BAJAJ AUTO LIMITED
v.
RAJENDRA KUMAR JAGANNATH KATHAR & ORS.
(Civil Appeal Nos. 2159-2160 of 2012)

APRIL 04, 2013

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

Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971 - ss. 28 and 30(1)(b) and Schedule IV item 6 - Unfair Labour Practice - Allegation by workman - Courts below held that the Company indulged in unfair labour practices - Held: Courts below rightly held that the Company indulged in unfair labour practice - In the facts of the present case, amount of reasonable compensation granted by the Industrial Court is modified - However, since the workmen have already withdrawn the compensation amount, no steps to be taken by the management to recover the differential amount from the workmen.

The respondents-workmen were employed with the appellant-Company. The workmen initiated action against the Company u/s. 28 of Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971, before Industrial Court, seeking declaration that there was unfair labour practice under items 5, 6 and 9 of Schedule IV of the Act. They alleged that though they were engaged from the year 1990 to 1997, 1998 and 1999, yet every year their services used to be terminated after expiry of 7 months. 17 more workmen file separate complaint in the year 2003 for providing work to them as they were kept outside the factory premises without work. The employees, in addition to their evidence also relied on the evidence produced in another complaint filed by the workmen of the appellant-Company (the case reached upto Supreme Court Bajaj Auto Ltd. v. Bhojane

Gopinath D. and Ors. wherein the supreme Court had held that the appellant had indulged in unfair labour practice).

Industrial Court held that standard of evidence produced in the proceedings decided earlier in Bhojane case and in the present proceedings were similar and from the evidence it is proved that despite the continuation of theworkmen for years, they were not given status of permanency, and thus appellant-Company indulged in unfair labour practice under item 6 of Schedule IV of the Act, and directed payment to the workmen following the Bhojane case. As regards 17 workmen who had filed complaint in 2003, the Court directed to adjust the compensation amount in the salary paid to them.

Management preferred writ petition against the order of Industrial Court. Single Judge of High Court confirmed the order of Industrial Court. In Writ Appeal, Division Bench also upheld the orders of courts below. Hence the present appeals.

Disposing of the appeals, the Court

HELD: 1. Unfair labour practice, in its very essence, is contrary to just and fair dealing by both the employer and the employee. Peace in industrial atmosphere requires the parties to behave and conduct in a just and fair manner. The grievance of the aggrieved workmen has to be adjudicated under the necessary enactments on the bedrock of fairness and just needs. It is to be borne in mind that the primary obligation and duty of an industrial forum is to see that peace is sustained between the management and the employees in an industry. An unfair action by the employer against an individual worker has its effect and impact. It could disturb peace and harmony in an industrial sphere and similarly, when a workman behaves contrary to the code of co d

norms, unhealthy tribulation comes into existence. That is why the enactments provide a mechanism for arriving at a settlement to see that the growth and progress of industry is not scuttled by taking recourse to such methods which will eventually affect the national growth. This being the position behind the philosophy which has to be kept in mind by the employer and the employee, all efforts are to be made to avoid any kind of unfair labour practice. [Para 18] [318-C-G]

2. The stray observation by the Industrial Court regarding the factum of rotational practice was not correct more so when such a finding was earlier recorded and travelled to this Court for being tested and was accepted. The ultimate conclusion in this regard by the Industrial Court is correct but the said observation, was absolutely unwarranted. Hence, the complainants have proved that the company had engaged itself in unfair labour practice as far as Item No. 6 of Schedule IV of the 1971 Act is concerned. [Para 17] [317-C-E]

3. Non-adducing of evidence by each workman would not make the order illegal on that score. The evidence in the earlier case was adopted and accepted by all parties and has to be read as evidence in the present case and, hence, it cannot be brushed aside. Even if the plea that evidence in the earlier case should not have been taken into consideration, is pressed to its ultimate conclusion, it might, in certain cases, be an irregularity but cannot create a dent in the justifiability of the conclusion more so when the controversy related to the same period, but the only difference was that though some of the workmen approached the Industrial Court earlier, yet they chose not to proceed with the case and some approached at a later stage and only proceeded after the judgment was delivered by this Court. [Para 12] [314-D-G]

4. In the earlier case, Supreme Court had held that the High Court should not have directed reinstatement of the workmen with 50% back wages, but the situation warranted for grant of payment of reasonable amount of compensation in terms of Section 30(1)(b) of the 1971 Act. In the earlier case, Supreme Court. on the basis of s. 30(1)(b) of the 1971 Act granted reasonable compensation by evolving a rational formula. What would be reasonable compensation would depend on the facts and circumstances of the case and no strait-jacket formula can be evolved or laid down. [Paras 18 and 20] [318-H; 319-A; 321-D-E]

5. In the instant case, the complainants were silent spectators when the earlier group of cases was tried and the matter travelled to this Court. There were certain cases which were filed at a later stage. The Division Bench also considered that the filing of the complaints range from 1997-2003. Regard being had to the totality of circumstances, the amount of reasonable compensation which has been granted by the Industrial Court needs to be modified. [Para 21] [321-E-G]

6. The appellant-management is directed to pay lump sum amount calculated at 65 days' salary, inclusive of all allowances for the number of year each complainant has actually worked irrespective of the days a complainant may have put in, in a year. The calculation would be made on the basis of work during a calendar year and that the calendar year in which a complainant may not have worked at all would be kept out of consideration while calculating the amount. In calculating the salary that would be taken into account would be Rs.8,000/- p.m. subject to condition that if on the date of termination, the salary of any particular complainant was more, than the calculation would be made on the actual last drawn salary. The calculation in the abov[illegible]e

made for the period up to the date of terminations in 1997. For the period after termination till date of this judgment, the basis of calculation would be lump sum two years of service on the basis aforesaid, viz. 65 days for each year i.e. 130 days. [Para 21] [321-G-H; 322-A-C]

7. Despite the modification, keeping in view the fact that the respondent-workmen had already withdrawn the amount in pursuance of the order dated 06-02-2012 when leave was granted, no steps shall be taken by the appellant-company to recover the differential sum from the respondents. [Para 21] [322-C-D]

Bajaj Auto Ltd. vs. Bhojane Gopinath D. and Ors. **(2004) 9 SCC 488:2003 (6) Suppl. SCR 958;** *Bajaj Auto Ltd. vs. R. P. Sawant and Ors.***(2004) 9 SCC 486 - referred to.**

Case Law Reference:

2003 (6) Suppl. SCR 958	**referred to**	**Para 4**
(2004) 9 SCC 486	**referred to**	**Para 7**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2159-2160 of 2012.

From the Judgment and Order dated 15.11.2011 and 20.12.2011 of the High Court of Judicature of Bombay, Bench at Aurangabad in Letter Patent Appeal No. 247 of 2011 and Review Application No. 248 of 2011, respectively.

WITH

C.A. Nos. 2821, 2822, 2823, 2824, 2825, 2826, 2827. 2828, 2829, 2830, 2831, 2832, 2833, 2834, 2835, 2836, 2837, 2838, 2839, 2840, , 2841, 2842, 2843, 2844, 2845, 2846, 2847, 2848, 2849, 2850, 2851, 2852, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, 2870, 2871, 2872, 2873, 2874, 2875, 2876, 2877, 2878, 2879, 2880, 2881, 2882, 2883, 2884, 2885, 2886, 2887, 2888, 2889, 2890, 2891, 2892, 2893, 2894, 2895, 2896, 2897, 2898 & 2899 of 2013.

J.P. Cama Gopal Singh, Manish Kumar, S.J. Cama, Amol N. Suryawanshi (for Uday B. Dube) Atul B. Dakh (for Dr. Kailash Chand) for the Apearinig parties.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted in all the Special Leave Petitions and they are taken up along with Civil Appeal Nos. 2159 and 2160 of 2012. Regard being had to the commonality of the issue involved, all the appeals were heard together and are disposed of by a common judgment.

2. The facts which are essential to be stated for adjudication of the present batch of appeals are that the appellant-company is engaged in manufacturing of two-wheelers and three-wheelers and it has factories at Akurdi (Pune District) and Waluj (Aurangabad District). The respondents, who were engaged as Welders, Fitters, Turners, Mechanics, Grinders, Helpers, etc., initiated an action against the appellant-company under Section 28 of the Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971 (for short "the 1971 Act") before the Industrial Court, Aurangabad, seeking a declaration that there has been unfair labour practices under items 5, 6 and 9 of Schedule IV of the 1971 Act on the foundation that though they were engaged in the year 1990, yet in every year, they were offered employment for seven months each year and after the expiry of the said period, their services used to be terminated and the said practice continued till they filed the complaints in 1997, 1998 and 1999. Seventeen of them also filed a separate complaint in the year 2003 for providing work to them as they were kept outside the factory premises without work. It was alleged that because of this unfair labour practice, none of them could complete 240 days in employment in any corresponding year to make them eligible to earn the status and privilege of permanent employees. It was contended before the Industrial Court that in the year 1996, the employer, in order to improve work culture, used multi-skill and multi-operational system and thereby the employees termed as mu[illegible]e

required to undertake various jobs, but the employer, by taking recourse to unfair labour practice, saw to it that their services were terminated immediately after the expiry of seven months. In this backdrop, they were deprived of the status under clause 4-C of the Model Standing Orders as appended to Schedule I-A of the Industrial Employment (Standing Orders) Act, 1945 (for short "the 1945 Act").

3. The aforesaid stand and stance of the workmen was opposed by the employer contending, inter alia, that the establishment was governed by the Certified Standing Orders dated 10.3.1986 and the said Certified Standing orders did not have a provision like clause 4-C of the Model Standing Orders. It was asserted that the company has employed 4250 permanent employees which is sufficient to meet the requirement of normal production but whenever there was a temporary rise during some period in a year, with the consent of the union, it used to engage employees for the duration which was restricted to few months. The allegation of unfair labour practice under items 5, 6 and 9 of Schedule IV of the 1971 Act was seriously controverted. It was categorically put forth that there was no intention whatsoever to deprive the workmen of their status but the appellant-company, in order to meet its target, had to engage the employees as and when required and, hence, the bald allegation of unfair labour practice was not only totally unwarranted but also uncalled for.

4. To substantiate their respective stands, the employer and the employees adduced evidence and also relied on the evidence produced in complaint ULP No. 192 of 1997. Be it noted, apart from the evidence recorded in complaint ULP No. 192 of 1997, one Mr. Dilip Suryavanshi was examined on behalf of the employer. The Industrial Court took note of the stand of the complainants with regard to the assertion that the employer deliberately adopted rotational system throughout the year as a consequence of which the temporary employees were rotated and not allowed to complete the requisite number

of days to have permanency of employment and referred to the evidence in complaint ULP No. 192 of 1997 and came to hold that the standard of evidence produced in the proceeding decided earlier and produced in the proceeding before him were more or less similar and from the said evidence, it was clear that the employees had been continued for years but were not granted the status or privilege of permanency at the relevant time. He referred to the earlier judgment of this Court in *Bajaj Auto Ltd. v. Bhojane Gopinath D. and others* and adverted to the doctrine of res judicata and principle of res integra and, eventually, came to hold that the appellant-company had indulged itself in unfair labour practice under item No. 6 of Schedule IV of the 1971 Act. Following the decision in *Bhojane Gopinath* (supra), he directed the appellant-company to pay lump sum amount calculated at 85 days salary inclusive of all allowances for the number of years each complainant had actually worked irrespective of the days a complainant may have put in a year and the calculation would be made on the basis of work during a calendar year and that the calendar year in which a complainant may not have worked at all would be kept out of consideration while calculating the amount. It was stated that in calculating the salary it shall be at the rate of Rs.8000/- p.m. subject to the condition that if on the date of termination, the salary of any particular complainant was more, then the calculation would be made on the basis of actual last drawn salary and the calculation in the above manner would be made for the period upto the date of termination in 1997 and for the period after termination till date of the judgment, the basis of calculation would be lump sum three years of service on the aforesaid basis, viz., 85 days for each year, i.e., 255 days. As far as 17 complainants in complaint ULP No. 79 of 2003 were concerned, the Industrial Court directed that the compensation amount would be adjusted in the salary paid to them.

5. Being aggrieved by the aforesaid order of the Industrial Court, the management preferred a batch of writ petitions. Before the writ court, it was contended t rt

has totally erred by coming to hold that the employer had indulged in unfair labour practice; that the workmen in their individual capacity could not have been allowed to prosecute the complaint after the recognized union came into existence in the year 1999; that the rise in production was not synonymous with the availability of work; that the increased production was achieved with the help of permanent employees of the company and whenever situation arose for meeting the target, the employees were engaged for few months on the basis of a settlement entered between the employer and the Union; that once the Industrial Court had expressed the opinion that the factum of rotational system had not been established by cogent evidence, a finding could not have been returned pertaining to unfair labour practice under item 6 of Schedule IV of the 1971 Act; that the reliance on the decision in *Bhojane Gopinath D.* (supra) was neither correct nor advisable as the said decision was restricted to its factual matrix; that there was no material on record to show that the employer had any intention to deprive the employees the benefits of permanency; that no independent evidence was adduced on behalf of the workmen but a conclusion had been arrived at by the Industrial Court on the base and foundation of the evidence recorded in complaint ULP No. 192 of 1997 which was absolutely impermissible; and that the Industrial Court failed to appreciate the evidence of Mr. Suryavanshi in proper perspective and had gone absolutely transient on the concept of res judicata and res integra which were untenable.

6. On behalf of the respondent-employees, reliance was placed on the previous pronouncement of this Court, the evidence brought on record and the defensibility of the analysis made by the Industrial Court.

7. The learned Single Judge referred to the decision in *Bajaj Auto Ltd. v. R. P. Sawant and others*[1] and the pronouncement in Bhojane Gopinath's case and opined that as

1. (2004) 9 SCC 486.

this Court had considered the same controversy, the lis required to be appreciated in the backdrop of the analysis made therein. The writ Court referred to paragraph 8 of the judgment delivered by the Industrial Court wherein a specific reference had been made to the fact that the parties had consented to rely upon the evidence produced in ULP complaint No. 192 of 1997 which came to be considered by this Court. The learned Single Judge scrutinised the reasoning ascribed by the Industrial Court and noticed that there was ample proof that the evidence in the earlier case had been adopted and the only additional evidence that had been brought on record was the evidence of one Mr. Suryavanshi. The Writ Court observed that the evidence adduced by Mr. Suryavanshi essentially pertained to the changed circumstances from July, 2000 onwards and, therefore, the same was inconsequential for the period prior to July 2000. It took note of the fact that the year of filing of the ULP complaints before the Industrial Court and decided by Judgment dated 21.8.2004 ranged from 1997 to 2003 but the thrust of the grievance was completion of 7 years of service from 1990 to 1997 and hence, the deposition of Mr. Suryavanshi really did not make any difference. In this backdrop, the learned Single Judge expressed the view that the earlier evidence being adopted by the parties by consensus deserved to be read as evidence in fresh cases and, therefore, the Industrial Court was absolutely justified to look into that evidence and in resting its finding on the same. Thereafter, commenting on the finding of the Industrial Court relating to the absence of rotational practice, the Writ Court observed as follows:-

> "Absence of rotation recorded by it cannot save the situation for the petitioner as all temporaries need to be treated as one class. In earlier round, the Industrial Court had directed the petitioner to prepare list of all temporaries whether continuing in service or out of it & to provide work to them as per seniority. This was as per the mandate of the standing orders. Petitioner did [illegible]h

list. In view of earlier findings & directions, it was not necessary for workers/complaints to again disclose names of any juniors who got work prior to them. The burden was upon petitioner to prove that as per their seniority turn of employees/complains never came prior to the date on which they actually got the work. Petitioner Company conveniently destroyed those documents & did not examine any witness having competence to depose for period from 1990 to 1997.

Industrial Court therefore rightly accepted earlier finding of unfair labour practice under Item 6 of Sch. IV and proceeded to grant relief of compensation to complainants before it. There is no jurisdictional error or perversity on it part."

Being of the aforesaid view, the order passed by the Industrial Court was concurred with and resultantly, the writ petitions were dismissed.

8. In intra-Court appeal, the Division Bench adverted to the factual score and addressed to the rivalised submissions of the parties and opined that the engagement of large number of temporary employees by the company during the relevant period was certainly a pertinent circumstance for deciding the issue of unfair labour practice under Item 6 of Schedule IV of the 1971 Act. It took note of the fact that there was circumstance to show that the company had admitted that the rotational system was in vogue during the said period. The plea of fluctuation of demand to meet the target was not accepted by the Division Bench. Further, analyzing the evidence of Mr. More, Operational Manager and Mr. Tripathi, Vice-President of the company and Mr. Malshe, General Manager, it came to hold thus:-

"The aforesaid evidence and circumstances are sufficient to infer that there was sufficient work with the company, the production was increasing, there was the demand to

the vehicles of the company in the market and due to these circumstances, the temporary employees were appointed during all those years. On the basis of this evidence final decision was given by the Court in the previous proceedings that unfair labour practice under item No. 6 is proved against the company. The present complainants, respondents were working during the same period and they were also appointed in similar manner. In view of these circumstances, no other inference is possible. The evidence and circumstances also show that the documentary evidence of concerned Departments was not produced by the company by giving excuse that such record (of manpower recruitment analysis, etc.) of pre - 1997 was destroyed. It is surprising that when in the year 1997 itself thousands of the complaints were filed in the Industrial Court, the company destroyed this record. In the pleadings no such defence was taken by the company. In view of these circumstances also, adverse inference needs to be drawn against the company."

Be it noted, the Bench also opined that the evidence of Mr. Suryavanshi did not make any difference. Being of this view, it declined to interfere with the order of the learned Single Judge and that of the Industrial Court.

9. We have heard Mr. J.P. Cama, learned senior counsel for the appellants-management, Mr. Atul B. Dakh, learned counsel for the respondents, and Mr. Uday B. Dube, learned counsel for the interveners.

10. Learned senior counsel appearing for the appellant has submitted that when the Industrial Court has recorded a categorical finding that the rotational pattern was not adopted by the management inasmuch as no other workman was employed in place of the complainant, the concept of unfair labour practice would not be attracted. It is urged by him there was no intention of the management to deprive the workers of their permanency and when such a find[illegible]d

by the Industrial Court, the ultimate conclusion by the said Court and the High Court that there was unfair labour practice is unsustainable. It is put forth by him that the Industrial Court erroneously relied on the evidence adduced in the earlier case and further flawed in its analysis by holding that similar evidence could not be viewed differently when he himself was of the view that no unfair labour practice was adopted by the management. It is canvassed by Mr. Cama that in the absence of any mala fide object to deprive the workmen the benefit of permanency, it is ex facie unjustified on the part of the Industrial Court and the High Court to record a conclusion that the company was involved in unfair labour practice. It is his further submission that the High Court, while exercising the writ jurisdiction, could not have evaluated the evidence and drawn inferences to justify the order passed by the Industrial Court which is replete with inconsistent findings and based on faulty understanding of the principles of res judicata and res integra.

11. Mr. Dakh and Mr. Dube, in oppugnation, have submitted that when the evidence adduced in the earlier case was treated to be the evidence in the present batch of cases, it is inapposite on the part of the management to contend that the same could not have been looked into. It is urged by them that the Industrial Court has rightly observed that on similar evidence, a different conclusion was not possible and correctly adhered to the decision in *Bhojane Gopinath* (supra) and the view expressed by it and concurrence of the said finding of the Industrial Court by the High Court cannot be found fault with.

12. First, we shall advert to the issue whether the evidence adduced in ULP No. 192 of 1997 could have been taken into consideration. What should have been done in the ordinary course of things need not be dwelled upon. Mr. Cama, learned senior counsel, would contend that every individual workman was obliged under law to adduce evidence to establish his claim. The said submission, on a first blush, looks quite attractive, and rightly so, but on dwelling into the proceedings

before the Industrial Court, the focused argument on that score dwells into insignificance. We are compelled to say so inasmuch as the Industrial Court, in paragraph 8 of its decision, has recorded that the parties relied on the evidence produced in the earlier case. Before the learned Single Judge, a contention was advanced as stated earlier that none of the workmen entered witness box before the Industrial Court to lead any evidence and the said submission was controverted by the workmen that the parties with open eyes chose to adopt earlier evidence. The learned Single Judge, upon perusal of the judgment passed by the Industrial Court, has recorded its concurrence by stating that the verdict of the Industrial Court expressly made reference to the fact that the parties chose to rely upon the evidence produced in ULP Complaint No. 192 of 1997 and the said finding is neither shown to be erroneous nor perverse. It appears that the same aspect has gone unassailed before the Division Bench. On a perusal of both the decisions, we are of the considered opinion that the evidence in the earlier case was adopted and accepted by all parties and has to be read as evidence in this case and, hence, it cannot be brushed aside. Even if the contention of Mr. Cama, learned senior counsel, is pressed to its ultimate conclusion, it might, in certain cases, be an irregularity but cannot create a dent in the justifiability of the conclusion more so when the controversy related to the same period, but the only difference was that though some of the workmen approached the Industrial Court earlier, yet they chose not to proceed with the case and some approached at a later stage and only proceeded after the judgment was delivered by this Court in *Bhojane Gopinath* (supra). Be that as it may, the said aspect cannot be magnified to such an extent that non-adducing of evidence by each workman would make the order illegal on that score. Thus, the submission, assiduously canvassed by Mr. Cama, does not deserve acceptance and, accordingly, we repel the same.

13. The next plank of submission relates to the finding recorded by the Industrial Court relat of

sufficient evidence to come to a conclusion that rotational practice had been adopted by the company. As is evincible, the Industrial Court has observed that even from the seniority list produced in complaint ULP No. 192 of 1997, it could not be pointed out that a particular workman was disengaged on earlier date and the workman who was disengaged five months to eighteen months prior was engaged in his place for the same work to have the rotation. We have already noted how the learned single Judge and the Division Bench have commented on the said aspect. In the earlier round of litigation, it relied on the same period while dealing with the rotational employment and other findings and recorded its view as under: -

> "Learned counsel appearing on behalf of the appellant Company made a vain attempt to challenge the finding recorded by the Industrial Court to the effect that the workmen succeeded in providing that the appellant Company had employed unfair labour practice in its establishment in relation to the matters enumerated in Item 6 of Schedule IV of the 1971 Act. We have been taken through the award of the Industrial Court in extensor from which it appears that the court recorded the said finding after threadbare discussion of evidence adduced on behalf of the parties and there being no infirmity therein, the High Court was quite justified in not interfering with the same, accordingly, it is not possible for this Court to disturb the same in view of the fact that the finding is a pure finding of fact and no interference therewith is called for."

14. After so stating, this Court addressed to the submission about the view expressed by the High Court in affirming the finding of the Industrial Court that the appellant-company had indulged in unfair labour practice as enumerated in Item No. 9 of the Schedule IV of the 1971 Act and, eventually, came to hold that it cannot be said that the company, in any manner, employed unfair labour practice under Item 9 and, therefore, the High Court was not correct in affirming the finding

of the Industrial Court in that regard.

15. Thus, it appears that the adoption of unfair labour practice in the establishment in relation to matters enumerated in Item No. 6 of Schedule IV was accepted. In this context, we may usefully refer to Item No. 6 of Schedule IV of the 1971 Act which reads as follows: -

> "6. To employ employees as "badlis", casuals or temporaries and to continue them as such for years, with the object of depriving them of the status and privileges of permanent employees."

16. The conclusion arrived at by the Industrial Court on the basis of the inferences drawn from the material on record which have been given the stamp of approval by the High Court was accepted by this Court and it needs no special emphasis that the said acceptation was on the foundation of the evidence which was considered by the Industrial Court. The question that emerges for consideration is whether a different conclusion should be recorded relating to the same period on the basis of the same evidence. As is perceptible, though the Industrial Court in its decision held that on the basis of the earlier evidence it could not be established that a particular workman was disengaged on earlier date and a workman who was engaged earlier was brought in and, hence, there was rotation of employees, yet at a later stage, the said court has categorically held that the employees had continued for years but were not granted the status and privilege of permanency at the relevant point of time. The learned single Judge, while scrutinizing the said finding, has opined that the Industrial Court had rightly accepted the earlier finding of unfair labour practice and proceeded to grant relief and such a view, as quoted hereinabove, would show that it was based on the material already on record and further reflect the conduct of the company in not producing the list of all temporary workmen continuing in service or out of it and in taking the plea that it had destroyed the records. The Division

the view that in respect of the complainants working during the period who were appointed in similar manner, the inference has been correctly drawn by the Industrial Court. The High Court, as is evident, felt that the evidence of Mr. Suryavanshi pertained to the future period and should not be made use of for the earlier period.

17. On a scrutiny of the evidence brought on record, we find that the analysis made by the Industrial Court as well as by the High Court is absolutely defensible and cannot be flawed, for the said witness has really deposed with regard to the changed circumstances. This being the position, in our considered opinion, the stray observation by the Industrial Court regarding the factum of rotational practice was not correct more so when such a finding was earlier recorded and travelled to this Court for being tested and was accepted. We may hasten to clarify that the ultimate conclusion in this regard by the Industrial Court is correct but the said observation, we are constrained to say, was absolutely unwarranted. Hence, the irresistible and inescapable conclusion is that the complainants have proved that the company had engaged itself in unfair labour practice as far as Item No. 6 of Schedule IV of the 1971 Act is concerned. We may hasten to add that the submission of Mr. Cama, learned senior counsel is that there was no mala fide intention and the said mala fide intention is sine qua non to arrive at a conclusion that there was unfair labour practice. He has also laid emphasis on the words used "with the object" which find place in Item No. 6 of Schedule IV. We need not labour hard on the said score as on earlier occasion, such a finding was returned on the basis of the material on record and this Court had accepted the said conclusion to be impeccable. Ergo, the assail on the said score has to be repelled and we so do.

18. It is evincible from the judgments of the Industrial Court as well as the High Court that similar benefit has been extended that has been given in the case of *Bhojane Gopinath* (supra).

It has been done on the basis of the conclusion arrived at relating to unfair labour practice and the consequent benefit given by this Court. Unfair labour practices have been dealt with in Chapter VI of the 1971 Act. Section 26 stipulates that unfair labour practices, unless the context requires otherwise, would mean any of the practices listed in Schedule II, III and IV of the 1971 Act. Section 27 mandates that no employer or union and no employee shall engage in any unfair labour practice. Section 28 provides the procedure for dealing with the complaints relating to unfair labour practices and Section 29 stipulates who are the parties and on whom the order of the court shall be binding. Unfair labour practice, in its very essence, is contrary to just and fair dealing by both the employer and the employee. Peace in industrial atmosphere requires the parties to behave and conduct in a just and fair manner. The grievance of the aggrieved workmen has to be adjudicated under the necessary enactments on the bedrock of fairness and just needs. It is to be borne in mind that the primary obligation and duty of an industrial forum is to see that peace is sustained between the management and the employees in an industry. An unfair action by the employer against an individual worker has its effect and impact. It could disturb peace and harmony in an industrial sphere and similarly, when a workman behaves contrary to the code of conduct and accepted norms, unhealthy tribulation comes into existence. That is why the enactments provide a mechanism for arriving at a settlement to see that the growth and progress of industry is not scuttled by taking recourse to such methods which will eventually affect the national growth. This being the position behind the philosophy which has to be kept in mind by the employer and the employee, all efforts are to be made to avoid any kind of unfair labour practice. As the finding has been returned that there has been violation of item No. 6 of Schedule IV of the 1971 Act, the question that arises as a fall-out is whether the Industrial Court has extended the apposite benefit or does it require any modification. In *Bhojane Gopinath* (supra), this Court had held that the High Court should not have directed reinstatement of the w[illegible]ck

wages, but the situation warranted for grant of payment of reasonable amount of compensation in terms of Section 30(1)(b) of the 1971 Act. While so holding, this Court referred to the submission of the learned counsel for the parties in Civil Appeal No. 5003 of 2002 wherein the appellant-company and the workmen had settled the controversy and the entire compensation had been paid to the workmen as was paid to the other workmen in terms of the order dated 11.9.2003 passed in Civil Appeal No. 5002 of 2002 and a prayer was made to dispose of the appeal in terms of the directions enumerated in the said order. Be it noted, in the case of *R.P. Sawant* (supra), while dealing with Civil Appeal No. 5002 of 2002, this Court recorded as follows: -

> "5. The matter has been settled between the parties. It is agreed that the order of reinstatement in favour of the workmen be set aside and instead the appellant management would pay to each of the workmen a lump sum amount calculated at 65 days' salary, inclusive of all allowances, for the number of years each workman has actually worked irrespective of the days a workman may have put in in a year. It is further agreed that the calculation would be made on the basis of work during a calendar year and that the calendar year in which a workman may not have worked at all would be kept out of consideration while calculating the amount. While calculating the salary for each workman the minimum salary that would be taken into account would be Rs.8000 per month subject to the condition that if on the date of termination the salary of any particular workman is more, then the calculation would be on the actual last-drawn salary. The calculation in the above manner would be made for the period up to the date of termination in the year 1997-98. For the period after termination till date, the basis of calculation would be lump sum three years of service on the basis aforesaid, namely, 65 days for each year i.e. salary for 195 days. The payment so calculated and made would be in full and final payment of all claims of the workmen and the workmen will have no further claim from the Company. The appeal is disposed of in the above terms agreed by learned counsel for the parties. The impugned judgment would not be treated as a precedent either on fact or on law."

19. In *Bhojane Gopinath* (supra), after referring to the said order, this Court took note of the fact that in Civil Appeal No. 5003 of 2002, out of 1197 respondents, 1006 had compromised the matter in terms of the order in Civil Appeal No. 5002 of 2002. As far as the remaining workmen were concerned, a view was expressed that it would be just and expedient that they are paid a reasonable amount of compensation under Section 30 of the 1971 Act. Therefore, the Court proceeded to direct as follows: -

> "Each of the remaining workmen shall be paid a lump sum amount calculated at 85 days' salary, inclusive of all allowances, for the number of years each workman had actually worked irrespective of the days a workman may have put in in a year. The calculation would be made on the basis of work during a calendar year and that the calendar year in which a workman may not have worked at all would be kept out of consideration while calculating the amount. In calculating the salary for each workman, the minimum salary that would be taken into account would be Rs.8000 per month subject to the condition that if on the date of termination, the salary of any particular workman was more, then the calculation would be made on the actual last-drawn salary. The calculation in the abovesaid manner would be made for the period up to the date of termination i.e. on 9-1-2001. For the period after termination till date, the basis of calculation would be lump sum two years of service on the basis aforesaid, namely, 85 days for each calendar year i.e. salary for 170 days."

20. Section 30 of the 1971 Act deals with the powers of industrial and labour courts. Section 30(:-

"(1) Where a Court decides that any person named in the complaint has engaged in, or is engaging in, any unfair labour practice, it may in its order -

(b) direct all such persons to cease and desist from such unfair labour practice, and take such affirmative action (including payment of reasonable compensation to the employee or employees affected by the unfair labour practice, or reinstatement of the employee or employees with or without back wages, or the payment of reasonable compensation), as may in the opinion of the Court be necessary to effectuate the policy of the Act;"

On the basis of the aforesaid provision, reasonable compensation was granted by evolving a rational formula. We may hasten to add that what would be reasonable compensation would depend on the facts and circumstances of the case and no strait-jacket formula can be evolved or laid down.

21. In the case at hand, as is noticeable from the judgment of the Industrial Court, the complainants were silent spectators when the earlier group of cases was tried and the matter travelled to this Court. It is also observed that there were certain cases which were filed at a later stage. The Division Bench also considered that the filing of the complaints range from 1997-2003. Regard being had to the totality of circumstances, we are inclined to modify the amount of reasonable compensation which has been granted by the Industrial Court. The modified order would read as under: -

The appellant is directed to pay lump sum amount calculated at 65 days' salary, inclusive of all allowances for the number of year each complainant has actually worked irrespective of the days a complainant may have put in in a year. The calculation would be made on the basis of work

during a calendar year and that the calendar year in which a complainant may not have worked at all would be kept out of consideration while calculating the amount. In calculating the salary that would be taken into account would be Rs.8,000/- p.m. subject to condition that if on the date of termination, the salary of any particular complainant was more, than the calculation would be made on the actual last drawn salary. The calculation in the above manner would be made for the period up to the date of terminations in 1997. For the period after termination till date of this judgment, the basis of calculation would be lump sum two years of service on the basis aforesaid, viz. 65 days for each year i.e. 130 days.

Although we have modified the order, yet keeping in view the fact that the respondent-workmen had already withdrawn the amount in pursuance of the order dated 06-02-2012 when leave was granted, no steps shall be taken by the appellant-company to recover the differential sum from the respondents.

22. With the aforesaid modifications in the order passed by the Industrial Court that has been affirmed by the learned single Judge and concurred with by the Division Bench of the High Court, the appeals and Interlocutory Application Nos. 10-11 of 2013 for intervention and vacation of the order of stay are disposed of. In the peculiar facts and circumstances of the case, there shall be no order as to costs.

K.K.T. Appeals disposed of.

RAM BHAROSEY LAL GUPTA(D) BY LRS. & ORS.
v.
M/S HINDUSTAN PETROLEUM CORP. LTD. & ANR.
(Civil Appeal No. 3902 of 2013)

APRIL 17, 2013

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

Transfer of Property Act, 1882 - ss. 106 and 111(g) - Lease - Renewal of - Property leased out for 20 years - Meanwhile, property mortgaged by appellant-lessor, but later redeemed to it - Determination of tenancy by appellant u/s.106 of Transfer of Property Act on expiry of original lease period - Challenged by respondent no.1-lessee on ground that the lease deed contemplated a provision for renewal of the lease for 20 years and that a notice for renewal of the lease had already been sent to the appellant - High Court holding that appellant was under legal obligation to renew the lease term for further period of 20 years in terms of clause 3 (d) of the lease deed - Propriety - Held: Not proper -Respondent no.1 did not comply with the requirements as provided under the lease deed - It did not send notice for renewal to the mortgagee who had stepped into the shoes of the owner of the property till the same was redeemed to the appellant-lessor and thus failed to exercise its right to get renewal of lease - No deemed renewal of lease in favour of respondent no.1 in view of the notice sent to the appellant - Determination of tenancy by appellant u/s106 of the Transfer of Property Act perfectly legal and valid - Respondent no.1 also not entitled to continue as tenant with reference to s.7 of the Caltex Act as no fairness, reasonableness and non-arbitrariness on its part to avail right under that provision - Since respondent no.1 continued in possession of the property even after termination of tenancy, it is liable to pay mesne profits by way of damages

to appellant - Caltex [Acquisition of Shares of Caltex Oil Refining (India) Ltd. and of the Undertakings in India of Caltex (India) Limited] Act 1977 - s.7.

The property in question was leased out by the appellant in favour of M/s Caltex India Ltd. for 20 years from 1.07.1960 renewable and determinable as provided in the lease deed on monthly rent. The said property was mortgaged by the appellant on 12.01.1962. Meanwhile, the Caltex [Acquisition of Shares of Caltex Oil Refining (India) Ltd. and of the Undertakings in India of Caltex (India) Limited] Act 1977, came to be enacted and respondent no.1-Corporation became the successor of original lessee. The property was redeemed in favour of the appellant on 15.4.1983.

Subsequently, the appellant issued a notice under Section 106 and 111 (g) of the Transfer of Property Act to respondent No.1 determining the tenancy of the property and directed the first respondent to vacate the same. A suit for ejectment of the respondents and for possession of the property was also filed by the appellant. During pendency of the suit, the first respondent sent a notice to the appellant to execute renewal of lease deed; and also filed written statement specifically pleading that the lease deed contemplated a provision for renewal of the lease for a period of 20 years and that a notice for renewal of the lease had already been sent to the appellant.

The trial court held that the appellant was not entitled to terminate the tenancy in view of the Act of 1977 as the said Act is a Special Act and prevails over the Transfer of Property Act. The order was set aside by the 1st appellate court. The respondents filed appeal before the High Court which allowed the same holding that the appellant-lessor was under the legal obligation to renew the lease term for further period of

clause 3 (d) of the lease deed.

The question which arose for consideration in the present appeal was whether the High Court was justified in setting aside the judgment of the first appellate court, by holding that there was deemed renewal of lease of the demised property for a period of 20 years from 1.07.1980 to 1.07.2000.

