profit to the dictum in *Shivaji Sahebrao Bobade and Another v. State of Maharashtra*[1], wherein a three-Judge Bench has opined thus:-

1. AIR 1973 SC 2622.

> ".....there are no fetters on the plenary power of the Appellate Court to review the whole evidence on which the order of acquittal is founded and, indeed, it has a duty to scrutinise the probative material de novo, informed, however, by the weighty thought that the rebuttable innocence attributed to the accused having been converted into an acquittal the homage of our jurisprudence owes to individual liberty constrains the higher court not to upset the finding without very convincing reasons and comprehensive consideration."

11. Similar view has been expressed in *Girija Prasad (dead) by LRs. v. State of M. P*.[2] and *State of Goa v. Sanjay Thakran*[3].

12. From the aforesaid authorities, it is clear as day that while dealing with an appeal against acquittal, the High Court has a duty to scrutinize the evidence and sometimes it is an obligation on the part of the High Court to do so. The power is not curtailed by any of the provisions of the Code of Criminal Procedure. It is also worthy to note that while reappreciating and reconsidering the evidence upon which the order of acquittal is based, certain other principles pertaining to other facets are to be borne in mind. The said aspects have been encapsuled in *Chandrappa v. State of Karnataka*[4] as under: -

> "(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced,

2. (2007) 7 SCC 625.
3. (2007) 3 SCC 755.
4. (2007) 4 SCC 415.

reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

Quite apart from the above, the High Court is required to see that unless there are substantial and compelling circumstances, the order of acquittal is not required to be reversed in appeal. It has been so stated in *State of Rajasthan v. Shera Ram @ Vishnu Dutta*[5].

13. From the analysis of the High Court, it is discernible that it has not accepted the appreciation of evidence made by the learned trial Judge pertaining to the testimonies of PWs-7 and 9 and has further based its reasoning on the bedrock that there was a property dispute between the deceased and her mother-in-law which provided motive for commission of the crime. The High Court has also expressed the view that conviction can be recorded on the basis of the sole testimony of a child witness. It is not in dispute that PW-9, Jagadevi, was eleven years old at the time of the occurrence. In *Dattu Ramrao Sakhare and others* v. *State of Maharashtra*[6], while dealing with the reliability of witness who was ten years old, this Court opined that a child witness, if found competent to depose to the facts and reliable, such evidence could form the basis of conviction. The evidence of a child witness and the credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored. Thereafter, the Court proceeded to lay down that there is no rule or practice that in every case the evidence of such a witness should be corroborated before a conviction can be

5. (2012) 1 SCC 602.
6. (1997) 5 SCC 341.

allowed to stand but, as a rule of prudence, the court always finds it desirable to seek the corroboration to such evidence from other dependable evidence on record.

14. In *Panchhi and Others v. State of U.P.*[7], it has been held thus: -

"Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more a rule of practical wisdom than of law (vide *Prakash v. State of M.P.*[8], *Baby Kandayanathil v. State of Kerala*[9], *Raja Ram Yadav v. State of Bihar*[10] and *Dattu Ramrao Sakhare v. State of Maharashtra* (supra)."

15. Similar view has been expressed in *State of U.P. v. Ashok Dixit and another*[11].

16. Thus, it is well settled in law that the court can rely upon the testimony of a child witness and it can form the basis of conviction if the same is credible, truthful and is corroborated by other evidence brought on record. Needless to say, the corroboration is not a must to record a conviction, but as a rule of prudence, the court thinks it desirable to see the corroboration from other reliable evidence placed on record. The principles that apply for placing reliance on the solitary statement of witness, namely, that the statement is true and correct and is of quality and cannot be discarded solely on the ground of lack of corroboration, applies to a child witness who is competent and whose version is reliable.

17. The trustworthiness of the version of PWs-7 and 9 are to be tested on the aforesaid touchstone and it is to be seen whether the other circumstances do support the prosecution

7. (1998) 7 SCC 177.
8. (1992) 4 SCC 225.
9. 1993 Supp (3) SCC 667.
10. (1996) 9 SCC 287.
11. (2000) 3 SCC 70.

case or to put it differently, whether the evidence brought on record proves the guilt of the accused persons beyond reasonable doubt. PW-9, the daughter of the deceased, has testified to have witnessed the accused appellants being exhorted by her paternal grandmother, Ningawwa, who had trespassed into the house and forcibly took out her mother. She had, as is reflected, immediately rushed to the house of her maternal grandmother and disclosed it to her. It has been elicited in the cross-examination that her maternal grandmother was staying with her another married daughter and both the daughter and son-in-law were at home. She did not choose it appropriate to inform them about the incident. It is manifest, the grandmother, PW-7, came with her granddaughter, PW-9, to the house of the deceased and tried to search for her. Despite the search becoming a Sisyphean endeavour and non effective, she chose to remain silent and did not inform any one. The High Court has accepted the version of these two witnesses on two counts, namely, that the daughter was threatened and both of them were in state of fear. The learned trial Judge, on the contrary, had found the aforestated conduct of both the witnesses to be highly unnatural. In *Gopal Singh and others v. State of Madhya Pradesh*[12], this Court did not agree with the High Court which had accepted the statement of an alleged eye witness as his conduct was unnatural and while so holding, it observed as follows: -

> "We also find that the High Court has accepted the statement of Feran Singh, PW 5 as the eye witness of the incident ignoring the fact that his behaviour was unnatural as he claimed to have rushed to the village but had still not conveyed the information about the incident to his parents and others present there and had chosen to disappear for a couple of hours on the specious and unacceptable plea that he feared for his own safety."

18. In *Rana Partap and others v. State of Haryana*[13], while

12. (2010) 6 SCC 407.

13. (1983) 3 SCC 327.

dealing with the behaviour of the witnesses, this Court has opined thus: -

> "Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way."

19. In *State of H.P. v. Mast Ram*[14], it has been stated that there is no set rule that one must react in a particular way, for the natural reaction of man is unpredictable. Everyone reacts in his own way and, hence, natural human behaviour is difficult to prove by credible evidence. It has to be appreciated in the context of given facts and circumstances of the case. Similar view has been reiterated in *Lahu Kamlakar Patil and anr. v. State of Maharashtra*[15].

20. Thus, the behaviour of witnesses or their reactions would differ from situation to situation and individual to individual. Expectation of uniformity in the reaction of witnesses would be unrealistic but the court cannot be oblivious of the fact that even taking into account the unpredictability of human conduct and lack of uniformity in human reaction, whether in the circumstances of the case, the behaviour is acceptably natural allowing the variations. If the behaviour is absolutely unnatural, the testimony of the witness may not deserve credence and acceptance. In the case at hand, PW-9 was given a threat when her mother was forcibly taken away but she had the courage

14. (2004) 8 SCC 660.

15. 2012 (12) SCALE 710.

to walk in the night to her grandmother who was in her mid-fifties. After coming to know about the incident, it defies commonsense that the mother would not tell her other daughter and the son-in-law about the kidnapping of the deceased by her mother-in-law. It is interesting to note that the High Court has ascribed the reason that PW-7 possibly wanted to save the reputation of the deceased-daughter and that is why she did not inform the other daughter and son-in-law. That apart, the fear factor has also been taken into consideration. Definitely, there would have been fear because, as alleged, the mother-in-law had forcibly taken away the deceased, but it is totally contrary to normal behaviour that she would have maintained a sphinx-like silence and not inform others. It is also worthy to note that she did not tell it to anyone for almost two days and it has not been explained why she had thought it apt to search for her daughter without even informing anyone else in the family or in the village or without going to the police station. In view of the obtaining fact situation, in our considered opinion, the learned trial Judge was absolutely justified in treating the conduct of the said witnesses unnatural and, therefore, felt that it was unsafe to convict the accused persons on the basis of their testimony. It was a plausible view and there were no compelling circumstances requiring a reversal of the judgment of acquittal. True it is, the powers of the appellate court in an appeal against acquittal are extensive and plenary in nature to review and reconsider the evidence and interfere with the acquittal, but then the court should find an absolute assurance of the guilt on the basis of the evidence on record and not that it can take one more possible or a different view.

21. In view of the aforesaid premises, the appeals are allowed and the judgment of conviction passed by the High Court in Criminal Appeal No. 937 of 1999 is set aside and the accused-appellants are acquitted of the charges. As the appellants are already on bail, they be discharged of their bail bonds.

K.K.T. Appeals allowed.

PALWINDER SINGH
v.
STATE OF PUNJAB
(Criminal Appeal No. 2356 of 2009)

MAY 08, 2013

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

Penal Code, 1860 – s.302/34 and 392/34 – Prosecution for murder and robbery – By 4 accused including the appellant-accused – Conviction of all the accused by trial court – High Court convicting appellant-accused while acquitting rest of the accused – Held: Prosecution case proved by evidence of eye-witnesses supported by medical evidence and the recoveries made at the instance of the accused – Conviction of appellant-accused upheld.

The appellant-accused, alongwith three other accused, was prosecuted for murder and robbery. There were two eye-witnesses (PW-3 and PW-4) to the incident. There were recoveries of weapons of offence and the articles belonging to the deceased, on the basis of confessional statements of the accused persons. Trial court convicted all the accused u/ss. 302/34 and 392/34 IPC. High Court upheld the conviction of appellant-accused, while acquitting rest of the accused. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1. The evidence led by the prosecution disclosed that the deceased died of ante-mortem injuries and that it was a homicidal death, which was fully supported by the version of P.W.1 (the doctor) who conducted post-mortem on the deceased. The injuries

were all grievous in nature and the deceased met with gruesome death. The recoveries made at the instance of the appellants also fully supported the case of the prosecution. [Paras 17 and 18] [1128-G; 1130-B-C]

2. Reliance placed upon the eye-witness account of P.W.3 for convicting the appellant with the aid of other witnesses is perfectly justified. It is true that with regard to the identity of the rest of the accused other than the appellant, PW-3 stated that he could name them only at the instance of the police personnel. As far as his presence at the place of occurrence was concerned, his version read along with the evidence of P.W.4 discloses that the presence of both of them was beyond any pale of controversy. Even as regards the assault on the deceased, the version of P.W.3 was fully corroborated by P.W.4. Therefore, the presence of P.W.3 at the place of happening of the occurrence was thus fully established with the support of P.W.4. The High Court made a close scrutiny of the version of P.W.3 and found that he was a totally independent witness and he had no axe to grind against the appellant. In fact, his statement that he could not identify the other accused was a very fair statement. When he also belonged to the same village, there was no reason for him to implicate the appellant alone. Therefore, the conclusion of the High Court that such a fair statement made by the witness, namely, P.W.3 cannot be used to totally erase his version, was perfectly justified. Further, because he did not make any attempt to go to rescue of the deceased cannot be put against the witness, inasmuch as when four persons were assaulting the deceased with dangerous weapons that too in the night hour in the present day set up, one cannot expect an unarmed person to get himself entangled and suffer unnecessary harm to himself. Moreover, the occurrence took place late in the light at around 9 pm and, therefore, prudence might have dawned upon him not to fall a

cheap prey at the hands of such criminals who were already assaulting a person with a dagger and other weapons. Equally his conduct in having come back to the place of occurrence in the early morning at around 7.30 am along with P.W.4 only shows his earnestness in disclosing what he witnessed on the previous night to the police. [Paras 17 and 18] [1128-G-H; 1130-B-C]

Govindaraju alias Govinda vs. State by Sriramapuram Police Station andAnr. **(2012) 4 SCC 722: 2012 (5) SCR 67;** *Lallu Manjhi and Anr. vs. State of Jharkhand* **(2003) 2 SCC 401: 2003 (1) SCR 1 – held inapplicable.**

Case Law Reference:

2012 (5) SCR 67	**held inapplicable**	**Para 19**
2003 (1) SCR 1	**held inapplicable**	**Para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2356 of 2009.

From the Judgment and Order dated 12.09.2008 of the High Court of Punjab and Haryana at Chandigarh in Criminal Appeal No. 350-DB of 1998.

Vikas Mahajan, Vinod Sharma, Dharam Bir Raj Vohra for the Appellant.

Bansuri Swaraj, Siddhesh Kotwal, kuldip Singh for the Respondent.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. This appeal is directed against the judgment of the Division Bench of Punjab & Haryana High Court at Chandigarh dated 12.09.2008 in Criminal Appeal No.350-DB of 1998.