Allowing the appeal, the Court

HELD: 1.1. It is an undisputed fact that the demised premises was mortgaged in favour of the mortgagee with possession as the appellant had executed mortgage deed in his favour on 12.01.1962, who continued to be a mortgagee till the appellant redeemed the said property on 15.4.1983. The first respondent had sent a notice for renewal of the lease deed to the appellant, but not to the mortgagee who had stepped into the shoes of the owner of the mortgaged property till the same was redeemed to the appellant on 15.04.1983. In view thereof, to avail the benefit of Clause 3 (d) of the lease deed, the first respondent should have sent the notice to the mortgagee of the property seeking renewal of lease of the demised property as provided under the above clause. Therefore, the first respondent Corporation failed to exercise its right to get the renewal of lease in respect of the demised premises. This aspect of the matter has been overlooked by both the trial court as well as the High Court though the first appellate court considered this aspect of the matter in its judgment. Therefore, the determination of tenancy of the demised property by the appellant under Section 106 of the Transfer of Property Act is perfectly legal and valid. The first respondent after termination of tenancy continued in possession of the property. Holding over of the suit property by the first respondent after the termination of lease is that of a trespasser not a tenant and therefore, it becomes liable to pay mesne profits by

way of damages to the appellants. The above important aspect of the matter has not been properly considered by the High Court. The High Court committed serious error both on facts and in law in holding that there was deemed renewal of the demised premises in favour of the first respondent though it did not comply with the requirements as provided under Clause 3 (d) of the lease deed. The second appellate court wrongly interpreted clause 3 (d) of the lease deed and the finding recorded by it that there was a deemed renewal of the demised property for a period of 20 years in view of the notice dated 1.4.1980 sent to the appellant but not to the mortgagee was erroneous and, therefore, liable to be set aside. [Paras 23, 24] [334-H; 335-A-H; 336-A-C]

1.2. The first appellate court was right in holding that the possession of the demised property by the first respondent Corporation is holding over month to month and therefore it is a trespasser of the said schedule property and therefore invoking Section 106 of the T.P. Act by the appellant and determining the tenancy by him and filing the suit for arrears of rent and also decree of ejectment of the first respondent from the demised premises is legally justified. Further, with reference to Section 7 of the Caltex Act the action of the first respondent is unfair as there is no fairness, reasonableness and non- arbitrariness on its part to avail the right under the above provision for continuing as a tenant in respect of the demised property. Hence, the impugned judgment of the second appellate court is set aside and the judgment and decree of the first appellate court is restored. [Para 25] [337-G-H; 338-A-B]

Bharat Petroleum Corporation Ltd. vs. Maddula Ratnavalli and Ors. **(2007) 6 SCC 81: 2007 (5) SCR 997 and** *Bharat Petroleum Corporation Ltd. vs. P.Kesavan and Anr.* **(2004) 9 SCC 772: 2004 (3) SCR 811**

Case Law Reference:

2007 (5) SCR 997	**referred to**	**Para 14, 16, 24**
2004 (3) SCR 811	**referred to**	**Para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. : 3902 of 2013.

From the Judgment Order dated 04.07.2007 of the High Court of Judicature at Allahabad in SA No. 1812 of 1988.

Nagendra Rai, Manita Verma, S.K. Sinha for the Appellants.

Sanjay Kapur, Priyanka Das, Abha R. Sharma for the Respondents.

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. 1. Leave granted.

2. This appeal is filed by the appellants who are owners of the property questioning the correctness of the impugned judgment dated 04.07.2007 passed in SA No.1812 of 1988 of the High Court of Judicature at Allahabad wherein it

has set aside the judgment and decree dated 10.08.1988 passed by the Ist Additional District Judge, Mainpuri in Civil Appeal No. 45 of 1987 arising out of judgment and decree passed by Munsif, Shikohabad dated 09.02.1987 in Original Suit No. 32 of 1984, urging various facts and legal contentions and prayed to set aside the impugned judgment and decree.

3. The property in question was leased out by lease deed dated 1.12.1960 by one Mansa Ram, father of the appellants in favour of M/s Caltex India Ltd. the demised property measures 120 x 100 feet situated on Agra Kanpur Road, Shikohabad. The said property was leased out in favour of

M/s Caltex India Ltd. for the purpose of installing, erecting and maintaining on the said piece of land road ways and path ways and underground petrol, high speed oil tanks and delivery pumps etc. and to erect shelter for attendants and other buildings of permanent or temporary nature as well as other constructions and carrying on with trade in petro and petroleum product with a right to carry on the said trade through its local dealers or agents and to use the property so demised at all times and for all purposes for an initial period of 20 years from 1.07.1960 renewable and determinable as provided in the lease deed on the monthly rent of Rs.50/-. The said lease deed was registered on 06.01.1961. The said property was mortgaged to one Ram Gopal, S/o Ramdayal on 12.01.1962.

4. In the year 1977, the Parliament enacted the law, namely, the Caltex [Acquisition of Shares of Caltex Oil Refining (India) Ltd. and of the undertakings in India of Caltex (India) Limited] Act 1977, being Act No. 17 of 1977 (hereinafter referred to as 'the Caltex Act') as well as of M/s Hindustan Petroleum Corporation Ltd. as the successor of the original lessee.

5. The first respondent Hindustan Petroleum Corporation Ltd. is the successor of original lessee. On 15.04.1983, the appellant (since deceased) redeemed the said mortgaged property and the same was accordingly informed to the first respondent.

6. On 13.06.1983, the appellant issued a notice under Section 106 and 111 (g) of the Transfer of Property Act (hereinafter referred to as the T.P. Act) to respondent No.1 determining the tenancy of suit schedule property and directed the first respondent to vacate the same upon the expiry of the period of the notice and to hand over vacant possession of the same to him. The first respondent never sent any reply to the said notice.

7. A suit for ejectment of the res e

possession of the suit schedule property was filed on 27.01.1984 despite service of notice of determination of tenancy which was neither replied nor complied with the demand for delivering the vacant possession of the leased property in favour of the appellant. The original suit was filed by the appellant seeking for arrears of rent and decree of eviction against the first respondent and to pass an appropriate decree against it.

8. During the pendency of the suit, on 27.06.1984 the first respondent sent a notice to the appellant to execute the renewal of lease deed and in the said notice it had made reference about their notice dated 1.04.1980, wherein it is stated that it has sent a notice to the appellant for renewal of lease deed and undisputedly the notice was not sent to the mortgagee as the leased property was mortgaged in his favour and the rent was being paid to him and he was receiving rent upto April, 1983 in respect of the suit schedule property.

9. The first respondent filed written statement denying the allegations made in the plaint and further specifically pleaded that the lease deed contemplated a provision for the renewal of the lease of the plot for a period of 20 years and a plea was taken that the notice for renewal of the lease was sent to the appellant. The respondent No. 2 filed an application for impleadment in the original suit proceeding which was allowed by the trial court. He also filed a written statement in the original suit.

10. On 09.02.1987, the trial court framed the issues and case went for trial where the suit for arrears of rent of Rs. 450/- was decreed but held that the appellant was not entitled to terminate the tenancy in view of the Act of 1977 as the said Act is a Special Act and prevails over the Transfer of Property Act.

11. On 13.03.1987, aggrieved by the judgment and decree of the trial court the appellant filed Civil Appeal No. 45 of 1987

before the Ist Additional District Judge Mainpuri. The Ist appellate court vide its judgment dated 10.08.1988, allowed the appeal by setting aside the judgment and decree of the trial court after holding that the provisions of the Transfer of Property Act apply to the property in question and the tenancy of the first respondent has rightly been determined by the appellant. The respondents herein being aggrieved by the said order of the appellate court filed second appeal No. 1812 of 1988 before the High Court of Judicature at Allahabad. The said second appeal was admitted on the following substantial question of law:

> "(1) Whether under clause 3 (d) of the lease deed executed between Mansa Ram and M/s Caltex India Ltd., the lessor was under the legal obligation to renew the lease term for further period of 20 years, if the conditions of clause 3 (d) were complied with?"

12. The second appeal was allowed by the High Court by answering the aforesaid substantial question of law in favour of the first respondent.

13. During pendency of the second appeal, the appellant Ram Bharosey Lal Gupta expired. An application for substitution of legal representatives of the deceased appellant was filed by them along with applications for condonation of delay in filing the said substitution application and setting aside abatement. The High Court after hearing the parties answered the substantial question of law in the second appeal and set aside the judgment of the first appellate court and allowed the same by its judgment dated 04.07.2007.

14. The learned senior counsel Mr. Nagendra Rai has placed strong reliance upon the decision of this Court in the case of *Bharat Petroleum Corporation Ltd. Vs. Maddula Ratnavalli and Ors.*[1] questioning the correctness of the finding recorded on the substantial question of law as erroneous in law

1. (2007) 6 SCC 81.

and error in law. Further, he has urged that it is the duty cast upon the court to construe the provisions of the Act 17 of 1977, strictly as the Act being expropriatory legislation. Further, it is contended that whether interpretation of provisions of Section 7 of the Caltex Act be permitted to overlook fairness, reasonableness and non-arbitrariness in action on the part of the first respondent as it is 'State' in terms of Article 12 of the Constitution of India.

15. He further contended that no notice was issued to the mortgagee to invoke the right by the first respondent under Clause 3 (d) of the lease deed for renewal of lease of the property. It is an undisputed fact that rent was being paid by the first respondent to the mortgagee till 1.04.1983 and therefore, there is no compliance of the requirement under clause 3 (d) of the lease deed seeking for renewal of the lease of the property for a period of another 20 years as per the terms and conditions laid down in the said clause. The conduct of the first respondent Corporation in continuing with the lease for a third term of 20 years commencing from 1.07.2000 to 30.06.2020 in the absence of any notice for renewal for the said period, is illegal, arbitrary and unreasonable. The High Court has failed to take into consideration the conduct of the first respondent in holding over the property of the appellants herein under the garb of automatic renewal of lease which action of the Corporation reflects undue enrichment for itself especially when the property as on date has a market value of crores of rupees.

16. It is further contended by the learned senior counsel that reasonableness, fairness and non-arbitrariness in action on the part of the first respondent Corporation should be there as it is a 'State' within the meaning of Article 12 of the Constitution. The same is not reflected in the case in hand as it has claimed renewal of lease under the Caltex Act 17 of 1977. The High Court has erred in law while interpreting the compliance of the conditions of the clause 3 (d) of the lease

deed by the first respondent. The High Court has erred in not following the law laid down by this Court in *Bharat Petroleum Corporation Ltd. case* (supra) where duty has been cast upon the courts to construe the provisions of expropriatory legislation strictly. The High Court has also failed to take into consideration that the first respondent Corporation again took the shield of "special Act" and it cannot be permitted to enjoy any lease property in perpetuity. Further, the interpretation of clause 3 (d) of the lease deed, particularly the word "will" is not synonymous to words "obligatory" or "mandatory". The High Court has also erred in holding that there was deemed presumption of renewal on the part of the lessor without giving two months' advance notice before expiry of the original lease period as contemplated under clause 3 (d) of the lease deed and indisputably upon the mortgagee who had stepped into the shoes of the mortgagor as he was being paid rent by the first respondent during the relevant period of time. Therefore, the interpretation made by the High Court in holding that there was a deemed presumption of renewal on the part of the lessor in relation to the leased property is erroneous in law. Further, the High Court has failed in interpreting the provisions of Section 7 of the Caltex Act and the first respondent Corporation cannot be permitted to over look fairness, reasonableness and non-arbitrariness on its part.

17. The High Court has failed to take into consideration the conduct of the first respondent in continuing with the lease of the property for the third term of 20 years commencing from 1.07.2000 to 30.06.2020 in the absence of any notice for renewal for the said period to the owners of the property. Therefore, the learned senior counsel has prayed for setting aside the impugned judgment and decree of the High Court.

18. On the other hand, Mr. H.P. Raval, learned Additional Solicitor General appearing for the first respondent contended that the impugned judgment and order passed by the Ist appellate court is perfectly legal and v[illegible]n

accordance with the provisions of Section 7 of the Caltex Act and the conduct of the first respondent is fair and reasonable and he has offered a sum of Rs. 5000/- per month as the rent for the period having regard to the valuation of the property and further he has contended that beyond Rs.5000/- the Corporation cannot give rent to the appellants herein. Therefore, they have offered Rs.5000/- as rent against the demand of more than Rs.30,000/- per month made by the appellant's counsel in respect of the suit schedule property.

19. With reference to the above said rival legal contentions urged on behalf of the parties this Court is required to examine as to whether the substantial question of law framed by the High Court and findings recorded in favour of the first respondent is vitiated in law and whether application of Section 7 of the Caltex Act to the leased property in question applies even though there is no fairness, reasonableness and non-arbitrariness on the part of the first respondent Corporation, is legal and valid?

20. The aforesaid points are answered in favour of the appellants by assigning the following reasons:-

The rent for the year 1960 for the vacant property was Rs.50/-. As per Clause 3 (d) of the lease deed, the renewal of the lease of the property for a period of 20 years is permissible if a desire is expressed by the lessee by issuing two months' notice to the lessor prior to expiry of the lease period of the property. Further, the renewal of lease must be for a further period of 20 years at the rate of 10% increase in the rental and containing the like covenants. This Court has examined whether the High Court was justified in setting aside the judgment and decree of the first appellate court, by holding that there is deemed renewal of the lease of the demised property for a period of 20 years from 1.07.1980 to 1.07.2000, in the absence of renewal notice issued to the mortgagee on the date of expiry of the original lease period?

21. The lease of the demised premises is of the year 1960 renewable on a monthly rent of Rs.50/-. The lease deed was executed in favour of M/s Caltex India Ltd. The Caltex Act was enacted in the year 1977 and the first respondent Corporation was the automatic successor of the original lessee.

22. It is an undisputed fact that the appellant had executed a mortgage deed on 12.01.1962 in favour of Ram Gopal S/o Ramdayal, with possession and he had been receiving rent from the first respondent up to 1.04.1983. The Caltex Act of 17 of 1977 was enacted by the Parliament and the first respondent Corporation became successor in place of the original lessee. It is an undisputed fact that the first respondent Corporation sent a notice to the appellant for renewal of the lease in its favour. It is necessary for us to appreciate the correctness of the finding recorded by the High Court on the substantial question of law regarding the deemed renewal of the lease in favour of the first respondent for a period of 20 years from 1.07.1980 to 1.7.2000. The sub-clause 3 (d) reads thus:

> "That the lessor will on the written request of the lessee made two calendar months before the expiry of the terms hereby created, and if there shall not at the time of such request by any existing breach or non-observance of any of the covenants on the part of lessee herein before contained, grant to it a tenancy of the demised premises for a further term of twenty years from the expiration of the said term at the rent of Rs. 50/- per month and containing the like covenants and provisos as are herein contained including a clause for renewal for the further term of twenty years at 10% increase in rental and containing the like covenants and provisos as are herein contained so as to give the lessee in its option two further renewals each of twenty years."

23. By careful reading of the said clause of the lease deed having regard to the undisputed fact that the demised premises was mortgaged in favour of the mortga[illegible]s

the appellant had executed mortgage deed in his favour on 12.01.1962, he continued to be a mortgagee till the property was redeemed in his favour on 15.4.1983. It is also the case of the first respondent that it had sent a notice for renewal of the lease deed to the appellant, but not to the mortgagee as he had stepped into the shoes of the owner of the mortgaged property till the same was redeemed to the appellant on 15.04.1983. In view of the above undisputed fact to avail the benefit of Clause 3 (d) of the lease deed, the first respondent should have sent the notice to the mortgagee of the property seeking renewal of lease of the demised property as provided under the above clause. Therefore, the first respondent Corporation has failed to exercise its right to get the renewal of lease in respect of the demised premises. This aspect of the matter has been overlooked by both the trial court as well as the High Court though the first appellate court considered this aspect of the matter in its judgment. Therefore, the determination of tenancy of the demised property by the appellant under Section 106 of the T.P. Act is perfectly legal and valid. Further, it has been held that the first respondent after termination of tenancy continued in possession of the property as a tenant of holding-over. Thus, in law, holding over of the suit schedule property by the first respondent after the termination of lease is that of a trespasser not a tenant and therefore, it becomes liable to pay mesne profits by way of damages to the appellants.

24. The above important aspect of the matter has not been properly considered by the High Court while answering the substantial question of law. The High Court has committed serious error both on facts and in law in holding that there is deemed renewal of the demised premises in favour of the first respondent and it has not properly interpreted Section 7 of the Caltex Act regarding the fairness, reasonableness and non arbitrariness on the part of the first respondent Corporation though it has not complied with the requirements as provided under Clause 3 (d) of the lease deed. Therefore, framing of

substantial question of law itself in the second appeal by the High Court is bad in law as the same does not arise at all. Having regard to the undisputed facts of the case in hand, the second appellate court has not rightly interpreted clause 3 (d) of the lease deed and the same is contrary to the facts and therefore, the finding recorded on the substantial question of law and holding that there is a deemed renewal of the demised property for a period of 20 years in view of the notice dated 1.4.1980 sent to the appellant but not to the mortgagee is not only erroneous but also error in law, therefore, the said finding is liable to be set aside. In the case of *Bharat Petroleum Corporation Ltd. Vs. Maddula Ratnavalli and Ors***.** (supra) this Court has interpreted the provisions of Section 5(2) and 7 (3) of Burmah Shell (Acquisition and Undertakings in India) Act, 1976 and Section 7 (3) of the Caltex Act 1977, with reference to the provisions of T.P. Act. Indisputably, 1976 Act is a special statute. No doubt, it over rides the provisions of Section 107 of the T.P. Act. Undisputedly, the first respondent Corporation is a 'State' as it is a successor of Caltex India Ltd. in terms of the definition of Article 12 of the Constitution of India. In the above referred case, vide para 13, this Court has laid down the legal principles after referring to its earlier decision in the case of *Bharat Petroleum Corporation Ltd. Vs. P.Kesavan and Anr.*[2] The legal principle evolved therein shows that the finding recorded by the High Court in the impugned judgment on the substantial question of law is contrary to the decision of this Court as well as terms and conditions of clause 3(d) of the lease deed. The said paragraph is extracted hereunder:-

> **"13.** The appellant company is a "State" within the meaning of Article 12 of the Constitution of India. It is, therefore, enjoined with a duty to act fairly and reasonably. Just because it has been conferred with a statutory power, the same by itself would not mean that exercise thereof in any manner whatsoever will meet the requirements of law.

2. (2004) 9 SCC 772.

The statute uses the words "if so desired by the Central Government". Such a desire cannot be based upon a subjective satisfaction. It must be based on objective criteria. Indisputably, the 1976 Act is a special statute. It overrides the provisions of Section 107 of the Transfer of Property Act. The action of the State, however, must be judged on the touchstone of reasonableness. Learned counselfor both the parties have relied upon a three-Judge Bench decision of this Court in *Bharat Petroleum Corpn. Ltd. v. P. Kesavan* wherein this Court in para 11 has held as hereunder:

11. The said Act is a special statute vis-à-vis the Transfer of Property Act which is a general statute. By reason of the provisions of the said Act, the right, title and interest of Burmah Shell vested in the Central Government and consequently in the appellant Company. A lease of immovable property is also an asset and/or right in an immovable property. The leasehold right, thus, held by Burmah Shell vested in the appellant. By reason of sub-section (2) of Section 5 of the Act, a right of renewal was created in the appellant in terms whereof in the event of exercise of its option, the existing lease was renewed for a further term on the same terms and conditions. As noticed hereinbefore, Section 11 of the Act provides for a non obstante clause."

25. In view of the undisputed facts referred to supra and the clause 3 (d) of the lease deed regarding the renewal of lease for a period of 20 years after expiry of the initial period of renewal it has come to an end on 1.7.2000. Therefore, the first appellate court was right in holding that the possession of the demised property by the first respondent Corporation is holding over month to month and therefore it is a trespasser of the said schedule property and therefore invoking Section 106 of the T.P. Act by the appellant and determining the tenancy by him and filing the suit for arrears of rent and also decree of ejectment of the first respondent from the demised premises

is legally justified. Further, with reference to Section 7 of the Caltex Act the action of the first respondent is unfair as there is no fairness, reasonableness and non- arbitrariness on its part to avail the right under the above provision for continuing as a tenant in respect of the demised property. Hence, we are required to set aside the impugned judgment of the second appellate court and restore the judgment and decree of the first appellate court. The first respondent Corporation is not even willing to give fair and reasonable rent as it has offered only Rs.5000/- per month whereas the rental market value of the property according to the appellants counsel is more than Rs.30,000/- per month.

26. Therefore, we are of the view that the aforesaid decision of this Court on all fours be applicable to the fact situation in favour of the appellants. Accordingly, for the reasons stated supra we set aside the impugned judgment and order dated 04.07.2007 of the second appellate court passed in Second Appeal No.1812 of 1988 and restore the judgment and decree dated 10.08.1988 of the first Additional District Judge in Civil Appeal No. 45 of 1987. The appeal is allowed with no order as to costs.

B.B.B. Appeal allowed.

SAFI MOHD.

v.

STATE OF RAJASTHAN

(Criminal Appeal No. 1954 of 2009)

APRIL 17, 2013

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

Official Secrets Act, 1923 - s.3(1)(c) - Supply of secret information pertaining to Indian Armed Forces to Pakistani Intelligence - One blue colored diary and a trace map seized on search of house of accused-appellant - Documents seized could affect the integrity and security of India - Conviction of appellant alongwith RI of seven years - Justification - Held: Justified - Matters under the Official Secrets Act are very sensitive which require immediate action - On facts, neither the search conducted in the presence of the independent witnesses nor the investigation made by the investigating officer became defective for want of search warrant to conduct search in the house of appellant - Merely because independent witnesses turned hostile, the other police witnesses' evidence cannot be disbelieved - Trial judge came to the right conclusion by accepting the evidence of police witnesses - Prosecution evidence made it clear that documents of strategic importance to the Nation were recovered from the possession of appellant and other accused and they failed to give satisfactory explanation about the documents being in their possession.

The prosecution case was that the appellant used to supply secret information pertaining to the Indian Armed Forces to the Pakistani Intelligence. On his house being searched, a blue colored diary of the year 1982 and a trace map Ex.D-3 were alleged to have been recovered. There were in all 5 accused persons. The documents

recovered from the accused were sent to the Air Force Officers for their opinion, who informed that the said documents were useful to enemy country and affect the security of India. The appellant was convicted by the Sessions Judge under Section 3(1)(c) of the Official Secrets Act, 1923 and sentenced to undergo seven years rigorous imprisonment. The conviction was confirmed by the High Court, and therefore the present appeal.

Dismissing the appeal, the Court

HELD: 1.1. After referring to the evidence of the PW-22 and PW-24 the search of the house of the appellant and seizure of certain documents along with diary particularly Ex D-3, handwritten map prepared with certain markings, it has proved the prosecution case. No doubt the independent witnesses have turned hostile, but the sessions judge has rightly accepted the testimony of the police witnesses after proper appreciation of their evidence to prove the seizure of the documents from the house of the appellant. [Para 20] [355-H; 356-A-C]

1.2. The matters under the Official Secrets Act are very sensitive which required immediate action. The search and seizure of Army documents from the house of the appellant for the offences alleged against the appellant under the provisions of the Act are very sensitive and pertains to the integrity and security of the country. In view of the above fact, neither the search conducted in the presence of the independent witnesses nor the investigation made by the investigating officer becomes defective for want of search warrant to conduct the search in the house of the appellant. [Para 21] [356-D, E-G]

1.3. The finding recorded by both the courts below regarding search and seizure of the documents which affect the integrity and security o

concurrent finding of fact rightly recorded by the High Court after proper appreciation and appraisal of the evidence on record. The same cannot be interfered with by this Court in exercise of its jurisdiction. Even if the search is made by the Investigating Officer in illegal manner, the same does not affect the legality of the search and investigation made by the Investigating Officer with regard to the seizure of the documents from the house of the appellant. From the evidence produced by the prosecution in the case in hand, it is clear that the documents of strategic importance to the Nation have been recovered from the possession of the appellant and other accused and they have failed to give satisfactory explanation about the documents being in their possession. [Para 22] [357-C-F]

1.4. Recovery of Ex. D-3 from the house of appellant is proved by the prosecution is the finding of fact which is accepted by the High Court based on recovery memo Ex.P-28. The independent witness to prove the memo is PW-2, besides, the evidence of the said witness, PW-5 who has stated in his evidence that Ex. D-3 was recovered from the quarter of the appellant. PW-7 ASM of Parihari Railway Station stated that the appellant was allotted a railway quarter and he had moved to this house with his family in 1989. In the said quarter the search was conducted by the Investigating Officer and certain documents were seized including Ex.D-3 from possession of the appellant is the finding of fact recorded by the trial judge which is rightly concurred with by the High Court after re-appreciation of evidence on record in the appeal filed by the appellant. [Paras 23, 24] [357-H; 358-E-F]

1.5. The sessions judge being the trial judge is competent to appreciate the evidence and had the opportunity to observe demeanour of the witnesses who have deposed before him to prove the prosecution case.

Merely because the independent witnesses have turned hostile, the other police witnesses' evidence cannot be disbelieved. The trial judge has come to the right conclusion by accepting the evidence of police witnesses PW-21, PW-22 with regard to the conduct of the search and seizure of documents from the house of the appellant and recorded the finding to this effect by assigning valid and cogent reasons in his judgment. He has rightly come to the conclusion on the fact while recording the finding on the charge on the basis of evidence of PW-27 and PW-32 who have opined that if the said document and information contained therein is made available to the Pakistani officials it will be dangerous to the integrity and security of the Nation. [Para 26] [359-B-E]

1.6. The contentions urged by the appellant that PW-27 and PW-32 are not expert witnesses in terms of Section 45 of the Evidence Act are mis-placed. The finding and reasons recorded by the sessions judge on the charge framed against the appellant has been re-examined by the High Court by applying its mind consciously and concurred with the said finding of fact by assigning valid reasons. Therefore, the same cannot be termed erroneous in law. [Para 27] [359-F, G-H; 360-A]

Sama Alana Abdulla Vs. State of Gujarat **AIR 1996 SC 569: 1995 (5) Suppl. SCR 279 - relied on.**

Pratap Singh Vs. State of M.P. **2005 (13) SCC 624: 2005 (5) Suppl. SCR 439;** *Mukhtiar Ahmed Vs. State (NCT of Delhi)* **2005 (5) SCC 258: 2005 (3) SCR 797;** *Raja Ram Vs. State of Rajasthan* **(2005) 5 SCC 272;** *State of Himachal Pradesh Vs. Jai Lal and Ors.* **(1999) 7 SCC 280: 1999 (2) Suppl. SCR 318;** *Ramesh Chandra Agarwal Vs. Regency Hospital Limited* **(2009) 9 SCC 709: 2009 (14) SCR 424;** *Padam Vs. State of U.P.* **2000 (1) SCC 621: 1999 (5) Suppl. SCR 59 and** *Prasad @ Hari Prasad Acharya Vs. State of Karnataka* **2009 (3) SCC 174: 2009 (1) SCR 1089 - referred to.**

Case Law Reference:

2005 (5) Suppl. SCR 439	**referred to**	**Para 4**
2005 (3) SCR 797	**referred to**	**Para 6**
(2005) 5 SCC 272	**referred to**	**Para 6**
1999 (2) Suppl. SCR 318	**referred to**	**Para 13**
2009 (14) SCR 424	**referred to**	**Para 13**
1999 (5) Suppl. SCR 59	**referred to**	**Para 14**
2009 (1) SCR 1089	**referred to**	**Para 14**
1995 (5) Suppl. SCR 279	**relied on**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Apeal No. 1954 of 2009

From the Judgment and Order dated 29.05.2009 of the High Court of Rajasthan at Jaipur in S.B. Criminal Appeal No. 314 of 2004.

Sushil Kumar Jain, H.D. Thanvi, Rishi Matoliya, Sarad Kumar Singhania for the Appellant.

Shovan Mishra, Milind Kumar for the Respondent.

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. 1. This appeal is filed by the appellant questioning the correctness of the judgment dated 29th May, 2009 passed by the High Court of Rajasthan at Jaipur in S.B. Criminal Appeal No. 314 of 2004 in confirming the judgment dated 9th March, 2004 of the sessions judge, Jaipur City, Jaipur in Sessions Case No. 196 of 1992 wherein this appellant along with the others were convicted under Section 3(1)(c)of the Official Secrets Act, 1923 (hereinafter referred to as 'the Act') and was sentenced to undergo seven years rigorous imprisonment.

2. For the purpose of considering the rival legal contentions urged in this appeal and with a view to find out whether this Court is required to interfere with the impugned judgment of the High Court, the necessary facts are briefly stated hereunder:

On 6th March, 1990, Bhoormal Jain, Superintendent of Police CID Zone, Jodhpur lodged an FIR for the offences punishable under Sections 3, 3/9 of the Act read with Section 120-B IPC with the Special Police Station Rajasthan, Jaipur numbered as FIR No.1/1990 against the accused Mohd. Ishfaq who was found roaming in suspicious circumstances in the Air Force Area and was arrested on 07.03.1990. On interrogation, he stated that the appellant Safi Mohd. used to supply secret information to the Pakistani Intelligence and had handed over Rs.6500/- to him for working for Pak Intelligence Agency. On 08.03.1990, the appellant was arrested from his Railway Quarters by the CID Police and on his house being searched, a blue colored diary of the year 1982 and a trace map Ex.D-3 were alleged to have been recovered. Later on, on further disclosure by the accused No.1, accused No. 3 - Chotu Khan and accused No. 4 - Chand Khan were arrested. On 12.04.1990, the other accused Mohd. Safi, Accused No.5, was also arrested. The documents recovered from the accused were sent to the Air Force Officers for their opinion, who informed that the said documents were useful to enemy country and affect the security of India. After completion of investigation of the case the charge-sheet was filed before the committal court by the Investigating Officer.

3. On 26.07.1994, charges were framed against the 5 accused persons but all of them pleaded not guilty. The appellant was charged under Section 3 read with Section 9 and 5 of the Act. The learned Sessions Judge after trial convicted the appellant u/s 3 (1) (c) of the Act by order dated 09.03.2004.

4. Learned counsel for the appellant Mr. Sushil Kumar Jain submits that the conviction of the ap[illegible]e

recovery of Ex.D-3 from the house of appellant is doubtful. Further, he submits that the conviction based on the experts opinion of Col S.K. Sareen (PW-27) and Wing Commander Alok Kumar (PW-32) on documents Ex. P-33 and P-34 respectively is not in favour of the prosecution. Therefore, the conviction of the appellant based on their evidence rendered the concurrent finding erroneous in law. Hence, the same is liable to be set aside. Further, he contends that the conviction of the appellant based on the recovery or possession of a trace Map Ex.D-3, which is a rough sketch map under Section 3 (1) (c) of the Act is not tenable in law. In so far as the recovery of the document Ex.D-3 from the quarters of appellant is concerned, it is contended by the learned counsel for the appellant that the said document as per recovery memo. Ex.P-22 said to have been recovered by Suresh Kumar (PW-22) is attested by two witnesses Bhoop Singh and Umed Singh. Bhoop Singh has been declared hostile and Umed Singh, the other attesting witness has not been examined in the case. Ex.P-22 was not put to the witness Bhoop Singh in his cross-examination by the prosecution. The prosecution has relied upon the said document solely on the statement of evidence of the investigating officer Yad Ram Tiwari PW-24 and Suresh Kumar PW-22. He submits that on account of non-examination of Umed Singh in the case, the attesting witness to the memo for recovery of the documents from the house of the appellant, both the learned sessions judge as well as the High Court should have drawn adverse inference against the prosecution stating that search and seizure of Ex.D-3 as per recovery memo was not from the house of the appellant. The learned counsel in support of the above said submission has placed reliance upon the decision of this Court in *Pratap Singh Vs. State of M.P.*[1]. In the said case it is observed by this Court that non examination of witnesses by the Investigating Officer who are material for the purpose of proving the prosecution case, who are independent witnesses and whose statements have not been recorded though it is the duty of the investigating

1. 2005 (13) SCC 624.

officer to produce such statements along with the charge sheet in the Court, if, the same has not been done by the prosecution, the benefit of doubt must be given to the defence and not to the prosecution.

5. Further, he submits that in the above referred case this Court held that the High Court committed serious error in not drawing adverse inference for non examination of the seizure witnesses in the peculiar facts and circumstances of the case.

6. Further learned counsel for the appellant submitted that the prosecution case with regard to the recovery of Ex.D-3 from the house of the appellant is falsified by the evidence of Om Prakash Rathi (PW-2) the only attesting witness examined with regard to the search of Rathi Guest House wherefrom Mohd. Safi was arrested with documents. This fact is established from the cross-examination of PW-2 who is the owner of the Rathi Guest House, who has admitted in his statement that "Map Ex.D-3 was recovered from the said accused along with other papers." The learned counsel for the appellant has further placed reliance upon the judgment of this Court in *Mukhtiar Ahmed Vs. State (NCT of Delhi)*[2] that if the prosecution has examined its witness and declared him hostile as he did not support the prosecution case but on the other hand he had supported the defence then it can rely on such evidence. Further, the learned counsel placed reliance on another judgment of this Court in the case of *Raja Ram Vs. State of Rajasthan*[3] in support of the case of the appellant that the sole testimony of the prosecution witness making the deceased believe that unless she puts the blame on the appellant and his parents she would have to face the consequences like prosecution proceedings. It did not occur to the public prosecutor in the trial court to seek permission from the court to declare PW-8 as a hostile witness, for the reasons known to him. Now, as it is, the evidence of PW-8 is binding on the prosecution.

2. 2005 (5) SCC 258 at paras 29-30.

3. (2005) 5 SCC 272 at para 9.

7. The learned counsel also submits that the observations made by this Court in the above cases are also applicable to the fact situation of the case in hand wherein evidence of PW-2 who is attesting witness to Ex. P-22 recovery Memo, it is mentioned that Ex. D-3 was recovered from the Rathi Guest House. Therefore, he contends that the same is not recovered from the house of the appellant as alleged. Further, learned counsel submits that it is a well settled principle of law that the defence is not required to establish its case but is only required to establish preponderance of probabilities of the case for consideration of the Court. The defence of the appellant in this case was that Ex.D-3 was recovered from Rathi Guest House is probable. Further the statements of PW-22 and PW-24, the police witnesses are interested witnesses who are interested in showing success of the raid and to support the prosecution case and therefore the courts below should not have placed reliance upon their testimony to convict the appellant.

8. PW-22 is not the witness of recovery of Ex.D-3 the trace Map as per recovery memo Ex.P-22. This fact is admitted by him in his cross examination and also, he is not the signatory to Ex.P-22. The conscious possession or knowledge of the document Ex. D-3 by this appellant is found in the diary of the appellant, this fact as alleged by the prosecution is not established and the prosecution has also not established that the diary belonged to the appellant. The document could have come to the house of the appellant by any unknown reason and unless specific knowledge of the appellant regarding possession of the document Ex. D-3 is proved, its recovery from the house of the appellant should not have been treated sufficient by the courts below for holding that the appellant consciously possessed the same.

9. Another ground of submission made by the learned counsel for the appellant is the experts' opinion of the witnesses PW-27 and PW-32, who have rendered their opinion as per Ex.P-34 and Ex.P-35, stating that document Ex. D-3 is just a

sketch which could not be of any help to the enemy country as it does not denote anything. The learned counsel for the appellant has further submitted that the prosecution has failed to establish that any site or road denoted in the sketch Map is in existence.

10. The learned counsel for the appellant has placed strong reliance on the experts' opinion Ex.P-34 and Ex.P-35, relevant portion of which reads thus:

Ex.P-34:

"Rough sketch of area showing the location of Blind: This area is not part of the Air Force range. It is part of the Army range and falls under the jurisdiction of Stn. HQ Pokharan."

Ex.P-35:

"It has no significance from counter intelligence point of view."

The opinion expressed by PW-27 in Ex.P-35 establishes the fact that Ex.D-3 has no importance from the point of view of Army.

11. Further, his opinion on Ex. P-4 and Ex.P-5 reads thus:

"For example Ex.P-4 and Ex.P-5 parking place for airplanes, Hangar, Air Traffic control, inform the Radars etc. on this basis if Pakistan wishes to finish them by Air attack, then it will be easier for it, it will get straight win in ground attack. In this way, the Chart of mountain division referred in Ex.P-32, from this the enemy will get clear information of numbers of Brigade, numbers of vehicle and Arms and quality of Arms and their numbers. On this basis they will get help of defence in case India attacks and if they want to attack, then they will get great help in preparation."

12. It is further contended by the learned counsel that since neither of the witnesses PW-27 and PW-32 are expert witnesses within the meaning of Section 45 of the Evidence Act to give their expert opinion on Ex.D-3 sketch Map, reliance cannot be placed upon their opinion or evidence to convict the appellant. Therefore, the learned counsel for the appellant submits that their opinion being outside the sphere of the alleged expertise, the same is of no significance. Hence, the same could not have been relied upon by the court to convict the appellant. PW-27 cannot be held to be a competent person to give expert opinion on the seized document Ex-D3.

Further, it is urged that both the witnesses were never posted and worked in that area. Therefore, they neither had the knowledge of the area nor did they visit the area as is evident from their statement of evidence on record.

In this regard, he has placed reliance upon the evidence elicited in the cross-examination of PW-27 who has categorically admitted the same. So also PW-32 with reference to Ex.P-4 and Ex.P-5 has stated as above. Therefore the statement of evidence given by said witnesses in the case could not have been placed reliance upon by both the trial court and the High Court to record a finding that the appellant is guilty of the offence punishable under Section 3 (1) (c) of the Act and to convict and sentence him.

13. The learned counsel has placed reliance upon the judgment of this court in the case of *State of Himachal Pradesh Vs. Jai Lal and Ors.*[4] and also another judgment of this court in *Ramesh Chandra Agarwal Vs. Regency Hospital Limited*[5] in support of the legal contention that the above said witnesses viz. PW-27 and PW-32 are not expert witnesses to render their expert opinion on Ex.-D3. The relevant paragraphs of the judgment of *State of Himachal Pradesh Vs. Jai Lal and Ors.'*

4. (1999) 7 SCC 280.

5. (2009) 9 SCC 709.

case (supra) are extracted hereunder:

> "13. An expert witness is one who has made the subject upon which he speaks a matter of particular study, practice, or observation; and he must have a special knowledge of the subject. Shri P.C. Panwar in his evidence has stated that he passed B.Sc. (Agriculture) Honours from the University of Delhi in 1959; thereafter he did his M.Sc. (Horticulture) in 1967 from Punjab University. He joined the Agricultural Department in the year 1969 as a Research Assistant; he was promoted as Horticulture Development Officer in the year 1973 and at the time of the assessment he was working as District Horticulture Officer, Shimla. He has also stated that in the year 1986 he attended a 3 months' training course on apple technology in the University of Tasmania, Australia. The assessment in the orchards in question were made on different dates in November 1984. He has fairly accepted the suggestion that he had not received any training with respect to assessment of apple crop but that has been a part of his job. The witness could not state the number of scab cases in which he had been called upon to make assessment. He has specifically stated in the case against Jai Lal and others that that was his first and last assignment till date as a commission for assessing productivity of an apple orchard.
>
> .....
>
> 17. Section 45 of the Evidence Act which makes opinion of experts admissible lays down that when the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting, or finger impressions are relevant facts. Therefore, in order to bring the evidence of a witness as that o[illegible]e

shown that he has made a special study of the subject or acquired a special experience therein or in other words that he is skilled and has adequate knowledge of the subject.

18. An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criterion to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions."

Further, on the subject, this Court, in *Ramesh Chandra Agrawal's* case (supra) held as under:

"19. It is not the province of the expert to act as Judge or Jury. It is stated in Titli v. Alfred Robert Jones that the real function of the expert is to put before the court all the materials, together with reasons which induce him to come to the conclusion, so that the court, although not an expert, may form its own judgment by its own observation of those materials."

In view of the decision in *State of Himachal Pradesh Vs. Jai Lal and Ors.* (supra) both the witnesses PW-27 and PW-32 do not fulfil three criteria held to be necessary for considering a person expert.

14. Learned counsel further contends that the conviction of the appellant and the concurrent finding of fact recorded by the High Court is ex-facie bad in law as none of the above legal

aspects have been carefully examined by it and answered while concurring with the finding of the trial court on the charge against the appellant. Further he submits that after careful examination and analyzing the evidence of prosecution witnesses namely, PW-2, PW-27, PW-32 and also placing reliance upon the evidence of witnesses namely PW-22 and PW-24 who are the police witnesses and the conviction of the appellant for the offence under Section 3(1) (c) of the Act and sentencing him to undergo seven years imprisonment is an erroneous finding and therefore the same cannot be allowed to sustain. The same is contrary to the judgment of this Court in the case of *Padam Vs. State of U.P.*[6] The learned counsel also placed reliance upon another judgment of this court in the case of *Prasad @ Hari Prasad Acharya Vs. State of Karnataka*[7].

The learned counsel with reference to the legal position laid down by this Court in the above cases submits that the concurrent finding of fact recorded by the High Court on the charge without proper appreciation of evidence on record has rendered the findings erroneous in law. Further, the High Court has erred in law in affirming the conviction and sentence of the appellant. The same is wholly unsustainable in law and is therefore, liable to be set aside by allowing this appeal and acquit the appellant from the charge levelled against him under Section 3(1)(c) of the Act.

15. On the other hand, learned counsel for the respondent State has sought to justify that the concurrent findings of fact has been recorded by the High Court by consciously applying its mind to the prosecution case and the legal evidence on record by the court particularly the evidence of PW-1, PW-11, PW-16, PW-19, PW-20, PW-22, PW-24, PW-27 and PW-32. He contends that after examining the correctness of the findings recorded by the learned sessions judge on the charge levelled

6. 2000 (1) SCC 621.
7. 2009 (3) SCC 174.

against the appellant, the High Court has rightly concurred with the findings of fact which are recorded in the impugned judgment and it was of the opinion that the conviction of the appellant under Section 3 read with Section 9 of the Act is 14 years maximum sentence. The learned sessions judge after considering the fact that the alleged offence is of the year 1990 sentenced the appellant for seven years rigorous imprisonment along with other accused persons. Correctness of the same is examined by the High Court and it has opined that in such type of heinous offences, imposition of sentence for seven years rigorous imprisonment upon the accused is held to be legal, valid, just and proper and therefore, it did not interfere with the same. The High Court has rightly concurred with the findings of fact of the trial court by assigning its reasons and therefore no remission should be given to them, particularly when they were caught spying and putting the country as a whole in danger. Therefore, the dismissal of the appeal of the appellant along with other appellants by the High Court is perfectly justified in law. The same does not call for interference by this Court in exercise of this Court's jurisdiction. Hence, he has prayed for dismissal of the same.

16. With reference to the above referred rival legal contentions urged on behalf of the parties we have carefully examined the correctness of the findings recorded in the impugned judgment passed by the learned sessions judge in Case No. 196 of 1992 and the concurrent findings recorded by the High Court in confirming the conviction and sentence of the appellant. With a view to find out as to whether the said concurrent findings are erroneous or error in law, we have carefully perused the evidence of PW-12, PW-13, PW-14, PW-15 and PW-17 who have deposed against the appellant to answer the above point which arose for our consideration.

17. The learned sessions judge has rightly placed reliance upon the evidence of Sher Singh, PW-18 who is a search witness who has witnessed the search of the house of the

appellant and who has also turned hostile. PW-21, Dr. T.S. Kapur has stated that he has received the documents relating to this case from the CID Security and the original copy is Ex. P-36. The disputed documents along with letter are marked as Exbts. Q-1 to Q-9. Sample writings have been marked as A-1 to A-52 which have been exhibited as Ex.P-44 to P-82 which have been scientifically examined and thereafter a report Ex. P-83 was prepared stating that the disputed writings marked as Q-1 to Q-4 and Q-9 show very significant similarities with the specimen writings marked as A-1 to A-52.

Along with this, a written slip, article 2 - a map traced by hand was recovered from the house of Safi Mohd. in which railway tracks and roads are depicted, the signs of directions shown on a paper having lines, an advertisement of Air Force, Hindi Sainik Newspaper and Army Weekly, Prohibited Chart of Mountain organization division were recovered from Chotu Khan and were sent for opinion as to whether the said documents and the information contained therein are threat to the security of the country or not. He has further stated that a letter in English Ex P-33 relating to the above stated documents were sent to the headquarters of IAF Commandant Jodhpur. Ex.P-33 bears the signature, the reply of which is Ex.P-34.

18. PW-24 Yad Ram Tiwari, who was posted as SHO, Special Police Station, Rajasthan, Jaipur, has spoken about the receipt of the report from SP CID Zone Jodhpur through Constable Navneet Kumar and on the basis of which he has recorded FIR No.1/90 under Sections 3,5 and 9 of the Act and Section 120-B of IPC. Along with the report, Ex.P-1 some other secret documents were recovered vide recovery memo. He has stated in his evidence that he took the search of the house of Safi Mohd. at Jetha Chanana Railway Quarter where one blue coloured diary was recovered from the almirah of the appellant marked as article 3. One traced map was also recovered from the diary in which Pokhran, Jaisalmer, Devra Village, roads and railway track details were given. The map is marked as Ex. P-3. He has identified the appellant Sa[illegible]h

recovery memo is marked as Ex.P-28. He has also spoken about the addresses of Pakistani officials mentioned in the diary at pages 11, 13, and 21. The said witness has also spoken about the search of the house of the appellant, which was made in the presence of Khurshid and Sher Singh and the articles were seized such as (a) passport of Safi Mohd. as article 4, (b) Passport of Nazima Bano as article 5, (c) marriage card of Safi Mohd. as article 6, (d) passbook of Safi Mohd. as article 7, and (e) Card Shadi Mubarak article 8, vide search memo marked as Ex. P-28.

19. In the deposition Colonel S.K. Saren PW-27 has stated that along with Ex.P-3 original map, the letter referred in Ex.P-35 and the photocopies of Ex.P-4, Ex.P-5, Ex.D-3, Ex. P-32, P-31, P-27 were obtained and his opinion with reference to the above said documents was sought as to whether the information mentioned in the said documents if reaches the Pakistani officials, would be useful to them and would adversely affect the security of India. He has stated in his deposition in the affirmative that if the above mentioned documents reach the Pakistani officials the same may be useful to them as they can work out the strategy to attack India. He further opined that on the basis of information available in the said documents if Pakistan wants to destroy the country by air attack it would become easier. The witness PW-32 Wing commander Alok Kumar has also stated in his evidence before the trial court that he was posted as Intelligence Officer Headquarters South Western Air Command, Indian Air Force, Jodhpur. He gave his opinion that Ex.D-3 six digits sketch shows the accuracy to pinpoint a target which is very important and accurate on the basis of which the country's security can be destroyed. He has spoken about the red arrow in Ex D-3 which is a grid reference to the special point. According to him the said document is a very important document from the point of view of Army.

20. After referring to the evidence of the PW-22 and PW-24 the search of the house of the appellant and seizure of certain

documents along with diary particularly Ex D-3, handwritten map prepared with certain markings, it has proved the prosecution case. No doubt the independent witnesses have turned hostile, but the learned sessions judge has rightly accepted the testimony of the police witnesses after proper appreciation of their evidence and he has rightly placed reliance upon the police witnesses to prove the seizure of the documents from the house of the appellant and therefore the same cannot be held to be bad in law as contended by the learned counsel for the appellant.

21. Further, the learned sessions judge has rightly accepted the testimony of the witnesses to prove the recovery of documents by assigning reasons and therefore the same cannot be rejected merely on the ground that they are police officials who are members of raiding party and that the matters under the Official Secrets Act are very sensitive which required immediate action. In these circumstances, the investigation does not become defective as contended by the learned counsel for the defence for the reason that the search warrant was not obtained and the recovery of documents and articles from the appellant's house could not be rejected. The search and seizure of Army documents from the house of the appellant for the offences alleged against the appellant under the provisions of the Act are very sensitive and pertains to the integrity and security of the country. In view of the above fact, neither the search conducted in the presence of the independent witnesses nor the investigation made by the investigating officer becomes defective for want of search warrant to conduct the search in the house of the appellant as urged by the appellant's counsel.

22. The learned public prosecutor has rightly placed reliance on the decision of this Court in *Sama Alana Abdulla Vs. State of Gujarat*[8]. In the said decision this court lays down the legal principle that merely because the police witnesses

8. AIR 1996 SC 569.

have spoken about the search and the seizure of documents from the custody of the appellant, their version cannot be disbelieved as the independent witnesses have not supported the search and the seizure of the documents. The observations made by this Court in the above referred case are applied to the facts of the case in hand to accept the proof of search and seizure of the documents from the house of the appellant which are very important and sensitive for the integrity and security of the Nation. The said conclusions arrived at by the learned sessions judge and concurrence of the same by the High Court cannot be termed as erroneous in law as contended by learned counsel on behalf of the appellant. Therefore, the finding recorded by both the courts below regarding search and seizure of the documents which affect the integrity and security of the country is the concurrent finding of fact rightly recorded by the High Court after proper appreciation and appraisal of the evidence on record. The same cannot be interfered with by this Court in exercise of its jurisdiction. Even if the search is made by the Investigating Officer in illegal manner, the same does not affect the legality of the search and investigation made by the Investigating Officer with regard to the seizure of the documents from the house of the appellant in view of the law laid down by this Court in the above case. From the evidence produced by the prosecution in the case in hand, it is clear that the documents of strategic importance to the Nation have been recovered from the possession of the appellant and other accused and they have failed to give satisfactory explanation about the documents being in their possession.

23. The learned sessions judge has rightly disbelieved the contentions urged on behalf of the appellant that Ex. D-3 was recovered from the possession of the accused Mohd. Ishfaq as stated by the prosecution witness Om Prakash PW-2 the owner of the Guest House. Recovery of the said document from the house of Safi Mohd. is proved by the prosecution is the finding of fact which is accepted by the High Court based on recovery memo Ex.P-28. The independent witness to prove the

memo is one Om Prakash Rathi PW-2, besides, the evidence of the said witness, Ram Dass Rathi PW-5 who has stated in his evidence that Ex. D-3 was recovered from the Railway quarter of Safi Mohd. the appellant herein.

24. Om Prakash Rathi PW-2 has clearly stated in his statement that he had read the memo Ex.P-22 before putting his signature from A to B. Non-mentioning of Ex. D-3 belies his evidence that D-3 was recovered from Mohd Ishfaq from the guest house. PW-5 and PW-6 the other recovery witnesses have not stated in their evidence with certainty that Ex D-3 was recovered from the possession of the Mohd. Ishfaq from his bag. Further, he has spoken about recovery of the document mentioning Ex.D-3 recovery memo which was prepared in his presence and the police sealed the recovery documents. In view of the aforesaid statement of evidence of the above witnesses the evidence of PW-2, the contention that Ex.D-3 map was recovered from the possession of Mohd. Ishfaq was rightly rejected by the learned sessions judge and the High Court. Apart from the said findings, the prosecution witness PW-7 ASM of Parihari Railway Station has stated that the house of ASM Safi Mohd. is not at Jetha Chanana. He was allotted a railway quarter and ASM Safi Mohd. had moved to this house with his family in 1989. In the said quarter the search was conducted by the Investigating Officer and certain documents were seized including Ex.D-3 from possession of the appellant is the finding of fact recorded by the trial judge which is rightly concurred with by the High Court after re-appreciation of evidence on record in the Appeal filed by the appellant.

25. In the impugned judgment learned sessions judge has referred to the evidence of PW-27 and PW-32 and opined that the documents particularly Ex. D-3 seized from the possession of the appellant be sent for their opinion as to whether the said document if reaches the Pakistani officials would be dangerous to the security and integrity of the Nation. After careful consideration of the document they hav

of information available in the said document that, if Pakistan officials want to destroy the country by air attack it would become easier.

26. The learned sessions judge being the trial judge is competent to appreciate the evidence and had the opportunity to observe demeanour of the witnesses who have deposed before him to prove the prosecution case. Merely because the independent witnesses have turned hostile, the other police witnesses' evidence cannot be disbelieved by the courts below to record a finding on the charge as has been done by the trial court by rightly placing reliance upon the judgment of this court referred to supra, he has come to the right conclusion by accepting the evidence of police witnesses PW-21, PW-22 with regard to the conduct of the search and seizure of documents from the house of the appellant and recorded the finding to this effect by assigning valid and cogent reasons in his judgment. He had rightly come to the conclusion on the fact while recording the finding on the charge on the basis of evidence of PW-27 and PW-32 who have opined that if the said document and information contained therein is made available to the Pakistani officials it will be dangerous to the integrity and security of the Nation.

27. The contentions urged by the learned counsel on behalf of the appellant that PW-27 and PW-32 are not expert witnesses in terms of Section 45 of the Evidence Act by placing reliance upon the decisions of this Court referred to supra are mis-placed and they do not support the case of defence for the reason that the learned sessions judge after careful scrutiny of the ocular evidence and the written submission has rightly come to the correct conclusion about the said document seized from the appellant. The said finding and reasons recorded by the learned sessions judge in his judgment on the charge framed against the appellant has been re-examined by the High Court by applying its mind consciously and concurred with the said finding of fact by assigning valid reasons. Therefore, the same

cannot be termed erroneous in law on the grounds urged by the learned counsel for the appellant and interfered with by this Court in exercise of its jurisdiction by placing reliance upon the decision of this Court referred to supra as they are mis-placed and do not support the case of the appellant.

28. In our considered view both the learned sessions judge and the High Court, on proper appreciation and re-appreciation of evidence on record, after considering the arguments advanced on behalf of the defence have arrived at the correct conclusion. The High Court has carefully considered the arguments advanced on behalf of the appellant and recorded its findings on the charge with reasons.

29. For the foregoing reasons, we are of the view that this is not a fit case for our interference with the impugned judgment having regard to the nature of charges made against the appellant under Sections 3, 9 and 5 of the Act as he is found to be guilty along with other accused persons and rightly convicted and sentenced them for seven years rigorous imprisonment. The appeal is devoid of merit and is liable to be dismissed and is accordingly dismissed.

B.B.B. Appeal dismissed.

KANHAIYA LAL & ORS.
v.
STATE OF RAJASTHAN
(Criminal Appeal No. 1108 of 2006)

APRIL 22, 2013

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

Penal Code, 1860 - ss. 302, 460, 148, 427 and 342 - Murder - By unlawful assembly with a common object - Conviction - Conversion of death sentence into life imprisonment by High Court - Sustainability - Held: The crime took place because the village Sarpanch suspected that the deceased persons were responsible for killing his son - All accused persons have almost spent thirteen years in custody - Similarly placed persons have been imposed life sentence - Regard being had to the totality of the circumstances, it cannot be said that imprisonment for life was inadequate and the circumstances so grave that it calls for a death sentence - Not a case which can be treated to be a case of extreme culpability and there is no other option but to impose death penalty - No error in the decision of High Court by which it commuted the death sentence to life imprisonment - Sentence / Sentencing.

Penal Code, 1860 - ss. 302, 460, 148, 427 and 342 - Murder case - Appeal against conviction of some accused by trial court - Acquittal by High Court - Propriety - Held: On facts, approach of the High Court cannot be said to be totally implausible - It took note of the involvement of number of persons and, after filtering the grain from the chaff and on due consideration of the material on record, extended the benefit of doubt to the accused persons who have been acquitted - Conclusions arrived at by the High Court in recording the acquittal justified.

FIR - Delay in lodging - Effect - Held: Mere delay in lodging FIR cannot be regarded by itself as fatal to the case of the prosecution - Whether the delay creates a dent in the prosecution story and ushers in suspicion has to be gathered by scrutinizing the explanation offered for the delay in light of the totality of the facts and circumstances - On facts, the explanation offered for delay was not implausible.

Witnesses - Related witness - Appreciation - Murder case - Held: In the case at hand, the witnesses lost their father, husband and a relative - The witnesses mentioned about the weapons used, the assault made and the parts of the body where injuries were inflicted - Nothing on record to discard their testimony as untrustworthy.

Appeal - Appeal against conviction and appeal against acquittal - Distinction between - Discussed.

Five persons of the same village were done to death by inflicting blows with swords, gandasis and sticks. The incident allegedly had its genesis in a prior incident where son of 'RN', Sarpanch of the village, was murdered and 'RN' nurtured deep rooted suspicion that the deceased persons were involved in that murder and thus, wanted to take revenge.

'RN' expired during pendency of the trial and, accordingly, the trial was closed against him. 17 persons were convicted out of which six accused persons, namely, Yuvraj, Hemraj, Hansraj, Radhey Shyam, Modu Nath and Mohan Lal were convicted under Sections 148, 427, 342, 460 and 302 IPC and sentenced to death and the rest 11 accused, namely, Lal Chand, Dhanpal, Kanyaiyalal, Naval, Revdi Lal, Ram Lal, Babu Lal, Mangi Lal, Ghanshyam, Radhey Shyam S/o Prahalad, and Radhey Shyam s/o Shankar Lal, were convicted under Sections 148, 427, 342, 460 and 302/149 IPC and sentenced to life imprisonment by th[illegible]st

of the accused persons were acquitted of the charges.

The Division Bench of the High Court partly allowed the appeals preferred by Mohan Lal and others, who were convicted under Sections 302 and 460 IPC and sentenced to death, acquitting Mohan Lal of the charges framed against him under Sections 302 and 460 IPC and as far as the other accused persons of the same category were concerned, the sentence of death was converted to life sentence and, resultantly, the death reference was declined. The accused persons, namely, Lal Chand, Revdi, Ghanshyam, Radhey Shyam, Mangilal and Babulal were given benefit of doubt and acquitted of the charges framed against them under Sections 302 and 460 IPC. As far as the other accused persons, namely, Kanhaiyalal, Naval, Ram Lal and Radhey Shyam, s/o Shankar Lal, are concerned, the conviction and sentence imposed by the trial court was maintained. Hence the present cross-appeals.

Dismissing all the appeals, the Court

HELD: 1.1. It is settled in law that mere delay in lodging the First Information Report cannot be regarded by itself as fatal to the case of the prosecution. However, it is obligatory on the part of the court to take notice of the delay and examine, in the backdrop of the case, whether any acceptable explanation has been offered, by the prosecution and if such an explanation has been offered whether the same deserves acceptance being found to be satisfactory. Whether the delay creates a dent in the prosecution story and ushers in suspicion has to be gathered by scrutinizing the explanation offered for the delay in the light of the totality of the facts and circumstances. [Paras 12, 15] [375-H; 376-A-B; 377-H; 378-A]

1.2. In the present case, the occurrence had taken

place at night. True it is, the house of Purshottam was surrounded sometime at 5.00 p.m. on 28.6.2001, but the real crime, the assault and the murder took place after midnight. The ghastly and gruesome crime must have sent a shiver in the spine and shattered the brains and bones of the witnesses to the crime and shock, panic and inequilibrium would have reigned simultaneously to leave them totally confounded. No one could have dared to move an inch towards the police station, for man's basic instinct prompts him to survive first and then think about any other action. The informant, brother of the deceased, has clearly deposed that he and others were in a terrible state of trauma to proceed to the police station to lodge an FIR. After the day broke, they mustered courage and proceeded towards the police station and lodged the FIR at 6.45 a.m. on 29.6.2001. The explanation offered, by no stretch of imagination, can be regarded implausible. A delayed FIR can usher in craftsmanship, manipulation and embellishment and may make the prosecution story vulnerable, but when the delay has been adequately explained, the same deserves acceptation. [Para 16] [378-D-H; 379-A]

State of H.P. v. Gian Chand **(2001) 6 SCC 71: 2001 (3) SCR 247;** *Ramdas and others v. State of Maharashtra* **(2007) 2 SCC 170;** *Meharaj Singh v. State of U.P.* **(1994) 5 SCC 188;** *Kilakkatha Parambath Sasi and others v. State of Kerala* **AIR 2011 SC 1064: 2011 (2) SCR 540 - referred to.**

2.1. When relatives, who are alleged to be interested witnesses, are cited by the prosecution, it is the obligation of the court to scrutinize their evidence with care, caution and circumspection. In the case at hand, the entire occurrence took place in and around the house of Purshottam. Five people had been done to death. In such a circumstance, it is totally unexpected that other villagers would come forward to give their statements and depose in the court. It is to be borne in mind

of the village, solely on the basis of suspicion, had seen to it that five persons meet their end. Such a situation compels one not to get oneself involved and common sense give consent to such an attitude. Thus, no exception can be taken to the fact that no independent witness was examined. [Para 17] [379-C-E]

2.2. In the case at hand, the witnesses have lost their father, husband and a relative. There is no earthly reason to categorise them as interested witnesses who would nurture an animus to see that the accused persons are convicted, though they are not involved in the crime. On the contrary, they would like that the real culprits are prosecuted and convicted. That is the normal phenomena of human nature and that is the expected human conduct. [Para 20] [380-D-E]

2.3. In a case of this nature, it is the relatives who would come forward to depose against the real culprits and would not like to falsely implicate others. They have witnessed the brutish crime committed and there is nothing on record to discard their testimony as untrustworthy. Their evidence is found to be reliable and credible. The witnesses have mentioned about the weapons used, the assault made and the parts of the body where injuries were inflicted. True it is, there are some discrepancies but they are absolutely minor. The accused had formed an unlawful assembly with a common object to put an end to the lives of the deceased persons. Their common object is writ large because they had the knowledge and they shared the common object from the beginning to the end. All the accused persons were a part of the unlawful assembly with the knowledge of the common object. [Paras 21, 22] [381-C-D, H; 382-A-C]

Hari Obula Reddy and others v. The State of Andhra Pradesh **(1981) 3 SCC 675:** *Kartik Malhar v. State of Bihar* **(1996) 1 SCC 614: 1995 (5) Suppl. SCR 239;** *Masalti and*

others v. The State of Uttar Pradesh **AIR 1965 SC 202: 1964 SCR 133;** *Lalji and others v. State of U.P.* **(1989) 1 SCC 437: 1989 (1) SCR 130;** *Ramachandran and others v. State of Kerala* **(2011) 9 SCC 257: 2011 (13) SCR 923 - referred to.**

3.1. The preponderance of judicial opinion of this Court is that there is no substantial difference between an appeal against conviction and an appeal against acquittal except that while dealing with an appeal against acquittal, the Court keeps in view the position that the presumption of innocence in favour of the accused has been fortified by his acquittal and if the view adopted by the High Court is a reasonable one and the conclusion reached by it had its grounds well set out on the materials on record, the acquittal may not be interfered with. Thus, this fine distinction has to be kept in mind by the Court while exercising its appellate jurisdiction. The golden rule is that the Court is obliged and it will not abjure its duty to prevent miscarriage of justice where interference is imperative and the ends of justice so require and it is essential to appease the judicial conscience. [Para 28] [385-A-C]

3.2. In the case of Lal Chand @ Ram Niwas, the High Court has opined that though he was named along with other persons who constituted a group of 25-26 persons and had surrounded the house of Purshottam, yet none of the witnesses had mentioned that he had gone on the roof of the house or damaged the roof and, therefore, his participation in the crime appears to be doubtful. While addressing the conviction relating to Revdi Lal, the High Court has noticed that the only evidence against him is that he had gone to the house of Purshottam and thrown stones, but no other witnesse has named him barring PW-2. The High Court has found that in all possibility, there was exaggeration or embellishment and, accordingly, given him benefit of d

the conviction of Ghanshyam, the High Court observed that the allegations against him are omnibus in nature and do not inspire confidence and, accordingly extended benefit of doubt. On similar analysis, Radhey Shyam s/o Prahlad, Mangi Lal and Babu Lal S/o Dev Lal have been extended the benefit of doubt. As far as Mohan Lal is concerned, the High Court perceived that there are material contradictions in the evidence of the witnesses pertaining to the involvement of Mohan Lal and, hence, felt that it was not safe to convict him and, accordingly, on proper scrutiny of the evidence, gave him the benefit of doubt. The approach of the High Court cannot be said to be totally implausible. It has taken note of the involvement of number of persons and, after filtering the grain from the chaff and on due consideration of the material on record, has extended the benefit of doubt to the accused persons who have been acquitted. Thus, this Court is not disposed to dislodge the conclusions arrived at by the High Court in recording the acquittal. [Para 29] [385-D-H; 386-A-D]

Jadunath Singh and others v. State of U.P. **AIR 1972 SC 116: 1971 (3) SCC 577;** *Sohrab and another v. The State of Madhya Pradesh* **AIR 1972 SC 2020: 1973 (1) SCR 472;** *State of M.P. v. Bacchudas alias Balram and others* **(2007) 9 SCC 135: 2007 (1) SCR 671;** *Bhagwan Singh v. State of M.P.* **(2003) 3 SCC 21: 2003 (1) SCR 506;** *State of Rajasthan through Secretary, Home Department v. Abdul Mannan* **(2011) 8 SCC 65: 2011 (7) SCR 1099;** *State of Rajasthan v. Shera Ram alias Vishnu Dutta* **(2012) 1 SCC 602: 2011 (15) SCR 485 - referred to.**

4. In the present case, the crime had taken place because 'RN' had suspected that the deceased persons were responsible for extinguishing the life spark of his son. It is also seen that similarly placed persons have been imposed life sentence. Quite apart from that, all the accused persons have almost spent thirteen years in

custody. Regard being had to the totality of the circumstances, it cannot be said that imprisonment for life is inadequate and the circumstances are so grave that it calls for a death sentence. On adjudication of the whole scenario in proper perspective, this Court is inclined to think that it is not a case which can be treated to be a case of extreme culpability and there is no other option but to impose death penalty. Thus, no error is found in the decision of the High Court by which it commuted the death sentence to life imprisonment. [Para 35] [389-G; 390-A-C]

Bachan Singh v. State of Punjab **(1980) 2 SCC 684;** *Machhi Singh and Others v. State of Punjab* **(1983) 3 SCC 470: 1983 (3) SCR 413;** *Haresh Mohandas Rajput v, State of Maharshtra* **(2011) 12 SCC 56: 2011 (14) SCR 921;** *C. Muniappan v. State of T.N.* **(2010) 9 SCC 567: 2010 (10) SCR 262;** *Dara Singh v. Republic of India* **(2011) 2 SCC 490: 2011 (1) SCR 929;** *Surendra Koli v. State of U.P.* **(2011) 4 SCC 80: 2011 (2) SCR 939;** *Mohd. Mannan v. State of Bihar* **(2011) 5 SCC 509;** *Sudam v. State of Maharashtra* **(2011) 7 SCC 125: 2011 (6) SCR 1104; and** *Ram Pal v. State of U.P. (2003) 7 SCC 141: Bhagwan Singh v. State of M.P.* **(2003) 3 SCC 21: 2003 (1) SCR 506 - referred to.**

Case Law Reference:

2001 (3) SCR 247	**referred to**	**Para 12**
(2007) 2 SCC 170	**referred to**	**Para 13**
(1994) 5 SCC 188	**referred to**	**Para 14**
2011 (2) SCR 540	**referred to**	**Para 15**
(1981) 3 SCC 675	**referred to**	**Para 18**
1995 (5) Suppl. SCR 239	**referred to**	**Para 19**
1964 SCR 133	**referr**	

1989 (1) SCR 130	**referred to**	**Para 22**
2011 (13) SCR 923	**referred to**	**Para 22**
1971 (3) SCC 577	**referred to**	**Para 24**
1973 (1) SCR 472	**referred to**	**Para 25**
2007 (1) SCR 671	**referred to**	**Para 26**
2003 (1) SCR 506	**referred to**	**Para 26**
2011 (7) SCR 1099	**referred to**	**Para 26**
2011 (15) SCR 485	**referred to**	**Para 27**
(1980) 2 SCC 684	**referred to**	**Para 28**
1983 (3) SCR 413	**referred to**	**Para 31**
2011 (14) SCR 921	**referred to**	**Para 33**
2010 (10) SCR 262	**referred to**	**Para 33**
2011 (1) SCR 929	**referred to**	**Para 33**
2011 (2) SCR 939	**referred to**	**Para 33**
(2011) 5 SCC 509	**referred to**	**Para 33**
2011 (6) SCR 1104	**referred to**	**Para 33**
(2003) 7 SCC 141	**referred to**	**Para 34**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1108 of 2006.

From the Judgment and Order dated 02.06.2005 of the High Court of Judicature for Rajasthan at Jaipur bench in D.B. Crl. A. No. 621/2004, D.B. Crl. A. No. 464/2003, D.B. Crl. Jail A. No. 421/2003 and D.B. Crl.A. No. 674/2003.

WITH

Crl. Appeal Nos. 1109, 1110, 1111 and 1112 of 2006

Sushil Kumar Jain, Puneet Jain, Anurag Gohil, Pratibha Jain for the Appellants.

Imtiaz Ahmed, Naghma Imtiaz, Milind Kumar for the Respondent.

The Judgment of the Court was delivered by.

DIPAK MISRA, J. 1. The case of the prosecution depicts a macabre chain of events that occurred in the intervening night of 28th and 29th June, 2001 which eventually led to the massacre of five persons, namely, Purshottam, Ram Kumar Dhaka, Kalu Lal Mali and Lokendra Sharma, all residents of village Railgaon, and Heera Lal Meghwal, resident of Rampuria, Kota. The extermination of five lives had its genesis in an incident that had occurred sometime prior to the date of occurrence where Kishan Chand, son of Ram Narayan, Sarpanch of the village, was murdered and the father nurtured deep rooted suspicion that the deceased persons had not only masterminded a well thought out plan but also executed the same and the seeds of the unquenched anger gradually got inflamed and took the shape of revenge ultimately resulting in the extinction of the life-spark of five persons. From the uncurtaining of the gruesome events, it is manifest that on the date of the occurrence, the night slowly and intensely developed into real darkness of revenge that reigned with avenge. Revenge, the pleasure of morbid minds, knows no bounds and the accused persons, clinging to the fire of revenge, possibly thinking it to be sweetest thing to relish, marched ahead on the escalator of bitterness and the ultimate eventuate was five deaths, trial of 29 persons and conviction of 17 accused out of which six accused persons, namely, Yuvraj, Hemraj, Hansraj, Radhey Shyam, Modu Nath and Mohan were imposed death sentence and the rest 11 accused, namely, Lal Chand, Dhanpal, Kanyaiyalal, Naval, Revdi Lal, Ram Lal, Babu Lal, Mangi Lal, Ghanshyam, Radhey Shyam s/0 Prahalad, and Radhey Shyam s/o Shankar Lal, were sentenced with rigorous imprisonment of life by the learned Additional Sessions Judge, Fast Track, in Sessions Case No. 27 of 2002. Be it noted, the rest of the accused persons were acqu

2. As is demonstrable, all the accused persons were sent up for trial for offences punishable under Sections 147, 148, 302, 342, 427, 435 and 460 read with 149 IPC. Filtering the unnecessary details, the facts which are necessitous to be stated for disposal of these appeals are that on 28.6.2001, about 5.00 p.m., Purshottam, brother of the informant, Ram Kumar Dhakad, Kalu Lal Mali, Lokendra Sharma, and Heera Lal Meghwal had come on two motorcycles to the house of Purshottam and no sooner had they arrived in the village than Ram Narayan, Mohan Lal, Yuvraj, Hansraj, Lalchand, Dhanpal, Kanhaiya Lal, Naval, Revdi Lal, Hemraj, Radhey Shyam s/o Gopal, Bhojraj, Ramesh Chand, Ram Singh, Babu Lal Meena, Mangilal, Ghanshyam, Radhey Shyam s/o Prahalad, Modulal, Radhey Shyam s/o Shankar Lal, Jagdish, Shambhu Dayal, Amar Lal and Sita Ram along with 15-20 others came being armed with Gandasis, Swords, Sabals and sticks. They surrounded the house of Purshottam who was in the house along with children. The accused persons scaled the house of Purshottam and started pelting stones as a consequence of which the roof sheets and the tiles of the house of Purshottam were broken. Purshottam and his four other companions jumped the common wall situate in between the houses of Purshottam and Radhey Shyam, brother of Purshottam, and stayed in one room of the informant. As the evening progressed, the evil designs became more animated and the deadly desires sprang into action and at midnight, the accused persons took the informant, his wife Badribai, mother Panabai and Nirmala Bai, wife of Purshottam, and made them sit in the thatched roof of one Prabhulal Meena. Almost after half an hour, the relatives of Ram Narayan Gujjar, Sarpanch of the said village, came in a jeep along with 15-20 persons in front of the house of the informant, broke open the door, entered the house and, in the house itself, inflicted blows with Swords, Gandasis and sticks, as a result of which Kalu Lal Mali, Lokendra Sharma and Heera Lal Meghwal breathed their last inside the house. The accused dragged Purshottam and Ram Kumar outside and assaulted them with Gandasis and swords on their heads, faces, hands

and feet and, eventually, those two succumbed to their injuries. They took both the motorcycles in the passage and burnt the same and, after the inhumane and barbaric act, left the scene.

3. The FIR, as is perceptible from the material brought on record, was not lodged immediately but was lodged at 6.45 a.m. on 29.6.2001. During investigation, the investigating agency prepared the site plan, got the autopsy done in respect of the dead bodies, seized the blood stained clothes, recorded the statements of the witnesses and, on the basis of the information furnished by the accused persons, while they were in custody, recovered the weapons used in the commission of the crime and, after following the other formalities of investigation, submitted the charge-sheets on different dates before the Judicial Magistrate, Digod, who, in turn, committed the matter to the Court of Session. After committal of the case to the Court of Session, the learned trial Judge, on 3.4.2002, framed charges under Sections 147, 427, 435, 148, 302, 460 and 342 IPC and in respect of 435/149 IPC against accused numbers 1, 5-9, 11, 12, 16, 21, 23, 24 and 26. As far as the other three sets of accused persons are concerned, almost similar charges were framed on 21.09.2002. The accused persons denied their involvement in the crime, pleaded innocence and claimed to be tried.

4. In order to substantiate the offences against the accused persons, the prosecution examined 45 witnesses, got number of documents exhibited and various material objects marked. The accused persons in their defence examined 15 witnesses.