2. The case of the prosecution as projected before the

Court below was that the deceased Dr. Jasbir Singh was running a chemist shop in the village Wadala Banger, that on 20.08.1996 at 08:00 pm, the cousin of the deceased P.W.2 Gurmeet Singh, along with one Baldev Singh wanted to meet the deceased, that he was proceeding from Kalanaur in his scooter and that near Mir Kachana, near a brick kiln, they found people gathered around on the road and learnt that somebody was murdered. When they went to the spot P.W.2 found that his cousin Dr. Jasbir Singh was found dead with stab wounds and blood was oozing out. He also found the scooter belonging to the deceased lying nearby. He further found 100 rupee currency notes were also lying scattered around the deceased. P.W.2, thereafter, asked his companion Baldev Singh to remain at the spot and proceeded to lodge a report, which came to be registered as FIR No.115 under Section 302, 392 read with 34 IPC on 20.8.1996.

3. P.W.11 the Assistant Sub-Inspector visited the place of occurrence, examined the body of the deceased, prepared the inquest report and sent the body for postmortem. He also collected the currency notes, which were in 100 rupee denomination, the scooter and a rope measuring about 24 feet, which was lying near the dead body. Blood stained earth was also collected from the spot.

4. P.W.1 Dr. Kulwant Singh, conducted the postmortem examination on the body of the deceased on 21.08.1996. Exhibit PA is the postmortem certificate issued by him wherein, as many as 8 injuries were noted by him. At the instance of P.W.14, Om Prakash, P.W.12, the Investigating Officer, arrested four accused including the appellant on 26.08.1996. Based on the admissible portion of the confessional statement of the appellant, as well as the other accused, various recoveries were made including weapons, cash, two gold rings with the inscription 'JSK' and one wrist watch.

5. The prosecution examined 15 witnesses and marked PA postmortem certificate, PV and PX Report of Chemical

Examiner and PY and PZ report of Serologists. When the incriminating circumstances were put against the appellant and the other accused under Section 313, they denied the same and pleaded that they have been falsely implicated. They also examined D.Ws.1 and 2 on their side. P.Ws.3 and 4 were examined as eye-witnesses of whom P.W.4 was treated hostile.

6. Having considered the evidence of the prosecution, in particular the version of P.Ws.1 to 4, the medical report, the serologist report, chemical examiner's report and the recoveries made at the instance of the accused, the trial Court found all the accused guilty of the offences alleged against them and while convicting them for the said offences, imposed the sentence of life with fine of Rs.2500/- each and in default to undergo further rigorous imprisonment for six months under Section 302 read with 34 IPC. For the offence proved under Section 392 read with 34 IPC, sentence of 10 years rigorous imprisonment with a fine of Rs.1000/- and in default to undergo rigorous imprisonment for three months was imposed. The sentences were directed to run concurrently.

7. On appeal by all the four accused, the High Court by the judgment impugned in this appeal confirmed the conviction and sentence imposed on the appellant and acquitted the rest of the accused from all the charges.

8. We heard Mr. Vikas Mahajan, learned counsel for the appellant and Ms. Bansuri Swaraj, learned counsel for the respondent/State. Learned counsel for the appellant mainly contended that there were too many contradictions in the version of P.W.3, the so-called eye-witness, that when the High Court chose to disbelieve his version, insofar as it related to the other three accused on the same reasoning, it ought to have acquitted the appellant as well. The learned counsel contended that the arrest of the appellant based on the version of P.W.14, was not true, that since the appellant was involved in some other criminal case earlier, he was falsely implicated in the case on hand. Learned counsel contended that there was no evidence

to show that there was any matching of blood group in order to hold that the appellant was involved in the murder of the deceased.

9. As against the above submissions, Ms. Bansuri Swaraj, learned counsel for the State contended that though P.W.4 was treated hostile, his version insofar as his going along with P.W.3 to the place of occurrence and the factum of the deceased being attacked by certain persons as stated by PW-3 was fully corroborated and consequently the conclusion reached by the trial Court based on the eye-witness account of P.W.3, supported by the version of P.W.4 to that extent read along with the medical evidence for convicting appellant and the confirmation of the same by the High Court in the impugned judgment, does not call for interference.

10. Having heard learned counsel for the appellant as well as the respondent/State and having bestowed our serious consideration to the case pleaded and on perusal of the material papers including the judgment of the High Court, as well as the trial Court, we are also convinced that the conviction and sentence imposed on the appellant cannot be assailed.

11. The thrust of the submission of the learned counsel for the appellant was that the whole case of the prosecution was built upon P.W.3 and his version was wholly unreliable. The learned counsel in support of his submission, placed reliance upon the decisions reported in *Govindaraju alias Govinda v. State by Sriramapuram Police Station and another* - (2012) 4 SCC 722 paragraph 25 and *Lallu Manjhi and another v. State of Jharkhand* - (2003) 2 SCC 401. By relying upon the above-said decisions, learned counsel contended that P.W.3 could not have witness the occurrence as deposed by him.

12. We perused the evidence of P.W.3. The version of P.W.3 was that on the date of occurrence, namely, 20.08.1996, he went to Batala to see his sister who was married in

Sagarpura adjoining Batala, that around 8.00 p.m. he started from his sister's house and on the way he met P.W.4 who agreed to provide a lift to P.W.3. It is his further version that when both of them reached a brick kiln at Mir Kachana around 8.45 or 9.00 p.m. they saw the deceased as well as the accused in a melee among whom the appellant was one of them. He, however, stated that he was not able to identify the rest of the accused. He also stated that appellant and the three other persons were attacking the deceased by giving dagger blows and that he saw the appellant giving such specific dagger blows on the palm of the right hand of the deceased, as well as, wrist on the chest. He also stated that further dagger blows were also inflicted upon the deceased. According to P.W.3, he could notice the above incident with the aid of the head lamp of the scooter.

13. In the cross-examination, he stated that the other accused muffled their faces and he was able to mention their names with the help of the police personnel. He also stated that it was 10 p.m. and, therefore, he left that place and on the next day morning he first informed his family members and along with P.W.4 he met police officials by around 8 or 8.40 a.m. at the place of occurrence where the body was still lying where he also gave his statement. According to him, none of the relatives of the deceased met him. He also fairly stated that he did not make any attempt to rescue the deceased.

14. P.W.4 who was treated as hostile supported the version of P.W.3 upto the factum of assault on the deceased by 4 or 5 persons near brick kiln of Mir Kachana, including the lift which he extended to P.W.3 on Dera Baba Nanak Road near Tonga stand. He also mentioned that both of them were going to village Wadala Banger. He, however, stated that he could not identify any of the accused who were assaulting the deceased. He also expressed his inability to identify the appellant.

15. P.W.1, Dr. Kulwant Singh identified the postmortem certificate issued by him as Exhibit PA and deposed that he noticed the following injuries on the body of the deceased:

"1. An incised wound C shaped 4 cm x ¼ cm on the Palmer side of right wrist joint, muscle deep.

2. An incised wound 1½ x ¼ cm on the palmer side of right hand in the middle, muscle deep.

3. An incised penetrating (both sides) wound spindle shaped 3 cm x 1 cm on the front of right shoulder joint, muscle deep.

4. An incised penetrating (both sides) wound spindle shaped 2 ½ cm x 1 cm on right lateral side and lower part of the chest on the interior axillaries line 17 cm from the axilla.

On dissection underlying liyar was ruptured and whole abdominal cavity was full of blood.

5. An incised penetrating wound (both side) spindle shaped 2 ½ cm x 1 cm on the front and upper part of left side of chest, 6 cm from midline 2 cm below clavical.

On dissection: underlying left lung was ruptured and thorax cavity is full of blood

6. An incised penetrating wound (both side) spindle shaped 2 ½ cm x ½ cm on the front and left side of chest 2 cm medial to the left nipple.

On dissection: underlying chest wall and pericardieum was pierced. Heart was ruptured and pericardieum was full of blood.

7. Incised penetrating wound ¾ cm x 1 ½ cm (both

side) spindle shaped on the left side of abdomen 19 cm from the umbilicus and parallel) do it.

On dissection: The abdominal cavity was ruptured. Colon on left side was ruptured. Abdominal cavity was full of blood.

8. 6 incised penetrating wounds (spindle shaped, sharp from both sides) 2 cm x 1 cm, 3cm x 1½ cm, 2 ½ cm x 1cm, 2cm x ½ cm, 2 cm x ½ cm, 2cm x ½ cm on the back and left side of chest. All were muscle deep."

16. The Investigating Officer, P.W.12, deposed that based on the interrogation, the appellant made a confessional statement and the admissible portion of which was to the effect that he had concealed one dagger used in the crime near a Shisham tree near brick kiln of Mir Kachana, apart from the concealment of one ring, one shirt and pant and Rs.1200/- in the iron box lying in his house, which were recovered under Exhibit PQ attested by Harjinder Singh. P.W.14 Om Prakash deposed that all the four accused met him and confessed about the killing of the deceased and that he produced them before the police. P.W.5, the wife of the deceased Jasbir Singh stated that her husband used to wear two gold rings with the impression 'JSK', one Titan wrist watch and one purse and that above articles were missing from the dead body of her husband.

17. The above evidence led by the prosecution, disclosed that the deceased died of ante-mortem injuries and that it was a homicidal death, which was fully supported by the version of P.W.1 Dr. Kulwant Singh. The injuries were all grievous in nature and the deceased met with gruesome death. When we come to the evidence of P.W.3 it is true that with regard to the identity of the rest of the accused other than the appellant, he stated that he could name them only at the instance of the police personnel. As far as his presence at the place of occurrence

was concerned, his version read along with the evidence of P.W.4 discloses that the presence of both of them was beyond any pale of controversy. Even as regards the assault on the deceased, the version of P.W.3 was fully corroborated by P.W.4. Therefore, when the presence of P.W.3 at the place of happening of the occurrence was thus fully established with the support of P.W.4, as rightly concluded by the trial Court, as well as, the High Court, the only other question was whether the rest of the statement made by P.W.3 merited any acceptance. In that respect, we find that the High Court made a close scrutiny of the version of P.W.3 and has found that he was a totally independent witness and he had no axe to grind against the appellant. In fact, his statement that he could not identify the other accused, as rightly held by the Division Bench of the High Court, was a very fair statement. When he also belonged to the same village, there was no reason for him to implicate the appellant alone. He could have simply stated that he knew the other accused also and that he had noted their presence at the place of occurrence. Therefore, the conclusion of the High Court that such a fair statement made by the witness, namely, P.W.3 cannot be used to totally erase his version, was perfectly justified. Further, because he did not make any attempt to go to rescue of the deceased cannot be put against the witness, inasmuch as when four persons were assaulting the deceased with dangerous weapons that too in the night hour in the present day set up, one cannot expect an unarmed person to get himself entangled and suffer unnecessary harm to himself. Moreover, the occurrence took place late in the light at around 9 pm and, therefore, prudence might have dawned upon him not to fall a cheap prey at the hands of such criminals who were already assaulting a person with a dagger and other weapons. Equally his conduct in having come back to the place of occurrence in the early morning at around 7.30 am along with P.W.4 only shows his earnestness in disclosing what he witnessed on the previous night to the police.

18. Therefore, we find force in the submission of the

learned counsel for the State that the presence of P.W.3 along with P.W.4 at the time when the occurrence took place and the identity of the appellant by P.W.3 and describing his involvement in the commission of the offence as narrated by him, was rightly believed by the trial Court, as well as, by the High Court and we are also convinced that such a reliance placed upon the eye-witness account of P.W.3 for convicting the appellant with the aid of other witnesses is perfectly justified. The recoveries made at the instance of the appellants also fully supported the case of the prosecution.

19. Having reached the above conclusion, we find that the reliance placed upon the decision reported in *Govindaraju alias Govinda* (supra), as well as, *Lallu Manjhi* (supra) will be of no avail to the appellant. We say so, since we are convinced that the version of P.W.3 was wholly reliable and there was no reason to doubt his version in order to apply the principles set out in the above referred decisions.

20. We, therefore, do not find any merit in this appeal. The appeal fails and the same is dismissed.

K.K.T. Appeal dismissed.