5. The learned trial Judge formulated four questions, namely, whether the accused in furtherance of the common object caused the death of the deceased persons and assaulted the other persons; whether all of them by throwing stones on the house of Purshottam and burning the Motorcycles in possession of the deceased persons committed mischief;

whether the accused persons with common object to commit murder of the deceased persons committed lurking trespass into the house of Radhey Shyam in the night; and whether the offences were committed by all the accused persons. The learned trial Judge addressed the questions one to three, as formulated by him, in a composite manner and, appreciating the evidence on record, came to hold that the accused Mohan Lal, Yuvraj, Hansraj, Hemraj, Radhey Shyam s/o Gopal and Modu Nath were guilty of the offences under Sections 148, 427, 342, 460 and 302 IPC and, accordingly, convicted them to undergo three years rigorous imprisonment and a fine of Rs.500/-, two years rigorous imprisonment and a fine of Rs.500/-, one year rigorous imprisonment and a fine of Rs.500/-, ten years rigorous imprisonment and a fine of Rs.2000/- and death sentence respectively with further stipulation of consequences in default of payment of fine respectively. Accused Lal Chand, Revdi Lal, Ghanshyam and Radhey Shyam, s/o Prahlad, were convicted for offences punishable under Sections 148, 427, 342, 460 and 302/149 IPC and sentenced to suffer rigorous imprisonment for three years and a fine of Rs.500/-, two years rigorous imprisonment and a fine of Rs.500/-, one year rigorous imprisonment and a fine of Rs.500/-, ten years rigorous imprisonment and a fine of Rs.2000/- and life imprisonment and a fine of Rs.2000/- respectively with the consequences enumerated in case of default of payment of fine respectively. Accused Dhanpal, Kanhaiya Lal, Naval, Ram Lal, Babu Lal, Mangi Lal, Radheysham and four others were found guilty of the same offences and imposed various sentences with a default clause. The maximum sentence was imprisonment for life and a fine of Rs.2000/- under Section 302/149 IPC. The rest of the accused stood acquitted.

6. At this juncture, it is worth mentioning that Ram Narayan, Sarpanch of the village Railgaon, who was sent up for trial, expired during the pendency of the trial and, accordingly, the trial was closed against him.

7. The accused appellants preferred seven criminal appeals, namely, Criminal Appeal Nos. 464 of 2003, 421 of 2003, 621 of 2003, 622 of 2003, 670 of 2003, 474 of 2003 and 520 of 2003. The State represented its case in Death Reference No. 1 of 2003, but did not question the defensibility of the acquittal recorded against 11 other accused persons. The accused-appellants before the High Court assailed the conviction in respect of all the offences and the sentence and the State defended the judgment passed by the court below.

8. The Division Bench of the High Court dealt with all the appeals and disposed all of them by a singular judgment dated 2.6.2005. The High Court, appreciating the evidence, scrutinizing the material on record and bestowing anxious consideration while dealing with the submissions canvassed by the learned counsel for the parties, partly allowed the appeals preferred by Mohan Lal and others, who were convicted under Sections 302 and 460 IPC and sentenced to death, acquitted Mohan Lal of the charges framed against him under Sections 302 and 460 IPC and as far as the other accused persons of the same category are concerned, the sentence of death was converted to life sentence and, resultantly, the death reference was declined. The accused persons, namely, Lal Chand, Revdi, Ghanshyam, Radhey Shyam, Mangilal and Babulal were given benefit of doubt and acquitted of the charges framed against them under Sections 302 and 460 IPC. As far as the other accused persons, namely, Kanhaiyalal, Naval, Ram Lal and Radhey Shyam, s/o Shankar Lal, are concerned, the conviction and sentence imposed by the trial court was maintained.

9. The High Court, on x-ray of the evidence, came to hold that all the deaths were homicidal; that imposition of death sentence by the learned trial Judge was not justified; that there was no unexplained delay in lodging the FIR; that the provisions enshrined under Section 149 of IPC were clearly attracted to the case at hand; that the plea of the defence that the prosecution had chosen only the rela[illegible]d

persons who are highly interested witnesses and, hence, their version did not deserve acceptance was without any merit; that the whole crime was committed in a planned design; that the proponement that no independent witnesses had been examined was bereft of any substratum because the witnesses could not have dared to depose against the Sarpanch who, on mere suspicion, had set himself on such a massacre and self-preservation being the basic instinct in such a situation had ruled supreme; that Dhanpal s/o Ram Pratap, accused no. 5 before the High Court, having expired, appeal at his instance abated; that the involvement of Lalchand, Revdi Lal, Ghanshyam, Radheyshyam s/o Prahlad, Mangi Lal, Babu Lal, and Mohan was doubtful and, accordingly, they deserved to be acquitted; that the other accused-appellants were involved in the commission of crime and, therefore, the conviction under Section 302 could not be interfered with. As far as the death reference is concerned, it opined that it is not a rarest of rare case warranting imposition of death sentence and, accordingly, modified it to rigorous life imprisonment. Recording such conclusions, the High Court disposed of the bunch of appeals.

10. We have heard Mr. Sushil Kumar Jain, learned counsel for the accused-appellants in Criminal Appeal No. 1108 of 2006, and Mr. Imtiaz Ahmed, learned counsel for the State in all the appeals.

11. The first submission of Mr. Jain is that the prosecution version deserves to be thrown overboard inasmuch there is delay in lodging of the FIR and the explanation offered for such delay is unacceptable, regard being had to the duration of the occurrence, proximity of the police station and the implication of number of accused persons which is indicative of embellishment. Learned counsel would further contend that innocent persons were dragged into trial and suffered immensely and hence, such a story should not be given credence to.

12. It is settled in law that mere delay in lodging the First

Information Report cannot be regarded by itself as fatal to the case of the prosecution. However, it is obligatory on the part of the court to take notice of the delay and examine, in the backdrop of the case, whether any acceptable explanation has been offered, by the prosecution and if such an explanation has been offered whether the same deserves acceptance being found to be satisfactory. In this regard, we may refer with profit a passage from *State of H.P. v. Gian Chand*[1], wherein a three-Judge Bench of this Court has expressed thus: -

> "Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the court on its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case."

13. In *Ramdas and others v. State of Maharashtra*[2], this Court has observed that mere delay in lodging the first information report is not necessarily fatal to the case of the prosecution. However, the fact that the report was lodged belatedly is a relevant fact of which the court must take notice. This fact has to be considered in the light of other facts and circumstances of the case, and, in a given case, the court may be satisfied that the delay in lodging the report has been sufficiently explained. In the light of the totality of the evidence, the court has to consider whether the delay in lodging the report adversely affects the case of the prosecution. That is a matter

1. (2001) 6 SCC 71.
2. (2007) 2 SCC 170.

of appreciation of evidence. There may be cases where there is direct evidence to explain the delay. Even in the absence of direct explanation, there may be circumstances appearing on record which provide a reasonable explanation for the delay. There are cases where much time is consumed in taking the injured to the hospital for medical aid and, therefore, the witnesses find no time to lodge the report promptly. There may also be cases where on account of fear and threats, witnesses may avoid going to the police station immediately. The time of occurrence, the distance to the police station, mode of conveyance available, are all factors which have a bearing on the question of delay in lodging of the report. It is also possible to conceive of cases where the victim and the members of his or her family belong to such a strata of society that they may not even be aware of their right to report the matter to the police and seek legal action, nor was any such advice available to them.

14. In *Meharaj Singh v. State of U.P.*[3], a two-Judge Bench of this Court has observed that FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial and the object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any, for delay in lodgment of the FIR results in embellishment which is a creation of afterthought. Emphasis was laid on the fact that on account of delay, the FIR not only gets bereft of the advantage of spontaneity but also danger of introduction of a coloured version or exaggerated story.

15. Thus, whether the delay creates a dent in the prosecution story and ushers in suspicion has to be gathered by scrutinizing the explanation offered for the delay in the light

3. (1994) 5 SCC 188.

of the totality of the facts and circumstances. Greater degree of care and caution is required on the part of the court to appreciate the evidence to satisfy itself relating to the explanation of the factum of delay. In *Kilakkatha Parambath Sasi and others v. State of Kerala*[4], it has been observed that when an FIR has been lodged belatedly, an inference can rightly follow that the prosecution story may not be true but equally on the other side, if it is found that there is no delay in the recording of the FIR, it does not mean that the prosecution story stands immeasurably strengthened.

16. The present factual scenario is to be tested on the touchstone of the aforesaid principles. On a careful perusal of the material on record, it is clear as crystal that the occurrence had taken place at night. True it is, the house of Purshottam was surrounded sometime at 5.00 p.m. on 28.6.2001, but the real crime, the assault and the murder took place after midnight. The ghastly and gruesome crime must have sent a shiver in the spine and shattered the brains and bones of the witnesses to the crime and shock, panic and inequilibrium would have reigned simultaneously to leave them totally confounded. No one could have dared to move an inch towards the police station, for man's basic instinct prompts him to survive first and then think about any other action. The informant, brother of the deceased, has clearly deposed that he and others were in a terrible state of trauma to proceed to the police station to lodge an FIR. After the day broke, they mustered courage and proceeded towards the police station and lodged the FIR at 6.45 a.m. on 29.6.2001. The learned counsel for the appellants would contend that they could have lodged the FIR when the house was seized and not after the whole episode was over. We are not impressed by the said submission and we think that the explanation offered, by no stretch of imagination, can be regarded implausible. As noticed earlier, a delayed FIR can usher in craftsmanship, manipulation and embellishment and may make the prosecution story vulnerable, but when the delay

4. AIR 2011 SC 1064.

has been adequately explained, the same deserves acceptation and, accordingly, we do so.

17. The next limb of argument of Mr. Jain, learned counsel for the appellants, is that all the alleged eye witnesses are closely related to the deceased Purshottam and the prosecution has chosen not to examine any independent witness despite number of houses situate in the close vicinity of the house of Purshottam and that itself creates a dent in the version of the prosecution. When relatives, who are alleged to be interested witnesses, are cited by the prosecution, it is the obligation of the court to scrutinize their evidence with care, caution and circumspection. In the case at hand, the entire occurrence took place in and around the house of Purshottam. Five people had been done to death. In such a circumstance, it is totally unexpected that other villagers would come forward to give their statements and depose in the court. It is to be borne in mind that Ram Narayan, Sarpanch of the village, solely on the basis of suspicion, had seen to it that five persons meet their end. Such a situation compels one not to get oneself involved and common sense give consent to such an attitude. Thus, no exception can be taken to the fact that no independent witness was examined. As far as the relatives are concerned, Radhey Shyam, PW-1, is the brother of the deceased, Ram Lal, PW-2, is the brother of Radhey Shyam, Panna Bai, PW-3, is the mother of Purshottam and Nirmala Bai, PW-5, is his wife, and Anita, PW-5, Badribai, PW-8, Manisha, PW-9 and Kaushalya, PW-10, are also close relatives and these witnesses have been cited as eye witnesses.

18. In *Hari Obula Reddy and others v. The State of Andhra Pradesh*[5], a three-Judge Bench has opined that it cannot be laid down as an invariable rule that interested evidence can never form the basis of conviction unless corroborated to a material extent in material particulars by independent evidence. All that is necessary is that the evidence

5. (1981) 3 SCC 675.

of the interested witnesses should be subjected to careful scrutiny and accepted with caution. If on such scrutiny, the interested testimony is found to be intrinsically reliable or inherently probable, it may, by itself, be sufficient, in the circumstances of the particular case, to base a conviction thereon.

19. In *Kartik Malhar v. State of Bihar*[6], this Court has stated that a close relative who is a natural witness cannot be regarded as an interested witness, for the term "interested" postulates that the witness must have some interest in having the accused, somehow or the other, convicted for some animus or for some other reason.

20. In the case at hand, the witnesses have lost their father, husband and a relative. There is no earthly reason to categorise them as interested witnesses who would nurture an animus to see that the accused persons are convicted, though they are not involved in the crime. On the contrary, they would like that the real culprits are prosecuted and convicted. That is the normal phenomena of human nature and that is the expected human conduct and we do not perceive that these witnesses harboured any ill motive against the accused persons, but have deposed as witnesses to the brutal incident. We may proceed to add, as stated earlier, that this court shall be careful and cautious while scanning their testimony and we proceed to do so.

21. Radhey Shyam, the informant, has deposed with regard to the threat, climbing of some of the accused on the roof, surrounding of the house, pelting of stones, carrying of lethal weapons like swords, gandhasis, sabals and sticks, the assault inside the house, dragging of the two deceased persons and the ultimate death of the deceased. The plea that he could not have witnessed the incident as it was night and he was inside a thatched house (chhappar), has been

6. (1996) 1 SCC 614.

disbelieved by the learned trial Judge as well as by the High Court. Mr. Jain, learned counsel for the appellants, made a fragile attempt to highlight that he could not have seen the assault, but on a scrutiny of the evidence, it is manifest that there was not complete darkness, as an electric bulb was burning at that time and he had the occasion to see the incident. Similar is the evidence of the other prosecution witnesses, which has been analysed with great anxiety by the High Court. On a careful perusal of the same, we do not find any reason to differ with the said evaluation solely on the ground that they are related to the deceased persons or that they could not have seen the occurrence. In a case of this nature, it is the relatives who would come forward to depose against the real culprits and would not like to falsely implicate others. They have witnessed the brutish crime committed and there is nothing on record to discard their testimony as untrustworthy. We find that their evidence is reliable and credible and it would not be inapposite not to act upon the same. Nothing has been elicited in the cross-examination to record a finding that the evidence is improbable or suspicious and deserves to be rejected. They have no motive to falsely implicate the accused and, that apart, their testimony have withstood the rigorous cross-examination in material particulars and received corroboration from the evidence of the doctor. That apart, the weapons seized lends credence to the prosecution story. Quite apart from the above, it is almost well nigh impossible to perceive that they have any animosity for some reason to see that the accused persons are convicted. Their family members have been done to death in ghastly manner, and in these circumstances, it cannot be thought of that they would leave the real culprits and implicate the accused persons.

22. It is next contended by Mr. Jain that the witnesses have not specifically stated about the exact role played by each of the accused persons inasmuch as they have not mentioned who assaulted on which part of the body and with what weapon. On a perusal of the evidence, it transpires that the witnesses have

mentioned about the weapons used, the assault made and the parts of the body where injuries were inflicted. True it is, there are some discrepancies but they are absolutely minor. That apart, they had formed an unlawful assembly with a common object to put an end to the lives of the deceased persons. Their common object is writ large because they had the knowledge and they shared the common object from the beginning to the end. Applying the principles laid down in *Masalti and others v. The State of Uttar Pradesh*[7], *Lalji and others v. State of U.P.*[8] and *Ramachandran and others v. State of Kerala*[9], we conclude that all the accused persons were a part of the unlawful assembly with the knowledge of the common object and, accordingly, we unhesitatingly repel the contention of the learned counsel for the appellants.

23. Presently, we shall advert to the appeals wherein the High Court has acquitted the accused persons. It is apt to mention here that the State had not preferred any appeal before the High Court assailing the judgment of acquittal by the learned trial Judge. As is seen, the High Court has acquitted seven accused, namely, Mohan, Lal Chand, Revdilal, Babulal, Mangilal, Ghanshyam and Radhey Shyam, in various criminal appeals. Before we advert to the correctness of the view taken by the High Court, we would like to state the role of the court while dealing with a judgment of acquittal.

24. In *Jadunath Singh and others v. State of U.P.*[10], a three-Judge Bench, while dealing with an appeal against acquittal, has held thus: -

"**22.** This Court has consistently taken the view that an appeal against acquittal the High Court has full power to review at large all the evidence and to reach the conclusion

7. AIR 1965 SC 202.
8. (1989) 1 SCC 437.
9. (2011) 9 SCC 257.
10. AIR 1972 SC 116.

that upon that evidence the order of acquittal should be reversed. This power of the appellate court in an appeal against acquittal was formulated by the Judicial Committee of the Privy Council in *Sheo Swarup v. King Emperor,* 61 Ind App 398 = (AIR 1934 PC 227 (2)) and *Nur Mohammad v. Emperor,* AIR 1945 PC 151. These two decisions have been consistently referred to in judgments of this Court as laying down the true scope of the power of an appellate court in hearing criminal appeals: see *Surajpal Singh v. State,* 1952 SCR 193 = (AIR 1952 SC 52) and *Sanwat Singh v. State of Rajasthan,* (1961) 3 SCR 120 = (AIR 1961 SC 715)."

25. In *Sohrab and another v. The State of Madhya Pradesh*[11], this Court opined that under the Code of Criminal Procedure, the High Court has full power to review at large the evidence upon which the order of acquittal is founded and to reach the conclusion that on proper appreciation of the evidence, the order of acquittal should be reversed. No limitation should be placed upon that power unless it is expressly stated in the Code. After so stating, the two-Judge Bench expressed thus: -

"But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court, should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses; (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial; (3) the right of the accused to the benefit of any doubt; and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses."

11. AIR 1972 SC 2020.

26. In *State of M.P. v. Bacchudas alias Balram and others*[12], after referring to *Bhagwan Singh v. State of M.P. and other*[13] pronouncements, it has been stated that the principle to be followed by the appellate court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference.

27. In *State of Rajasthan through Secretary, Home Department v. Abdul Mannan*[14], this Court has stated that when an accused is acquitted of a criminal charge, a right vests in him to be a free citizen and this Court is very cautious in taking away that right. The presumption of innocence of the accused is further strengthened by the fact of acquittal of the accused under our criminal jurisprudence. The courts have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused, may be adopted by the court. However, this principle must be applied keeping in view the facts and circumstances of the case and the thumb rule is whether the prosecution has proved its case beyond reasonable doubt. If the prosecution has succeeded in discharging its onus, and the error in appreciation of the evidence is apparent on the face of the record, then the court can interfere in the judgment of acquittal to ensure that the ends of justice are met. This is the linchpin around which the administration of criminal justice revolves.

28. In *State of Rajasthan v. Shera Ram alias Vishnu Dutta*[15], after survey of the earlier pronouncements, it has been observed that there is a very thin but a fine distinction between an appeal against conviction on the one hand and acquittal on

12. (2007) 9 SCC 135.
13. (2003) 3 SCC 21.
14. (2011) 8 SCC 65.
15. (2012) 1 SCC 602.

the other. The preponderance of judicial opinion of this Court is that there is no substantial difference between an appeal against conviction and an appeal against acquittal except that while dealing with an appeal against acquittal, the Court keeps in view the position that the presumption of innocence in favour of the accused has been fortified by his acquittal and if the view adopted by the High Court is a reasonable one and the conclusion reached by it had its grounds well set out on the materials on record, the acquittal may not be interfered with. Thus, this fine distinction has to be kept in mind by the Court while exercising its appellate jurisdiction. The golden rule is that the Court is obliged and it will not abjure its duty to prevent miscarriage of justice where interference is imperative and the ends of justice so require and it is essential to appease the judicial conscience.

29. Keeping in view the aforesaid principles, we proceed to analyse the reasons ascribed by the High Court while recording the acquittal. In the case of Lal Chand @ Ram Niwas, the High Court has opined that though he was named along with other persons who constituted a group of 25-26 persons and had surrounded the house of Purshottam, yet none of the witnesses had mentioned that he had gone on the roof of the house or damaged the roof and, therefore, his participation in the crime appears to be doubtful. While addressing the conviction relating to Revdi Lal, the High Court has noticed that the only evidence against him is that he had gone to the house of Purshottam and thrown stones, but no other witnesse has named him barring Ramlal, PW-2. The High Court has found that in all possibility, there was exaggeration or embellishment and, accordingly, given him benefit of doubt. Dwelling upon the conviction of Ghanshyam, the Division Bench has observed that the allegations against him are omnibus in nature and do not inspire confidence and, accordingly extended benefit of doubt. On similar analysis, Radhey Shyam s/o Prahlad, Mangi Lal and Babu Lal S/o Dev Lal have been extended the benefit of doubt.

As far as Mohan Lal is concerned, the High Court perceived that there are material contradictions in the evidence of the witnesses pertaining to the involvement of Mohan Lal and, hence, felt that it was not safe to convict him and, accordingly, on proper scrutiny of the evidence, gave him the benefit of doubt. Applying the principles laid down by this Court in the aforesaid authorities, it is very difficult to hold that there are 'substantial and compelling reasons', 'good and sufficient grounds', 'very strong circumstances', 'distorted conclusions' or 'glaring mistakes', and the prosecution has discharged the onus and, therefore, we are of the considered opinion that the view expressed by the High Court does not suffer from any such infirmity. We are inclined to think that the approach of the High Court cannot be said to be totally implausible. It has taken note of the involvement of number of persons and, after filtering the grain from the chaff and on due consideration of the material on record, has extended the benefit of doubt to the accused persons who have been acquitted. Thus, we are not disposed to dislodge the conclusions arrived at by the High Court in recording the acquittal.

30. The next issue that emerges for consideration is whether the High Court has fallen into error by commuting the death sentence to that of life imprisonment. The High Court, while dealing with the Death Reference, has opined that when specific overt acts have not been attributed and similarly placed accused persons have been given life sentence and Ram Narayan, who had engineered the incident, has breathed his last, it would not be appropriate to impose death sentence. The High Court has observed that the three sons of Ram Narayan had been awarded death sentence and the other two are villagers and in the backdrop of the situation, there were mitigating factors for commutation of the sentence.

31. Apart from the reasons ascribed by the High Court, we think it apposite to consider the circumstances whether in the present case, death sentence is warra*h*

v. State of Punjab[16], the Constitution Bench has held as follows:-

> "A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

32. In *Machhi Singh and Others v. State of Punjab*[17], the Court, after stating the feeling of the community and its desire for self preservation, expressed that in every case, the community does not desire to withdraw the protection of self preservation by sanctioning the death penalty. It may do so in "rarest of rare cases" when its collective conscience is so shocked that it would expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards the desirability or otherwise of retaining death penalty. After so stating, the three-Judge Bench culled out the propositions envisaged from *Bachan Singh's* case which are as follows: -

> "(*i*) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (*ii*) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
>
> (*iii*) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
>
> (*iv*) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

16. (1980) 2 SCC 684.

17. (1983) 3 SCC 470.

33. In *Haresh Mohandas Rajput v. State of Maharshtra*[18], the Bench referred to the principles in *Bachan Singh* (supra) and *Machhi Singh* (supra) and proceeded to state as follows:-

> " "The rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of "the rarest of the rare case". There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the-moment provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the

18. (2011) 12 SCC 56.

society e.g. crime committed for power or political ambition or indulging in organised criminal activities, death sentence should be awarded. (See *C. Muniappan v. State of T.N.*[19], *Dara Singh v. Republic of India*[20], *Surendra Koli v. State of U.P.*[21], *Mohd. Mannan v. State of Bihar*[22] and *Sudam v. State of Maharashtra*[23].)"

34. In *Ram Pal v. State of U.P.*[24], a two-Judge Bench took note of the fact that there has been termination of life of number of people and opined that the number of deaths cannot be the sole criterion for awarding the maximum punishment of death. It further ruled that while in a given case, death penalty may be the appropriate sentence even for a single murder, it would not necessarily mean that in every case of multiple murders, death penalty has to be the normal rule. The Court took note of the guidelines stated by the Constitution Bench in the case of *Bachan Singh* (supra), the aggravating circumstances and the mitigating circumstances postulated therein and opined that the incident had taken place as a sequel to the murder of close relative of the appellant and the other principal accused which was suspected to have been committed by the members of the victims' family. The two-Judge Bench expressed the view that the circumstance could be treated as a circumstance which amounted to a provocation from the victim side. That apart, the two-Judge Bench observed that the appellant therein was similarly placed with the other accused persons who had been imposed sentence for life imprisonment and further, they had spent nearly seventeen years in custody.

35. In the present case, as we notice from the factual matrix, the crime had taken place because Ram Narayan had

19. (2010) 9 SCC 567.
20. (2011) 2 SCC 490.
21. (2011) 4 SCC 80.
22. (2011) 5 SCC 509.
23. (2011) 7 SCC 125.
24. (2003) 7 SCC 141.

suspected that the deceased persons were responsible for extinguishing the life spark of his son. It is also seen that similarly placed persons have been imposed life sentence. Quite apart from that, all the accused persons have almost spent thirteen years in custody. Regard being had to the totality of the circumstances, it cannot be said that imprisonment for life is inadequate and the circumstances are so grave that it calls for a death sentence. When we adjudge the whole scenario in proper perspective, we are inclined to think that it is not a case which can be treated to be a case of extreme culpability and there is no other option but to impose death penalty. Thus, we do not find any error in the decision of the High Court by which it has commuted the death sentence to life imprisonment.

36. Consequently, the appeal filed by the accused-appellants and the appeals filed by the State for enhancement of penalty and reversal of the judgment of acquittal rendered in favour of the accused persons are dismissed.

B.B.B. Appeals dismissed.

N. NARAYANAN

v.

ADJUDICATING OFFICER, SEBI

(Civil Appeal Nos. 4112-4113 of 2013)

APRIL 26, 2013

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

Securities and Exchange Board of India Act, 1992 - s.12A & s.15HA r/w s.15J - Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practice Relating to Securities Market) Regulations, 2003 - Regulation 3(b), 3(c), 3(d), 4(1), 4(2)(a), 4(2)(e), 4(2)(f), 4(2)(k), 4(2)(r) - Securities Market - Market abuse - Allegations of, against the appellant, who was promoter as well as whole time Director of the company in question - Held: Disclosure and transparency are the two pillars on which market integrity rests - Disclosure of information about companies whose securities are traded on a public market is crucial for accurate pricing of the companies' securities and also for efficient operation of the market - On facts, investors' confidence was eroded and the market was abused for personal gains and attainments - Directors of the company in question failed in their duty to exercise due care and diligence and allowed the company to fabricate figures and making false disclosures - The Directors "created artificiality" and manipulated financial results of the company resulting in price rise of the scrip of the company and then pledged their shares at artificially inflated prices to raise substantial funds from financial institutions - Clear violation of s.12A of the SEBI Act r/w Regulations 3 and 4 of the 2003 Regulations which essentially intends to preserve 'market integrity' and to prevent 'market abuse' - Conduct of appellant-Director and other Directors was fraudulent and the practices they adopted, relating to securities, were unfair, which attracted the penalty provisions contained in s.15 HA

r/w s.15J of the SEBI Act - SEBI rightly restrained the appellant-Director for two years from buying, selling or dealing with any securities, in any manner, or accessing the securities market, directly or indirectly and from being Director of any listed company - Adjudicating officer rightly imposed penalty of Rs.50 lakhs u/s.15HA of the SEBI Act - Maxims - acta exteriora indicant interiora secreta" (meaning external actions reveals inner secrets).

Company Law - Listed companies - Corporate Governance and Directors -Obligations of the Directors - Held: Obligations of the Directors in listed companies are particularly onerous - Over-riding obligation of the Directors to approve the accounts only if they are satisfied that they give true and fair view of the profits or loss for the relevant period and the correct financial position of the company.

Company Law - Disclosure and Transparency - Requirement of - Held: The Companies Act casts an obligation on the company registered under the Companies Act to keep the Books of accounts to achieve transparency - Disclosure of information about the company is crucial for the accurate pricing of the company's securities and for market integrity - Records maintained by the company should show and explain the company's transactions, it should disclose with reasonable accuracy the financial position, at any time - Accounts to give a true and fair view.

Shares & Securities - Market abuse - What is - Effect of 'market abuse' - Discussed.

Shares and Securities - Securities market - SEBI, the market regulator - Duty of the SEBI to protect investors-individual and collective, against opportunistic behavior of Directors and Insiders of the listed companies so as to safeguard market's integrity - Duty of Print and Electronic Media.

The appellant was the promoter as well as a whole time Director of a company registered under the Companies Act, 1956. The company had nine Directors, including the appellant and was involved in the business of Exhibition (Theatre), Film and Television, Content Production, Distribution, Hospitality, Food & Beverage, Animation and Gaming and Cine Advertising etc. The shares of the company were listed on Bombay Stock Exchange Ltd. (BSE) and National Stock Exchange (NSE) at the relevant time.

The investigation department of SEBI noticed that the company had committed serious irregularities in its books of accounts and showed inflated profits and revenues in the financial statements and lured the general public to invest in the shares of the company based on such false financial statements and thereby violated the provisions of Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practice Relating to Securities Market) Regulations, 2003. Show cause Notice was issued to the appellant and to the other Directors stating that they had violated Section 12A of the Securities and Exchange Board of India Act, 1992 and Regulation 3(b), 3(c), 3(d), 4(1), 4(2)(a), 4(2)(e), 4(2)(f), 4(2)(k), 4(2)(r) of 2003 Regulations. Further, a notice under Rule 4(1) of the SEBI (Procedure for Holding Inquiry and imposing penalties by Adjudicating Officer) Rules, 1995 was issued to the Directors to show cause why penalty be not imposed under Section 15HA of the SEBI Act for the alleged contravention of the provisions of the Act.

The appellant stated, though a whole time Director of the company, he was only handling Human Resource Department of the company and was fully engrossed in the recruitment of personnel, training and team buildup. Further, it was also stated that he had only relied upon the auditor's statements in financial matters and hence

was not personally liable for the violation of the provisions of SEBI Act and 2003 Regulations.

The Whole Time Member (WTM) of SEBI, however, held that the Directors were guilty for violation of Section 12A of the SEBI Act, 1992 and Regulation 3(b), 3(c), 3(d), 4(1), 4(2)(a), 4(2)(e), 4(2)(f), 4(2)(k), 4(2)(r) of the 2003 Regulations. Order was passed restraining the appellant for a period of two years from buying, selling or dealing in securities in any manner whatsoever or accessing the securities market directly or indirectly and from being Director of any listed company; and further, monetary penalty to the tune of 50 lacs was imposed on the appellant under Section 15HA of SEBI Act. The order was affirmed by the Securities Appellate Tribunal, the legality of which was the subject matter of this appeal under Section 15Z of the SEBI Act.

Dismissing the appeals, the Court

HELD: 1. Investors' confidence in the capital market can be sustained largely by ensuring investors' protection. Disclosure and transparency are the two pillars on which market integrity rests. Facts of the case disclose how the investors' confidence has been eroded and how the market has been abused for personal gains and attainments. "Market abuse" has now become a common practice in the India' security market and, if not properly curbed, the same would result in defeating the very object and purpose of the Securities and Exchange Board of India Act, 1992 which is intended to protect the interests of investors in securities and to promote the development of securities market. Disclosure of information about companies whose securities are traded on a public market is crucial for the accurate pricing of the companies' securities and also for the efficient operation of the market. In the instant case, the Directors of the company had clearly violated [illegible]n

12A of the SEBI Act read with Regulations 3 and 4 of the Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practice Relating to Securities Market) Regulations, 2003. The SEBI rightly restrained the appellant for a period of two years from the date of that order from buying, selling or dealing with any securities, in any manner, or accessing the securities market, directly or indirectly and from being Director of any listed company and the adjudicating officer has rightly imposed a penalty of Rs.50 lakhs under Section 15HA of SEBI Act. [Paras 1, 10, 28, 42] [400-A-B; 403-C-D; 413-C-D; 418-F-G]

Palmer's Company Law, 25th Edition (2010), Volume 2 and Gower & Davies - Principles of Modern Company Law, **9th Edition (2012) - referred to.**

Corporate Governance and Directors

2. The SEBI Act read with Regulations of the Companies Act would indicate that the obligations of the Directors in listed companies are particularly onerous especially when the Board of Directors makes itself accountable for the performance of the company to share holders and also for the production of its accounts and financial statements especially when the company is a listed company. [Para 29] [413-E-F]

3. Responsibility is cast on the Directors to prepare the annual records and reports and those accounts should reflect 'a true and fair view'. The over-riding obligation of the Directors is to approve the accounts only if they are satisfied that they give true and fair view of the profits or loss for the relevant period and the correct financial position of the company. The Directors are expected to exercise their power on behalf of the company with utmost care, skill and diligence. [Paras 32, 33] [414-C-D]

Official Liquidator v. P.A. Tendolkar **(1973) 1 SCC 602: 1973 (3) SCR 364 - relied on.**

4. The facts in this case clearly reveal that the Directors of the company in question had failed in their duty to exercise due care and diligence and allowed the company to fabricate the figures and making false disclosures. Facts indicate that they have overlooked the numerous red flags in the revenues, profits, receivables, deposits etc. which should not have escaped the attention of a prudent person. The facts clearly indicated that the company had made false corporate announcement stating that it had entered into agreements with 802 theatres and that false corporate announcement gave false figures relating to advance, security deposit and income pertaining to the theatres which were not inexistence. The deposits shown turned out to be not genuine but mere book entries to hide receivables in the balance sheet. [Paras 31, 34] [413-H; 414-A-B, F-G]

Securities Market - Market abuse

5. Market abuse refers to the use of manipulative and deceptive devices, giving out incorrect or misleading information, so as to encourage investors to jump into conclusions, on wrong premises, which is known to be wrong to the abusers. 'Market abuse' impairs economic growth and erodes investor's confidence. The object of the SEBI Act is to protect the interest of investors in securities and to promote the development and to regulate the securities market, so as to promote orderly, healthy growth of securities market and to promote investors protection. Section 12A of the SEBI Act read with Regulations 3 and 4 of the Regulations 2003 essentially intended to preserve 'market integrity' and to prevent 'Market abuse'. The statutory provisions deal with the situations where a person, who[illegible],

takes advantage of the impact of an action, may be manipulative, on the anticipated impact on the market resulting in the "creation of artificiality'. The same can be achieved by inflating the company's revenue, profits, security deposits and receivables, resulting in price rice of scrip of the company. Investors are then lured to make their "investment decisions" on those manipulated inflated results, using the above devices which will amount to market abuse. [Para 35] [415-E-G]

6. On facts, it is clearly found that the Directors of the company have "created artificiality" by projecting inflated figures of the company's revenue, profits, security deposits and receivables and that the manipulation in the financial results of the company resulted in price rise of the scrip of the company and the promoters of the company then pledged their shares to raise substantial funds from financial institutions. The conduct of the appellant and others was, therefore, fraudulent and the practices they had adopted, relating to securities, were unfair, which attracted the penalty provisions contained in Section 15 HA read with 15J of the SEBI Act. [Para 36] [415-H; 416-A-B]

Disclosure and Transparency:

7. The Companies Act casts an obligation on the company registered under the Companies Act to keep the Books of accounts to achieve transparency. Disclosure of information about the company is crucial for the accurate pricing of the company's securities and for market integrity. Records maintained by the company should show and explain the company's transactions, it should disclose with reasonable accuracy the financial position, at any time, and to enable the Directors to ensure that the balance-sheet and profit and loss accounts will comply with the statutory expectations that accounts give a true and fair view. [Para 38] [416-F-H; 417-A-B]

8. In the instant case, the Directors and the Chief Financial Officers of the company had caused to publish forged and misleading results of the company, various quarterly financial results and the annual results for the year 2007-08, were reported to the stock-exchanges containing inflated figures of the company's revenue, profits, security deposits and receivables and those financial statements which were relied upon by investors in making investment decisions, which did not reflect a true and fair view of the state of affairs of the company. The appellant, admittedly, was a whole time Director of the company, as regards the preparation of the annual accounts, the balance-sheet and financial statement and laying of the same before the company at the Annual General Meeting and filing the same before the Registrar of the Companies as well as before SEBI, the Directors of the company have greater responsibility, especially when the company is a registered company. Directors of the companies, especially of the listed companies, have access to inside knowledge, such as, financial position of the company, dividend rates, annual accounts etc. So far as this case is concerned, the subsequent conduct of pledging their shares at artificially inflated prices, based on inflated financial results and raising loan on them would indicate that they had deliberately and with full knowledge committed the illegality and hence the principle of "acta exteriora indicant interiora secreta" (meaning external actions reveals inner secrets) applies with all force. [Paras 39, 40, 41] [417-F-G; 418-A-E]

Sahara India Real Estate Corporation Limited and Others v. Securities and Exchange Board of India and Another **(2013) 1 SCC 1 - relied on.**

A word of caution:

9.1. SEBI, the market regulator has to deal sternly with companies and their Dire n

manipulative and deceptive devices, insider trading etc. or else they will be failing in their duty to promote orderly and healthy growth of the Securities market. Economic offence is a serious crime which, if not properly dealt with, as it should be, will affect not only country's economic growth, but also slow the inflow of foreign investment by genuine investors and also casts a slur on India's securities market. Fraud, deceit, artificiality, SEBI should ensure, have no place in the securities market of this country and 'market security' is our motto. SEBI has a duty to protect investors, individual and collective, against opportunistic behavior of Directors and Insiders of the listed companies so as to safeguard market's integrity. Print and Electronic Media have also a solemn duty not to mislead the public, who are present and prospective investors, in their forecast on the securities market. A media projection on company's position in the security market with a view to derive a benefit from a position in the securities would amount to market abuse, creating artificiality. [Paras 43, 44] [419-A-F]

Case Law Reference:

(2013) 1 SCC 1	**relied on**	**Para 25**
1973 (3) SCR 364	**relied on**	**Para 33**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4112-4113 of 2013.

From the Judgment and Order dated 05.10.2012 of the Securities Appellate Tribunal at Mumbai in Appeal Nos. 28 & 29.

Sibo Sankar Mishra, M.K. Pandey for the Appellant.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. India's capital market in

the recent times has witnessed tremendous growth, characterized particularly by increasing participation of public. Investors' confidence in the capital market can be sustained largely by ensuring investors' protection. Disclosure and transparency are the two pillars on which market integrity rests. Facts of the case disclose how the investors' confidence has been eroded and how the market has been abused for personal gains and attainments.

2. The Appellate Jurisdiction of this Court guaranteed under Section 15Z of the Securities and Exchange Board of India Act, 1992 (for short 'SEBI Act') has been invoked challenging a joint order dated 5.10.2012 passed in Appeal Nos. 28 and 29 of 2012 passed by Securities Appellate Tribunal, Mumbai (for short 'Tribunal') upholding the order passed by SEBI dated April 18, 2011 restraining the appellant for a period of two years from buying, selling or dealing in securities and the order passed by the adjudication officer dated July 28, 2011 imposing a monetary penalty of 50 lacs under Section 15HA of SEBI Act.

3. The appellant was the promoter as well as a whole time Director of M/s Pyramid Saimira Theatre Limited (PSTL), a company registered under the Companies Act, 1956. The shares of PSTL were listed on Bombay Stock Exchange Ltd. (BSE) and National Stock Exchange (NSE) at the relevant time. The company was involved in the business of Exhibition (Theatre), Film and Television, Content Production, Distribution, Hospitality, Food & Beverage, Animation and Gaming and Cine Advertising etc. The company had nine Directors, including the appellant herein. The investigation department of SEBI noticed that the company had committed serious irregularities in its books of accounts and showed inflated profits and revenues in the financial statements and lured the general public to invest in the shares of the company based on such false financial statements thereby violated the provisions of Securities and Excha

(Prohibition of Fraudulent and Unfair Trade Practice Relating to Securities Market) Regulations, 2003 (for short 'Regulations 2003'). Consequently, a notice was issued to the appellant and to the other Directors stating that they had violated Section 12A of SEBI Act and Regulation 3(b), 3(c), 3(d), 4(1), 4(2)(a), 4(2)(e), 4(2)(f), 4(2)(k), 4(2)(r) of Regulations 2003 and were directed to show cause why appropriate directions as deemed fit and proper under Sections 11, 11B and 11(4) of the SEBI Act read with Regulation 11 of Regulations 2003 be not issued against them.

4. The appellant replied to the show cause notice vide letter dated February 3, 2010 stating that there were no irregularities and the company's Managing Director and the Principal Officer would send a detailed reply in that regard. Later,a notice dated April 8, 2010 under Rule 4(1) of the SEBI (Procedure for Holding Inquiry and imposing penalties by Adjudicating Officer) Rules, 1995 was issued to the Directors to show cause why penalty be not imposed under Section 15HA of the SEBI Act for the alleged contravention of the provision of the Act.

5. The appellant submitted a detailed reply stating that it was the Managing Director and Principal Officer of the company who was in charge of day-to-day affairs of the company including the operations, finance and accounts, secretarial and compliance, legal services and technical services. Appellant, it was stated, though was a whole time Director of the company was only handling Human Resource Department of the company and was fully engrossed in the recruitment of personnel, training and team buildup. Further, it was also stated that he had only relied upon the auditor's statements in financial matters and hence was not personally liable for the violation of the provisions of SEBI Act and Regulations 2003. Personal hearing was accorded to the appellant on 30.8.2010. Written Submissions dated 15.9.2010 filed by the appellant was also considered by SEBI. The Board

noticed following specific violations:-

(a) manipulated accounts by fictitious entries;

(b) made false disclosures to the stock exchange;

(c) did not co-operate with the investigations, and

(d) did not maintain certain books of accounts.

6. On facts, the officer found that all the above-mentioned violations had been established. Consequently, the Whole Time Member (WTM) of SEBI, in exercise of powers conferred under Section 19 of the SEBI, held that the Directors were found guilty for the violation of Section 12A of SEBI Act, 1992 and Regulation 3(b), 3(c), 3(d), 4(1), 4(2)(a), 4(2)(e), 4(2)(f), 4(2)(k), 4(2)(r) of the Regulations 2003. WTM of SEBI then, in exercise of the powers conferred on him under Section 19 read with Sections 11, 11B and 11(4) of the SEBI Act and Regulation 11 of Regulations 2003, passed an order restraining the appellant and other Directors for a period of two years and three years respectively from buying, selling or dealing in securities in any manner whatsoever or accessing the securities market directly or indirectly and from being Director of any listed company.

7. The Adjudicating Officer also held that the appellant and others have violated the provisions of Section 12A of SEBI Act and Regulation 3(b), 3(c), 3(d), 4(1), 4(2)(a), 4(2)(e), 4(2)(f), 4(2)(k), 4(2)(r) of Regulations 2003 and took the view that the appellant and other Directors are liable for monetary penalty under Section 15HA of SEBI Act whereby a penalty of 50 lacs was imposed on the appellant.

8. The above order, as already indicated, was affirmed in an appeal by the Tribunal, the legality of which is the subject matter of this appeal.

9. We may before examining various legal issues that arise for consideration in this appeal w e

investigation had revealed that the financial results contained in the quarterly report filed with the stock exchanges contained inflated figures of the company's revenue profits, security deposits and receivables. Further, the manipulation in the financial results of the company resulted in price rise of the scrip of the company and the promoters pledged their shares to raise substantial funds from financial institutions.

10. We would like to demonstrate on the facts of this case as well as law on the point that "market abuse" has now become a common practice in the India' security market and, if not properly curbed, the same would result in defeating the very object and purpose of SEBI Act which is intended to protect the interests of investors in securities and to promote the development of securities market. Capital market, as already stated, has witnessed tremendous growth in recent times, characterized particularly by the increasing participation of the public. Investor's confidence in capital market can be sustained largely by ensuring investors' protection.

11. Before examining the law on the point, we would like to demonstrate how the company and its Directors had inflated figures of the company's revenue profits, security deposits and receivables which were relied upon by investors for making investment decisions. Facts would also indicate that the Directors had pledged their shares and artificially inflated prices of the scrip based on inflated financial results which enabled them to raise higher quantum of funds that would not have been possible otherwise.

12. The quarterly unaudited financial results of the company for the quarter ended 31st March 2007 to the quarter ended 31st March 2009 shows the following details:

13. The above facts and figures would indicate that the net sales for the quarter ended June 30, 2007 doubled as compared to the previous quarter. In the subsequent quarters, till the quarter ended September 30, 2008, that upward trend had continued and in the quarter ended December 31, 2008, there was a sudden fall in the net sales figures (the net sales figures for the quarter ended December 31, 2008 were down by around 45% as compared to the previous quarter).

14. The company also showed a loss of Rs.74.74 crore in the said quarter. For the quarter ended March 31, 2009, the company again showed a loss of Rs. 85.37 crore. The net profit figures also surged in sync with the total income upto the quarter ended June 30, 2008 except for the quarter ended March 31, 2008.

15. SEBI, it was pointed out, had verified books of accounts of the company for the financial year 2007-2008 to ascertain whether proper books of accounts and supporting documents were maintained by the company in respect of the theatre income, theatre receivables and theatre security deposits and whether the financial disclosures made by the company to the stock exchanges as per listing agreement reflected true and fair view of the state of affairs of the company.

16. SEBI's investigation revealed that for the financial year 2007-08, total revenue of Rs. 749.30 crore included an income of Rs. 549.58 crore from theatres which is stated as follows:

(In Rs. Crore)

Region	From PSTL Theatres	From Non-PSTL Theatre	Total Revenue from Theatres
Tamil Nadu	303.46	41.51	344.97
Andhra Pradesh	74.66	62.04	136.70
Karnataka	45.86	7.60	53.45
Kerala	12.95		12.95
Others	0.28	1.23	1.52
Total	437.21	112.18	549.58

17. On theatre income of Rs. 303.46 crore from Tamil Nadu region included consolidated credit entries of Rs.244 crore with corresponding consolidated debits 'Theatre Collections Receivable Account'. The account did not show any income from April 2008 onwards. The journal vouchers in respect of those entries did not carry any such narration such as daily collection report number, name of theatre etc. The receivables were adjusted against cost of content, transferred to advance/security deposit account or remained unrealized. As on March 31, 2008, the total receivables of the company from Tamil Nadu region were Rs. 38.58 crore. Out of that, Rs.2.19 crore was outstanding against 162 theatres and the balance Rs. 36.39 crore outstanding in one account only which did not contain the theatre wise break up. Further it was also noticed that the entire amount of Rs.75 crore from own theatres in Andhra Pradesh was accounted by single journal voucher which did not have any other supporting documents in support of those consolidated entries or journal vouchers, despite assurance to provide the same. Those facts lead the SEBI to conclude that those revenues disclosed inflated figures in its annual report for 2007-08 and thereby misled the investors.

18. The company disclosed no stock exchanges on January 30, 2009 that it had entered into agreement with 802 theatres as on June 30, 2008. Out of 802 agreements, the company could show only 257 original agreements to SEBI officials which lead SEBI to conclude that the balance 545 agreements never existed. The fictitious revenues had converted to 'theatre collection receivables' which in turn had been converted to 'security deposits'. It was noticed security deposits were not genuine but were created to hide receivables in the balance sheet since outstanding receivables for a period of six months had to be compulsorily disclosed in its annual report. The SEBI therefore concluded the company had made a false corporate announcement to the effect that it had entered into agreement with 802 theatres thereby misled the investing public.

19. The appellant's main defence w s

the Whole Time Director as well as Promoter of the company, yet was not involved in the day-to-day management of the company and that he was looking after the Human Resource Department of the company. Further, it was also stated that the financial statements, accounts etc. were prepared and duly audited by the statutory auditors, verified by the audit committees and reviewed by the managing Director and that, in the company, the role of each Director was confined to his field of operation and there was no justification for holding a Director to be in over-all charge and control of the affairs of the company. Further, it was also pointed out that the auditors were well versed in accounts and finance, therefore, there was no reason for the Directors who have no expertise or knowledge of the intricacies of the accounts and finance to suspect them or sit in judgment over their decisions. In such circumstances, it was contended, that there is no justification in debarring them from buying, selling or dealing in securities or accessing securities market or to impose penalty since there is no *mens rea* on the part of the appellant in intentionally stating any untrue statement or preparing false records and that he has no role as such in preparing the accounts and finance of the company.

20. The facts and figures as such are not in dispute and the defence taken is that the statements were duly audited by statutory auditors and, consequently, it could not be held that the appellant had violated the provision of SEBI Act or the provisions of Regulations 2003.

21. Let us now examine the scope of the various provisions stated to have been violated by the appellant and its consequences. Section 12A falls in Chapter VA of the SEBI Act which reads as follows:

"PROHIBITION OF MANIPULATIVE AND DECEPTIVE DEVICES, INSIDER TRADING AND SUBSTANTIAL ACQUISITON OF SECURITIES OR CONTROL

Prohibition of manipulative and deceptive devices, insider

trading and substantial acquisition of securities or control.

12A. No person shall directly or indirectly –

(a) use or employ, in connection with the issue, purchase or sale of any securities

listed or proposed to be listed on a recognised stock exchange, any manipulative or

deceptive device or contrivance in contravention of the provisions of this Act or the rules or the regulations made thereunder;

(b) employ any device, scheme or artifice to defraud in connection with issue or dealing in securities which are listed or proposed to be listed on a recognised stock exchange;

(c) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person, in connection with the issue, dealing in securities which are listed or proposed to be listed on a recognised stock exchange, in contravention of the provisions of this Act or the rules or the regulations made thereunder;

(d) engage in insider trading;

(e) deal in securities while in possession of material or non-public information or communicate such material or non-public information to any other person, in a manner which is in contravention of the provisions of this Act or the rules or the regulations made thereunder;

(f) acquire control of any company or securities more than the percentage of equity share capital of a company whose securities are listed or proposed to be listed on a recognised stock exchange in contravention of the regulations made under this Act."

22. Section 12A has to be read along with various provisions of Regulations 2003. Chapter II of Regulations 2003 deals with prohibition of fraudulent and unfair trade practices relating to the securities market and Chapter III deals with investigation. SEBI has also noticed the violation of Regulations 3 and 4 of 2003 Regulations, which read as follows:

"PROHIBITION OF FRAUDULENT AND UNFAIR TRADE PRACTICES RELATING TO THE SECURITEIS MARKET:

3. *Prohibition of certain dealings in securities*

No person shall directly or indirectly.

(a) buy, sell or otherwise deal in securities in a fraudulent manner;

(b) use or employ, in connection with issue, purchase or sale of any security listed or proposed to be listed in a recognized stock exchange, any manipulative or deceptive devise or contrivance in contravention of the provisions of the Act or the rules or the regulations made there under;

(c) employ any device, scheme or artifice to defraud in connection with dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange;

(d) engage in any act, practice, course of business which operates or would operate as fraud or deceit upon any person in connection with any dealing in or issue of securities which are listed or proposed to be listed on a recognized stock exchange in contravention of the provisions of the Act or the rules and the regulations made there under:

4. *Prohibition of manipulative, raudulent and unfair trade practices*

(1) Without prejudice to the provisions of regulation 3, no person shall indulge in a fraudulent or an unfair trade practice in securities.

(2) Dealing in securities shall be deemed to be a fraudulent or an unfair trade practice if it involves fraud and may include all or any of the following namely:-

(a) indulging in an act which creates false or misleading appearance of trading in the securities market;

(b) …..

(d)…..

(e) any act or omission amounting to manipulation of the price of a security;

(f) publishing or causing to publish or reporting or causing to report by a person dealing in securities any information which is not true or which he does not believe to be true prior to or in the course of dealing in securities.

(g) …….

(h) …….

(i) ……..

(j) ……...

(k) an advertisement that is misleading or that contains information in a distorted manner and which may influence the decision of the investors;

(l) …….

(p) …….

(q) …….

(r) planting false or misleading news which may induce sale or purchase of securities."

23. The object and purpose of the above-mentioned statutory provisions are to curb "market manipulation". *Palmer's Company Law,* 25th Edition (2010), Volume 2 at page 11097 states: "Market manipulation is normally regarded as the "unwarranted" interference in the operation of ordinary market forces of supply and demand and thus undermines the "integrity" and efficiency of the market." See also *Gower & Davies – Principles of Modern Company Law*, 9th Edition (2012) at page 1160.

24. Reference may also be made to the penalty provisions which is contained in Chapter VI A of the SEBI Act of which we are mainly concerned with Section 15HA which deals with penalty for fraudulent and unfair trade practices and Section 15J which deals with the factors to be taken into account by the adjudicating officer while adjudging the quantum of penalty. Those provisions are given below for easy reference:

"**15HA**. Penalty for fraudulent and unfair trade practices.- If any person indulges in fraudulent and unfair trade practices relating to securities, he shall be liable to a penalty of twenty-five crore rupees or three times the amount of profits made out of such practices, whichever is higher."

"**15J.** Factors to be taken into account by the adjudicating officer.-While adjudging quantum of penalty under section 15 I, the adjudicating officer shall have due regard to the following factors, namely:

(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;

(b) the amount of loss caused to an investor or group of investors as a result of the default;

(c) the repetitive nature of the default."

25. In *Sahara India Real Estate Corporation Limited and Others v. Securities and Exchange Board of India and Another* (2013) 1 SCC 1, this Court has noticed that though the Indian Companies Act, 1956 was modeled on English Companies Act, 1948, no efforts have been made to incorporate universally accepted principles and concepts into our company law. Of late, however, some efforts have been made by carrying out few amendments to the Companies Act, 1956, so also in the SEBI Act, 1992 and Rules and Regulations framed therein to keep pace with the English Companies Act and related legislations. When we interpret the provisions of the SEBI Act and the Regulations relating to a company registered under the Companies Act, the provisions of the Companies Act have also to be borne in mind. For instance, in SEBI Act, there is no provision for keeping proper books of accounts by a registered company.

26. Section 209 of the Companies Act says that every company shall keep at the registered office proper books of accounts. Books of accounts should be so kept as to give true and fair view of the state of the company's affairs and explain transactions. Of course, the auditors of the company must examine whether the company has maintained proper cost accounting records as required by the rules. Companies whose securities are traded on a public market, it is trite law that the disclosure of information about the company is crucial for the correct and accurate pricing of the company's securities and for the official operation of the market. Section 210 of the Companies Act states that at every annual general meeting of the company, the Board of Directors is required to lay before it a balance-sheet as at the end of and a profit and loss account for the financial year.

27. Clause 41 of Listing Agreement between the SEBI and the concerned companies requires the companies to furnish to stock exchange and to publish unaudite a

quarterly basis in the prescribed format. Section 55A of the Companies Act deals with the powers of SEBI which says some of the provisions referred to therein, so far as they relate to issue and transfer of securities and non-payment of dividends in the case of listed companies be administered by SEBI. Further, it is also indicated that how the books of accounts have to be kept by the company, so also with regard to audit of account etc. finds a place in the Companies Act, so also the qualification and disqualification of the Managing Directors.

28. We notice in this case that the Directors of the company had clearly violated provisions of Section 12A of SEBI Act read with Regulations 3 and 4 of 2003 Regulations. Companies whose securities are traded on a public market, disclosure of information about the company is crucial for the accurate pricing of the companies' securities and also for the efficient operation of the market.

Corporate Governance and Directors

29. SEBI Act read with Regulations of the Companies Act would indicate that the obligations of the Directors in listed companies are particularly onerous especially when the Board of Directors makes itself accountable for the performance of the company to share holders and also for the production of its accounts and financial statements especially when the company is a listed company.

30. The Directors of the company or the person in charge directly or indirectly use or employ, in connection with the issue, purchase or sale of any securities listed in stock exchange, any manipulative or deceptive device or contrivance in contravention of SEBI Act or the Regulations made thereunder have necessarily to be dealt with in accordance with the provisions of the Act and the Regulations which is absolutely necessary for the investor's protection and to avoid market abuse.

31. The facts clearly indicated that the company had made

false corporate announcement stating that it had entered into agreements with 802 theatres and that false corporate announcement gave false figures relating to advance, security deposit and income pertaining to the theatres which were not inexistence. The deposits shown were turned out to be not genuine but mere book entries to hide receivables in the balance sheet.

32. Responsibility is cast on the Directors to prepare the annual records and reports and those accounts should reflect 'a true and fair view'. The over-riding obligation of the Directors is to approve the accounts only if they are satisfied that they give true and fair view of the profits or loss for the relevant period and the correct financial position of the company.

33. Company though a legal entity cannot act by itself, it can act only through its Directors. They are expected to exercise their power on behalf of the company with utmost care, skill and diligence. This Court while describing what is the duty of a Director of a company held in *Official Liquidator v. P.A. Tendolkar* (1973) 1 SCC 602 that a Director may be shown to be placed and to have been so closely and so long associated personally with the management of the company that he will be deemed to be not merely cognizant of but liable for fraud in the conduct of business of the company even though no specific act of dishonesty is provide against him personally. He cannot shut his eyes to what must be obvious to everyone who examines the affairs of the company even superficially.

34. The facts in this case clearly reveal that the Directors of the company in question had failed in their duty to exercise due care and diligence and allowed the company to fabricate the figures and making false disclosures. Facts indicate that they have overlooked the numerous red flags in the revenues, profits, receivables, deposits etc. which should not have escaped the attention of a prudent person. For instance, profit as on quarter ending June 2007 was three times more than the preceding quarter, it doubled in the qua

2007 over the preceding quarter. Further, there was disproportionate increase in the security deposits i.e. Rs. 36.05 crore in September 2007 to Rs. 270.38 crore in December 2007 as compared to increase in the number of theatres during the same period. They have participated in the board meetings and were privy to those commissions and omissions.

Securities Market – Market abuse

35. Prevention of market abuse and preservation of market integrity is the hallmark of Securities Law. Section 12A read with Regulations 3 and 4 of the Regulations 2003 essentially intended to preserve 'market integrity' and to prevent 'Market abuse'. The object of the SEBI Act is to protect the interest of investors in securities and to promote the development and to regulate the securities market, so as to promote orderly, healthy growth of securities market and to promote investors protection. Securities market is based on free and open access to information, the integrity of the market is predicated on the quality and the manner on which it is made available to market. 'Market abuse' impairs economic growth and erodes investor's confidence. Market abuse refers to the use of manipulative and deceptive devices, giving out incorrect or misleading information, so as to encourage investors to jump into conclusions, on wrong premises, which is known to be wrong to the abusers. The statutory provisions mentioned earlier deal with the situations where a person, who deals in securities, takes advantage of the impact of an action, may be manipulative, on the anticipated impact on the market resulting in the "creation of artificiality'. The same can be achieved by inflating the company's revenue, profits, security deposits and receivables, resulting in price rice of scrip of the company. Investors are then lured to make their "investment decisions" on those manipulated inflated results, using the above devices which will amount to market abuse.

36. We have, on facts, clearly found that the Directors of the company have "created artificiality" by projecting inflated

figures of the company's revenue, profits, security deposits and receivables and that the manipulation in the financial results of the company resulted in price rise of the scrip of the company and the promoters of the company then pledged their shares to raise substantial funds from financial institutions. The conduct of the appellant and others was, therefore, fraudulent and the practices they had adopted, relating to securities, were unfair, which attracted the penalty provisions contained in Section 15 HA read with 15J of the SEBI Act.

Disclosure and Transparency:

37. Gower and Davies on Principles of Modern Company Law, 9th Edition (2012) at page 751, reiterated their views on the scope and rationale of annual reporting required under the Companies Acts, as follows:

"On the basis that "forewarned is forearmed" the fundamental principle underlying the Companies Act has been that of disclosure. If the public and the members were enabled to find out all relevant information about the company, this, thought the founding fathers of our company law, would be a sure shield. The shield may not have proved quite so strong as they had expected and in more recent times, it has been supported by offensive weapons."

38. The Companies Act casts an obligation on the company registered under the Companies Act to keep the Books of accounts to achieve transparency. Previously, it was thought that the production of the annual accounts and it preparation is that of the Accounting Professional engaged by the company where two groups who were vitally interested were the shareholders and the creditors. But the scenario has drastically changed, especially with regard to the company whose securities are traded in public market. Disclosure of information about the company is, therefore, crucial for the accurate pricing of the company's securities and for market integrity. Records maintained by the company should show and explain the company's transactions, it[illegible]h

reasonable accuracy the financial position, at any time, and to enable the Directors to ensure that the balance-sheet and profit and loss accounts will comply with the statutory expectations that accounts give a true and fair view. Companies (Amendment) Act, 2000 has added clause (a)(iii) under which SEBI has also been given the power of inspection of listed companies or companies intending to get listed through such officers, as may be authorized by it.

39. So far as the company in question is concerned, books of accounts were maintained in the Tally accounting software and for the financial year 2007-08 separate books of accounts were maintained for each region/unit. Books of accounts were reportedly maintained by the regions in their respective regional office and at the end of the year for the preparation of annual financial statement and for auditing purpose, those books of accounts were brought to the companies registered office. The auditors had informed that those books were audited at the registered office of the company. As already indicated, after the declaration of financial results on January 31, 2008, containing inflated profits, revenues for the quarter ended on 31.12.2007, the Managing Directors of the company, his wife and the appellant had together pledged 72,75,455 shares of the company with various banks and financial institutions and raised 97.30 crores as loans. We have noticed that the Directors and the Chief Financial Officers of the company had caused to publish forged and misleading results of the company, various quarterly financial results and the annual results for the year 2007-08, were reported to the stock-exchanges containing inflated figures of the company's revenue, profits, security deposits and receivables and those financial statements which were relied upon by investors in making investment decisions, which did not reflect a true and fair view of the state of affairs of the company.

40. The appellant has taken the stand, as already stated, that even though he was a whole time Director he was not conversant with the accounts and finance and was only dealing

with the human resource management of the company, hence, he had no fraudulent intention to deceive the investors. We find it difficult to accept the contention. The appellant, admittedly, was a whole time Director of the company, as regards the preparation of the annual accounts, the balance-sheet and financial statement and laying of the same before the company at the Annual General Meeting and filing the same before the Registrar of the Companies as well as before SEBI, the Directors of the company have greater responsibility, especially when the company is a registered company. Directors of the companies, especially of the listed companies, have access to inside knowledge, such as, financial position of the company, dividend rates, annual accounts etc. Directors are expected to exercise the powers for the purposes for which they are conferred. Sometimes they may misuse their powers for their personal gain and makes false representations to the public for unlawful gain.

41. We have indicated, so far as this case is concerned, the subsequent conduct of pledging their shares at artificially inflated prices, based on inflated financial results and raising loan on them would indicate that they had deliberately and with full knowledge committed the illegality and hence the principle of "*acta exteriora indicant interiora secreta"* (meaning external actions reveals inner secrets) applies with all force, a principle which this Court applied in *Sahara's* case.

42. Above being the factual and legal position, we are of the view that the SEBI has rightly restrained the appellant for a period of two years from the date of that order from buying, selling or dealing with any securities, in any manner, or accessing the securities market, directly or indirectly and from being Director of any listed company and that the adjudicating officer has rightly imposed a penalty of Rs.50 lakhs under Section 15HA of SEBI Act. The appeals are, therefore, dismissed. However, there will be no order as to costs.

A word of caution:

43. SEBI, the market regulator, has to deal sternly with companies and their Directors indulging in manipulative and deceptive devices, insider trading etc. or else they will be failing in their duty to promote orderly and healthy growth of the Securities market. Economic offence, people of this country should know, is a serious crime which, if not properly dealt with, as it should be, will affect not only country's economic growth, but also slow the inflow of foreign investment by genuine investors and also casts a slur on India's securities market. Message should go that our country will not tolerate "market abuse" and that we are governed by the "Rule of Law". Fraud, deceit, artificiality, SEBI should ensure, have no place in the securities market of this country and 'market security' is our motto. People with power and money and in management of the companies, unfortunately often command more respect in our society than the subscribers and investors in their companies. Companies are thriving with investors' contributions but they are a divided lot. SEBI has, therefore, a duty to protect investors, individual and collective, against opportunistic behavior of Directors and Insiders of the listed companies so as to safeguard market's integrity.

44. Print and Electronic Media have also a solemn duty not to mislead the public, who are present and prospective investors, in their forecast on the securities market. Of course, genuine and honest opinion on market position of a company has to be welcomed. But a media projection on company's position in the security market with a view to derive a benefit from a position in the securities would amount to market abuse, creating artificiality. SEBI has the duty and obligation to protect ordinary genuine investors and the SEBI is empowered to do so under the SEBI Act so as to make security market a secure and safe place to carry on the business in securities.

B.B.B. Appeals dismissed.

SUNDARGARH ZILLA ADIVASI ADVOCATES ASSOCIATION AND OTHERS

v.

STATE GOVERNMENT OF ODISHA AND ORS.

(Writ Petition (Civil) No. 215 of 2012)

MAY 7, 2013

[R.M. LODHA, J. CHELAMESWAR AND MADAN B. LOKUR, JJ.]

Constitution of India, 1950 – Part IX-A, Articles 243-ZC and 243-ZF, 244 and Schedule V items 5(1) and 6(1) –– Scheduled area declared in terms of Clause 6(1) of the V Schedule – Applicability of the Orissa Municipal Act, beyond 1st June, 1994 – After coming into force of Part IX-A of the Constitution w.e.f. 1st June 1993 – Held: In view of Art. 243-ZC, Part IX-A of the Constitution was not applicable to the Scheduled area in question – But the Act was made applicable to the area w.e.f. 31st May, 1994 by the issuance of a public Notification issued by the Governor in exercise of its power conferred under Clause 5(1) of the Fifth Schedule to the Constitution – In view of Art.243ZF, the Municipal Act can be applicable to the Scheduled area even beyond the period of one year, if it is not inconsistent with the provisions of Part IX-A – Since no provision of the Act is shown to be inconsistent with the provisions of Part IX-A, it would be applicable to the Scheduled area in question even beyond the period of one year –– Orissa Municipal Act, 1950 – Notification SRO No. 743/1995 dated 14th August, 1995.

The question for consideration in the present writ petition was whether the provisions of the Orissa Municipal Act, 1950 are applicable to 'Sundargarh' a district in the State of Odisha, (a declared 'Scheduled Area' in terms of Clause 6(1) of the Fifth Schedule to the

Constitution, administration whereof is provided under Article 244 of the Constitution), on coming into force of Part IX-A of the Constitution.

The contention of the petitioners was that on coming into force of Part IX-A, the Municipal Act, which was existing in the Scheduled area could not continue beyond a period of one year as provided in Article 243-ZF and therefore the existing Municipal Act could not have continued beyond 1st June 1994; and that since the Parliament has not extended the provisions of Part IX-A to the area of Sundargarh, nor had the Governor extended the provisions of Orissa Municipal Act to Sundargarh in exercise of power conferred by Clause 5 of Fifth Schedule, provisions of the Municipal Act are not applicable to Sundargarh beyond 1st June, 1994.

Dismissing the petition, the Court

HELD: 1. Clause 1 of Article 243-ZC of the Constitution of India provides that the provisions of Part IX-A of the Constitution do not apply to Scheduled Areas such as Sundargarh. Clause 3 of Article 243-ZC provides that Parliament may, by law, extend the provisions of Part IX-A of the Constitution to Scheduled Areas such as Sundargarh subject to exceptions and modifications. Such a law has not been enacted by Parliament. Thus, Part IX-A of the Constitution which deals with the municipalities as institutions of self government does not apply to Sundargarh. There is also no statute relating to the extension of Part IX-A of the Constitution relating to municipalities to Scheduled Areas. [Paras 18 and 19] [430-E-F, H]

2. Clause 5 of Schedule V of the Constitution empowers the Governor of the State, inter alia, to issue a public Notification to the effect that: (a) Any particular statute (enacted either by Parliament or by the State

Legislature) shall not apply to a Scheduled Area; (b) Any particular statute (enacted either by Parliament or by the State Legislature) shall apply to a Scheduled Area, subject to specific exceptions and modifications. [Para 10] [426-G-H; 427-A]

3. Therefore, in the absence of the application of Part IX-A of the Constitution to the Scheduled Area of Sundargarh, the Orissa Municipal Act, 1950 has been made applicable with effect from 31st May 1994 by the issuance of a public Notification being SRO No.743/1995 dated 14th August 1995 by the Governor in exercise of its powers conferred under Clause 5(1) of the Fifth Schedule to the Constitution. The provisions of Section 12 of the Orissa Municipal Act (relating to the general election of councillors and formation of wards) have also been extended to the Scheduled Areas by a Notification being SRO No.1264/1995 dated 16th November 1995 with effect from 14th November 1995. These facts relating to the issuance of the two Notifications have not been denied by the petitioners [Paras 13 and 20] [427-E; 431-A-D]

4. Article 243-ZF provides that any law relating to municipalities shall continue to apply even to a Scheduled Area for one year, except to the extent of inconsistency with the provisions of Part IX-A of the Constitution. Even beyond a period of one year, a law relating to municipalities may be applicable to a Scheduled Area, if the law is so extended, provided it is not inconsistent with the provisions of Part IX-A. No provision of the Orissa Municipal Act is shown to be inconsistent with the provisions of Part IX-A of the Constitution.[Para 21] [431-E-F]

5. The purpose behind the introduction of Part IX-A in the Constitution has been achieved by the Orissa Municipal Act and the amendments made there[illegible]e

Scheduled Areas. [Para 23] [432-C; 433-A]

Bondu Ramaswamy vs. Bangalore Development Authority **(2010) 7 SCC 129: 2010 (6) SCR 29 – referred to.**

Case Law Reference:

2010 (6) SCR 29 Para 23 referred to

CIVIL ORIGINAL JURISDICTION : Under Article 32 of The Constitution of India.

Writ Petition (Civil) No. 215 of 2012.

A.P. Mohanty, for the Petitioner.

Sunil Kumar Krishnanad Pandeya, Jayesh Gaurav, Amrender Kr. Choubey, Kumar Anurag Singh, Praiyanka, Anil K. Jha, Binu Tamta, D.L. Chidananda, Sushma Suri, Jitendra Kumar, Kirti Renu Mishra, Dr. Maya Rao for the Respondents.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. The primary question for consideration in this writ petition under Article 32 of the Constitution is whether the provisions of the Orissa Municipal Act, 1950 are applicable to Sundargarh district in Odisha.

2. It is not in dispute that Sundargarh district is a declared 'Scheduled Area' in terms of Clause 6(1) of the Fifth Schedule to the Constitution. This Clause reads as follows:

"**6. Scheduled Areas.**—(1) In this Constitution, the expression "Scheduled Areas" means such areas as the President may by order declare to be Scheduled Areas."

3. The administration and control of a Scheduled Area is provided for in Article 244 of the Constitution which reads as under:-

"**244. Administration of Scheduled Areas and Tribal Areas** : (1) The provisions of the Fifth Schedule shall apply

to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the States of Assam Meghalaya, Tripura and Mizoram.

(2) The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam, Meghalaya, Tripura and Mizoram."

4. What follows from this is that an area may be declared by the President as a Scheduled Area (as has happened in the case of Sundargarh) and the administration and control of that area is then governed by the Fifth Schedule to the Constitution.

5. Scheduled Areas are also referred to in Part IX-A of the Constitution. This Part came into effect from 1st June 1993 through the Constitution (Seventy-fourth Amendment) Act, 1992. This Part concerns itself with the establishment, constitution, powers and functions of municipalities as institutions of self government. For the present purposes, we are concerned with Article 243-ZC and Article 243-ZF in Part IX-A. These provisions read as follows:

"**243ZC. Part not to apply to certain areas.—**(1) Nothing in this Part shall apply to the Scheduled Areas referred to in clause (1), and the tribal areas referred to in clause (2), of article 244.

(2) Nothing in this Part shall be construed to affect the functions and powers of the Darjeeling Gorkha Hill Council constituted under any law for the time being in force for the hill areas of the district of Darjeeling in the State of West Bengal.

(3) Notwithstanding anything in this Constitution, Parliament may, by law, extend the provisions of this Part to the Scheduled Areas and the tribal areas referred to in clause (1) subject to such exceptions and modifications as may

be specified in such law, and no such law shall be deemed to be an amendment of this Constitution for the purposes of article 368."

"**243ZF. Continuance of existing laws and Municipalities.—**Notwithstanding anything in this Part, any provision of any law relating to Municipalities in force in a State immediately before the commencement of the Constitution (Seventy-fourth Amendment) Act, 1992, which is inconsistent with the provisions of this Part, shall continue to be in force until amended or repealed by a competent Legislature or other competent authority or until the expiration of one year from such commencement, whichever is earlier:

Provided that all the Municipalities existing immediately before such commencement shall continue till the expiration of their duration, unless sooner dissolved by a resolution passed to that effect by the Legislative Assembly of that State or, in the case of a State having a Legislative Council, by each House of the Legislature of that State."

6. A break-down of the provisions of Article 243-ZC of the Constitution makes it clear that: (a) Part IX-A does not *ipso facto* apply to Scheduled Areas [Article 243-ZC(1)]; (b) Parliament may, by law, extend the provisions of Part IX-A to a Scheduled Area subject to exceptions and modifications [Article 243-ZC(3)]. Factually, Part IX-A has not been extended to the Scheduled Area of Sundargarh. In other words, Part IX-A of the Constitution (with or without exceptions and modifications) does not apply to the Scheduled Area of Sundargarh.

7. Similarly, a break-down of the provisions of Article 243-ZF of the Constitution makes it clear that: (a) The existing law relating to municipalities will remain in force even if it is inconsistent with the provisions of Part IX-A of the Constitution

[first part of Article 243-ZF]; (b) However, the inconsistent provisions of the existing law will remain in force only for a period of one year, unless amended or repealed earlier [second part of Article 243-ZF]. Clearly, the purpose of continuing an existing law (even though it may be inconsistent with Part IX-A) was to enable necessary amendments to be made to the existing law to make it in consonance with Part IX-A.

8. At this distant point of time, we are not concerned with the proviso to Article 243-ZF of the Constitution.

9. If Part IX-A of the Constitution does not apply to a Scheduled Area, how is the Scheduled Area of Sundargarh to be administered? For this, one as to fall back on the Fifth Schedule to the Constitution which specifically relates to the administration and control of Scheduled Areas. Clause 5(1) thereof is of relevance so far as the present case is concerned. This reads as follows:-

"5. **Law applicable to Scheduled Areas.**—(1) Notwithstanding anything in this Constitution, the Governor may by public notification direct that any particular Act of Parliament or of the Legislature of the State shall not apply to a Scheduled Area or any part thereof in the State or shall apply to a Scheduled Area or any part thereof in the State subject to such exceptions and modifications as he may specify in the notification and any direction given under this sub-paragraph may be given so as to have retrospective effect.

(2) xxx xxx xxx [dealing with regulations]."

10. Clause 5 empowers the Governor of the State, *inter alia,* to issue a public notification to the effect that: (a) Any particular statute (enacted either by Parliament or by the State Legislature) shall not apply to a Scheduled Area; (b) Any particular statute (enacted either by Par

Legislature) shall apply to a Scheduled Area, subject to specific exceptions and modifications.

11. In so far as the State of Odisha is concerned, an amendment was carried out in the Orissa Municipal Act by inserting sub-section (6) in Section 1 thereof to the following effect:

> "(6) Nothing in this Act shall apply to the scheduled areas referred to in Clause (1) of Article 244 of the Constitution."

The aforesaid amendment was carried out through Orissa Act No.11 of 1994 with effect from 31st May 1994.

12. The effect of the above amendment was that the Orissa Municipal Act was no longer applicable to Sundargarh, a Scheduled Area, with effect from 31st May 1994. In a sense, therefore, there was a vacuum in the administration and control of the Scheduled Area of Sundargarh from 1st June 1994 since neither Part IX-A of the Constitution nor the Orissa Municipal Act were applicable to the Scheduled Areas in Odisha.