ANAMIKA ROY
v.
JATINDRA CHOWRASIYA AND OTHERS
(Civil Appeal No.4539 of 2013)

MAY 9, 2013

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

West Bengal Premises Tenancy Act, 1956 – s. 13(4) – Suit for eviction of tenanted premises – On the ground of bona fide requirement – Trial court as well as first appellate court decreed the suit directing eviction of entire rented premises – High Court remitted the matter to trial court opining that in view of s.13(4) it was the duty of the court to consider whether partial eviction of the tenant could have satisfied the requirement of the landlady – Held: In view of the findings by trial court and first appellate court that the landlady required the entire premises, High Court committed grave error in holding that partial eviction should have been considered – Consideration of extent of requirement by the courts, would be sufficient compliance of provision of the Act.

Appellant-landlady filed suit against the respondents-tenant for eviction under West Bengal Premises Tenancy Act, 1956, on the ground of *bonafide* requirement. Trial court passed decree of eviction in respect of the entire suit premises. First appellate court confirmed the decree. In second appeal, High Court remitted the matter to trial court holding that it was duty of the court to consider, as to whether partial eviction of the suit premises would satisfy the requirement of landlord, as mandated by s.13(4) of the Act. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. Having regard to the finding recorded both

by the trial court and the appellate court that the entire flat was required by the plaintiff-landlady for her use and occupation, the High Court has committed grave error in formulating a question and holding that the question of partial eviction has to be considered since it is a mandatory requirement of law. The High Court has further committed serious error of law in setting aside the judgment and decree of the trial court and that of the appellate court. [Para 18] [1141-F-G]

2. Indisputably, the appellant-landlady has been residing in one room at the mercy of her brother and she needed the suit premises on the ground of her personal requirement. The suit premises is a flat, consisting of three bedrooms with bathroom, one store room, one kitchen and one dining room. The suit was filed in the year 1993 and for the last 20 years the appellant-landlady, who is 58 years old, has been fighting with the tenant for getting her flat for her own use and occupation. Both the trial court and the appellate court have considered the question of partial eviction and recorded the finding that the appellant-landlady needed the entire flat to live there comfortably. It would be too harsh if the flat which consists of three rooms is divided and a decree in respect of the portion of the flat is passed which will result in inconvenience for both the parties. Moreover, the defendant- respondent neither before the appellate court nor before the trial court or in the High Court has asserted that a portion of the premises will satisfy the requirement of the appellant. [Para 18] [1141-G-H; 1142-A-D]

3. It is correct that the provision contained in the West Bengal Premises Tenancy Act, 1956 mandates the court to consider whether partial eviction as contemplated therein should be ordered or the entire building should be directed to be vacated. However, while

deciding the issue of reasonable personal requirement of the landlord, if the trial court or the appellate court also considers the extent of requirement and records a finding that the entire premises or part thereof satisfies the need of the landlord, then, there is sufficient compliance of the provision contained in the said Act. [Para 19] [1142-D-F]

Krishna Murari Prasad vs. Mitar Singh **1993 Supp (1) SCC 439;***Rahman Jeo Wangnoo vs. Ram Chand and Ors.* **AIR 1978 SC 413:1978 (2) SCR 380 – referred to.**

Case Law Reference:

1993 Supp (1) SCC 439	**referred to**	**Para 10**
1978 (2) SCR 380	**referred to**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4539 of 2013.

From the Judgment and Order dated 10.02.2011 of the High Court of Calcutta in S.A. No. 342 of 2007.

R.K. Gupta, S.K. Gupta, M.K. Singh, Anindra Roy, Shekhar Kumar for the Appellant.

Shymal Chakravarti, Bimlesh Jain, Braj Kishore Mishra, Aparna Jha, Siddhartha Arya for the Respondents.

The Judgment of the Court was delivered by

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

2. Aggrieved by the judgment dated 10.2.2011 passed by learned Single Judge of the Calcutta High Court in S.A. No.342 of 2007, whereby the second appeal filed by the defendant-respondents was allowed, the judgments and decrees of the courts below were set aside and the matter was remitted to the trial court after expressing the view that considering the provisions of Section 13(4) of the West Bengal Premises

Tenancy Act, 1956 it is a duty cast upon the Court to consider whether the requirement of the plaintiff could be satisfied by evicting the defendant from a part only of the suit property, plaintiff-appellant has preferred this appeal by special leave under Article 136 of the Constitution of India. The trial court and the first appellate court had passed decree for eviction against the defendant/tenant in respect of the entire suit premises in question.

3. The litigation between the parties started on the filing of Title Suit No.66 of 1993 by the plaintiff in the Court of 4th Civil Judge (Senior Division) at Alipore, District 24 Parganas (South) for eviction and recovery of khas possession of the suit premises against the original defendant/tenant - Lalji Chowrasia (predecessor of the respondents) and for mesne profits and compensation for damages to the suit property. The suit property happens to be a portion of the ground floor flat consisting of three bed rooms with attached three bathrooms with modern fittings, sanitary privy, one store room, one kitchen, one dining room and one covered verandah in the front portion with grill in the premises No.128/15, Hazra Road, Kolkata.

4. The case of the plaintiff in the above mentioned suit, inter alia, is that she is the owner and landlady of suit property in terms of a decree passed on 17.3.1988 in Title Suit No.55 of 1986. She requires the suit property in occupation of the defendant for her own use and occupation. She alleges that she is a divorcee and is occupying one room on the second floor of the three-storeyed building where her brother with his family is residing. Entire first floor of the building has been in occupation of a Bank (State Bank of India) as a tenant. The plaintiff alleges that she has been permitted by her brother to stay in one room, but since she is having bitter relationship with her brother's wife, she wants to reside in the suit property. Her further case is that she does not have any source of income except a paltry amount of Rs.500/- which she gets as her share in the rent collected from the tenant-bank. According to her, if

she rearranges the suit premises and makes provision for one room flat, she will be able to augment a minimum income of Rs.2500/- per month by letting or leasing it out. She alleges that the original defendant was guilty of causing damage to the suit premises.

5. The suit was contested by the defendant by filing written statement contending inter alia that there was no relationship of landlord and tenant between the parties to the suit. Defendant further alleged that although the plaintiff might have realized rent from the defendant and the defendant might have paid/deposited monthly rent in the name of the plaintiff, yet there could not be any relationship of landlord and tenant in between the plaintiff and the defendant. Although defendant did not dispute the fact that plaintiff has been residing with her brother and his family on the second floor of the suit holding, but he denied that the plaintiff requires the suit premises for her own use and occupation. According to the defendant, her present accommodation is suitable and her statement that she had no alternative suitable accommodation elsewhere is not correct. The defendant also disputed the plaintiff's claim of ownership of the suit premises on the basis of compromise decree passed in the said Title Suit No.55 of 1986. It is further contended that the alleged decree is not binding upon the defendant. It appears from the judgments of the courts below that after the original defendant died, the respondents herein were substituted in place of the original defendant. Defendant No.5 also filed a separate written statement denying pleas of the plaintiff.

6. The trial court by its judgment dated 30.7.2002 decreed the said suit and directed the defendants to hand over the vacant possession of the suit premises to the plaintiff within a stipulated period of time. The trial court found that the defendant had admitted in evidence that the plaintiff is the landlady of the defendant and that the suit premises is the portion of the ground floor and the remaining portion of the ground floor is in

possession of the plaintiff's brother's son. The trial court further found that admittedly the original defendant was inducted in the suit premises as a tenant by the father of the plaintiff and the defendants have been substituted on the death of the original defendant. However, the trial court did not find any cogent evidence with regard to the alleged damage to the suit property. The trial court found that the present accommodation of the plaintiff on the second floor is not suitable where she has got only one room as per the Will of her father and she has got no separate kitchen and bath-cum-privy for herself. Finding the said Title Suit No.55 of 1986 being suit for declaration and not a partition suit, the trial court found that the decree passed in the suit was a compromise decree, from which it is clear that the plaintiff has got title in respect of the suit premises and from Ex.4 - the probate of the Will executed by plaintiff's father it is clear that the plaintiff has got life-estate in one room on the second floor and 15% share of rent from the said bank-tenant on the first floor. Admitting the compromise decree, the trial court concluded that the plaintiff is the owner of the suit premises and the present accommodation of the plaintiff is not suitable and the suit premises is reasonably and in good faith required by the plaintiff for own use and occupation and for augmentation of her income from the suit premises and there cannot be any partial eviction as such.

7. Challenging the judgment and decree of the trial court, the defendants filed Title Appeal No.280 of 2002, which was placed before the Additional District and Sessions Judge, Fast Track Court-II, Alipore, who also opined that a complete flat is required for the purpose of the residence of the plaintiff and the plaintiff has bona fide requirement of the suit premises for her own use and occupation. Dismissing the title appeal on 28.2.2005, the first appellate court took note of the fact that the trial court had already decided that there was a relationship of landlord and tenant between the parties and held that the trial court had rightly decreed the suit. The lower appellate court also found that there is bitter relationship between the plaintiff and

her brother's wife and it is not expected that the plaintiff being a divorcee will reside in the house of her brother at the mercy of her brother's wife.

8. The defendants (contesting Respondent Nos.1 and 2 herein) challenged aforesaid judgment and decree of the lower appellate court before the High Court by way of second appeal. It appears that the second appeal was admitted by the High Court on the following substantial questions of law:

> (a) Whether the learned Courts below committed substantial error of law in not considering the question of partial eviction of the appellants from the suit property?
>
> (b) Whether the learned Court of appeal below committed substantial error of law in refusing to consider the question of partial eviction on the ground that no such prayer was made by the defendants by totally overlooking the fact that in view of the provision contained in Section 13(4) of the West Bengal Premises Tenancy Act, a duty is cast upon the Court to consider whether the requirement of the plaintiff can be satisfied by evicting the tenants from a part of the property?

9. On the aforesaid substantial questions of law, it was contended by the defendants (appellants in second appeal) in the High Court that the courts below did not consider question of partial eviction and it is the plaintiff's case to let out a part of the suit property for augmenting her income. It is the case of the defendant that there is a vacant flat in the ground floor of the suit holding which was allowed to the brother of the plaintiff and the same can be provided to the plaintiff for residence. There is no dispute that in the instant case no local inspection was held in respect of the suit premises and/or suit building itself.

10. Defendants referred to a decision reported in AIR 1978 SC 413 (*Rahman Jeo Wangnoo vs. Ram Chand and others*)

in support of their contention submitting that it is mandatory for the Court to consider the question of partial eviction as contemplated under the West Bengal Premises Tenancy Act, 1956. Reference was also made to this Court's judgment in *Krishna Murari Prasad vs. Mitar Singh,* 1993 Supp (1) SCC 439, in which this Court has observed that the landlord's requirement having been found proved, the Court had to consider the matter further according to the relevant provision of law and the order for eviction from the entire premises could be made only if a decree for partial eviction in the manner provided could not substantially satisfy the landlord's requirement. Plaintiff (respondent in second appeal), on the other hand, submitted that the question of local inspection in the present case does not arise as the present occupation of the plaintiff is precarious and that is enough to prove her reasonable requirement for own use and occupation and there can be no partial eviction in the present case.

11. The learned Single Judge of the High Court was not inclined to upset the concurrent finding with regard to the right of the plaintiff in respect of the suit premises as found by the courts below. From the materials on record, it appeared to the High Court that the plaintiff proved her bona fide requirement. However, the High Court is of the view that the decisions reported in AIR 1978 SC 413 (supra) and 1993 (Supp) (1) SCC 439 (supra) supported the case of the defendants in so far as their stand on the question of partial eviction is concerned. Without disturbing the finding of the courts below with regard to the relationship of landlord and tenant between the parties to the suit and the plaintiff's ownership in respect of the suit property, the High Court allowed the second appeal filed by the defendants and made it clear that the inquiry, that will thereafter be done by the courts below, shall be limited to the question whether or not the eviction of the defendants from a part only of the suit premises can substantially satisfy the plaintiff's need. Liberty has also been given by the High Court to the parties to the proceedings to adduce appropriate evidence before the trial

court and also to make an appropriate application for appointment of a Local Commissioner for holding a local inspection in respect of the suit premises and/or the suit holding.