13. Realizing the existence of a vacuum, the Governor of Odisha issued Notification No. SRO No.743/95 dated 14th August 1995 with effect from 31st May 1994. This was in exercise of powers conferred on him by Clause 5(1) of the Fifth Schedule to the Constitution. By virtue of this Notification, sub-section (6) in Section 1 of the Orissa Municipal Act was repealed and the said Act was extended to the Scheduled Areas of the State.

14. Unfortunately, this Notification has not been placed on record by either of the parties, though a reference to this is made by the Union of India in its counter affidavit. Therefore, it is appropriate to reproduce the Notification. It reads as follows:

"Housing & Urban Development Department
Notification
The 14th August 1995

S.R.O. No. 743/95- Whereas the Orissa Municipal Act, 1950 has been amended by Orissa Municipal (Amendment) Act, 1994 for strengthening the Municipalities and for giving effective and adequate representation to the Scheduled Castes, Scheduled Tribes, Backward Class of citizens and Women;

And, whereas, the constitution of the Municipalities prior to the commencement of the Orissa Municipal (Amendment) Act, 1994 has not been made in accordance with the amended provisions with regard to the composition, reservation of seats and reservation of offices of the Chairpersons and Vice-Chairpersons of Municipalities for the Scheduled Castes, Scheduled Tribes, Backward Class of citizens and Women;

And, whereas, for the purpose of strengthening the Municipalities and giving effective and adequate representation to the Scheduled Castes, Scheduled Tribes, Backward class of citizens and Women in the Scheduled Areas of the State, it is considered expedient to apply the provisions of the Orissa Municipal Act, 1950 as amended by the Orissa Municipal (Amendment) Act, 1994 to the Scheduled Areas of the State of Orissa;

Now, therefore, in exercise of the powers conferred by sub-paragraph (1) of paragraph 5 of the Fifth Schedule to the Constitution of India and in supersession of the notification of the Governor bearing No. 16222—Legis-H.U.D., dated the 28th May 1994 issued under the Housing & Urban Development Department of the Government of Orissa and published as S.R.O. No. 521/94, the Governor of Orissa hereby directs that the provisions of the Orissa Municipal Act, 1950 (Orissa Act 23 of 1950) shall be deemed to have been applied to the Scheduled Areas of the State with effect from the 31st day of May 1994 subject to the following exception and modification, namely :-

(1) Sub-section (6) of Section 1 of the Orissa Municipal Act, 1950 shall be omitted; and

(2) Notwithstanding anything to the contrary in the Orissa Municipal Act, 1950, the term of office of every Councilor, Vice-Chairperson and Chairperson of the Municipal Councils and Notified Area Councils existing in the Scheduled Areas of the State immediately before the commencement of the Constitution (Seventy-fourth Amendment) Act, 1992 shall be deemed to have come to an end with effect from the 2nd day of August 1995, and –

(a) during the period beginning with the 2nd day of August 1995 till the reconstitution of said Councils, the powers and duties of every such Council and Chairperson and Vice-Chairperson thereof shall be exercised and performed by such authority and in such manner as the State Government may, by notification, direct; and

(b) any action taken or thing done by the State Government under the Orissa Municipal Act, 1950, so applied to the Scheduled Areas of the State, shall be deemed to have been validly taken or done.

[No. 27397—Elec.-37/95-H.U.D.]
G. RAMANUJAM
Governor of Orissa"

15. In this constitutional and statutory background, the contention urged by learned counsel for the petitioners is that on the coming into force of Part IX-A of the Constitution, the existing municipalities in Sundargarh district, that is, Sundargarh, Rourkela, Rajgangpur and Birmitrapur could not continue beyond a period of one year as provided in Article 243-ZF of the Constitution and therefore, their existence beyond 1st June 1994 was unconstitutional. The basic postulate of this

contention is that the provisions of the Orissa Municipal Act are inconsistent with Part IX-A of the Constitution.

16. The further submission is that Parliament has not extended the provisions of Part IX-A of the Constitution to the Scheduled Area of Sundargarh nor has the Governor extended the provisions of the Orissa Municipal Act to Sundargarh district in exercise of power conferred by Clause 5 of the Fifth Schedule to the Constitution. Therefore the provisions of the said Act are not applicable to Sundargarh district with the result that the continuance of the municipalities beyond 1st June 1994 is illegal.

17. We are unable to accept both contentions urged by the petitioners since they proceed on a misunderstanding of facts and the relevant provisions of the Constitution. We may also note that Notification No. SRO No. 743/95 dated 14th August, 1995 is not under challenge.

18. Clause 1 of Article 243-ZC provides that the provisions of Part IX-A of the Constitution do not apply to Scheduled Areas such as Sundargarh. Clause 3 of Article 243-ZC provides that Parliament may, by law, extend the provisions of Part IX-A of the Constitution to Scheduled Areas such as Sundargarh subject to exceptions and modifications. It is nobody's case that such a law has been enacted by Parliament. The only consequence of this is that Part IX-A of the Constitution which deals with the municipalities as institutions of self government does not apply to Sundargarh.

19. This may be contrasted with the Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 which specifically extends Part IX of the Constitution relating to panchayats introduced by the Constitution (Seventy-third Amendment) Act, 1992 to Scheduled Areas. There is no corresponding statute relating to the extension of Part IX-A of the Constitution relating to municipalities to Scheduled Areas.

20. Therefore, in the absence of the application of Part IX-A of the Constitution to the Scheduled Area of Sundargarh, what does apply is the Orissa Municipal Act, 1950. This Act has been made applicable with effect from 31st May 1994 by the issuance of a public notification being SRO No.743/1995 dated 14th August 1995. The petitioners seem to be oblivious of this fact which has been stated by the Union of India in its counter affidavit filed to the writ petition. It has further been stated by the Union of India in its affidavit that the provisions of Section 12 of the Orissa Municipal Act (relating to the general election of councillors and formation of wards) have also been extended to the Scheduled Areas by a Notification being SRO No.1264/1995 dated 16th November 1995 with effect from 14th November 1995. These facts relating to the issuance of the two notifications have not been denied by the petitioners by filing any rejoinder affidavit. Therefore, the entire basis on which the petitioners have built up their case is factually lacking.

21. Apart from the above, learned counsel for the petitioners has not shown us any provision of the Orissa Municipal Act which is inconsistent with the provisions of Part IX-A of the Constitution. Article 243-ZF provides that any law relating to municipalities shall continue to apply even to a Scheduled Area for one year, except to the extent of inconsistency with the provisions of Part IX-A of the Constitution. Even beyond a period of one year a law relating to municipalities may be applicable to a Scheduled Area, if the law is so extended, provided it is not inconsistent with the provisions of Part IX-A. It is in this context that learned counsel for the petitioners could not point out any provision in the Orissa Municipal Act which is inconsistent with Part IX-A. The contentions of learned counsel for the petitioners are presently without any foundational basis, but we leave open this question and express no opinion in this regard since Part IX-A has not been made applicable to the Scheduled Area of Sundargarh.

22. The interpretation of Article 243-ZC and Article 243-

ZF of the Constitution has come up for consideration in some High Courts from time to time but the issue raised before us, which is entirely factual in nature, has not come up for consideration earlier. It is, therefore, not necessary to advert to those decisions.

23. Reference may, however, be made to *Bondu Ramaswamy v. Bangalore Development Authority, (2010) 7 SCC 129* which explains the purpose behind the introduction of Part IX-A in the Constitution. This is what was said:

> "The Constitution (Seventy-fourth Amendment) Act, 1992 inserting Part IX-A in the Constitution, seeks to strengthen the system of municipalities in urban areas, by placing these local self-governments on sound and effective footing and provide measures for regular and fair conduct of elections. Even before the insertion of the said Part IX-A, municipalities existed all over the country but there were no uniform or strong foundations for these local self-governments to function effectively.
>
> "Provisions relating to composition of municipalities, constitution and composition of Ward Committees, reservation of seats for weaker sections, duration of municipalities, powers, authority, responsibilities of municipalities, power to impose taxes, proper superintendence and centralised control of elections to municipalities, constitution of committees for district planning and metropolitan planning, were either not in existence or were found to be inadequate or defective in the State laws relating to municipalities.
>
> "Part IX-A seeks to strengthen the democratic political governance at grass root level in urban areas by providing constitutional status to municipalities, and by laying down minimum uniform norms and by ensuring regular and fair conduct of elections."

This objective has been achieved by the Orissa Municipal Act and the amendments made thereto, as extended to the Scheduled Areas.

24. In view of the factual position before us, we see no merit in this writ petition. It is accordingly dismissed. No costs

K.K.T. Writ Petition Dismissed.

KUMAR

v.

STATE OF TAMIL NADU

(Criminal Appeal No. 1450 of 2009)

MAY 9, 2013

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

Penal Code, 1860 - ss. 376, 302, 302 r/w 201 and 506 - Rape followed by double murder - Allegation that appellant struck a blow with 'poorikatai' on the head of his sister-in-law due to which she fell unconscious and then he had sexual intercourse with her and thereafter, he attacked her 13 months' old daughter on which she also became unconscious - Appellant-accused then allegedly caused death of his sister-in-law and her daughter by pouring kerosene and setting them on fire - Conviction of appellant-accused alongwith sentence of life imprisonment - Justification - Held: Justified - Extra-judicial confession by appellant to PW-2 rightly accepted by trial Court as same was within the parameters of law and withstood the test of reasonableness and credibility - Evidence of PWs 2 & 3 made it clear that appellant had the motive, namely, he had a lustful eye towards his sister-in-law, which was proved beyond doubt - Since she refused to accede to the wish of appellant, he forcibly raped her - Evidence of PWs 1,2 and 3 amply proved various circumstances as pleaded by the prosecution - Prosecution established all the links including the fisting of the child and laying her nearby the sister-in-law of appellant when she became unconscious and thereafter, burning both of them to death by pouring kerosene - Likewise, prosecution also proved the other circumstances, namely, threat to PW-2 with dire consequences and making her to speak to PW-1 over phone impersonating the deceased, to make it a suicidal case - Not only appellant had the knowledge that he had committed the heinous crime but

he also caused disappearance of evidence and had the intention to screen the offence by burning the body of his sister-in-law and her child - Reports submitted by the Scientific Officers, viz., PWs 11 and 16, coupled with the post mortem certificate and the evidence of Medical Officer, established beyond doubt that it was a clear case of murder - Overall assessment of evidence of prosecution witnesses clearly established the circumstances against the accused in a cogent manner.

Evidence - Confession - Extra-judicial Confession - When can be relied upon - Held: If extra-judicial confession is voluntary and made in a fit state of mind, it can be relied upon along with other materials.

The prosecution case was that the appellant-accused intended to rape his sister-in-law and, on the fateful day, when she was alone, he attempted to have sexual intercourse with her; that when she resisted him, he struck a blow with 'poorikatai' on her head due to which she fell unconscious. Taking undue advantage of her condition, the appellant-accused had sexual intercourse with her. Immediately thereafter, he attacked her 13 months' old daughter on account of which she also became unconscious. The further case of the prosecution was that the appellant-accused with the intention of causing disappearance of evidence and in order to show it a suicidal case, caused death of his sister-in-law and her daughter by pouring kerosene and set them on fire. The appellant-accused arranged kerosene for the same from PW-2 - a neighbour, on the pretext of cleaning a machine. He also narrated the whole incident to her and even threatened her to give a call to PW-1 (the brother of the deceased) impersonating the deceased, which she did.

The trial court, primarily placing reliance upon the extra-judicial confession made to PW-2, convicted the

appellant-accused under Sections 376, 302, 302 read with 201 and 506 IPC and sentenced him to undergo imprisonment for life. The High Court confirmed the conviction and sentence, and therefore the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1. The law is well settled as to what extent extra-judicial confession can be relied on. If the same is voluntary and made in a fit state of mind, it can be relied upon along with other materials. Extra-judicial confession is a weak type of evidence and depends upon the nature of circumstances like the time when the confession was made and the credibility of the witnesses who speak to such a confession. [Para 8] [446-C-D]

1.2. In the instant case, extra-judicial confession was made by the accused-appellant to PW-2. The trial Court as well as the High Court rightly relied on the evidence of PW-2. Her statement before the Court and confession made by the accused before PW-28, the District Revenue Officer corroborates each other. Even in cross-examination, PW-2 reiterated what she deposed in the examination-in-chief. There is no reason to disbelieve her testimony, on the other other hand, the same is acceptable if other circumstances are considered. [Paras 9, 10] [446-E; 448-B-C]

2. PW-1 is the brother of the deceased. In his evidence, he deposed that the deceased called him over phone and asked him to come with money within an hour, otherwise, she would commit suicide. Though the appellant raised a doubt about the phone call by showing the telephone number and other details, if one considers the evidence of PW-1 along with the evidence of PW-2, there is no reason to doubt the veracity of their evidence. PW-3 is the sister-in-law of the decea e,

she also stated that PW-1 called her and stated about the demand raised by the deceased over phone. On analysis of the evidence of PW-3 with that of PWs 1 and 2, it is clear that the evidence of PW-2 is corroborated by the evidence of PW-1 in respect of the phone call by PW-2 impersonating the deceased, hence, all the three witnesses support the case put forth by the prosecution. [Paras 13, 14] [448-F-G; 449-B, D]

3. As regards the offence under Section 376 of IPC followed by death is concerned, in the extra-judicial confession made by the accused to PW-2, he had stated that when he hugged the deceased, she refused to accept and wanted to wriggle out of it, hence, he hit on her head with 'poorikattai' (M.O. 11) due to which she fell unconscious. The wound certificate (Exh. P-25) supports the case of the prosecution viz., that the simple injury might be due to finger nail scratch. In addition, the Chemical Report (Exh. P-8) stating that the brief (M.O. 15) contained semen also supports the claim made by the prosecution about the offence under Section 376 of IPC. No doubt, there is no medical evidence about the same, however, PW-24, the doctor who conducted the autopsy, had stated that due to extensive burns over the front part of the body, he could not notice any symptom for the commission of offence of rape. In view of the explanation offered and also if one considers the evidence of PW-24, there is no difficulty in accepting the case of the prosecution that the accused committed rape before setting fire on her body. [Para 15] [449-F-H; 450-A]

4. The prosecution has also proved the motive from the evidence of PWs 2 and 3. When PW-2 explained about the extra-judicial confession made by the accused, she informed the court that the accused had an eye over the deceased and since nobody was in the house on the date and time of the incident, he intends to utilize the

same. Since the deceased refused to accede to his wish, he forcibly committed the offence of rape by pushing her down. This aspect has been corroborated by PW-3 in categorical terms. Apart from this, PW-3, in her evidence also explained the complaint made by the deceased about the conduct of the accused and his behaviour towards her. PW-3 has also stated that when the deceased visited her house on the last occasion, she narrated the lust of the accused and requested her not to reveal the same to anyone including her brother viz., husband of PW-3. [Paras 16, 17] [450-B-E]

5. If the deceased had committed suicide, naturally, she would have poured kerosene on her head which would have spread on all over her body and on setting fire, all parts of the body would have got burnt. The post mortem report shows differently. In the Post Mortem Certificate (Ex. P-46) extensive second degree burns were found on the front side of the whole body except the crown of head, the back head, backside, buttocks and the bottom of the foot. The way in which she was lying on the floor and the throwing of can containing Kerosene in the house itself undoubtedly establish that the deceased had not committed suicide and it is a case of murder. The evidence of PWs 1, 2 and 3 amply prove various circumstances as pleaded by the prosecution. The prosecution has established all the links including the fisting of child and laying her nearby the deceased when she became unconscious and thereafter, burning both of them to death by pouring kerosene. Likewise, the prosecution has also proved the other circumstances, namely, threat to PW-2 with dire consequences and making her to speak to PW-1 over phone impersonating the deceased, to make it a suicidal case. As rightly analysed by the trial Court and the High Court, the deceased has not committed suicide but it is a case of homicide by the accused and th s

established the offence under Section 302 IPC. Not only the accused had the knowledge that he had committed the heinous crime but he also caused disappearance of evidence and had the intention to screen the offence by burning the body of the deceased and her child, hence, the prosecution has also established the offence under Section 302 read with Section 201 IPC. [Para 18] [450-F-H; 451-A-E]

6. The trial Court rightly found the appellant-accused guilty of all the charges and passed the order of conviction and imposed the appropriate sentence. The reports submitted by the Scientific Officers, viz., PWs 11 and 16, coupled with the post mortem certificate and the evidence of the Medical Officer, establish beyond doubt that this is a clear case of murder. [Para 19] [451-F]

7. The extra-judicial confession made to PW-2 has been rightly accepted by the trial Court as the same is within the parameters of law and withstood the test of reasonableness and credibility. An overall assessment of the evidence of the prosecution witnesses clearly establishes the circumstances against the accused in a cogent manner. It is seen from the evidence of PWs 2 & 3 that the appellant-accused had the motive, namely, he had a lustful eye towards his sister-in-law, which had been proved beyond doubt. [Para 20] [451-G-H; 452-A]

8. In justice delivery system, Courts are conscious and mindful of the proportion between the rigor of offence committed and the penalty imposed as also its impact on society in general and the victim of the crime in particular. Social impact of the crime where it relates to offences against women cannot be lost sight of and per se requires exemplary treatment. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court. Though the trial Court imposed life imprisonment which was upheld by the High

Court in view of the gruesome act of rape followed by double murder, this Court is of the view that the authorities having power of remission have to be conscious and cannot pass any such order of remission lightly without adhering to various principles enunciated by this Court. [Para 21] [452-B-D]

Swami Shraddananda (2) @ Murli Manohar Mishra vs. State of Karnataka **(2008) 13 SCC 767: 2008 (11) SCR 93;** *Sahib Hussain @ Sahib Jan vs. State of Rajasthan* **2013 (6) SCALE 219 - relied on.**

Case Law Reference:

2008 (11) SCR 93	**relied on**	**Para 21**
2013 (6) SCALE 219	**relied on**	**Para 21**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1450 of 2009.

From the Judgment and Order dated 23.04.2008 of the High Court of Judicature at Madras in Criminal Appeal No. 792 of 2007.

V. Krishnamurthy, Prasanth P., V. Vasudevan, T. Harish Kumar, K.V. Bharathi Upadhyaya for the Appellant.

Subramonium Prasad, AAG, M. Yogesh Kanna, A. Santha Kumaran, Sasikala for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal has been filed against the judgment and order dated 23.04.2008 passed by the High Court of Judicature at Madras in Criminal Appeal No. 792 of 2007 whereby the Division Bench of the High Court dismissed the appeal filed by the appellant herein and confirmed the order of conviction and sentence dated 30.07.2007 passed by the Ist Additional Sessions Judge, Salem, in Sessions Case No. 56 of 2004.

2. **Brief facts:**

(a) The marriage of Vijayalakshmi (the deceased) and Thiruselvam was solemnized on 06.09.2001 at Murugan Nagar, Zerinakadu, Yercaud, Tamil Nadu. After the marriage, she was staying at her matrimonial home in a joint family consisting of her husband, Krishnan (father-in-law), Chellammal (mother-in-law) and Kumar-the appellant/accused, brother-in-law of the deceased. After one year of the marriage, a baby girl was born out of the said wedlock.

(b) It is the case of the prosecution that after the birth of the girl child, the deceased was harassed and tortured by her husband and in-laws to bring money from her parents in order to take care of the baby. On several occasions, she was forced and even harassed to arrange money from her paternal home in order to fulfill the demand of dowry. In addition to this, her brother-in-law, Kumar (the appellant-accused) had bad intentions towards her.

(c) On 15.08.2003, at 2.00 p.m., the deceased called her brother - Chandrabose (PW-1) over phone and informed him that her husband and in-laws are torturing her for the money and asked him to bring the money immediately, within one hour, failing which, she would kill her and her child. Since she disconnected the phone immediately, PW-1 tried to contact her but he could not get it. Thereafter, he spoke to his sister-in-law - Mariyayi (PW-3) about the same and asked her to visit the house of the deceased. At 3.30 p.m., PW-1 got a call from his elder brother that Vijayalakshmi and her baby died due to burn injuries. On the same day, PW-1 registered a complaint with the Yercaud Police Station which was registered as Crime No. 350/2003 under Sections 498A and 304B of the Indian Penal Code, 1860 (in short "IPC"). Taking note of the death of a 13 months' old baby along with her mother by burning in the matrimonial home, the Superintendent of Police, Yercaud, himself took up the investigation. After one week of the said incident, it was published in the newspapers that the deceased

had not committed suicide but it was a case of murder.

(d) During investigation, the role of the appellant-accused came to light whose intention was to rape her sister-in-law and, on the fateful day, when she was alone, he even attempted to have sexual intercourse with her. When Vijayalakshmi resisted him, he struck a blow with 'poorikatai' on her head due to which she fell unconscious. Taking undue advantage of her condition, the appellant-accused had sexual intercourse with her. Immediately thereafter, he attacked her 13 months' old baby-Srimathi who was playing nearby by giving a forcible punch on her face on account of which she also became unconscious.

(e) It was further revealed during investigation that the appellant-accused with the intention of causing disappearance of evidence and in order to show it a suicidal case, caused death of Vijayalakshmi and her daughter by pouring kerosene and set them on fire. It was also revealed during investigation that the appellant-accused arranged kerosene for the same from one Selvi (PW-2) - the neighbour, on the pretext of cleaning a machine. He also narrated the whole incident to her and even threatened her to give a call to PW-1 impersonating the deceased, which she did.

(f) On the basis of the above said investigation, a chargesheet was filed against the appellant herein under Sections 376, 302, 302/201 and 506(2) of IPC and the case was committed to the court of Ist Additional Sessions Judge, Salem which was numbered as Sessions Case No.56 of 2004.

(g) The Additional Sessions Judge, by judgment dated 30.07.2007, convicted the appellant-accused under Sections 376, 302, 302 read with 201 and 506 IPC and sentenced him to undergo rigorous imprisonment (RI) for 7 years along with a fine of Rs.5,000/-, in default, to further undergo RI for 1 year for the offence punishable under Section 376 of IPC. He was further sentenced to undergo imprisonment for life along with a fine of Rs. 10,000/-, in default, to further under

offence under Section 302 of IPC. Further, he was sentenced to undergo RI for 2 years along with a fine of Rs. 1,000/-, in default, to further undergo RI for 1 month for the offence under Section 201 of IPC for screening the evidence of rape and murder. He was further sentenced to RI for 7 years along with a fine of Rs. 2,000/-, in default, to undergo RI for one year for the offence under Section 506(2) of IPC.

(h) Challenging the said order, the appellant-accused filed Criminal Appeal No. 792 of 2007 before the High Court. By impugned judgment dated 23.04.2008, the High Court dismissed the said appeal and confirmed the conviction and sentence imposed on the appellant-accused by the trial Court.

(i) Aggrieved by the said order, the appellant-accused has filed this appeal by way of special leave before this Court.

3. Heard Mr. V. Krishnamurthy, learned senior counsel for the appellant-accused and Mr. Subramonium Prasad, learned Additional Advocate General for the respondent-State.

Contentions:

4. Mr. V. Krishnamurthy, learned senior counsel for the appellant made the following contentions:

(i) At the foremost, the conviction solely based on the extra-judicial confession made to one Selvi (PW-2) cannot be sustained since she had not disclosed the same at the earliest point of time.

(ii) The reliance placed on the complaint (Exh. P-1) is also not sustainable inasmuch as in the said complaint, PW-1 had not uttered anything about the conduct of the appellant-accused towards the deceased.

(iii) The inconsistent stand of PW-3, particularly, at the time of incident and after a gap of 2 months, makes her evidence wholly unreliable.

(iv) Inasmuch as PWs 4-8 were examined after a period of 10-15 days, their statements are not reliable.

(v) Inasmuch as the evidence clearly shows that it is a case of suicidal death, the conviction and sentence under Section 302 of IPC is not maintainable.

(vi) Finally, the offence under Sections 376, 302 and 302 read with 201 IPC has not been proved with the aid of medical evidence, beyond reasonable doubt, therefore, the conviction and sentence under these sections have to be set aside.

5. Mr. Subramonium Prasad, learned Additional Advocate General for the Respondent-State while rebutting the above contentions submitted as under:-

(i) The extra-judicial confession made to PW-2, who is a neighbour, is reliable and acceptable since in her statement made to K. Palanivelu, Deputy Superintendent of Police (PW-30), she stated that she was threatened by the accused that he would do away with her in the same manner like that of the deceased if she reveals the same to anyone and also made her to impersonate as the deceased over phone to PW-1. It is further submitted that it is clear from the above that the accused threatened her to death due to which she did not disclose anything to Thiru P. Kannuchamy (PW-17) on 16.08.2003, the very next day after the alleged incident. Hence, the same would not make her evidence unreliable as she is the only witness who saw the deceased and her child in the kitchen before the incident and in the hall after they were burnt to death.

(ii) With regard to the contention that PW-1 had not uttered anything about the conduct of the appellant in the complaint, learned AAG submitted that since PW-1 was informed by PW-3 about the conduct of the accused towards the deceased only after the publication of article in the newspapers that the death of the deceased is not suicide but homicide, hence the same was not mentioned in his complaint (Ex[illegible]e

of PW-3 is more dependable since on seeing the article in the newspaper that the death was homicidal, she recalled the statement made by the deceased with regard to the conduct of the accused 15 days prior to the date of occurrence and the gap of 2 months does not render her evidence unreliable.

(iii) With regard to the contention regarding delay in examining PWs 4-8, learned AAG submitted that PWs 4-8 only spoke about the movement of the accused just prior to the occurrence, immediately thereafter and at the place of occurrence. Inasmuch as they are not eye-witnesses, even the delay in examining them would not make their evidence unbelievable.

(iv) As regards the claim that it is a case of suicide, learned AAG submitted that while explaining the extra-judicial confession made by the accused, PW-2 had explained that the accused had an eye over the deceased and since the deceased refused to heed his wish, he hit the deceased on her head and when she fell unconscious, the accused committed rape on her. PW-2 also witnessed the deceased and her child lying in the kitchen before being burnt and in the hall after they were burnt to death. He further submitted that in view of the above, it clearly establishes the motive under Section 302 and 376 IPC.

(v) In reply to the contention regarding deposition of more carbon particles in the kitchen in comparison to the hall supported with the fact that the tiles were removed from the kitchen only and also the evidence of the brother of the deceased (PW-1) who had stated that the deceased called him and stated that she would commit suicide if he did not reach her place within one hour with money, it was submitted by learned AAG that in view of the deposition of PW-2 coupled with the certificate (Exh. P-25) issued by Dr. R. Vallimayagam (PW-20), who examined the accused and the evidence of Tmt. Kamalatchi (PW-11), the Scientific Officer, who examined the brief (M.O. 15) and detected semen in it as per the Chemical

Report (Exh. P-8), there is no doubt about the role of the appellant-accused in committing rape and double murder.

6. We have carefully considered the rival contentions and also perused all the materials relied on by both sides.

Discussion:

7. Inasmuch as the extra-judicial confession made by the accused is a material evidence for prosecution, let us discuss its reliability and acceptability.

8. The law is well settled as to what extent extra-judicial confession can be relied on. If the same is voluntary and made in a fit state of mind, it can be relied upon along with other materials. It is true that the extra-judicial confession is a weak type of evidence and depends upon the nature of circumstances like the time when the confession was made and the credibility of the witnesses who speak to such a confession.

9. The extra-judicial confession was made by the accused to Selvi (PW-2), who is his neighbour. In her evidence, she deposed that she is residing near the Krishnan's House in Murugan Nagar, Yercaud. At the relevant time, she was working as an Assistant of Nutritious Meal in Mungagambadi School. According to her, she knows the deceased Vijayalakshmi and her child as her neighbours. She also identified the accused in the Court. She narrated that on 15.08.2003, when she was having lunch at her home, the appellant-accused called her and asked for some Kerosene for cleaning the machine. As requested, she handed over the Kerosene available in a 10 litre can. Within 10 minutes, when she came out of the house, she saw the appellant-accused standing on the rear side of the house who asked her to come by action. When she went there, the accused called her inside the house where she saw that Vijayalakshmi and her daughter lying without any sign of life. After seeing this, she asked the appellant-accused "You sinner. What did you do to her?" The appellan

to shout. Thereafter, he told her that he had an eye on his sister-in-law. She further deposed that the accused informed her that since nobody was there in the house, he embraced her but when she did not agree for the same, he took a wooden ruler used to make 'poorikattai' and gave a blow on her head due to which, she became unconscious and fell down. Thereafter, he raped her and he also informed PW-2 that he will make it as if she had committed suicide. He also said that he punched the baby on her nose who was playing nearby and when the child cried, he put the child also near to his sister-in-law. Thereafter, the accused squashed her neck and threatened her not to tell this matter to anyone, otherwise, he will kill her also. On his direction, PW-2 made a call to the elder brother of the deceased over phone. In her evidence, she further deposed that at about 2.00 p.m., she ran from there and again returned to their house at 4.00 p.m. and saw that lot of persons were gathered at the spot. She further noticed from the kitchen that Vijayalakshmi and her child were burnt and lying in the hall. On 16.08.2003, she was examined by Revenue Divisional Officer but she did not depose much to him. On 17.08.2003, when she was examined by the Deputy Superintendent of Police, she deposed all the details to him. Similarly, on 19.08.2003 and 25.08.2003, she was examined by Superintendent of Police and the Magistrate Court respectively and she deposed the entire truth before them.

10. The analysis of the evidence of PW-2 clearly shows that the extra judicial confession was made by the accused to her, who is a neighbour. It is also clear from her evidence that the accused had taken kerosene from her house stating that it was required for cleaning the machine and thereafter, when PW-2 came out, she was called by the accused to his house where she witnessed the deceased and her child lying unconscious in the kitchen. When she questioned the accused about the same, he admitted to her about the occurrence and compelled her to speak to PW-1 impersonating the deceased by threatening her. It is also clear that among all the prosecution

witnesses, PW-2 was the only witness who saw the deceased and her child in the kitchen before being burnt and in the hall after they were burnt. It is only PW-2 before whom the accused had confessed about the commission of offence under Section 376. The trial Court as well as the High Court rightly relied on the evidence of PW-2. Her statement before the Court and confession made by the accused before Shri T.P. Rajesh (PW-28), the District Revenue Officer corroborates each other. Even in cross-examination, PW-2 reiterated what she deposed in the examination-in-chief. There is no reason to disbelieve her testimony, on the other other hand, the same is acceptable if we consider other circumstances.

11. Apart from the extra-judicial confession made to PW-2 by the accused, who is a neighbour, the prosecution heavily relied on various circumstantial evidence.

12. While discussing the evidence of PW-2, this Court noted her statement that the accused threatened her to call the brother of the deceased (PW-1) as if that the deceased was calling him by putting her saree on the receiver of the phone. In fact, PW-2 spoke to PW-1 as threatened by the accused that she had been tortured for money and asked him to come within one hour, otherwise, she would commit suicide.

13. Now, it is useful to refer the evidence of PW-1. He is the brother of the deceased and residing in Mettupalayam and at the relevant time, he was working as a clerk in Kerala Transport Office. It is also informed by him that the accused is brother of his younger sister's husband. In his evidence, he deposed that the deceased called him over phone and asked him to come with money within an hour, otherwise, she would commit suicide. Thereafter, PW-1 contacted at his brother's residence as well as his sister-in-law (PW-3) and informed about the demand made by the deceased over phone and asked PW-3 to visit the place of the deceased and apprise him. His evidence further disclosed that he hurriedly reached his sister's house around 7 p.m., where he [illegible]er

sister and the child were burnt to death and were lying on the back of the floor. Thereafter, he along with his elder brothers-Thangavelu and Balasubramaniam, went to Yercaud Police Station and informed the incident. Though Mr. Krishnamurhty, learned senior counsel for the appellant raised a doubt about the phone call by showing the telephone number and other details, if we consider the evidence of PW-1 along with the evidence of PW-2, there is no reason to doubt the veracity of their evidence.

14. One Mariyayi was examined as PW-3. She is a resident of Vellakkadai, Yerkaud, Tamil Nadu. Her husband is running a grocery shop. According to her, the deceased was her sister-in-law. She narrated about the marriage of her sister-in-law and the child born to her. In her evidence, she also stated that PW-1 called her and stated about the demand raised by the deceased over phone. We have analysed the evidence of PW-3 with that of PWs 1 and 2 and we are satisfied that the evidence of PW-2 is corroborated by the evidence of PW-1 in respect of the phone call by PW-2 impersonating the deceased, hence, all the three witnesses support the case put forth by the prosecution.

15. As regards the offence under Section 376 of IPC followed by death is concerned, in the extra-judicial confession made by the accused to PW-2, he had stated that when he hugged the deceased, she refused to accept and wanted to wriggle out of it, hence, he hit on her head with 'poorikattai' (M.O. 11) due to which she fell unconscious. The wound certificate (Exh. P-25) supports the case of the prosecution viz., that the simple injury might be due to finger nail scratch. In addition, the Chemical Report (Exh. P-8) stating that the brief (M.O. 15) contained semen also supports the claim made by the prosecution about the offence under Section 376 of IPC. No doubt, there is no medical evidence about the same, however, Shri S. Neelamegan (PW-24), the doctor who conducted the autopsy, had stated that due to extensive burns over the front part of the body, he could not noticed any

symptom for the commission of offence of rape. In view of the explanation offered and also if we consider the evidence of PW-24, there is no difficulty in accepting the case of the prosecution that the accused committed rape before setting fire on her body.

16. The prosecution has also proved the motive from the evidence of PWs 2 and 3. When PW-2 explained about the extra-judicial confession made by the accused, she informed the court that the accused had an eye over the deceased and since nobody was in the house on the date and time of the incident, he intends to utilize the same. Since the deceased refused to accede to his wish, he forcibly committed the offence of rape by pushing her down. This aspect has been corroborated by PW-3 in categorical terms.

17. Apart from this, PW-3, in her evidence also explained the complaint made by the deceased about the conduct of the accused and his behaviour towards her. PW-3 has also stated that when the deceased visited her house on the last occasion, she narrated the lust of the accused and requested her not to reveal the same to anyone including her brother viz., husband of PW-3. PW-3 has also stated in her evidence that when her husband came to know about this he scolded her, in fact, he slapped her for not informing the same at the appropriate time.

18. Dr. S. Neelamegam (PW-24), the Doctor who conducted the post mortem had deposed that the back side of the body, crown of the head and the soles were not burnt and, therefore, there is no possibility of committing suicide. It is noted in the Post Mortem Certificate (Ex. P-46) that extensive second degree burns were found on the front side of the whole body except the crown of head, the back head, backside, buttocks and the bottom of the foot. As rightly pointed out by the prosecution that if the deceased had committed suicide, naturally, she would have poured kerosene on her head which would have spread on all over her body and on setting fire, all parts of the body would have got burnt. As pointed out above, the post mortem report shows differently e

was lying on the floor and the throwing of can containing Kerosene in the house itself undoubtedly establish that the deceased had not committed suicide and it is a case of murder. The evidence of PWs 1, 2 and 3 amply prove various circumstances as pleaded by the prosecution. The prosecution has established all the links including the fisting of child and laying her nearby the deceased when she became unconscious and thereafter, burning both of them to death by pouring kerosene. Likewise, the prosecution has also proved the other circumstances, namely, threat to PW-2 with dire consequences and making her to speak to PW-1 over phone impersonating the deceased, to make it a suicidal case. As rightly analysed by the trial Court and the High Court, we have no hesitation in arriving at a conclusion that the deceased has not committed suicide but it is a case of homicide by the accused and the prosecution has established the offence under Section 302 IPC. We are also satisfied that not only the accused had the knowledge that he had committed the heinous crime but he also caused disappearance of evidence and had the intention to screen the offence by burning the body of the deceased and her child, hence, the prosecution has also established the offence under Section 302 read with Section 201 IPC.

19. We are satisfied that the trial Court, after exhaustive consideration of the oral and documentary evidence adduced by both sides, rightly found the appellant-accused guilty of all the charges and passed the order of conviction and imposed the appropriate sentence. The reports submitted by the Scientific Officers, viz., PWs 11 and 16, coupled with the post mortem certificate and the evidence of the Medical Officer, establish beyond doubt that this is a clear case of murder.

20. As discussed earlier, the extra-judicial confession made to PW-2 has been rightly accepted by the trial Court as the same is within the parameters of law and withstood the test of reasonableness and credibility. An overall assessment of the evidence of the prosecution witnesses clearly establishes the circumstances against the accused in a cogent manner. It is

seen from the evidence of PWs 2 & 3 that the appellant-accused had the motive, namely, he had a lustful eye towards his sister-in-law, which had been proved beyond doubt.

21. In justice delivery system, Courts are conscious and mindful of the proportion between the rigor of offence committed and the penalty imposed as also its impact on society in general and the victim of the crime in particular. Social impact of the crime where it relates to offences against women cannot be lost sight of and per se requires exemplary treatment. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court. Though the trial Court imposed life imprisonment which was upheld by the High Court in view of the gruesome act of rape followed by double murder, we are of the view that the authorities having power of remission have to be conscious and cannot pass any such order of remission lightly without adhering to various principles enunciated by this Court. [Vide *Swami Shraddananda (2) @ Murli Manohar Mishra vs. State of Karnataka* (2008) 13 SCC 767 and *Sahib Hussain @ Sahib Jan vs. State of Rajasthan* 2013 (6) Scale 219].