12. The relevant portion of the findings recorded by the High Court is extracted herein below:-

"In the facts of the present case no Commissioner was appointed to hold a local inspection and consequently no local inspection report is on record. The description of the suit property appears to be a ground floor flat consisting of three bedrooms with attached three bathrooms with modern fittings, sanitary privy, one store, one kitchen, one dining room, one covered verandah in the front portion with grill in the suit holding, that is, premises No.128/15, Hazra Road: P.S. Bhowanipore Kolkata 700026. The learned Lower Appellate Court has found that the plaintiff would require one privy, one kitchen, one bathroom and one dinning space that is a complete flat for the purpose of her residence. As it appears to this Court that none of the Courts below has examined the question of partial eviction, the matter should be remitted back to the learned Trial court since this Court is of the view that considering the said provisions of Section 13(4) of the said Act of 1956 it is a duty cast upon the Court to consider whether the requirement of the plaintiff could be satisfied by evicting the defendant from a part only of the suit property. The decisions reported at AIR 1978 Supreme Court 413 (supra) and 1993 SUPP(1) SCC 439 (supra) supported the case of the appellants in so far as their stand on the question of partial eviction is concerned. In the present case, the plaintiff's reasonable requirement has been found to be proved by both the learned Courts below and, accordingly, the inquiry is now required to be made only with regard to the question of partial eviction. This Court is also not disturbing the finding of the learned Courts below with regard to the relationship of landlord and tenant

in between the parties to the suit and the plaintiff's ownership in respect of the suit property."

13. We have heard Mr. R.K. Gupta, learned counsel appearing for the appellant and Mr. Shymal Chakravarti, learned counsel appearing for the respondent.

14. The question that falls for consideration is as to whether the High Court is justified in holding that both the trial court and the appellate court have not examined the question of partial eviction.

15. Both the courts have recorded the concurrent finding of fact that the appellant is a divorcee old lady and is occupying one room on second floor of three-storeyed building owned by her brother. The first appellate court has taken note of the fact that there is a bitter relationship between the plaintiff and her brother's wife and it is not expected that the plaintiff being a divorcee resides in the house of her brother at the mercy of her brother's wife.

16. The trial court while deciding the issue as to whether the suit premises is reasonably required by the plaintiff or not, has gone into the details of the difficulties, which the old landlady is facing. While discussing the question of partial eviction, the trial court referred to a decision reported as 2001 (3) CHN 244 (Jagat Bandhu Batabayal vs. Jiban Krishna Roy) for the proposition that the question of partial eviction was rightly not considered in that case by the appellate court as the tenant never raised such issue before the appellate court nor any material was available before the learned Judge to form an opinion that the requirement of plaintiff can be substantially satisfied by ejecting the tenant from a portion of the suit premises. In the concluding portion of the judgment, the trial court observed:-

" Considering the evidence adduced by both parties and the principles of law discussed above, I find that the

plaintiff is the owner of the suit premises, the compromise decree in T.S. No.55/86 is admissible in evidence, the present accommodation of the plaintiff is not suitable and the suit premises is required for the reasonable requirement of the plaintiff for own use and occupation and for augmentation of her income from the suit premises and there cannot be any partial eviction and as such all these issues be disposed of in favour of the plaintiff."

17. Similarly, in the appeal filed by the respondent-tenant, the appellate court has also gone into the question as to the reasonable requirement of the landlady and held that a complete flat is required for the purpose of residence of the plaintiff. The appellate court held that:-

"It is not expected that the plaintiff being divorcee will reside in the house of her brother and at mercy of her brother and brother's wife.

In order to reside peacefully one privy, one kitchen, one bath room and one dining space in other words complete flat is required for the purpose of the residence of the plaintiff, so in the circumstances I hold that the plaintiff has bonafide reasonable requirement of the suit premises for her own use and occupation."

18. Having regard to the finding recorded both by the trial court and the appellate court that the entire flat is required by the plaintiff landlady for her use and occupation, the High Court has committed grave error in formulating a question mentioned hereinabove and holding that the question of partial eviction has to be considered since it is a mandatory requirement of law. The High Court has further committed serious error of law in setting aside the judgment and decree of the trial court and that of the appellate court. Indisputably, the appellant-landlady has been residing in one room at the mercy of her brother and she needs the suit premises on the ground of her personal requirement. The suit premises is a flat consisting of three

bedrooms with bathroom, one store room, one kitchen and one dining room. The suit was filed in the year 1993 and for the last 20 years the appellant-landlady, who is 58 years old, has been fighting with the tenant for getting her flat for her own use and occupation. Both the trial court and the appellate court have considered the question of partial eviction as noticed above and recorded the finding that the appellant-landlady needs the entire flat to live there comfortably. In our considered opinion, it would be too harsh if the flat which consists of three rooms is divided and a decree in respect of the portion of the flat is passed which will result in inconvenience for both the parties. Moreover, the defendant- respondent neither before the appellate court nor before the trial court or in the High Court has asserted that a portion of the premises will satisfy the requirement of the appellant.

19. There is no dispute with regard to the ratio laid down by this Court in *Rahman Jeo Wangnoo vs. Ram Chand and Others* (AIR 1978 SC 413) that the provision contained in the West Bengal Premises Tenancy Act, 1956 mandates the court to consider whether partial eviction as contemplated therein should be ordered or the entire building should be directed to be vacated. However, while deciding the issue of reasonable personal requirement of the landlord, if the trial court or the appellate court also considers the extent of requirement and records a finding that the entire premises or part thereof satisfies the need of the landlord, then, in our considered opinion, there is sufficient compliance of the provision contained in the said Act.

20. Taking into consideration these facts and also having regard to the finding recorded both by the trial court and the appellate court after discussing the question of partial eviction, the substantial question of law framed by the High Court does not arise. Consequently, the impugned judgment passed by the High Court cannot be sustained in law.

21. For the reasons aforesaid, this appeal is allowed. The

impugned judgment of the High court is set aside and the judgment and decree of the trial court is affirmed. However, there shall be no order as to costs.

22. The defendant-respondents are directed to vacate the suit premises within three months and hand over vacant possession of the same to the appellant.

K.K.T. Appeal allowed.

STATE OF HARYANA
v.
JANAK SINGH & ETC.
(Criminal Appeal Nos. 792-793 of 2013)

MAY 10, 2013

[G.S. SINGHVI AND RANJANA PRAKASH DESAI, JJ.]

Crime Against Women – Rape – Held: Rape is one of the most heinous crimes against women, which violates her right to life guaranteed under Article 21 of the constitution – Constitution of India, 1950 – Article 21.

Bodhisattwa Gautam vs. Subhra Chakraborty **(1996) 1 SCC 490:1995 (6) Suppl. SCR 731 – relied on.**

Sentence/Sentencing – Rape case – Punishment for – High Court in appeal, maintaining the conviction of the accused persons, but reduced the sentence of imprisonment of accused No. 1 from 8 years to already undergone(i.e. more than 2 years) and of accused No. 2 from 4 years to already undergone (i.e. 1 year 10 months and 7 days) – On appeal, held: Sentence bargaining is impermissible in a serious office like rape – Minimum sentence for rape is 7 years as provided u/s 376(1) IPC – The minimum sentence can be reduced only after assigning adequate and special reasons – The reasons must contain extenuating circumstances which prompted the court to reduce the sentence below the prescribed minimum – The courts are required to strictly abide by this legislative command – In the instant case, High Court heard the appeals in slipshod manner – Even if the accused did not press the appeals, it was the duty of the High Court to consider the propriety of conviction – The High Court could have reduced the sentence below the minimum prescribed under the law only when it gave reasons containing extenuating

circumstance – High Court did not give any reason for reducing the sentence and such a course is against the mandate of s. 376(1) IPC, hence legally unsustainable – Matter remanded to High Court for disposal afresh – Penal Code, 1860 – s.376(1).

State of Karnataka vs. Krishnappa **(2000) 4 SCC 75: 2000 (2) SCR 761;** *State of A.P. vs. Bodem Sundara Rao***(1995) 6 SCC 230: 1995 (4) Suppl. SCR 48 – relied on.**

Case Law Reference:

1995 (6) Suppl. SCR 731	**relied on**	**Para 6**
2000 (2) SCR 761	**relied on**	**Para 8**
1995 (4) Suppl. SCR 48	**relied on**	**Para 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 792-793 of 2013.

From the Judgment and Order dated 02.08.2010 of the High Court of Judicature at Punjab and Haryana at Chandigarh in Criminal Appeal No. 648-SB & 811-SB of 2000.

Narender Hooda, Sr. AAG, Dr Monika Gusain for the Appellant.

Kapil Arora, Dharitry Phookan, Vikrant Rana for the Respondents.

The order of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. Leave granted.

2. In these appeals by special leave the State of Haryana has challenged the judgment and order dated 2/8/2010 passed by the High Court of Punjab & Haryana maintaining the conviction of respondent Joginder Singh (original accused 1) under Sections 376 and 506 of the Indian Penal Code (for short,

'**the IPC')** and conviction of respondent Janak Singh (original accused 2) under Sections 376 read with Section 511 and Section 506 of the IPC and reducing their sentence for the said offences to the sentence already undergone by them.

3. According to the prosecution the prosecutrix lodged an FIR on 31/10/1998 at Police Post Jalmana stating that she was residing in the dera of Shekhupura along with her brother Gurpreet Singh and mother Joginder Kaur. On 27/10/1998 she, her mother Joginder Kaur and brother Gurpreet Singh were sleeping in the dera. At about 11.00 p.m. she got up for easing herself. After unbolting the room she went to the courtyard. She found that two men i.e. respondent Joginder Singh and respondent Janak Singh were standing near the boundary of the courtyard. One of them was having a khes and another was having a piece of cloth on his head. They lifted her and threatened to kill her in case she raised cries. They took her to a field of maize where respondent Joginder Singh raped her. Respondent Janak Singh also tried to catch hold of her to rape her, but, since she cried for help her mother Joginder Kaur came there and on seeing her both the accused fled away towards the fields. On the basis of this FIR, offences under Sections 376/506/511 of the IPC were registered against both the respondents. Investigation commenced. On completion of investigation, respondent Joginder Singh was charged under Sections 376 and 506 of the IPC while respondent Janak Singh was charged under Sections 376, 511 and 506 of the IPC.

4. Both the respondents pleaded not guilty to the charge and claimed to be tried. According to respondent Joginder Singh he had a love affair with the prosecutrix. However, he was married by his parents to a woman from their community and hence the prosecutrix and her mother were nursing a grudge against him. Therefore, he has been falsely implicated in this case. He also contended that he had advanced money to the mother of the prosecutrix. When he asked her to return the amount the prosecutrix and her mother were annoyed. This was

also the reason why he was falsely implicated in this case. In support of his case he produced certain photographs showing the prosecutrix standing near him. Respondent Janak Singh stated that he had been falsely implicated in this case. The respondents examined DW-1 Kashmiri Lal and placed reliance on photographs Ex. DA and Ex. DB and negatives thereof being Ex. DC and Ex. DD. The prosecution, in support of its case, examined nine witnesses. The prosecution heavily relied on the evidence of PW-2 the prosecutrix. After considering the evidence on record learned Sessions Judge convicted respondent Joginder Singh for offence punishable under Section 376 of the IPC and sentenced him to undergo rigorous imprisonment for eight years and fine of Rs. 2,000/-, in default of payment of fine, to further undergo rigorous imprisonment for two months. He was also convicted under Section 506 of the IPC and sentenced to undergo rigorous imprisonment for one year. Respondent Janak Singh was convicted under Section 376 read with Section 511 of the IPC and sentenced to undergo rigorous imprisonment for four years and fine of Rs. 1,000/-, in default of payment of fine, to further undergo rigorous imprisonment for one month. He was also convicted under Section 506 of the IPC and sentenced to undergo rigorous imprisonment of one year. The substantive sentences were ordered to run concurrently.

5. Both respondents filed appeals in the High Court. We are rather surprised at the manner in which the High Court disposed of the appeals. After narrating the gist of the prosecution story the High Court noted the submission of learned counsel for the respondents that respondent Joginder Singh had undergone more than two years of actual sentence and respondent Janak Singh had undergone one year, ten months and seven days of actual sentence; that the respondents are the only bread earners of their family and are facing criminal proceedings since the years 1998 and that in the facts and circumstances of the case and considering the medical evidence the possibility of the prosecutrix going with

respondent Joginder Singh out of her own free will cannot be ruled out. The counsel appears to have made it clear that the respondents had not challenged their conviction but they wanted their sentence to be reduced to the sentence already undergone. The State counsel made a feeble attempt to oppose this submission by stating that the sentence is not liable to be reduced. There is no indication in the impugned judgment that the State counsel vehemently opposed the submission of the counsel for the respondents. The High Court after referring to the submissions of the counsel observed as under:

> "After hearing learned counsel for the parties and going through the record of the case, it would be just and expedient to reduce the sentence qua imprisonment of the appellants to already undergone by them. Fine is stated to have already been deposited by the appellants.
>
> Accordingly, the conviction of appellant Joginder Singh under Sections 376, 506 IPC and the conviction of appellant Janak Singh under Sections 376/511 and 506 IPC, as ordered by the trial court, is maintained. However, sentence qua imprisonment of the appellants is reduced to already undergone by them.
>
> The present appeals stand disposed of accordingly."

The High Court gave no reasons for reducing the sentence to sentence already undergone.

6. Rape is one of the most heinous crimes committed against a woman. It insults womanhood. It violates the dignity of a woman and erodes her honour. It dwarfs her personality and reduces her confidence level. It violates her right to life guaranteed under Article 21 of the Constitution of India. We may remind ourselves of the observations made by this Court in *Bodhisattwa Gautam v. Subhra Chakraborty,*[1] that rape is violative of the victim's most cherished of the fundamental rights

1. (1996) 1 SCC 490.

guaranteed under Article 21 of the Constitution of India. In a series of judgments this Court has reiterated these observations. Rape cases have to be dealt with keeping these observations in mind.

7. Section 376 of the IPC provides for punishment for rape. Offence of rape is punishable with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years. The convict shall also be liable to fine. Proviso to Section 376(1) states that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years. Thus, a minimum of seven years sentence is provided under Section 376(1) of the IPC. Sentence for a term of less than seven years can be imposed by a court only after assigning adequate and special reasons for such reduction. Thus, ordinarily sentence for an offence of rape shall not be less than seven years. When the legislature provides for a minimum sentence and makes it clear that for any reduction from the minimum sentence of seven years, adequate and special reasons have to be assigned in the judgment, the courts must strictly abide by this legislative command. Section 376(1) read with the proviso thereto reflects the anxiety of the legislature to ensure that a rapist is not lightly let off and unless there are some extenuating circumstances stated in writing, sentence below the minimum i.e. less than seven years cannot be imposed. While imposing sentence on persons convicted of rape, the court must be careful and must not overlook requirement of assigning reasons for imposing sentence below the prescribed minimum sentence. The High Court appears to have not noticed this requirement.

8. In this connection we may usefully refer to *State of Karnataka v. Krishnappa*[2]. In that case the High Court had reduced the sentence of ten years rigorous imprisonment imposed by the trial court on the accused for an offence under

2. (2000) 4 SCC 75

Section 376 of the IPC to four years rigorous imprisonment. Severely commenting on this indiscretion, this Court observed as under:-

> *"Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of the heinous crime of rape on innocent helpless girls of tender years, as in this case, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court. There are no extenuating or mitigating circumstances available on the record which may justify imposition of any sentence less than the prescribed minimum on the respondent. To show mercy in the case of such a heinous crime would be a travesty of justice and the plea for leniency is wholly misplaced. The courts are expected to properly operate the sentencing system and to impose such sentence for a proved offence, which may serve as a deterrent for the commission of like offences by others. Sexual violence apart from being a dehumanising act is an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity — it degrades and humiliates the victim and where the victim is a helpless innocent child, it leaves behind a traumatic experience. The courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely. A socially sensitised Judge, in our opinion, is a better statutory armour in cases of crime against women*

than long clauses of penal provisions, containing complex exceptions and provisos."

9. In *State of A.P. v. Bodem Sundara Rao*[3], the accused was sentenced by the trial court for an offence under Section 376 of the IPC for ten years. The High Court maintained the conviction, however, reduced the period of sentence to four years. This Court set aside the High Court's order and enhanced the sentence to seven years which is the minimum prescribed sentence under Section 376 of the IPC. The relevant observations of this Court are as under:

"In recent years, we have noticed that crime against women are on the rise. These crimes are an affront to the human dignity of the society. Imposition of grossly inadequate sentence and particularly against the mandate of the Legislature not only is an injustice to the victim of the crime in particular and the society as a whole in general but also at times encourages a criminal. The courts have an obligation while awarding punishment to impose appropriate punishment so as to respond to the society's cry for justice against such criminals. Public abhorrence of the crime needs a reflection through the court's verdict in the measure of punishment. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of the appropriate punishment. The heinous crime of committing rape on a helpless 13/14 year old girl shakes our judicial conscience. The offence was inhumane. There are no extenuating or mitigating circumstances available on the record which may justify imposition of sentence less than the minimum prescribed by the Legislature under Section 376(1) of the Act."

The above observations of this Court made in *Krishnappa*

3. (1995) 6 SCC 230.

and in *Bodem Sundara Rao* state what should be the approach of the courts while sentencing accused convicted of rape. We shall examine the present case in light of the above discussion.

10. We notice that before the High Court learned counsel for the respondents did not challenge the conviction. At the same time, he stated that the circumstances of the case and medical evidence indicated that this could be a case where the prosecutrix had gone with respondent Joginder Singh of her own will. Therefore, it is not clear whether the respondents had really instructed their counsel not to press the appeal on merits or whether the counsel on his own thought that getting the respondents released on sentence already undergone by them was an easy way out and, therefore, he preferred that option. We feel that the appeals were heard in a slipshod manner. It was open for the respondents to press the appeals on merits and pray for acquittal. Had the case been argued on merits, the High Court could have acquitted the respondents if it felt that the prosecution had not proved its case beyond reasonable doubt. Assuming the respondents did not press the appeals, the High Court had to still consider whether the concession made by the counsel was proper because it is the duty of the court to see whether conviction is legal. But, once the respondents stated that they did not want to press the appeals and the High Court was convinced that conviction must follow, then, ordinarily it could not have reduced the sentence to the sentence already undergone by the respondents which is below the minimum prescribed by law. The High Court could have done so only if it felt that there were extenuating circumstances by giving reasons therefor. While reducing the sentence, the High Court has merely stated that it was *"just and expedient"* to do so. These are not the reasons contemplated by the proviso to Section 376(1) of the IPC. Reasons must contain extenuating circumstances which prompted the High Court to reduce the sentence below the prescribed minimum. Sentence bargaining is impermissible in a serious offence like rape. Besides, at the cost of repetition, it must be stated that such a

course would be against the mandate of Section 376(1) of the IPC.

11. In view of the above discussion, we hold that the impugned judgment is legally unsustainable and is liable to be set aside and the matter deserves to be remanded to the High Court for fresh disposal of the appeals filed by the respondents.

12. In the result, the appeals are partly allowed, the impugned judgment is set aside and the matter is remanded to the High Court with the request to dispose of the appeals filed by the respondents expeditiously after giving opportunity of hearing to all the parties. In the peculiar facts of the case, we direct that the respondents shall continue to remain on bail till the disposal of the appeals.

13. It is made clear that nothing said in this order should be treated as expression of our opinion on the merits of the case.

K.K.T. Appeals partly allowed & Matter remanded to High Court.

JOSE S/O EDASSERY THOMAS
v.
STATE OF KERALA
(Criminal Appeal No. 234 of 2010)

MAY 22, 2013

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

Penal Code,1860 – s.302 – Murder of wife – By setting her on fire, while she was sleeping – Circumstantial evidence – Conviction by courts below – Held: The cumulative effect of the evidence viz., the conduct of the accused, dying declaration and the motive proves the guilt of the accused – The chain of circumstances exclusively leads towards the accused and none else – Conviction upheld.

Dying declaration – Acceptance of – Plea that in view of 92% burn injuries, dying declaration of deceased not acceptable – Held: There is no thumb rule that a person sustaining a particular percentage of burn injuries would not be in a position to give dying declaration – In the instant case, evidence proves that the deceased was in a fit state of mind while making dying declaration, hence the declaration is acceptable.

The appellant-accused was prosecuted for murder of his wife and attempt to murder his grandchild. The prosecution case was that the deceased being 52 years of age, was not capable of satisfying the lust of the accused and that he also suspected his wife having illicit relations with their son-in-law. The accused killed his wife by pouring petrol on her, while she was sleeping. She gave dying declaration to the doctor, who was attending her, implicating the accused. Trial court convicted the accused u/s 302 and 307 IPC and awarded life imprisonment. High Court confirmed the conviction and

sentence u/s 302 IPC. However, he was acquitted u/s 307 IPC. Hence, the present appeal.

Dismissing the appeal, the Court

HELD: 1. The cumulative effect of the evidence clearly proves the guilt of the accused and the chain of circumstances exclusively leads towards him and none else. [Para 14] [1164-H; 1165-A]

2. The evidence on record indicate that the deceased was conscious and hence, her dying declaration is acceptable which would reveal the cruel treatment meted out by the husband to the wife, the suspicion harboured by him and the threats given. True it is, she had stated that she had suspected that her husband might have set her ablaze but to prove the said aspect, there are numerous circumstances which the trial court as well as the High Court have taken into consideration. On a perusal of the evidence on record, it is manifest that PW-1 (the doctor) clearly stated that he had recorded the dying declaration. It has come out in the evidence that the deceased was conscious and her mind was well-oriented. Other witnesses have also deposed that she was in a fit state of mind. The medical report produced by the hospital also reflects that she was conscious and oriented. She was given a pain killer injection. That apart, there cannot be any thumb rule that a person sustaining a particular percentage of burn injuries would not be in a position to give any declaration. [Paras 11 and 12] [1162-F-H; 1163-A, G-H; 1164-A-B]

Laxman vs. State of Maharashtra **(2002) 6 SCC 710 – followed.**

Babu Lal and Ors. vs. State of Madhya Pradesh **AIR 2004 SC 846:2003 (5) Suppl. SCR 54;** *State of Madhya Pradesh v. Dal Singhand Ors.* **2013 (7) SCALE 513 – relied on.**

3. The circumstances which lead singularly to the guilt of the accused are that the accused was sleeping in the bed room and it was a small house; that the bed room was not having any shutters; that PW-3 (the daughter of the deceased and accused) woke up on hearing the cries of the deceased; that the accused had purchased petrol from the petrol pump belonging to PW-5 in a bottle; that Ext. P-15, Chemical Analysis Report, has clearly mentioned that kerosene was not detected in any of the material objects sent for chemical analysis; that the accused was seen running away from the house by PW-3 and PW-7; that it has been clearly deposed by PW-3 that the accused used to demand that mother should sleep with him, but she could not oblige him; and that he had threatened to kill her. The elder daughter has deposed that the father was doubting the husband of PW-3 to have illicit relationship with the mother. PW3had also deposed that the deceased was 52 years of age and was infirm and not in a position to cater to the desire of her husband (i.e. the accused). All these circumstances appreciated in the context of the dying declaration, clearly establish the involvement of the accused in causing burn injuries on the deceased. [Para 12] [1164-B-F]

4. The conduct of the accused is also worth noting. After escaping from the house, he had surrendered at the police station. In his statement under Section 313, Crl. P.C., he has stated that he tried to save his wife, but no burn injuries were found on his body. Though he had taken the plea of accidental fire, yet it has clearly been established by the medical evidence that the possibility of causing burn injuries from a small kerosene lamp is impossible. Therefore, it is evident that the accused has given false statement. [Para 13] [1164-F-G]

Case Law Reference:

(2002) 6 SCC 710	**followed**	**Para 10**
2003 (5) Suppl. SCR 54	**relied on**	**Para 11**
2013 (7) SCALE 513	**relied on**	**Para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 234 of 2010.

From the Judgment and Order dated 17.09.2008 of the High Court of Kerala at Ernakulam in Crl. A. No. 280 of 2005.

Kamal Mohan Gupta (A.C.), Sanjeev Kumar, Mohd. Zahid Hussain for the Appellant.

Jogy Scaria for the Respondent.