22. The High Court, while analyzing the entire prosecution case and the different versions, appreciated the efforts made by the team headed by Mr. A.G. Ponn Manickavel (Superintendent of Police) (PW-31), who in spite of being the Head of the District Police Force, keeping in view the importance and complicity of the crime, personally investigated the matter and brought all the relevant and acceptable materials before the Court of law. As appreciated by the High Court, we also express our appreciation to the team headed by Mr. A.G. Ponn Manickavel for their tireless investigation in presenting the truth before the Majesty of Law.

23. In the light of the above discussion, we are in entire agreement with the conclusion arrived at by the trial Court and affirmed by the High Court. Consequently, we dismiss the appeal being devoid of merits.

B.B.B. .

ANTRIX CORP. LTD.
v.
DEVAS MULTIMEDIA P. LTD.
(Arbitration Petition No. 20 of 2011)

MAY 10, 2013

[ALTAMAS KABIR, CJI AND SURINDER SINGH NIJJAR, J.]

Arbitration and Conciliation Act, 1996 - s.11, 13 & 34 - Party to a dispute invoking the jurisdiction of the International Chamber of Commerce (ICC) and appointment of arbitrator pursuant thereto - Entitlement of the other party to proceed in terms of s.11(6) in such a situation - Held: Where in terms of the agreement, the arbitration clause has already been invoked by one of the parties thereto under the ICC Rules, the provisions of s.11(6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an Arbitrator in terms of the Agreement, his/its remedy would be by way of a petition u/s.13, and, thereafter, u/s.34 - On facts, in view of the language of the Arbitration Agreement which provided that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce or UNCITRAL, the respondent was entitled to invoke the Rules of Arbitration of the ICC for the conduct of the arbitration proceedings - Once the provisions of the ICC Rules of Arbitration had been invoked by respondent, the proceedings initiated thereunder could not be interfered with in a proceeding u/s.11 - Invocation of the ICC Rules would be subject to challenge in appropriate proceedings but not by way of an application u/s.11(6) - Arbitration Petition u/s.11(6) for appointment of Arbitrator, therefore, rejected, but this will not prevent the Petitioner from taking recourse to other provisions of the Act for appropriate relief - International Chamber of Commerce (ICC) Rules.

The question which arose for consideration in the present arbitration petition was whether when one of the parties to a dispute has invoked the jurisdiction of the International Chamber of Commerce (ICC) and pursuant thereto an Arbitrator has already been appointed, the other party would be entitled to proceed in terms of Section 11(6) of the Arbitration and Conciliation Act, 1996.

Dismissing the petition, the Court

HELD: 1. Section 11 of the Arbitration and Conciliation Act, 1996 is very clear as to the circumstances in which parties to a dispute, and governed by an Arbitration Agreement, may apply for the appointment of an Arbitrator by the Chief Justice of the High Court or the Supreme Court. As is evident from the relevant provisions of Section 11 of the Act, when any of the parties to an Arbitration Agreement fails to act in terms thereof, on the application of the other party, the Chief Justice of the High Courts and the Supreme Court, in different situations, may appoint an Arbitrator. [Paras 27, 28] [469-D; 471-B, C]

2.1. In the instant case, the respondent-Devas, without responding to the Petitioner's letter written in terms of Article 20 of the Arbitration Agreement entered into between the parties, unilaterally addressed a Request for Arbitration to the ICC International Court of Arbitration for resolution of the disputes arising under the Agreement and also appointed its nominee Arbitrator. On the other hand, the Petitioner appointed its nominee Arbitrator with the caveat that the arbitration would be governed by the 1996 Act and called upon Devas to appoint its nominee Arbitrator under the said provisions. As Devas did not respond to the Petitioner's letter dated 30th July, 2011, the Petitioner filed the application under Section 11(6) of the 1996 Act. [Para 29] [471-D-E]

2.2. Once the Arbitration Agreement had been invoked by respondent-Devas and a nominee Arbitrator had also been appointed by it, the Arbitration Agreement could not have been invoked for a second time by the Petitioner, which was fully aware of the appointment made by the Respondent. It would lead to an anomalous state of affairs if the appointment of an Arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an Arbitrator. While the Petitioner was certainly entitled to challenge the appointment of the Arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an Arbitrator under Section 11(6) of the 1996 Act, such appointment can be questioned under Section 13 thereof. In a proceeding under Section 11 of the 1996 Act, the Chief Justice cannot replace one Arbitrator already appointed in exercise of the Arbitration Agreement. [Para 31] [472-B-E]

2.3. Sub-Section (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of Sub-Section (6) may be invoked by any of the parties. Where in terms of the Agreement, the arbitration clause has already been invoked by one of the parties thereto under the I.C.C. Rules, the provisions of Sub-section (6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an Arbitrator in terms of the Agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act. [Para 32] [473-A-C]

2.4. The law is well settled that where an Arbitrator had already been appointed and intimation thereof had been conveyed to the other party, a separate application

for appointment of an Arbitrator is not maintainable. Once the power has been exercised under the Arbitration Agreement, there is no power left to, once again, refer the same disputes to arbitration under Section 11 of the 1996 Act, unless the order closing the proceedings is subsequently set aside. When the Arbitral Tribunal is already seized of the disputes between the parties to the Arbitration Agreement, constitution of another Arbitral Tribunal in respect of those same issues which are already pending before the Arbitral Tribunal for adjudication, would be without jurisdiction. [Para 33] [473-D-F]

2.5. In view of the language of Article 20 of the Arbitration Agreement which provided that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce or UNCITRAL, Devas was entitled to invoke the Rules of Arbitration of the ICC for the conduct of the arbitration proceedings. Article 19 of the Agreement provided that the rights and responsibilities of the parties thereunder would be subject to and construed in accordance with the laws of India. There is, therefore, a clear distinction between the law which was to operate as the governing law of the Agreement and the law which was to govern the arbitration proceedings. Once the provisions of the ICC Rules of Arbitration had been invoked by Devas, the proceedings initiated thereunder could not be interfered with in a proceeding under Section 11 of the 1996 Act. The invocation of the ICC Rules would, of course, be subject to challenge in appropriate proceedings but not by way of an application under Section 11(6) of the 1996 Act. Where the parties had agreed that the procedure for the arbitration would be governed by the ICC Rules, the same would necessarily include the appointment of an Arbitral Tribunal in terms of the Arbitration e

said Rules. Arbitration Petition No.20 of 2011 under Section 11(6) of the 1996 Act for the appointment of an Arbitrator must, therefore, fail and is rejected, but this will not prevent the Petitioner from taking recourse to other provisions of the aforesaid Act for appropriate relief. [Para 34] [473-G-H; 474-A-D]

Som Datt Builders Pvt. Ltd. vs. State of Punjab **2006 (3) RAJ 144 (P&H) - approved.**

Sumitomo Heavy Industries Ltd. vs. ONGC Ltd. & Ors. **(1998) 1 SCC 305: 1997 (6) Suppl. SCR 186;** *National Thermal Power Corporation vs. Singer Company* **(1992) 3 SCC 551: 1992 (3) SCR 106;** *SBP & Co. vs. Patel Engineering Ltd. & Anr.* **(2005) 8 SCC 618: 2005 (4) Suppl. SCR 688;** *Gas Authority of India Ltd. vs. Keti Construction (I) Ltd. & Ors.* **(2007) 5 SCC 38: 2007 (6) SCR 439;** *Sudarsan Trading Co. vs. Government of Kerala & Anr.* **(1989) 2 SCC 38: 1989 (1) SCR 665;** *McDermott International Inc. vs. Burn Standard Co. Ltd. & Ors.* **(2006)11 SCC 181: 2006 (2) Suppl. SCR 409;** *Gesellschaft Fur Biotechnologische Forschun GMBH vs. Kopran Laboratories Ltd. & Anr.* **(2004) 13 SCC 630 - referred to.**

Case Law Reference:

1997 (6) Suppl. SCR 186	**referred to**	**Para 13**
1992 (3) SCR 106	**referred to**	**Para 15**
2005 (4) Suppl. SCR 688	**referred to**	**Para 16**
2007 (6) SCR 439	**referred to**	**Para 21**
1989 (1) SCR 665	**referred to**	**Para 22**
2006 (2) Suppl. SCR 409	**referred to**	**Para 22**
(2004) 13 SCC 630	**referred to**	**Para 31**
2006 (3) RAJ 144 (P&H)	**approved**	**Para 33**

ORIGINAL JURISDICTION : Arbitration Petition No. 20 of 2011

R.F. Nariman, S.G.I., Bindu Saxena, Shailendra Swarup, Ritin Rai, Aparajita Swarup, K.k. Patra, Neha Khattar for the Petitioner.

Ciccu Mukhopadhya, Manu Nair, Omar Ahmad, Sanjay Kumar, Anish Maheshwari for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, CJI. 1. An application under Section 11(4) read with Section 11(10) of the Arbitration and Conciliation Act, 1996, hereinafter referred to as "the 1996 Act", has given rise to an important question of law relating to the scope and ambit of the powers of the Chief Justice under Section 11(6) of the said Act. In view of the importance of the question, which has arisen, the matter which was being heard by the delegatee of the Chief Justice, has been referred to a larger Bench for determination thereof.

2. M/s. Antrix Corporation Limited, the Petitioner herein, a Government Company incorporated under the Companies Act, 1956, and engaged in the marketing and sale of products and services of the Indian Space Research Organization (ISRO), entered into an Agreement with the Respondent, Devas Multimedia P. Ltd., hereinafter referred to as "Devas" on 28th January, 2005, for the lease of Space Segment Capacity on ISRO/ Antrix S-Band Spacecraft. Article 19 of the Agreement empowered the Petitioner to terminate the Agreement in certain contingencies. It also provided that the Agreement and the rights and responsibilities of the parties thereunder would be subject to and construed in accordance with the laws of India. In other words, the domestic law would be the governing law of the Agreement.

3. Article 20 of the Agreement deals specially with

arbitration and provides that in the event any dispute or difference arises between the parties as to any clause or provision of the Agreement, or as to the interpretation thereof, or as to any account or valuation, or as to rights and liabilities, acts, omissions of any party, such disputes would be referred to the senior management of both the parties to resolve the same within 3 weeks, failing which the matter would be referred to an Arbitral Tribunal comprising of three Arbitrators. It was provided that the seat of arbitration would be New Delhi in India. It was also provided that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce (ICC) or UNCITRAL.

4. On 25th February, 2011, the Petitioner Company terminated the Agreement with immediate effect in terms of Article 7(c) read with Article 11(b) of the Agreement in keeping with the directives of the Government, which it was bound to follow under Article 103 of its Articles of Association. By its letter dated 28th February, 2011, the Respondent objected to the termination. On 15th April, 2011, the Petitioner Company sent to the Respondent Company a cheque for Rs. 58.37 crores refunding the Upfront Capacity Reservation Fee received from Devas. The said cheque was, however, returned by Devas on 18th April, 2011, insisting that the Agreement was still subsisting.

5. In keeping with the provisions of Article 20 of the Arbitration Agreement, the Petitioner wrote to the Respondent Company on 15th June, 2011, nominating its senior management to discuss the matter and to try and resolve the dispute between the parties. However, without exhausting the mediation process, as contemplated under Article 20(a) of the Agreement, Devas unilaterally and without prior notice to the Petitioner, addressed a Request for Arbitration to the ICC International Court of Arbitration on 29th June, 2011, seeking resolution of the dispute arising under the Agreement. Through the unilateral Request for Arbitration, Devas sought the

constitution of an Arbitral Tribunal in accordance with the ICC Rules of Arbitration, hereinafter referred to as "the ICC Rules", and nominated one Mr. V.V. Veedar, Queen's Counsel, as its nominee Arbitrator, in accordance with the ICC Rules.

6. According to the Petitioner, it is only on 5th July, 2011, that it came to learn that Devas had approached the ICC and had nominated Mr. V.V. Veedar, as its nominee Arbitrator, upon receipt of a copy of the Respondent's Request for Arbitration forwarded by the ICC. By the said letter, the Petitioner was also invited to nominate its nominee Arbitrator.

7. Instead of nominating its Arbitrator, the Petitioner, by its letter dated 11th July, 2011, once again requested Devas to convene the Senior Management Team meet on 27th July, 2011, in terms of the Agreement. Pursuant to such request, a meeting of the Senior Management Team was held, but Devas insisted that the parties should proceed to arbitration and did not discuss the issues in accordance with Article 20(a) of the Agreement. Despite the attempt to resolve the dispute through the Senior Management Team and despite the fact that Devas had already invoked the Arbitration Agreement by making a Request for Arbitration to the ICC and had also appointed its nominee Arbitrator under the ICC Rules, the Petitioner appointed Mrs. Justice Sujata V. Manohar, as its Arbitrator and called upon Devas to appoint its nominee Arbitrator within 30 days of receipt of the notice. Consequently, while Devas had invoked the jurisdiction of the ICC on 29th June, 2011, the Petitioner subsequently invoked the Arbitration Agreement in accordance with the UNCITRAL Rules on the ground that Devas had invoked ICC Rules unilaterally, without allowing the Petitioner to exercise its choice. Having invoked the Arbitration Agreement under the UNCITRAL Rules, the Petitioner called upon the Respondent to appoint its Arbitrator within 30 days of receipt of the notice.

8. On 5th August, 2011, the Petitioner wrote to the Secretariat of the ICC Court stating th s

Arbitrator, in accordance with the Agreement between the parties, asserting that in view of Article 20 of the Agreement, the arbitral proceedings would be governed by the Indian law, viz., the Arbitration and Conciliation Act, 1996.

9. The Respondent did not reply to the Petitioner's letter dated 30th July, 2011. However, the International Chamber of Commerce, by its letter dated 3rd August, 2011, responded to the Petitioner's letter dated 30th July, 2011, and indicated as follows :

> "We refer to our letter dated 18 July, 2011, and remind the parties that the issues raised regarding the arbitration clause would shortly be submitted to the Court for consideration. All comments submitted by the parties will be brought to the Court's attention. In this regard, any final comments from the parties may be submitted to us by 5 August, 2011.
>
> Should the Court decide that this arbitration shall proceed pursuant to Article 6(2) of the Rules, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself."

10. It is in such circumstances that the application under Section 11(4) read with Section 11(10) of the 1996 Act, being Arbitration Petition No. 20 of 2011, came to be filed by the Petitioner, *inter alia*, for a direction upon Devas to nominate its Arbitrator in accordance with the Agreement dated 28th January, 2005, and the UNCITRAL Rules, to adjudicate upon the disputes, which had arisen between the parties and to constitute the Arbitral Tribunal and to proceed with the Arbitration.

11. The said application came to be listed before one of us, Surinder Singh Nijjar, J., the Designate of the Chief Justice, who was of the view that the questions involved in the

application were required to be heard by a larger Bench. The parties were requested to propose the questions of law to be considered by the Larger Bench and the same are as follows:

> "i) Where the arbitration clause contemplates the application of either ICC Rules or UNCITRAL Rules after the constitution of the Tribunal, could a party unilaterally proceed to invoke ICC to constitute the Tribunal and proceed thereafter?
>
> ii) Whether the judgment of this Hon'ble Court in TDM Infrastructure v. UE Development reported in (2008) 14 SCC 271 lays down the correct law with reference to the definition of International Commercial Arbitration?
>
> iii) Whether the jurisdiction of the Court under Section 11 extends to declaring as invalid the constitution of an arbitral tribunal purportedly under an arbitration agreement, especi-ally, where the tribunal has been constituted by an Institution purportedly acting under the Arbitration agreement?
>
> iv) Whether the jurisdiction of an arbitral tribunal constituted by an institution purportedly acting under an arbitration agreement can be assailed only before the Tribunal and in proceedings arising from the decision or award of such Tribunal and not before the Court under Section 11 of the Act?
>
> v) Whether, once an arbitral tribunal has been constituted, the Court has jurisdiction under Section 11 of the Act to interfere and constitute another Tribunal?
>
> vi) Whether an arbitration between two Indian companies could be an international commercial arbi-tration within the meani[illegible] of the Act if the management a[illegible]e

said companies is exercised in any country other than India?

vii) Whether the petition is maintainable in light of the reliefs claimed and whether the conditions precedent for the exercise of jurisdiction under Section 11 of the Act are satisfied or not?"

12. While the matter was pending, most of the seven questions raised were resolved. However, the most important issue as to whether Section 11 of the 1996 Act could be invoked when the ICC Rules had already been invoked by one of the parties, remains to be decided.

13. On behalf of the Petitioner, reliance was sought to be placed on the decision of this Court in *Sumitomo Heavy Industries Ltd. Vs. ONGC Ltd. & Ors.* [(1998) 1 SCC 305], wherein different laws that could apply to an arbitral relationship had been explained, namely :

(i) The proper law of the underlying contract is the law governing the contract which creates the substantive rights and obligations of the parties with regard to the contract.

(ii) The proper law of the arbitration agreement is the law governing the rights and obligations of the parties arising from the arbitration agreement.

(iii) The proper law of the reference is the law governing the contract which regulates the individual reference to arbitration.

(iv) The curial law is the law governing the arbitration proceedings and the manner in which the reference has to be conducted. It governs the procedural powers and duties of the arbitrators, questions of evidence and the determination of the proper law of the contract.

14. It was submitted that in the instant case, the proper law of the contract is the Indian law and the proper law of the Arbitration Agreement is the Arbitration and Conciliation Act, 1996. Accordingly, matters relating to the constitution of the Arbitral Tribunal would be governed by Sections 10 to 15 of the 1996 Act. It was pointed out by learned counsel that the parties had agreed that the arbitration proceedings could be conducted either in accordance with the rules and procedures of the ICC or UNCITRAL. The choice of the procedure to be adopted by the Arbitral Tribunal in conducting the arbitration was left to the determination of the parties under Section 19(2) of the 1996 Act. It was submitted that the choice of the applicable procedural law could be exercised only after the constitution of the Arbitral Tribunal and not at any stage prior thereto.

15. It was also submitted that in addition to the clear provision of Section 2(2) of the 1996 Act and the Agreement between the parties that the place of arbitration would be New Delhi, the Agreement would be expressly governed by Indian law under Article 19 of the Agreement. Accordingly, as was held in *National Thermal Power Corporation Vs. Singer Company* [(1992) 3 SCC 551], the proper law of the contract would be the Indian law which would govern the arbitration Agreement. It was submitted that the cardinal test, as suggested by Dicey in his "Conflict of Laws", stood fully satisfied and that the governing law of the arbitration would be the law chosen by the parties, or in the absence of any agreement, the law of the country in which the arbitration is held. Learned counsel submitted that according to Dicey, the proper law of the arbitration is normally the same as the proper law of the contract. It is only in exceptional cases that it is not so, even where the proper law of the contract is expressly chosen by the parties.

16. However, as indicated hereinbefore, the question with which we are concerned is whether the Arbitration Agreement contemplates the application of Section 11 of the 1996 Act after the ICC Rules had been invoked by or[illegible]h

also appointed its nominee Arbitrator. Equally important is the question whether Section 11 of the 1996 Act empowers the Chief Justice to constitute a Tribunal in supersession of the Tribunal already in the stage of constitution under the ICC Rules, notwithstanding the fact that one of the parties had proceeded unilaterally in the matter. Learned counsel for the Petitioner urged that since the Arbitration Agreement contemplates the constitution of an Arbitral Tribunal without any reference to the ICC Rules or the ICC Court, the recourse taken by Devas to approach the ICC Court was without any basis and was contrary to the express agreement between the parties. Learned counsel also referred to the decision of this Court in *SBP & Co. vs. Patel Engineering Ltd. & Anr. [*(2005) 8 SCC 618], in this regard.

17. Learned counsel further urged that the issue as to whether once an Arbitral Tribunal has been constituted, the Chief Justice has jurisdiction under Section 11 of the 1996 Act to constitute another Tribunal, presupposes that an Arbitral Tribunal has been validly constituted and is not a Tribunal constituted by one party acting entirely in contravention of the Arbitration Agreement between the parties. It was contended that till such time as the question of jurisdiction was considered by the Court under Section 11, the question of a separate Tribunal being constituted by the International Chamber of Commerce did not arise. According to learned counsel, in fact, the constitution of the Arbitral Tribunal by the ICC Court amounted to usurpation of the exclusive jurisdiction of the Chief Justice under Section 11 of the 1996 Act. It was submitted that initially the Court would have to be moved under Section 11 of the 1996 Act and it would have to examine whether it would have the jurisdiction to entertain the request and whether the condition for exercise of its powers to take necessary measures to secure the appointment of the Arbitrator, at all existed. If the answer to both the issues was in the affirmative, the Court was duty bound to appoint the Arbitrator.

18. On the other hand, on behalf of Devas it was submitted that the choice of an institution under whose auspices the arbitration was to be held, would have to be made once the Arbitral Tribunal had been constituted. It was contended that what was intended by the Arbitration Agreement was the formation of an ad-hoc Tribunal which would have to follow one of the two procedures prescribed.

19. It was submitted that Devas had already invoked the Arbitration Agreement and had sought the constitution of an Arbitral Tribunal, after having chosen its nominee Arbitrator, in accordance with the ICC Rules of Arbitration. It was further submitted that since the Arbitral Tribunal had been constituted under the ICC Rules, any objection as to whether or not the Tribunal had been properly constituted would have to be raised before the Arbitral Tribunal itself. It is only in such objection that the Arbitral Tribunal would have to decide as to whether a Tribunal was required to be constituted before application of the ICC or UNCITRAL Rules, inasmuch as, according to the Agreement, the Claimant in the arbitration has the right to choose any of the two Rules when commencing the arbitration.

20. Reliance was placed on Section 16 of the 1996 Act which incorporates the *Kompetenz Kompetenz* principle within its scope. Since the arbitration was to be governed by Part I of the 1996 Act, the Tribunal would have complete authority over all issues, including the validity of its constitution.

21. Reference was also made to the decision of this Court in *Gas Authority of India Ltd. vs. Keti Construction (I) Ltd. & Ors.*[(2007) 5 SCC 38], wherein the aforesaid principle contained in Section 16 of the 1996 Act had been referred to. Learned counsel submitted that in arriving at the aforesaid decision, this Court had fully considered its decision in *SBP & Co.* (supra). It was submitted that the question regarding the validity of the constitution of the Arbitral Tribunal, upon a proper construction of Article 20 of the Agreement would, therefore, have to be left for decision to the said

22. On the question as to whether the Chief Justice or his Designate would be entitled in exercise of their jurisdiction under Section 11 of the 1996 Act, to question the validity of the appointment of an Arbitral Tribunal, both the parties were *ad idem* that they could not. It was urged that the decision in *SBP & Co.* (supra) does not contemplate such a course of action. In this regard, reference was also made by learned counsel for the Respondent to the decision of this Court in *Sudarsan Trading Co. vs. Government of Kerala & Anr*. [(1989) 2 SCC 38], wherein it was held that once there is no dispute as to the contract, the interpretation thereof is for the Arbitrator and not the Courts, and the Court cannot substitute its own decision for that taken by the learned Arbitrator. It was urged that Section 5 of the 1996 Act also supports such construction as it bars any interference by the Court, except as provided in the Act. Learned counsel also submitted that as had been held by this Court in *McDermott International Inc. vs. Burn Standard Co. Ltd. & Ors*. [(2006) 11 SCC 181], after the 1996 Act came into force, it was for the party questioning the authority of the Arbitrator to raise such question at the earliest point of time after the commencement of the Arbitration proceedings, under Section 16 of the 1996 Act, and a decision thereupon could be challenged under Section 34 of the said Act.

23. On behalf of Devas, it was also contended that the issue raised relating to jurisdiction falls outside the first category of cases, on account of the fact that the Petitioner's claim that the Tribunal must be constituted first before application of either of the ICC Rules or the UNCITRAL Rules, essentially involves the question as to whether the Arbitration clause excludes the applicability of the Rules prior to the constitution of the Tribunal and that the constitution of the Tribunal is, therefore, reserved for a decision under Section 11 of the 1996 Act. Learned counsel for the Respondent submitted that in the facts of the case, the Chief Justice, in exercise of his power under Section 11(6) of the 1996 Act, was not entitled to question the validity of the appointment of the Arbitral Tribunal and the instant

Arbitration Petition was liable to be dismissed.

24. As indicated hereinbefore, the question which we are called upon to decide is whether when one of the parties has invoked the jurisdiction of the International Chamber of Commerce and pursuant thereto an Arbitrator has already been appointed, the other party to the dispute would be entitled to proceed in terms of Section 11(6) of the 1996 Act.

25. In order to answer the said question, we will have to refer back to the provisions relating to arbitration in the agreement entered into between the Petitioner and the Respondent on 28th January, 2005. Article 19 in clear terms provides that the rights and responsibilities of the parties under the Agreement would be subject to and construed in accordance with the laws in India, which, in effect, means the Arbitration and Conciliation Act, 1996. Article 20 of the Agreement specifically deals with arbitration and provides that disputes between the parties regarding the provisions of the Agreement or the interpretation thereof, would be referred to the Senior Management of both the parties for resolution within three weeks, failing which the dispute would be referred to an Arbitral Tribunal comprising of three Arbitrators. It was also provided that the seat of arbitration would be New Delhi in India and the arbitration would be conducted in accordance with the rules and procedures of the International Chamber of Commerce or UNCITRAL.

26. The Respondent has invoked the provisions of Article 20 of the Agreement and has approached the ICC for the appointment of an Arbitral Tribunal in accordance with the rules of arbitration and, pursuant thereto, the Respondent appointed its nominee Arbitrator. In fact, after the Respondent had invoked the arbitration clause, the Petitioner came to know of the same from the Respondent's request for arbitration which was forwarded by the ICC to the Petitioner on 5th July, 2011. By the said letter, the Petitioner was also invited by the ICC to nominate its nominee Arbitrator, and

hereinbefore, instead of nominating its Arbitrator, the Petitioner once again requested Devas to convene the Senior Management Meet on 27th July, 2011, in terms of the Agreement. Simultaneously, the Petitioner appointed a former Judge of this Court, Mrs. Sujata V. Manohar, as its Arbitrator and informed the ICC Court accordingly. However, disputes were also raised by the Petitioner with the ICC that since the Agreement clearly intended that the arbitration proceedings would be governed by the Indian law, which was based on the UNCITRAL model, it was not available to the Respondent to unilaterally decide which of the rules were to be followed. It was only thereafter that the Petitioner took recourse to the provisions of Section 11(4) of the 1996 Act, giving rise to the questions which have been set out hereinbefore in paragraph 11, of which only one has survived for our consideration.

27. Section 11 of the 1996 Act is very clear as to the circumstances in which parties to a dispute, and governed by an Arbitration Agreement, may apply for the appointment of an Arbitrator by the Chief Justice of the High Court or the Supreme Court. For the sake of reference, the relevant provisions of Section 11 are reproduced hereinbelow :-

"**11. Appointment of arbitrators.**

(1) A person of any nationality may be an arbitrator, unless otherwise agreed by the parties.

(2) Subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators.

(3) Failing any agreement referred to in sub-section (2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

(4) If the appointment procedure in sub- section (3) applies and-

(a) a party fails to appoint an arbitrator within thirty days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within thirty days from the date of their appointment,

the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(5) Failing any agreement referred to in sub-section (2), in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator within thirty days from receipt of a request by one party from the other party to so agree the appointment shall be made, upon request of a party, by the Chief Justice or any person or institution designated by him.

(6) Where, under an appointment procedure agreed upon by the parties,-

(a) a party fails to act as required under that procedure; or

(b) the parties, or the two appointed arbitrators, fail to reach an agreement expected of them under that procedure; or

(c) a person, including an institution, fails to perform any function entrusted to him or it under that procedure,

a party may request the Chief Justice or any person or institution designated by him to [illegible] y

measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(7) A decision on a matter entrusted by sub-section (4) or sub-section (5) or sub- section (6) to the Chief Justice or the person or institution designated by him is final."

28. As will be evident from the aforesaid provisions, when any of the parties to an Arbitration Agreement fails to act in terms thereof, on the application of the other party, the Chief Justice of the High Courts and the Supreme Court, in different situations, may appoint an Arbitrator.

29. In the instant case, Devas, without responding to the Petitioner's letter written in terms of Article 20 of the Arbitration Agreement, unilaterally addressed a Request for Arbitration to the ICC International Court of Arbitration for resolution of the disputes arising under the Agreement and also appointed its nominee Arbitrator. On the other hand, the Petitioner appointed its nominee Arbitrator with the caveat that the arbitration would be governed by the 1996 Act and called upon Devas to appoint its nominee Arbitrator under the said provisions. As Devas did not respond to the Petitioner's letter dated 30th July, 2011, the Petitioner filed the application under Section 11(6) of the 1996 Act.

30. In the instant case, the Arbitration Agreement provides that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce or UNCITRAL. Rightly or wrongly, Devas made a request for arbitration to the ICC International Court of Arbitration on 29th June, 2011, in accordance with the aforesaid Agreement and one Mr. V.V. Veedar was appointed by Devas as its nominee Arbitrator. By the letter written by the International Chamber of Commerce on 5th July, 2011, the Petitioner was required to appoint its nominee Arbitrator, but it chose not to do so and instead made an application under

Section 11(6) of the 1996 Act and also indicated that it had appointed Mrs. Justice Sujata V. Manohar, as its Arbitrator in terms of Article 20(9) of the Agreement.

31. The matter is not as complex as it seems and in our view, once the Arbitration Agreement had been invoked by Devas and a nominee Arbitrator had also been appointed by it, the Arbitration Agreement could not have been invoked for a second time by the Petitioner, which was fully aware of the appointment made by the Respondent. It would lead to an anomalous state of affairs if the appointment of an Arbitrator once made, could be questioned in a subsequent proceeding initiated by the other party also for the appointment of an Arbitrator. In our view, while the Petitioner was certainly entitled to challenge the appointment of the Arbitrator at the instance of Devas, it could not do so by way of an independent proceeding under Section 11(6) of the 1996 Act. While power has been vested in the Chief Justice to appoint an Arbitrator under Section 11(6) of the 1996 Act, such appointment can be questioned under Section 13 thereof. In a proceeding under Section 11 of the 1996 Act, the Chief Justice cannot replace one Arbitrator already appointed in exercise of the Arbitration Agreement. It may be noted that in case of *Gesellschaft Fur Biotechnologische Forschun GMBH Vs. Kopran Laboratories Ltd. & Anr.* [(2004) 13 SCC 630], a learned Single Judge of the Bombay High Court, while hearing an appeal under Section 8 of the 1996 Act, directed the claims/disputes of the parties to be referred to the sole arbitration of a retired Chief Justice with the venue at Bombay, despite the fact that under the Arbitration Agreement it had been indicated that any disputes, controversy or claim arising out of or in relation to the Agreement, would be settled by arbitration in accordance with the Rules of Reconciliation of the International Chamber of Commerce, Paris, with the venue of arbitration in Bombay, Maharashtra, India. This Court held that when there was a deviation from the methodology for appointment of an Arbitrator, it was incumbent on the part of the C n

reasons for such departure.

32. Sub-Section (6) of Section 11 of the 1996 Act, quite categorically provides that where the parties fail to act in terms of a procedure agreed upon by them, the provisions of Sub-Section (6) may be invoked by any of the parties. Where in terms of the Agreement, the arbitration clause has already been invoked by one of the parties thereto under the I.C.C. Rules, the provisions of Sub-section (6) cannot be invoked again, and, in case the other party is dissatisfied or aggrieved by the appointment of an Arbitrator in terms of the Agreement, his/its remedy would be by way of a petition under Section 13, and, thereafter, under Section 34 of the 1996 Act.

33. The law is well settled that where an Arbitrator had already been appointed and intimation thereof had been conveyed to the other party, a separate application for appointment of an Arbitrator is not maintainable. Once the power has been exercised under the Arbitration Agreement, there is no power left to, once again, refer the same disputes to arbitration under Section 11 of the 1996 Act, unless the order closing the proceedings is subsequently set aside. In *Som Datt Builders Pvt. Ltd. Vs. State of Punjab* [2006 (3) RAJ 144 (P&H)], the Division Bench of the Punjab & Haryana High Court held, and we agree with the finding, that when the Arbitral Tribunal is already seized of the disputes between the parties to the Arbitration Agreement, constitution of another Arbitral Tribunal in respect of those same issues which are already pending before the Arbitral Tribunal for adjudication, would be without jurisdiction.

34. In view of the language of Article 20 of the Arbitration Agreement which provided that the arbitration proceedings would be held in accordance with the rules and procedures of the International Chamber of Commerce or UNCITRAL, Devas was entitled to invoke the Rules of Arbitration of the ICC for the conduct of the arbitration proceedings. Article 19 of the Agreement provided that the rights and responsibilities of the

parties thereunder would be subject to and construed in accordance with the laws of India. There is, therefore, a clear distinction between the law which was to operate as the governing law of the Agreement and the law which was to govern the arbitration proceedings. Once the provisions of the ICC Rules of Arbitration had been invoked by Devas, the proceedings initiated thereunder could not be interfered with in a proceeding under Section 11 of the 1996 Act. The invocation of the ICC Rules would, of course, be subject to challenge in appropriate proceedings but not by way of an application under Section 11(6) of the 1996 Act. Where the parties had agreed that the procedure for the arbitration would be governed by the ICC Rules, the same would necessarily include the appointment of an Arbitral Tribunal in terms of the Arbitration Agreement and the said Rules. Arbitration Petition No.20 of 2011 under Section 11(6) of the 1996 Act for the appointment of an Arbitrator must, therefore, fail and is rejected, but this will not prevent the Petitioner from taking recourse to other provisions of the aforesaid Act for appropriate relief.

35. The Arbitration Petition is, therefore, dismissed.

36. Having regard to the facts of the case, each party shall bear its own costs.

B.B.B. Arbitration Petition dismissed.

MARKIO TADO

v.

TAKAM SORANG

(Civil Appeal No. 8260 of 2012)

MAY 10, 2013

[G.S. SINGHVI AND H.L. GOKHALE, JJ.]

Constitution of India, 1950 - Article 141 - Act of judicial impropriety - State Legislative Assembly elections - Appellant declared elected defeating his nearest rival, the respondent No.1 - Respondent No. 1 filed election Petition challenging the election of appellant on ground of corrupt practice of booth capturing - Respondent no.1 also moved I.A. alleging double voting claiming it to be a facet of booth capturing, and praying for calling of the records of the voters' counterfoils (in Form 17A) - Single Judge of the High Court called for such records, but that order set aside by the Supreme Court on ground that impersonation and double voting would amount to deception and it will be a facet of improper reception of votes and not booth capturing - Notwithstanding the judgment of Supreme Court, subsequently, the Single Judge of the High Court directed the registers of voters (Form 17A) to be sent to FSL for scientific examination and verification of signatures/finger prints and after examination of court witnesses including finger print expert, and the defence witnesses, allowed the Election Petition - Further, the Single Judge held that respondent no.1 had received more votes, and therefore, declared him as elected from the constituency concerned - On appeal, held: The Single Judge of High Court clearly transgressed the limits of his jurisdiction by going into the counterfoils of the voters inspite of the fact that the Supreme Court had already ruled in the facts of the present case, that no case was made out for calling of the counterfoils - This amounts to nothing but judicial indiscipline and disregard of

the mandate of Article 141 of the Constitution - The Election Petition was filed only on the ground of booth capturing which was not established - The Single Judge entered into an impermissible exercise, and deleted the votes received by the appellant which he considered to be tainted votes - The Judge ignored that even if the ground of improper reception of votes u/s.100(1)(d)(iii) was to be taken, the respondent no.1 had failed to establish that the result of the election of the appellant had been materially affected by such improper reception of votes - Further, this resulted into a waste of the time of the Court, which is so precious - Representation of the People's Act, 1951 - s.123 (8) r/w s.135A & s.100 (1) (d) (iii) - Judicial discipline.

In the State Legislative Assembly elections, the appellant was declared elected defeating his nearest rival, the respondent No. 1, by 2713 votes. Respondent No. 1 filed election Petition before a Single Judge of the High Court challenging the election of appellant on the ground of corrupt practice of booth capturing.

The respondent no.1 also moved an interlocutory application alleging double voting and praying for calling of the records of the voters' counterfoils (in Form 17A). The Single Judge of the High Court called for the record of registers of voters' counterfoils in form 17A, but that order was set aside by the Supreme Court in Civil Appeal No. 1539 of 2012. The Supreme Court held that booth capturing is a specific corrupt practice under section 123 (8) read with section 135A of the Representation of the People's Act, 1951 which involves use of force, whereas impersonation or double voting is on the basis of deception; that impersonation or double voting would lead to improper reception of votes, which is another ground for declaring an election to be void under section 100 (1) (d) (iii) of the Act, and this ground was not pleaded in the petition nor was any issue fra[illegible]l;

that having failed to place any material with respect to either booth capturing or impersonation, the first respondent was trying to make fishing and roving inquiry to improve his case by calling for the record of the voters register, in support of his grievance of double voting and that an order for inspection of ballot papers could not be granted to support the vague pleas made in the petition not supported by material facts or to fish out the evidence to support such pleas.