The Judgment of the Court was delvered by

DIPAK MISRA, J. 1. The present appeal depicts a gruesome and repulsive picture that paints the appellant justifiably as the cruel protagonist who, invaded by passion of an uncultivated mind, insatiated by sexual desire and a further sense of suspicion that leads one into the realm of the worst, committed an act of unthinkable depravity. The ghastly act here is the murder of wife. In fact, the accused-appellant, as the prosecution story would reveal, was not only driven by the fierce frenzy of passion but also his rational thinking had been totally darkened. In the ultimate eventuate, consumed by the fire and ire of anger, he burnt his wife to death. He might have thought that he would bring an end to the anarchy in his house but his uncontrolled act ushered in anarchy of the darkest hour in his own life. The result is the conviction under Sections 302 and 307 of the Indian Penal Code (for short "IPC") and sentence for life and rigorous imprisonment for three years on both the counts by the learned trial Judge in S.C. No. 169 of 2004 which has received the stamp of approval by the High Court of Kerala in respect of conviction under Section 302 IPC vide judgment

dated 17.9.2008 in Criminal Appeal No. 280 of 2005. Hence, the present appeal by special leave.

2. The prosecution case as uncurtained is that the accused was living with the deceased, and their daughter, PW-3, and son-in-law, PW-5, along with their two grand children. The accused harboured a suspicion that his wife was having an illicit relationship with the son-in-law. The said suspicion got aggravated and intensified due to non-cooperation of the wife to satisfy his lustful hunger for sex. The uncontrolled sensual desire was further inflamed by the seed of suspicion that he himself had planted in his heart and nurtured relentlessly in his mind. The ablaze of anger led him, in the early hours of 23.12.2002, to pour petrol and set his wife on fire. The horrendous act resulted in the tragic incident. She suffered 92% burn injuries and was taken to Jubilee Mission Hospital, Thrissur about 3.40 a.m. on that day where she succumbed to the injuries at 2.15 p.m. on 24.12.2002.

3. It is worthy to mention here that after the incident, the accused surrendered at Thrissur Town West Police station in the early morning of 23.12.2002 and narrated the incident to the police. The Thrissur Town West Police Station informed the incident to Anthikkad Police Station. The Head Constable of Anthikkad Police Station went to the Jubilee Mission Hospital and there the dying declaration, Ext. P-3, of the deceased was recorded by the doctor, PW-1, working in the Jubilee Mission Hospital. Initially, the daughter of the deceased, PW-3, had lodged an FIR, Ext.P-14, and a crime was registered by the ASI for the offence punishable under Section 307 IPC and the allegation was that the accused had attempted to commit the murder of his wife as well as that of his grand child. The said crime was registered by the Assistant Sub-Inspector, PW-15. Later on, after the death of the deceased, Section 302 IPC was added as per the report contained in Ext.P-16. The accused was arrested on 24.12.2002. The initial Investigating Officer prepared the scene mahazar, conducted the inquest and

prepared the report, recorded the statement of the witnesses and, thereafter, his successor-in-office, PW-17, completed the investigation and placed the charge sheet before the Judicial First Class Magistrate, Court II, Thrissur, who committed the case for trial to the Court of Session. It was eventually tried by the learned III Additional Sessions Judge (Ad hoc) Fast Track Court No. I, Thrissur.

4. The accused pleaded innocence and claimed to be tried.

5. The prosecution examined 18 witnesses and brought Exhibits P-1 to P-23 on record. Material objects MO-1 to MO-5 were marked at the instance of the prosecution. The accused, in his examination under Section 313 of Code of Criminal Procedure (for short 'The Code'), denying the circumstances against him filed a statement stating that the burn injuries on his wife were caused by an accident. His version was that his wife used to sleep, keeping a burning kerosene lamp by her side, and on the fateful day, she accidentally received burn injuries from the said lamp. When the accused attempted to save her life and take her to the hospital, his son-in-law drove him away and later when he was on his way to the hospital, he was arrested by the police.

6. The learned trial Judge, after considering the rivalised submissions and appreciating the evidence brought on record, found that the appellant was guilty of the offences punishable under Sections 302 and 307 IPC and sentenced him as has been mentioned earlier.

7. The High Court, analysing the evidence on record, considering the reliability of Ext. P-3, the dying declaration of the deceased, that has been recorded by PW-1, the doctor, taking note of the motive behind the crime, appreciating the conduct of the accused at the time of the crime, scanning the testimony of the daughters of the deceased and weighing the strained relationship between the accused and the deceased

and the other circumstances, found that the accused was guilty under Section 302 of IPC and, accordingly, it affirmed the conviction under Section 302 of IPC but acquitted him of the offence under Section 307 IPC on the ground that there was no evidence on record to prove his attempt to commit the murder of his grand child.

8. Mr. Kamal Mohan Gupta, learned amicus curiae, has submitted that the whole case is based on suspicion and there is no concrete evidence to implicate the accused in the crime in question. It is urged by him that there has been collusion between the son-in-law and the daughter to rope him in the crime and hence, the concurrent findings should be treated as perverse and the judgment of conviction should be set aside. It is also contended by Mr. Gupta that the dying declaration could not have been placed reliance upon, regard being had to the nature of burn injuries and further the circumstances have been given undue weightage by the trial Court as well as the High Court which they do not deserve.

9. Per contra, Mr. Jogy Scaria, learned counsel appearing for the State, submitted that the Courts below have microscopically analyzed the evidence on record and nothing has brought on record to discard the testimony of the witnesses treating them as untrustworthy. He has placed heavy reliance on the dying declaration and the other circumstances including the conduct of the accused.

10. First, we shall consider whether the dying declaration recorded by the doctor should be accepted or it is so improbable that it deserves to be thrown overboard. The dying declaration was recorded by PW-1 at 8.15 A.M. on 23.12.2012 when the deceased was in the ICU in the Burns Ward. The doctor, a plastic surgeon, has signed the dying declaration, Ext. P-3. In the dying declaration, the deceased had stated that on the date of the incident, there was a quarrel between her and her husband alleging that the deceased was having illicit relationship with her son-in-law and he had threatened to kill

her. She had clearly stated that her husband was running away and it is he who might have set fire on her. The concerned doctor, in his cross-examination, has stood embedded in his stand that the state of mind of the injured was absolutely clear and she was speaking fluently. She had denied the suggestion of the defence that because of the 92% of the burn injuries, the patient may not be conscious. It is not disputed that the doctor had not endorsed about the condition of the declarant of the dying declaration. In this context, we may refer with profit to the decision in *Laxman v. State of Maharashtra*[1] wherein the Constitution Bench, while dealing with the concept of dying declaration, the fitness of mind and the necessity of endorsement by Doctor, has stated thus: -

> "The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable."

1. (2002) 6 SCC 710.

11. In *Babu Lal and others v. State of Madhya Pradesh*[2], while dealing with the value of dying declaration in evidence, this Court has observed thus:-

> "A person who is facing imminent death, with even a shadow of continuing in this world practically non-existent, every motive of falsehood is obliterated. The mind gets altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person. The maxim is "a man will not meet his maker with a lie in his mouth" (*Nemo moriturus praesumitur mentire*). Mathew Arnold said, "truth sits on the lips of dying man". The general principle on which the species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced and mind induced by the most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.

In the case at hand, the deceased was taken to the hospital with 92% burn injuries. Learned counsel for the appellant would submit that a person with 92% burn injuries could not have been in a proper state of mind. On a perusal of the evidence on record, it is manifest that PW-1 has clearly stated that he had recorded the dying declaration, Ext. P-2 at 8.15 P.M. 23.12.2012. It has come out in the evidence that the deceased was conscious and her mind was well-oriented. Other witnesses have also deposed that she was in a fit state of mind. The medical report produced by the Jubilee Mission Hospital also reflects that she was conscious and oriented. She was given a pain killer injection. That apart, there cannot be any thumb

2. AIR 2004 SC 846.

rule that a person sustaining a particular percentage of burn injuries would not be in a position to give any declaration. Recently, in *State of Madhya Pradesh v. Dal Singh & Ors.,* in Criminal Appeal No. 2303 of 2009, this Court while dealing with burn injuries, has expressed thus:-

> "20. Burn injuries are normally classified into three degrees. The first is characterised by the reddening and blistering of the skin alone; the second is characterised by the charring and destruction of the full thickness of the skin; and the third is characterised by the charring of tissues beneath skin, e.g. of the fat, muscles and bone. If a burn is of a distinctive shape, a corresponding hot object may be identified as having been applied to the skin, and thus the abrasions will have distinctive patterns.
>
> 21. There may also be in a given case, a situation where a part of the body may bear upon it severe burns, but a small part of the body may have none. When burns occur on the scalp, they may cause greater difficulties. They can usually be distinguished from wounds inflicted before the body was burnt by their appearance, their position in areas highly susceptible to burning, and on fleshy areas by the findings recorded after internal examination. Shock suffered due to extensive burns is the usual cause of death, and delayed death may be a result of inflammation of the respiratory tract, caused by the inhalation of smoke. Severe damage to the extent of blistering of the tongue and the upper respiratory tract, can follow due to the inhalation of smoke. (See: Modi's Medical Jursprudence and Toxicology by Lexis Nexis Butterworths Chapter 20)."

12. We have referred to the aforesaid dictum only to show various types and natures of burn injuries. The ample of evidence on record indicate that the deceased was conscious and hence, we are inclined to accept the dying declaration which would reveal the cruel treatment meted out by the husband to the wife, the suspicion harboured by him and the threats

given. True it is, she had stated that she had suspected that her husband might have set her ablaze but to prove the said aspect, there are numerous circumstances which the trial Judge as well as the High Court has taken into consideration. The circumstances which lead singularly to the guilt of the accused are that the accused was sleeping in the bed room on the eastern side of the room where she was sleeping and it was a small house; that the bed room was not having any shutters; that PW-3 woke up on hearing the cries of the deceased; that the accused had purchased petrol from the petrol pump belonging to PW-5 in a bottle; that Ext. P-15, Chemical Analysis Report, has clearly mentioned that kerosene was not detected in any of the material objects sent for chemical analysis; that the accused was seen running away from the house by PW-3 and PW-7; that it has been clearly deposed by PW-3, the daughter, that the father used to demand that mother should sleep with him, but she could not oblige him; and that he had threatened to kill her. The elder daughter has deposed that the father was doubting the husband of PW-3 to have illicit relationship with the mother. She had also deposed that the mother was 52 years of age and was infirm and not in a position to cater to the desire of her husband. All these circumstances appreciated in the context of the dying declaration clearly establish the involvement of the accused in causing burn injuries on the deceased.

13. Quite apart from above, the conduct of the accused is also worth noting. After escaping from the house, he had surrendered at the police station. In his statement under Section 313, Crl. P.C., he has stated that he tried to save his wife, but no burn injuries were found on his body. Though he had taken the plea of accidental fire, yet it has clearly established by the medical evidence that the possibility of causing burn injuries from a small kerosene lamp is impossible. Therefore, it is evident that the accused has given false statement.

14. Thus, the cumulative effect of the evidence clearly

proves the guilt of the accused and the chain of circumstances exclusively leads towards him and none else. The obsession with the inferior endowments of nature made him to do a totally insensible act and ultimately, the addiction with the insatiated desire drove him to become frentic and frenzied to commit the crime. The lust led him to burn his wife and the result is the commission of offence for murder and the conviction and sentence of rigorous imprisonment for life which has been imposed by the learned trial Judge and affirmed by the High Court. The concurrence by the High Court deserves acceptation and we do so.

15. Consequently, the appeal, being devoid of merit, stands dismissed.

K.K.T. Appeal dismissed.

KARAN SINGH

v.

STATE OF HARYANA AND ANR.

(Criminal Appeal No. 1474 of 2010)

MAY 28, 2013

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

Penal Code, 1860 – s.302 – Murder – Conviction by courts below – Held: Consistent versions by the material witnesses regarding motive for murder – Prosecution case also supported by independent witness – There was no reason to falsely implicate the accused who was an influential person –conviction upheld.

Investigation :

Tainted investigation – Effect – Held: Tainted investigation leads to miscarriage of criminal justice, and thus deprives a man of his fundamental rights guaranteed under Article 21 of the Constitution – Every investigation must be judicious, fair transparent and expeditious to ensure compliance with the rules of law as required under Articles 19, 20 and 21 of the Constitution – Constitution of India, 1950 – Articles, 19, 20 and 21.

Tainted investigation – Effect of – On prosecution case – Held: Every discrepancy in investigation does not result in acquittal unless proved that it was dishonest or guided investigation or seriously prejudiced the defence of the accused.

The appellant accused was prosecuted for killing a woman. The prosecution case was that when PW-3 was irrigating her agricultural fields alongwith her daughter PW-4, she heard cries of her daughter (the deceased).

She saw that appellant alongwith co-accused had put a rope around the neck of the deceased and was dragging her in the field; and that the appellant had certain dispute with the deceased regarding non-payment of Rs. 47000/- by the appellant as consideration, for the sale of a bufallo. Charge-sheet was filed against the appellant and the co-accused was declared proclaimed offender.

Trial court convicted the appellant-accused under s. 302 IPC, sentenced him to imprisonment for life and imposed fine of Rs. 25000/- with default clause. High Court upheld the conviction and sentence. Hence, the present appeal.

Dismissing the appeal, the Court

HELD: 1.1. Consistent versions have been provided by the material witnesses regarding the non-payment of the sum of Rs.47,000/- as sale consideration for the sale of a buffalo, by the appellant. This version of events also fully stands established by the evidence provided by PW.3 and PW.4. No attempt was made by the defence to falsify the allegation of the non-payment of the sum of Rs.47,000/-. It also stands established from the material on record, that there had been an altercation between the appellant and the deceased 2-3 days before the incident, and the appellant had threatened the deceased with dire consequences. Such version of events stands further fortified, by the evidence of PW.8, who is an independent witness. None of the witnesses have been properly cross-examined by the defence. Both the courts though have expressed their anguish regarding the manner in which the investigation was conducted, they have convicted the appellant for the offence punishable under Section 302 IPC, and have awarded appropriate sentences. [Paras 6 to 8] [1175-D, F, G; 1176-B-C]

1.2. The presence of PWs 3 and 4 in the field cannot

be doubted, as it is usual for every agriculturist to carry out the task of irrigation, whenever his/her turn for irrigation arises. The defence had not asked PWs. 3 and 4 to furnish any further details regarding the cultivation of the land, in relation to the terms and conditions of the Batai, and also regarding who's duty it was to irrigate the land, and what the source and means of irrigation were. [Para 9] [1176-E-F]

1.3. The courts below rightly held that there was no reason for the false implication of the accused, who being the Sarpanch of the village was an influential person; that PW.8 was an independent witness and there was no ground to disregard his testimony; and that Abadi was at some distance from the place of occurrence and hence, the hue and cry raised by the deceased, and subsequently by PW.3, could not have attracted the attention of any person. [Para 17] [1181-B-D]

1.4. Other theories introduced by the defence are liable to be rejected. Their stating that the deceased had been a woman of easy virtue, her having illicit relationships with a large number of persons; humiliation of her mother (PW.3) etc. cannot adversely affect the case of the prosecution. The theory of political rivalry between certain persons and the appellant, at whose behest PW.3 and PW.4 had levelled the allegation of such a heinous crime, also do not inspire confidence. [Para 8, 10] [1176-C; 1176-H; 1177-A]

2.1.The investigation into a criminal offence must be free from any objectionable features or infirmities which may give rise to an apprehension in the mind of the complainant or the accused, that investigation was not fair and may have been carried out with some ulterior motive. The Investigating Officer must not indulge in any kind of mischief, or cause harassment either to the complainant or to the accused. His conduct must be

entirely impartial and must dispel any suspicion regarding the genuineness of the investigation. The Investigating Officer, "is not merely present to strengthen the case of the prosecution with evidence that will enable the court to record a conviction, but to bring out the real unvarnished version of the truth." Ethical conduct on the part of the investigating agency is absolutely essential, and there must be no scope for any allegation of *mala fides* or *bias.* [Para 12] [1177-C-F]

Ram Bihari Yadav vs. State of Bihar & Ors. **AIR 1998 SC 1850: 1998 (2) SCR 1097;** *Amar Singh vs. Balwinder Singh & Ors.* **AIR 2003 SC 1164: 2003 (1) SCR 754;** *Ram Bali vs. State of Uttar Pradesh* **AIR 2004 SC 2329: 2004 (1) Suppl. SCR 195 – relied on.**

2.2. Words like 'personal liberty' contained in Article 21 of the Constitution provide for the widest amplitude, covering all kinds of rights particularly, the right to personal liberty of the citizens of India, and a person cannot be deprived of the same without following the procedure prescribed by law. In this way, the investigating agencies are the guardians of the liberty of innocent citizens. Therefore, a duty is cast upon the Investigating Officer to ensure that an innocent person should not suffer from unnecessary harassment of false implication, however, at the same time, an accused person must not be given undue leverage. An investigation cannot be interfered with or influenced even by the courts. Therefore, the investigating agency must avoid entirely any kind of extraneous influence, and investigation must be carried out with equal alacrity and fairness irrespective of the status of the accused or the complainant, as a tainted investigation definitely leads to the miscarriage of criminal justice, and thus deprives a man of his fundamental rights guaranteed under Article 21 of the Constitution. Thus, every investigation must be judicious, fair, transparent and expeditious to ensure

compliance with the rules of law, as is required under Articles 19, 20 and 21 of the Constitution. [Para 12] [1177-C-F]

Babubhai vs. State of Gujarat & Ors. **(2010) 12 SCC 254: 2010 (10) SCR 651 – relied on.**

2.3. Omissions made on the part of the Investigating Officer, where the prosecution succeeds in proving its case beyond any reasonable doubt by way of adducing evidence, particularly that of eye-witnesses and other witnesses, would not be fatal to the case of the prosecution, for the reason that every discrepancy present in the investigation does not weigh upon the court to the extent that it necessarily results in the acquittal of accused, unless it is proved that the investigation was held in such manner that it is dubbed as "a dishonest or guided investigation", which will exonerate the accused. Thus, unless lapses made on the part of Investigating authorities are such, so as to cast a reasonable doubt on the case of the prosecution, or seriously prejudice the defence of the accused, the court would not set aside the conviction of the accused merely on the ground of tainted investigation. [Para 14] [1178-F-H; 1179-B-C]

2.4. There is adequate evidence on record to show that PW.9, who had conducted the investigation at its initial stage, had not acted in accordance with law and had favoured the appellant. It was for this reason that the police authorities upon a complaint made, changed the Investigating Officer, who then conducted the investigation properly. In spite of the fact that certain serious findings have been recorded by the Trial Court, as well as by the High Court regarding the unfair investigation conducted by the SHO of the Police Station, but for the reasons best known to the administration, no action was taken against him. The Chief Secretary of the

State of Haryana is requested to examine the case, and proceed in accordance with law. [Paras 11 and 19] [1177-B; 1181-G-H; 1182-A-B]

Sonali Mukherjee vs. Union of India **(2010) 15 SCC 25: 2009 (14) SCR 858;** *Mohd. Imran Khan vs. State Government (NCT of Delhi)* **(2011) 10 SCC 192: 2011 (15) SCR 1030;** *Sheo Shankar Singh vs. State of Jharkhand and Anr.* **AIR 2011 SC 1403: 2011 (4) SCR 312;** *Gajoo vs. State of Uttarakhand* **(2012) 9 SCC 532: 2012 (7) SCR 1033;** *Shyamal Ghosh vs. State of West Bengal* **AIR 2012 SC 3539: 2012 (10) SCR 95;** *Hiralal Pandey and Ors. vs. State of U.P.* **AIR 2012 SC 2541: 2012 (3) SCR 1066 – relied on.**

Dayal Singh and Ors. vs. State of Uttaranchal **(2012) 8 SCC 263: 2012(10) SCR 157 – referred to.**

Case Law Reference:

2010 (10) SCR 651	**relied on**	**Para 12**
1998 (2) SCR 1097	**relied on**	**Para 13**
2003 (1) SCR 754	**relied on**	**Para 13**
2004 (1) Suppl. SCR 195	**relied on**	**Para 13**
2009 (14) SCR 858	**relied on**	**Para 14**
2011 (15) SCR 1030	**relied on**	**Para 14**
2011 (4) SCR 312	**relied on**	**Para 14**
2012 (7) SCR 1033	**relied on**	**Para 14**
2012 (10) SCR 95	**relied on**	**Para 14**
2012 (3) SCR 1066	**relied on**	**Para 14**
2012 (10) SCR 157	**referred to**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1474 of 2010.

From the Judgment and Order dated 06.02.2009 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 226-DB of 2007.

Neeraj Kumar Jain, Rishi Malhotra, Devashish Bharuka for the Appellant.

Manjit Singh, AAG, Ramesh Kumar, Kamal Mohan Gupta for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the impugned judgment and order dated 6.2.2009 in Criminal Appeal No.226-DB of 2007, passed by the High Court of Punjab & Haryana at Chandigarh, by way of which the High Court has affirmed the judgment and order dated 8.2.2007, passed by the Additional Sessions Judge, Bhiwani in Sessions Trial No.110 of 8.9.2005, by way of which and whereunder the Trial Court has convicted the appellant under Section 302 of the Indian Penal Code 1860 (hereinafter referred to as the 'IPC'), and sentenced him to undergo imprisonment for life and to pay a fine of Rs.25,000/-. In default of payment of such fine, he would further suffer RI for a period of 3 years.

2. Facts and circumstances giving rise to this appeal as per the prosecution are that:-

A. In the intervening night between 6-7.1.2005, Maya Devi (PW.3), mother of Raj, deceased was irrigating her agricultural fields alongwith her daughter Birma (PW.4). On hearing the cries of her daughter Raj, Maya Devi and Birma reached the spot and saw that one Kalia had caught hold of Raj and Karan Singh, the appellant had put a rope around her neck and was dragging her deeper into the fields. Maya Devi (PW.3) raised considerable hue and cry but attracted no help, and Raj died on the spot as a result of the throttling. In the morning, Maya

Devi (PW.3) went to the place of occurrence alongwith her son Hariom (a simpleton). There were marks of dragging in the wheat field. A contusion mark on the neck of deceased was also clearly visible.

B. Maya Devi (PW.3) went to the police station to file a report. On her way there, she met some police officials and she informed them about the incident, based on which, an FIR was registered on 7.1.2005, under Sections 302/34 IPC at the Police Station, Sadar Charkhi Dadri.

C. The dead body of Raj was sent for post-mortem. Dr. U.S. Dasodia (PW.7), conducted the post-mortem on the body of the deceased and found a ligature mark on her neck. He has opined that she died due to asphyxia, caused by strangulation which was sufficient to cause death in the ordinary course of nature. The time gap between her injuries and death was only a few minutes, and between her death and post-mortem, less than 24 hours.

D. The police recorded the statements of various persons including Maya Devi (PW.3), Birma (PW.4) anlongwith other people. After completing the investigation, a chargesheet was filed against the appellant. The co-accused Kalia, could not be apprehended and was declared as a proclaimed offender.

E. The case of the prosecution is that Karan Singh, the appellant, had a certain dispute with deceased Raj regarding the non-payment of dues to her to the extent of Rs.47,000/-, as consideration for the sale of a buffalo by the deceased Raj. Since the appellant had not paid the said money, there was a quarrel between them on 3-4.1.2005 as regards the same, wherein appellant had threatened to kill her. In furtherance thereof, Raj was murdered by the appellant.

F. The prosecution examined several witnesses including Maya Devi (PW.3), Birma (PW.4) and Omkar Singh (PW.8). The statement of the accused-appellant was recorded under

Section 313 of Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.') After the conclusion of the trial, the learned Sessions Judge, Bhiwani, convicted and sentenced the appellant, as has been referred to hereinabove.

Hence, this appeal.

3. Shri Neeraj Kumar Jain, learned senior counsel appearing for the appellant has submitted, that the investigation in the instant case, was tainted. The statement under Section 161 Cr.P.C. had been recorded after several months of the incident. Raj, deceased was a woman who had gotten separated from her husband for the reason that she had been a woman of easy virtue, and had also been living separately from her mother and sister. The specific case of Maya Devi (PW.3), mother of deceased was, that she had gone alongwith her daughter to irrigate the fields, though in her cross-examination she has admitted that the agricultural land had been given to one Khazan, upon sharing of the agricultural produce (Batai). Birma (PW.4), the sister of the deceased has deposed that they did not cultivate the land themselves.

The Trial Court did not believe the version of events as provided by Maya Devi (PW.3) and Birma (PW.4), but treated the case as one of circumstantial evidence. The entire case of the prosecution is improbable. Thus, the appeal deserves to be allowed.

4. On the contrary, Shri Manjit Singh, AAG, appearing for the State of Haryana, has opposed the appeal contending that the courts below have recorded concurrent findings of fact. The defence had not put any question in the cross-examination either to Maya Devi (PW.3) or Birma (PW.4), regarding the non-payment of the sum of Rs.47,000/- as consideration for the sale of a buffalo by the deceased Raj to Karan Singh, appellant, despite the fact that there was ample evidence on record to show that there had been an altercation regarding the non-

payment of the said amount on 3.1.2005, between the deceased and the appellant. The appellant had threatened to kill her. Moreover, this statement stood corroborated by the deposition of Omkar Singh (PW.8). In the event that there had been some impropriety in the course of the investigation, the same had been only at the behest of the appellant and that too, entirely in his favour and certainly not in the favour of the prosecution. The appellant has made a disclosure statement about concealing the rope that had been used in the crime, but the Investigating Officer has not made any effort to recover the same. Thus, the appeal is liable to be rejected.

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

6. Consistent versions have been provided by the material witnesses regarding the non-payment of the sum of Rs.47,000/- as sale consideration for the sale of a buffalo, by the appellant. This version of events also fully stands established by the evidence provided by Maya Devi (PW.3) and Birma (PW.4). In his statement under Section 313 Cr.P.C., the defence did not ask any question to test the veracity of the said statement, either to Maya Devi (PW.3) or to Birma (PW.4). Mere denial stating that the same is incorrect by the appellant, is not sufficient and there is no reason to disbelieve the said portion of the case of the prosecution. It also stands established from the material on record, that there had been an altercation between the appellant and the deceased 2-3 days before the incident, and the appellant had threatened the deceased with dire consequences. Such version of events stands further fortified, by the evidence of Omkar Singh (PW.8).

7. Omkar Singh (PW.8) is an independent witness who has deposed that on the fateful day, he had gone to bring some vegetables from a shop. The accused-appellant had then come there from the side of the Harijan Basti, asking where Raj (prostitute) had gone, and had stated that he would kill her

within 2-3 days. The accused-appellant had been having illicit relations with the deceased, and at the said time, the accused had been under the influence of alcohol.

8. None of these witnesses have been properly cross-examined by the defence. Both the courts though have expressed their anguish regarding the manner in which the investigation was conducted, they have convicted the appellant for the offence punishable under Section 302 IPC, and have awarded appropriate sentences. A large number of other theories were introduced by the defence stating that the deceased had been a woman of easy virtue, and that it was for this reason that her husband had divorced her, she had settled in the village and had been living in a separate house, away from her mother's house, and that even here, she had been having illicit relationships with a large number of persons, etc. In relation to the same, a Panchayat was also conducted, and Maya Devi (PW.3) etc. had been humiliated. Be that as it may, this kind of theory could not adversely affect the case of the prosecution.

9. So far as the issue of cultivating the said land is concerned, the defence had not asked PWs.3 and 4 to furnish any further details regarding the cultivation of the land, in relation to the terms and conditions of the Batai, and also regarding who's duty it was to irrigate the land, and what the source and means of irrigation were, as they have claimed to be in the agriculture fields at mid night for purpose of irrigating the same. Their presence cannot be doubted, as it is usual for every agriculturist to carry out the task of irrigation, whenever his/her turn for irrigation arises.

10. As the defence has not put any further question in the course of the cross-examination of Maya Devi (PW.3) and Birma (PW.4) in this regard, we are not in a position to grant the benefit of any of these issues to the appellant. The theory of political rivalry between certain persons and the appellant,

at whose behest Maya Devi (PW.3) and Birma (PW.4) had levelled the allegation of such a heinous crime, do not inspire confidence. The same are thus liable to be rejected.

11. There is adequate evidence on record to show that Rajesh Kumar, SI (PW.9), who had conducted the investigation at its initial stage, had not acted in accordance with law and had favoured the appellant. It was for this reason that the police authorities upon a complaint made, changed the Investigating Officer, who then conducted the investigation properly.

12. The investigation into a criminal offence must be free from any objectionable features or infirmities which may give rise to an apprehension in the mind of the complainant or the accused, that investigation was not fair and may have been carried out with some ulterior motive. The Investigating Officer must not indulge in any kind of mischief, or cause harassment either to the complainant or to the accused. His conduct must be entirely impartial and must dispel any suspicion regarding the genuineness of the investigation. The Investigating Officer, "is not merely present to strengthen the case of the prosecution with evidence that will enable the court to record a conviction, but to bring out the real unvarnished version of the truth." Ethical conduct on the part of the investigating agency is absolutely essential, and there must be no scope for any allegation of mala fides or bias. Words like 'personal liberty' contained in Article 21 of the Constitution of India provide for the widest amplitude, covering all kinds of rights particularly, the right to personal liberty of the citizens of India, and a person cannot be deprived of the same without following the procedure prescribed by law. In this way, the investigating agencies are the guardians of the liberty of innocent citizens. Therefore, a duty is cast upon the Investigating Officer to ensure that an innocent person should not suffer from unnecessarily harassment of false implication, however, at the same time, an accused person must not be given undue leverage. An investigation cannot be interfered with or influenced even by the courts. Therefore, the investigating

agency must avoid entirely any kind of extraneous influence, and investigation must be carried out with equal alacrity and fairness irrespective of the status of the accused or the complainant, as a tainted investigation definitely leads to the miscarriage of criminal justice, and thus deprives a man of his fundamental rights guaranteed under Article 21 of the Constitution. Thus, every investigation must be judicious, fair, transparent and expeditious to ensure compliance with the rules of law, as is required under Articles 19, 20 and 21 of the Constitution. (Vide: *Babubhai v. State of Gujarat & Ors.,* (2010) 12 SCC 254).

13. In *Ram Bihari Yadav v. State of Bihar & Ors.,* AIR 1998 SC 1850, this Court observed, that if primacy is given to a designed or negligent investigation, or to the omissions or lapses created as a result of a faulty investigation, the faith and confidence of the people would be shaken not only in the law enforcing agency, but also in the administration of justice.

A similar view has been re-iterated by this Court in *Amar Singh v. Balwinder Singh & Ors.,* AIR 2003 SC 1164.

Furthermore, in *Ram Bali v. State of Uttar Pradesh,* AIR 2004 SC 2329, it was held by this Court that the court must ensure that the defective investigation purposely carried out by the Investigating Officer, does not affect the credibility of the version of events given by the prosecution.

14. Omissions made on the part of the Investigating Officer, where the prosecution succeeds in proving its case beyond any reasonable doubt by way of adducing evidence, particularly that of eye-witnesses and other witnesses, would not be fatal to the case of the prosecution, for the reason that every discrepancy present in the investigation does not weigh upon the court to the extent that it necessarily results in the acquittal of accused, unless it is proved that the investigation was held in such manner that it is dubbed as "a dishonest or guided investigation", which will exonerate the accused. (See: *Sonali*

Mukherjee v. Union of India, (2010) 15 SCC 25; *Mohd. Imran Khan v. State Government (NCT of Delhi),* (2011) 10 SCC 192; *Sheo Shankar Singh v. State of Jharkhand & Anr.,* AIR 2011 SC 1403; *Gajoo v. State of Uttarakhand,* (2012) 9 SCC 532; *Shyamal Ghosh v. State of West Bengal,* AIR 2012 SC 3539; and *Hiralal Pandey & Ors. v. State of U.P.,* AIR 2012 SC 2541).

Thus, unless lapses made on the part of Investigating authorities are such, so as to cast a reasonable doubt on the case of the prosecution, or seriously prejudice the defence of the accused, the court would not set aside the conviction of the accused merely on the ground of tainted investigation.

15. This Court in *Dayal Singh & Ors. v. State of Uttaranchal,* (2012) 8 SCC 263, has laid down certain norms for taking stern action against an Investigating Officer, guilty of dereliction of duty or misconduct in conducting investigation, and held that the State is bound to initiate disciplinary proceedings against such officers even ignoring the law of limitation, and even if such officer has retired.

16. In the instant case, the Trial Court and the High Court have elaborately examined the grievances raised by the complainant regarding the tainted investigation carried on by the first Investigating Officer, Shri Rajesh Kumar, and the High Court has commented on the same as under:

> "It is well established on record that SI Rajesh Kumar had not conducted the investigation properly and he was favourably inclined to the appellant and therefore, spoiled the case. Detailed reasons have been recorded by learned trial court in paragraph 19 of its judgment manifesting that the appellant had influence over the police. We agree with the said reasoning of the trial court which is also apparent from the contentions advanced by learned State counsel, as noticed hereinabove. There were marks of dragging the deceased as mentioned in the inquest report, but still SI

> Rajesh Kumar did not depict the said marks in the rough site plan Ex.P-25 prepared by him. He also did not avail of the services of dog squad or crime team of the Forensic Science Laboratory. Shutter of shop, where the deceased used to reside, had also been broken, but the Investigating Officer did not care to get the same photographed nor mentioned the same anywhere in the investigation proceedings. Therefore, the complainant cannot be made to suffer for the lapse of the Investigating Officer…….The complainant is a widow having seven daughters and only one son, who is also simpleton. The deceased was also a divorcee and was living alone in the house (shop) in the fields in her parental village…….The complainant Maya Devi, who is mother of the deceased, is a widow and illiterate rustic villager, whereas the deceased was divorcee. On the other hand, the appellant is an influential person and was Sarpanch at the time of occurrence. The complainant named the appellant and his co-accused Kalia in the FIR itself. However, distorted version was recorded in the FIR and when the complainant party received copy of FIR on 26.1.2005 (as stated by Birma Devi PW.4), they learnt of the same and then they approached the Superintendent of Police (SP), who also did not take any action because the appellant, along with Member Legislative Assembly, had met the SP. Thereafter, with change of SP, the complainant party again approached the new SP and it was only thereafter that on 18.2.2005, correct statements of Maya Devi and Birma Devi were recorded. The appellant was so much influential that even thereafter, he was not arrested for more than four months and in fact, SI Rajesh Kumar did not arrest him and the next Investigating Officer ASI Raghbir Singh arrested the appellant on 24.6.2005. The appellant had been named in the FIR on 7.1.2005, but still SI Rajesh Kumar did not even join him in investigation and did not interrogate him, what to talk of arresting him. The statements of Maya Devi

and Birma Devi, therefore, cannot be discarded in view of the manner in which SI Rajesh Kumar was conducting the investigation from the very beginning."

17. After considering the entire evidence on record, the High Court has concurred with the findings recorded by the Trial Court as under:

(i) There is no reason for the false implication of the appellant, who being the Sarpanch of the village was an influential person.

(ii) Omkar Singh (PW.8) was an independent witness and there was no ground to disregard his testimony.

(iii) Abadi was at some distance from the place of occurrence. Therefore, the hue and cry raised by Raj-deceased, and subsequently by Maya Devi (PW.3), could not have attracted the attention of any person.

(iv) No attempt was made by the defence to falsify the allegation of the non payment of the sum of Rs.47,000/-, as consideration for the sale of a buffalo by the deceased to the appellant.

18. In view of the above, we do not find any force in the appeal, which lacks merit and is accordingly, dismissed.

19. Before parting with the case, we feel it necessary to bring the matter to the notice of the administration of the State of Haryana that in spite of the fact that certain serious findings have been recorded by the Trial Court, as well as by the High Court regarding the unfair investigation conducted by Shri Rajesh Kumar, who was the SHO of the Police Station, Sadar Dadri on 7.1.2005, but for the reasons best known to the administration, no action was taken against him. We have no words to express our anguish, and fail to understand under what circumstances the State authorities have adopted such an indifferent attitude where a helpless divorcee has been

murdered, and her widowed mother has been crying and running from pillar to post to secure justice, but the administration did not feel it necessary to wake up from its deep slumber. We request the learned Chief Secretary of the State of Haryana to examine the case, and proceed in accordance with law. A copy of the judgment be sent by the registry directly to the Chief Secretary, Haryana.

K.K.T. Appeal dismissed.