Notwithstanding the judgment of the Supreme Court, subsequently, the Single Judge of the High Court directed the registers of voters (Form 17A) to be sent to the Forensic Science Laboratory (FSL) for scientific examination and verification of signatures/finger prints appearing in Form 17A and for ascertaining as to whether the thumb impression and signatures contained and recorded in Form 17A (voters register) were put single handedly and fraudulently by few persons as a measure of impersonation of the genuine voters concerned. The Single Judge thereafter proceeded to examine court witnesses including finger print expert, and also examined the defence witnesses, and thereafter allowed the Election Petition, holding the election of appellant to be void. On the basis of the calculations of votes made by the Judge, the Single Judge held that respondent no.1 had received more votes, and therefore, declared him as elected from the constituency concerned. This order was challenged in the present appeal under Section 116A of the Representation of the People's Act, 1951.

Allowing the appeal, the Court

HELD: 1. The Election Petition was filed only on the ground of booth capturing. The respondent No. 1 himself accepted that he could not name any person involved in the act of booth capturing. The evidence on record

clearly showed that, apart from some allegations, there was no material evidence placed in support thereof. The petitioner tried to claim impersonation and double voting as a facet of booth capturing. This submission was already rejected by this Court while deciding C.A No. 1539 of 2012 by holding that impersonation and double voting would amount to deception and it will be a facet of improper reception of votes and not booth capturing. Booth capturing involves use of force and that was not established. The petition was not filed on the ground of improper reception of votes. Even if that ground was to be looked into, the respondent No. 1 accepted in his evidence that he had no direct evidence regarding casting of votes by impersonation. [Para 23] [492-B-E]

Hari Ram v. Hira Singh **AIR 1984 SC 396;** *Fulena Singh v. Vijoy Kr. Sinha* **2009 (5) SCC 290: 2009 (1) SCR 748;** *Ram Sevak Yadav v. Hussain Kamil Kidwai* **AIR 1964 SC 1249: 1964 SCR 235 and** *Markio Tado v. Takam Sorang and Ors.* **2012 (3) SCC 236: 2012 (4) SCR 661 - referred to.**

2. The Single judge of the High Court clearly transgressed the limits of his jurisdiction, by going into the exercise of calling for the handwriting and finger print experts, and comparing the voters' signatures and finger prints with the help of the records in Form 17A, when that was clearly held to be impermissible in the present case itself. This is apart from the fact that this has resulted into a waste of the time of the Court, which is so precious. The evidence was recorded on a number of dates and so many witnesses, including public officers, were called when their evidence was not required. The Judge clearly ignored that the law declared by this Court is binding on all courts within the territory of India under Article 141 of the Constitution, and judicial discipline required him to follow the mandate of the Constitution. He entered into an impermissible exercise, and delet[illegible]d

by the appellant which he considered to be tainted votes. The judge, therefore, ignored that even if the ground of improper reception of votes under section 100(1)(d)(iii) was to be taken, the respondent no.1 had failed to establish that the result of the election of the appellant had been materially affected by such improper reception of votes. The decision of the Single Judge was therefore clearly flawed and untenable. [Paras 24, 25] [492-F-G; 493-F; 494-B-C]

Azar Hussain v. Rajiv Gandhi **AIR 1986 SC 1253: 1986 SCR 782 - referred to.**

3. The Single Judge of the High Court went into the counterfoils of the voters inspite of the fact that this court had already ruled in the judgment in C.A. 1539 of 2010, that in the facts of the present case, no case was made out for calling of the counterfoils. It is not that he was unaware of the judgment rendered by this court. However, he proceeded to act exactly contrary to the direction contained in the said judgment which amounts to nothing but judicial indiscipline and disregard to the mandate of Article 141 of the Constitution. This is shocking, to say the least, and most unbecoming of a judge holding a high position such as that of a High Court Judge. It is unfortunate that such acts of judicial impropriety are repeated inspite of clear judgments of this court on the significance of Article 141 of the Constitution. [Para 26 & 27] [494-D-F, H; 495-A]

Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. and Anr. **(1997) 6 SCC 450: 1997 (1) Suppl. SCR 184;** *State of West Bengal & Ors. v. Shivanand Pathak and Ors.* **(1998) 5 SCC 513: 1998 (1) SCR 811 - referred to.**

4. The Election petition filed by the respondent no.1 is accordingly dismissed. [Para 28] [495-G]

Case Law Reference:

AIR 1984 SC 396	**referred to**	**Para 15**
2009 (1) SCR 748	**referred to**	**Para 15**
1964 SCR 235	**referred to**	**Para 18**
2012 (4) SCR 661	**referred to**	**Para 10**
1986 SCR 782	**referred to**	**Para 24**
1997 (1) Suppl. SCR 184	**referred to**	**Para 27**
1998 (1) SCR 811	**referred to**	**Para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8260 of 2012.

From the Judgment and Order dated 12.11.2012 of the Gauhati High Court in Election Petition No. 1 (AP) of 2012.

Manish Goswami (for Map & Co.) for the Appellant.

Abhijit Sengupta for the Respondent.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. This statutory appeal under Section 116A of the Representation of the People's Act, 1951, seeks to challenge the judgment and order of the Gauhati High Court dated 12.11.2012, allowing the Election Petition No. 1(AP) of 2009, renumbered as Election Petition No. 1 (AP) of 2012, filed by the Respondent No. 1 whereby the election of the appellant from 20-Tali (ST) constituency of the Arunanchal Pradesh Assembly was declared void, and whereby the first respondent was declared elected to the State Legislative Assembly from the said constituency. After passing of the said judgment and order, the appellant applied for the stay of the said order, and the learned Judge by his order dated 16.11.2012 stayed the impugned judgment and order for a period of 14 days from the date of the said order. He made it clear [illegible]

have the right to participate in the assembly proceedings but will not have the right to vote and will not be entitled to any remuneration as an elected member of the assembly. This appeal, therefrom, was admitted on 27.11.2012, and by the order passed on that date by this Court, the above order dated 16.11.2012 was directed to continue to remain in operation. This interim order has been subsequently continued until further orders.

2. Facts leading to this appeal are as follows. The appellant and the respondent No. 1 herein contested the election to the Arunachal Pradesh Legislative Assembly from 20-Tali (ST) Assembly Constituency held in October 2009. The respondent no.1 was the sitting MLA from the said constituency at the time when the election was held, and the Government formed by the Indian National Congress was in power in the State. The appellant was a candidate of the People's Party of Arunanchal Pradesh (PPA), and the first respondent was that of the Indian National Congress. The voting took place on 13.10.2009, and the appellant was declared elected on 22.10.2009, defeating his nearest rival the respondent No. 1, by 2713 votes. Respondent No. 1 filed Election Petition No. 01/ 2009 to challenge the election of the appellant on the ground of corrupt practice of booth capturing.

3. This 20-Tali (ST) Assembly Constituency consists of two circles viz. (i) Tali, and (ii) Pipsorang. Each of the circles was having 10 polling stations. It was alleged in the petition by the first respondent that on two polling stations viz. (i) 7-Roing and (ii) 2-Ruhi from circle Tali, boxes (containing EVMs) were illegally removed by the party workers of the appellant, and votes in favour of the appellant were cast single handedly. The genuine voters were not allowed to exercise their voting rights as they were threatened for their lives by the miscreants of the appellant. It was claimed that polling agents of the first respondent, at these two polling stations, jointly reported about the happenings in these polling stations on 15.10.2009, to the

Assistant Returning Officer. It was further alleged that such incidents also took place in 6 more polling stations.

4. It was stated in para 9 of the petition, that it was necessary to bring the EVMs and counter foils of Form 17A (register of voters) of these 8-polling stations (mentioned in para-7 of the petition) for forensic test and other examinations etc. before the Hon'ble Court for proper adjudication of the case. It was claimed that the votes received by the appellant in these 8 polling stations were 3763, and if they were deleted from the votes of appellant, the first respondent would be declared as elected. It was prayed that the records of (i) register of voters counterfoils (Form 17-A) of these 8 polling stations described in paragraph 7 of the petition, (ii) EVMs of these 8 polling stations, and (iii) records relating to 20 Tali (ST) Assembly Constituency be called, and the appellant be directed to show cause as to why votes cast by booth capturing in 8 polling stations, in favour of the appellant, should not be declared as illegal, and the election order dated 22.10.2009 not be declared as void, and why the respondent No. 1 should not be declared as the elected candidate.

5. The petition was contested by the appellant by filing a Written Statement. He submitted that no unfair means were employed by him, or by his agents, and stated that the allegation of illegal practice adopted in 8 polling stations is completely false. He submitted that the election was conducted peacefully with free and fair means. The polling stations were guarded by police personnel who carried arms and ammunition. There was no booth capturing or criminal intimidation at all. EVMs and voters' counterfoils were duly verified at the Receiving Centre, and there was no need to call for any of these documents, nor was there any question to declare the election void.

6. Thereafter, the learned Judge by his order dated 8.3.2010 formulated the following issues:- (i) Whether the Election Petition is maintainable?; (ii) Whether the polling team of 7-Roing polling station alongwith the [illegible]d

on 12.10.2009 by PPA Workers?; (iii) Whether booth capturing was committed at 2-Ruhi and 5-Guchi polling stations on 13.10.2009 by PPA workers, including the Petitioner?; (iv) Whether any offence of booth capturing was committed at any of the other 5 polling stations; (v) Whether Annexures 1 to 9 to the Election Petition are forged, fabricated and an afterthought?; (vi) Whether the election of the returned candidate Markio Tado is liable to be declared void?; and (vii) Whether the Election Petitioner is entitled to be declared elected?

7. It is relevant to note that, before the evidence could start, the first respondent filed Interlocutory Application No. 6 of 2010 in the said Election Petition on 29th March, 2010. In para 1 thereof he submitted as follows:-

> "*1.That your applicants beg to state and submit that some thousand of voters of those 8 polling stations viz. (i) Giba, (ii) Tungmar, (iii) 15-Richik, (iv) 7-Roing, (v) 10-Yarda, (vi) 5-Guchi, (vii) 8-Dotte, (viii) 2-Ruhi of 20 Tali (ST) Assembly Constituency have double entry in different 38 polling stations of 13-(ST) Itanagar Assembly Constituency. So far your applicant knowledge is concerned about 80% of the voters of 20-(ST) Tali Assembly Constituency from those 8 polling stations viz. (i) 6-Giba, (ii) 4-Tugnmar, (iii) 15-Richik, (iv) 7-Roing, (v) 10-Yarda, (vi) 5-Guchi, (vii) 8-Dotte, (viii) 2-Ruhi have cast their votes at 13-(ST) Itanagar Assembly Constituency and not at 20-(ST) Tali Constituency."*

Thereafter, he gave the list of 38 polling stations of Itanagar constituency. He claimed that the total number of such voters, who had their names in those 38 polling stations, was 1304. He, therefore, prayed that the record of register of voters counterfoils (Form 17-A) of the above 38 polling stations of 13-(ST) Itanagar Assembly Constituency from the District Returning Officer, Distt. Papum Pare be called.

8. This application was opposed by the appellant. The learned Single Judge noted the submissions on behalf of the respondent No. 1. He also noted the submissions on behalf of the appellant that there was no allegation of double enrollment, and no issue had been framed in this respect in the election petition, and therefore the application was liable to be dismissed. Having noted the submissions, the learned Single Judge rejected the said application by his order dated 31.03.2010 observing *"I am of the considered view that calling of records as sought for by the applicant is not justified at this stage."*

9. When the evidence was recorded, PW (1) stated that 1 person voted for another person. PW (2) stated that she was not allowed to enter the polling station, and yet she stated that there was single handed voting. PW (3) was the polling agent of the respondent No. 1, but he did not state that he lodged any complaint about whatever had happened at the polling station. PW (4) stated that he was not allowed to enter the polling station. He stated that the workers of both the parties were not allowed to enter the polling station, but at the same time he said that the polling agents of both the parties were inside the polling station. He has filed no complaint. PW(5) made some interesting statements. He stated that he was the agent of the Indian National Congress, and he was forced to vote for his candidate. He also stated that he did not file any complaint with the presiding officer. PW (6) also made similar interesting statements in the sense that it was proposed that a few votes be casts in favour of Indian National Congress. It is relevant to note that at the polling station, where he cast his vote, Indian National Congress got 42 votes. PW (7) was the polling agent of the first respondent at the Roing polling station. He claims to have lodged the complaint, but he does not know who wrote that complaint. PW (8) stated in his cross-examination that he does not know whether any polling officer was kidnapped. PW (9) makes an interesting statement that he was forced to cast some votes for the Indian National Con

10. Thereafter, the first respondent PW (10) went into the witness box on 4.4.2010. In his examination in chief, he stated that he had sent a fax message to the Returning Officer of 20-Tali (ST) Assembly Constituency on 15.10.2009 alleging the booth capturing of 2-Ruhi and 7-Roing polling stations. He stated that he had complained about the booth capturing in 6 more polling stations, and produced copies of complaints. He stated that there was single handed voting in favour of the appellant, and first respondent's voters were threatened and not allowed to cast their votes. He further stated that a large number of voters had double entries in the electoral roll of 20 Tali (ST) as well as Itanagar (ST) Assembly Constituency. They had actually cast their votes at 38 different polling stations of 13-(ST) Itanagar Assembly Constituency, and in their place votes were cast in Tali Constituency by the miscreants of the appellant. The electoral rolls of the two constituencies were to be exhibited. He further pointed out that a vote was cast against a dead person by name Markio Tama from 2-Ruhi polling station, and the death certificate of the person concerned was produced.

11. The first respondent, in his cross examination on 9.6.2010, accepted that he had not made any averments in the election petition regarding double enrollment of the voters in the two Assembly Constituencies. He accepted that he was aware that the final electoral rolls were published by the authorities concerned before the election was held, prior to which the draft roll was published for information of the voters concerned, and that he did not lodge any complaint before the authorities concerned about the double enrollment in the two constituencies. He explained it by stating that he did not know that such double enrollment had taken place. He could not say who actually cast the vote for Markio Tama, who had already expired.

12. The first respondent accepted that he had appointed his polling agents for all the polling stations. He knew about the

duties of the polling agents which included raising objection in case of detection of any impersonation during the polling time, before the Presiding Officer concerned by filling up a prescribed form alongwith a fee of Rs. 2/-. He stated that his polling agents were not allowed to enter into the polling booths, and the candidates appointed by the appellant acted as fake polling agents for the first respondent. He however, accepted that he has not stated in election petition that the candidates appointed by the opposite party had acted as fake polling agents for him. He further accepted that his complaint to the Returning Officer did not mention all the 8 polling stations. It mentioned only about 2 polling stations. He also accepted that he did not mention the names of persons involved in booth capturing. He stated in his examination-in-chief itself as follows-

> "I have no direct evidence regarding casting of votes by impersonation by the booth capturing party but it can be proved if the finger prints and thumb impression taken and the signatures put in Form 17A of the respective polling station are compared by the respective votes."

13. The first respondent had alleged that in two polling stations viz. Ruhi and Roing, booth capturing had taken place which was on the basis that in Ruhi the first respondent got only 3 votes as against appellant getting 697 votes, and in Roing he got only one vote as against the appellant getting 1196 votes. On this aspect, it was put to him that there were two circles in this constituency viz. Tali and Pipsorang. The above two polling stations were in Tali Circle. The first respondent accepted that the returned candidate secured no vote in 11-Vovia polling station. He also accepted that the returned candidate secured only 7 votes in 13-Zara polling station, both falling in Pipsorang circle. Thereafter, he accepted that

> "It may be correct that securing less vote by a candidate may be due to his less attachment to the people of a particular area and it may also be the one of the reasons for losing the election."

The first respondent also accepted that Micro Observers were appointed in all the polling stations and they were provided with digital cameras for their use, as and when required during the election, for all the purposes.

14. It was at that stage that the first respondent moved another application viz. Misc. Case No. 05(AP) of 2010 on 29th June, 2010. In that application he repeated that some of the voters of the 8 polling stations mentioned earlier, had double entries in different 38 polling stations of 13 Itanagar (ST) Assembly Constituency. In para 2 he stated that 30% of voters of Tali Constituency, from those 8 polling stations, had cast their votes in Itanagar and not in Tali, and in their place the double voting was effected on behalf of the appellant, and therefore it was necessary to get the record of the voters' counterfoils (in Form 17A) from the 38 polling stations under 13-(ST) Itanagar Assembly Constituency. The appellant opposed this application. The counsel for the appellant submitted that this was a fishing inquiry to improve the case. This time however, the learned Judge observed:

> "This allegation sounds to be new one, but when it is closely examined, it also comes under the purview of booth capturing because votes by impersonation is one of the modus operandi adopted towards accomplishment of securing votes by use of illegal method or illegal resource."

15. The learned Judge referred to a judgment of this Court in *Hari Ram* Vs. *Hira Singh* reported in *AIR 1984 SC 396,* that electoral rolls and counter foils should be called sparingly, and only when sufficient material is placed before the Court. He also referred to a judgment of this Court in *Fulena Singh* Vs. *Vijoy Kr. Sinha* reported in *2009(5) SCC 290* wherein it was held that inspection of the record of register of voters in Form 17-A would be permissible where a clear case is made out. The learned Judge held that the official record would be the most

reliable evidence to decide as to whether there was impersonation, and thereafter passed the order calling for the record of registers of voters' counterfoils in form 17A from 38 polling stations of 13-(ST) Itanagar Assembly Constituency, which order was challenged by the appellant by filing one SLP earlier.

16. This earlier petition was numbered as Civil Appeal No. 1539 of 2012 which came to be decided by this Court on 2.12.2012. It was pointed out on behalf of the appellant that the Election Petition was filed on the basis of corrupt practice of booth capturing, and what was being canvassed on behalf of the respondent No. 1 was the allegation of impersonation/ double voting on the part of the appellant. It was submitted on behalf of the appellant that booth capturing is a specific corrupt practice under section 123 (8) read with section 135A of 1951 Act. Booth capturing involves use of force, whereas impersonation or double voting is on the basis of deception. This submission was accepted by this Court. This was apart from the fact that impersonation or double voting would lead to improper reception of votes, which is another ground for declaring an election to be void under section 100 (1) (d) (iii) of the Act, and this ground was not pleaded in the petition nor was any issue framed thereon for trial. It was canvassed on behalf of the appellant that double voting or impersonation could not be considered as facets of booth capturing which was also accepted by this Court.

17. This Court while deciding Civil Appeal No. 1539 of 2012 noted that there was hardly any evidence to justify any plea of impersonation or double voting. Therefore, this Court held in the said appeal, that it was thus obvious that having failed to place any material with respect to either booth capturing or impersonation, the first respondent was trying to make fishing and roving inquiry to improve his case by calling for the record of the voters register from Itanagar Constituency, in support of his grievance of double vo[illegible]f

any evidence with respect to the persons who, at the instance of the appellant, allegedly captured the booths or made double voting or impersonation in Tali Constituency, no such inference could have been drawn. The learned Single Judge, therefore, was clearly in error in allowing the second application made by the first respondent.

18. As seen from the above, the learned Judge while deciding Misc. Case No.5(AP) of 2010 had relied upon the judgment of this court in Fulena Singh (supra) to justify his direction to produce the record of register of voters' counterfoils in Form 17-A of 38 polling stations of 13-(ST) Itanagar constituency. This court, therefore, while deciding Civil Appeal 1539 of 2012 explained the judgment in Fulena Singh, and the correct legal position with respect to the production of such records in court. It referred to the Constitution Bench judgment of this court in *Ram Sevak Yadav v. Hussain Kamil Kidwai,* reported in *AIR 1964 SC 1249,* which has held that an order for inspection cannot be granted as a matter of course having regard to the secrecy of the ballot papers. To seek such an order two conditions are required to be fulfilled:

(i) that the petition for setting aside an election contains an adequate statement of the material facts on which the petitioner relies in support of his case; and

(ii) the tribunal is prima facie satisfied that in order to decide the dispute and to do complete justice between the parties inspection of the ballot papers is necessary.

But an order for inspection of ballot papers cannot be made to support vague pleas made in the petition, not supported by material facts, or to fish out evidence to support such pleas. In the present case, there was no material whatsoever to justify the production of the register of counterfoils of votes in Form 17-A and therefore, this court allowed the said Civil Appeal and dismissed Misc. Case (EP) No. 05 (AP) of 2010 by judgment and order dated 2.2.2012

19. Facts which had come on record clearly showed that the first respondent received overwhelming votes in some polling stations, whereas the appellant received similarly overwhelming votes in other polling stations. The first respondent had in fact accepted that it depended on the popularity of the candidate whether he would receive more votes in any particular voting station. Assuming that the ground of improper reception of votes could be raised for declaring the election to be void under section 100 (1) (d), this Court noted in the decision of C.A No. 1539 of 2012 as follows:-

> "*28. Besides, the ground of improper reception requires a candidate to show as to how the election in so far as it concerns the returned candidate was materially affected, in view of the requirement of Section 100 (1) (d) of the Act of 1951. First respondent has stated that there were some 1304 double entries of voters. The allegation of respondent No.1 on evidence was only with respect to Roing and Ruhi polling station. The votes received by the appellant in both these polling stations put together come to 1873. The appellant has won with a margin of 2713 votes. That being so the second application could not have been entertained even on that ground in the absence of prima facie case that the result of the election had been materially affected.*"

20. Therefore, this Court went into the issue as to whether the record of the voters' counterfoils in Form 17 (A) from 38 polling station of 13 Itanagar (ST) Assembly Constituency could be called. It examined the relevant provisions of Rule 93 of Conduct of Elections rules, 1961 and the judgments governing the field, and held in this matter also as in *Ram Sevak Yadav* (supra), that an order for inspection of ballot papers could not be granted to support the vague pleas made in the petition not supported by material facts or to fish out the evidence to support such pleas. This Court therefore, allowed that appeal and set aside the judgment and order

dismissed Misc. Case No. 5 (AP)/2010 dated 29.6.2010. The judgment in Civil Appeal 1539 of 2012 in *Markio Tado Vs. Takam Sorang and Ors.* is reported in *2012 (3) SCC 236.*

21. In this background when the matter proceeded further there was no occasion for the Court to once again call for that record. The learned Judge still passed an order on 19.3.2012 on Misc. Case (EP) 06 (AP) of 2010 holding that:-

> "it is considered expedient to send the registers of voters (Form 17A) which were already procured from the District Election Authority under sealed cover to the Director of Regional Forensic Science Laboratory (FSL), Police Training Centre, Banderdewa, Arunachal Pradesh requesting him to conduct scientific examination and verification of signatures/finger prints appearing in Form 17A and to ascertain as to whether the thumb impression and signatures contained and recorded in Form 17A (voters register) were put single handedly and fraudulently by few persons as a measure of impersonation of the genuine voters concerned and after such scientific examination/verification to submit report to the Registry of this Court is sealed cover within 3rd of May, 2012. The registry was directed to take steps accordingly.

This order dated 19.3.2012 passed by the learned Judge was challenged by the appellant by filing Special Leave Petition 12707 of 2012, by pointing out that such an order could not be made in the teeth of the judgment and order rendered by this Court in Civil Appeal No. 1539 of 2012. However, the appellant, preferred to withdraw the SLP No. 12707 of 2012 subsequently, with a liberty to agitate the questions raised therein, if required, when the main Election Petition was decided.

22. The learned Judge proceeded to examine court witnesses including finger print expert, CW3. Thereafter, the court examined the defence witnesses, and after hearing the

arguments of the counsel for both the parties allowed the Election Petition, and held that the election of the petitioner was void. On the basis of the calculations of votes made by the learned judge, he held that the first respondent had received more votes, and therefore, declared him as elected from the constituency concerned. It is this order which is under challenge.

23. Now, as can be seen from the narration above, the Election Petition was filed only on the ground of booth capturing. The respondent No. 1 himself accepted that he could not name any person involved in the act of booth capturing. The evidence on record clearly showed that, apart from some allegations, there was no material evidence placed in support thereof. The petitioner tried to claim impersonation and double voting as a facet of booth capturing. This submission was already rejected by this Court while deciding C.A No. 1539 of 2012 (supra) by holding that impersonation and double voting would amount to deception and it will be a facet of improper reception of votes and not booth capturing. Booth capturing involves use of force and that was not established. The petition was not filed on the ground of improper reception of votes. Even if that ground was to be looked into, the respondent No. 1 accepted in his evidence that he had no direct evidence regarding casting of votes by impersonation.

24. The learned judge has clearly transgressed the limits of his jurisdiction, by going into the exercise of calling for the handwriting and finger print experts, and comparing the voters' signatures and finger prints with the help of the records in Form 17A, when that was clearly held to be impermissible in the present case itself. This is apart from the fact that this has resulted into a waste of the time of the Court, which is so precious. The evidence was recorded on a number of dates and so many witnesses, including public officers, were called when their evidence was not required. It would be relevant to refer to the observations of this Court in paragraph 12 of *Azar Hussain v. Rajiv Gandhi* reported in *AIR*

context of rejecting an election petition summarily, at the threshold, where such a case is not made out. The observations are to the following effect,

> "***12.*** *Learned counsel for the petitioner has next argued that in any event the powers to reject an election petition summarily under the provisions of the Code of Civil Procedure should not be exercised at the threshold. In substance, the argument is that the court must proceed with the trial, record the evidence, and only after the trial of the election petition is concluded that the powers under the Code of Civil Procedure for dealing appropriately with the defective petition which does not disclose cause of action should be exercised. With respect to the learned counsel, it is an argument which it is difficult to comprehend.* ***The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose.*** *……...*
>
> (emphasis supplied)

25. The judge clearly ignored that the law declared by this Court is binding on all courts within the territory of India under Article 141 of the Constitution of India, and judicial discipline required him to follow the mandate of the Constitution. He entered into an impermissible exercise, and deleted the votes received by the appellant which he considered to be tainted votes. It is quite shocking to see that the learned judge has proceeded to delete the votes of the appellant from 8 polling stations, although the grievance was only about Ruhi and Roing polling stations. By making these deductions, he came to the conclusion that the respondent No. 1 had received 826 votes more. As can be seen from paragraph 28 of the judgment, rendered in Civil Appeal No. 1539 of 2012, that at best the case

of the first respondent was that there were double entries of voters in 1304 names. The allegation was only with respect to two polling stations. In those polling stations, the appellant had received 1873 votes. Even if these 1304 votes were to be deleted, it would not affect the result materially since the appellant had won with a margin of 2713 votes. The learned judge, therefore, ignored that even if the ground of improper reception of votes under section 100(1)(d)(iii) was to be taken, the respondent no.1 had failed to establish that the result of the election of the appellant had been materially affected by such improper reception of votes. The decision of the learned judge was therefore clearly flawed and untenable.

26. Thus, the learned judge went into the counterfoils of the voters inspite of the fact that this court had already ruled in the judgment in C.A. 1539 of 2010, that in the facts of the present case, no case was made out for calling of the counterfoils. It is not that he was unaware of the judgment rendered by this court. He referred to this judgment in Para 9(i) by stating that CA No. 1539 of 2010 was preferred against his judgment and order dated 14.9.2010. Thereafter, he specifically noted "*the said Civil Appeal was allowed vide judgment and order dt. 2.2.2012 dismissing the aforesaid M.C. (EP) No. 5 (AP) of 2010 under Section 83(1) of the R.P. Act as reported in (2012) 3 SCC 236.*" Thereafter, however he proceeded to act exactly contrary to the direction emanating from the dismissal of M.C. (EP) No. 5 (AP) of 2010, which amounts to nothing but judicial indiscipline and disregard to the mandate of Article 141 of the Constitution of India. This is shocking, to say the least, and most unbecoming of a judge holding a high position such as that of a High Court Judge. We fail to see as to what made the judge act in such a manner, though we refrain from going into that aspect.

27. Before we conclude, we may state that it is unfortunate that such acts of judicial impropriety are repeated inspite of clear judgments of this court on the sig

of the Constitution. Thus, in a judgment by a bench of three judges in *Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd. and Anr.,* reported in *(1997) 6 SCC 450,* this court observed,

> "32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."

We may as well refer to Para 28 of the *State of West Bengal & Ors. v. Shivanand Pathak and Ors.,* reported in *(1998) 5 SCC 513,* wherein this court observed,

> "If a judgment is overruled by the higher court, the judicial discipline requires that the judge whose judgment is overruled must submit to the judgment. He cannot, in the same proceedings or in collateral proceedings between the same parties, rewrite the overruled judgment…"

28. In the circumstances, we have no option but to allow this appeal and set aside the impugned judgment and order rendered by the learned judge of Gauhati High Court dated 12.11.2012. The Election Petition filed by the respondent no. 1, bearing Election Petition No. 1(AP) of 2009, renumbered as Election Petition No. 1 (AP) of 2012, shall stand dismissed. The parties will bear their own costs.

B.B.B. Appeal allowed.

MOTI LAL SONGARA
v.
PREM PRAKASH @ PAPPU AND ANR.
(Criminal Appeal No. 785 of 2013)

MAY 16, 2013

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

Code of Criminal Procedure, 1973 - s.190(1)(b) - Order of Magistrate taking cognizance against accused-respondent no.1 - Held: On facts, cannot be found fault with - The Magistrate took cognizance on the basis of facts brought to his notice by the appellant-informant and, therefore, he, in fact, exercised power u/s.190(1)(b) CrPC - Penal Code, 1860 - ss. 307, 323, 324 & 341.

Criminal Trial - Suppression of fact by accused - Fraud on Court - Cognizance of offences by Magistrate - Charges framed by Sessions Judge - Order of quashment of summons obtained by accused-respondent no.1 from another Sessions Judge hearing revision against the order of the Magistrate by calculated concealment of facts - Held: Though respondent no.1 was fully aware about the fact that charges had been framed against him by the Sessions Judge, yet he did not bring the same to the notice of the other Sessions Judge hearing revision against the order of the Magistrate taking cognizance - As the order of quashment of summons was obtained by practising fraud and suppressing material fact before a court of law to gain advantage, power u/Article 142 of the Constitution invoked to do complete justice between the parties - Order of quashment of summons accordingly set aside - Order framing charges restored - Trial directed to continue - Penal Code, 1860 - ss. 307, 323, 324 & 341 - Maxims - "supressio veri, expression faisi" - Constitution of India, 1950 - Art. 142.

The appellant lodged FIR, on the basis of which charge sheet was placed against one 'S'. Subsequently, the appellant filed application before the Magistrate, asseverating that respondent no.1, who had attacked his son with knife had not been made an accused. By order dated 19-11-2008, the Magistrate took cognizance against respondent no.1 and summoned him. Accordingly, both 'S' and respondent no.1, were sent up for sessions trial. The Sessions Judge, No. 3 by order dated 27-7-2009, framed charges against respondent no.1.

Respondent no.1 challenged order dated 19-11-2008 of the Magistrate in Criminal Revision No. 7 of 2009 before Sessions Judge, No. 1, without bringing to its notice the order dated 27-7-2009 passed by Sessions Judge, No. 3. The Sessions Judge, No. 1 by order dated 14-10-2009 set aside the order of the Magistrate.

Subsequently, respondent no.1 filed application seeking discharge. The trial Judge declined to discharge respondent no.1. He preferred Criminal Revision No. 327 of 2011 before the High Court which quashed the charges framed against him for the offences punishable under Sections 323, 324 and 307 IPC on the foundation that the order dated 19-11-2008 passed by the Magistrate taking cognizance and issuing summons had already been set aside by the revisional Court i.e. Sessions Judge, No. 1, in Criminal Revision No. 7 of 2009.The High Court held that when the order dated 14-10-2009 passed by Sessions Judge No.1 setting aside the order taking cognizance was not challenged, the very basis of the continuance of the proceeding had become extinct and, therefore, the order of framing of charges could not be sustained.

In the instant appeal, the appellant contended that respondent no.1 had not approached the court with clean hands and the High Court should not have interfered with the order of trial Judge declining to discharge respondent

no.1. Per contra, respondent No. 1 contended that once the order taking cognizance had gone unchallenged, it was obligatory on the part of the High Court to direct a discharge; and that apart, the Magistrate could not have taken cognizance in exercise of power under Section 190 CrPC.

Allowing the appeal, the Court

HELD: 1. The order of Magistrate taking cognizance against the first respondent cannot be found fault with. The Magistrate took cognizance on the basis of facts brought to his notice by the appellant-informant and, therefore, he has, in fact, exercised the power under Section 190(1)(b) CrPC. [Para 17] [509-D-E]

M/s. India Carat Pvt. Ltd. v. State of Karnataka and another **(1989) 2 SCC 132: 1989 (1) SCR 718 and** *Uma Shankar Singh v. State of Bihar and another* **(2010) 9 SCC 479: 2010 (10) SCR 1132 - relied on.**

Kalamudeen and others v. State of Rajasthan and another **2005 (2) Cr.L.R. (Raj.) 1118;** *Natthi Singh v. State of Rajasthan and another* **2007 (1) Cr.L.R. (Raj.) 621** *Ranjit Singh v. State of Punjab* **(1998) 7 SCC 149: 1998 (2) Suppl. SCR 8;** *Raj Kishore Prasad v. State of Bihar* **(1996) 4 SCC 495: 1996 (2) Suppl. SCR 125;** *Kishun Singh v. State of Bihar* **(1993) 2 SCC 16: 1993 (1) SCR 31;** *Kishori Singh and others v. State of Bihar and another* **(2004) 13 SCC 11;** *Abhinandan Jha v. Dinesh Mishra* **AIR 1968 SC 117: 1967 SCR 668;** *H.S. Bains v. State* **(1980) 4 SCC 631: 1981 (1) SCR 935;** *Dharam Pal and others v. State of Haryana and another* **(2004) 13 SCC 9;** *Rajinder Prasad v. Bashir* **(2001) 8 SCC 522: 2001 (3) Suppl. SCR 156;** *SWIL Ltd. v. State of Delhi* **(2001) 6 SCC 670: 2001 (1) Suppl. SCR 527 - referred to.**

2. Though respondent no.1 wa **t**

the fact that charges had been framed against him by the trial Judge, yet he did not bring the same to the notice of the revisional court hearing the revision against the order taking cognizance. It is a clear case of suppression. It was within the special knowledge of the accused. Anyone who takes recourse to method of suppression in a court of law, is, in actuality, playing fraud with the court, and the maxim supressio veri, expression faisi, i.e., suppression of the truth is equivalent to the expression of falsehood, gets attracted. There has been a calculated concealment of the fact before the revisional court. It can be stated with certitude that the accused-respondent tried to gain advantage by such factual suppression. The fraudulent intention is writ large. In fact, he has shown his courage of ignorance and tried to play possum. The High Court applied the principle "when infrastructure collapses, the superstructure is bound to collapse". However, as the order has been obtained by practising fraud and suppressing material fact before a court of law to gain advantage, the said order cannot be allowed to stand. Under these circumstances, the power under Article 142 of the Constitution is required to be invoked to do complete justice between the parties. Cognizance of the offences had been rightly taken by the Magistrate and charges have been correctly framed by the trial Judge. A victim of a crime has as much right to get justice from the court as an accused who enjoys the benefit of innocence till the allegations are proven against him. In the case at hand, when an order of quashment of summons has been obtained by suppression, this Court has an obligation to set aside the said order and restore the order framing charges and direct the trial to go on. Consequently, the order passed by the High Court in Criminal Revision No. 327 of 2011 and the order passed by the Sessions Judge, No.1, in Criminal Revision No. 7 of 2009 are set aside and it is directed that the trial which is pending before the Sessions Judge, No. 3, shall

proceed in accordance with law. [Paras 18, 19] [509-F-G, H; 510-A-G]

Case Law Reference:

2005 (2) Cr.L.R. (Raj.) 1118	**referred to**	**Para 4**
2007 (1) Cr.L.R. (Raj.) 621	**referred to**	**Para 4**
1998 (2) Suppl. SCR 8	**referred to**	**Para 11**
1996 (2) Suppl. SCR 125	**referred to**	**Para 11**
1993 (1) SCR 31	**referred to**	**Para 11**
(2004) 13 SCC 11	**referred to**	**Para 12**
1989 (1) SCR 718	**relied on**	**Para 13**
1967 SCR 668	**referred to**	**Para 13**
1981 (1) SCR 935	**referred to**	**Para 13**
(2004) 13 SCC 9	**referred to**	**Para 14**
2001 (3) Suppl. SCR 156	**referred to**	**Para 14**
2001 (1) Suppl. SCR 527	**referred to**	**Para 14**
2010 (10) SCR 1132	**relied on**	**Para 15**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 785 of 2013.

From the Judgment and order dated 13.08.2012 of the High Court of Judicature for Rajasthan at Jodhpur in Criminal Revision Petition No. 327 of 2011.

Madhurima Tatia for the Appellant.

Rishabh Sancheti, T. Mahipal, Imtiaz Ahmed, Naghma Imtiaz, Milind Kumar for the Respondents.

The Judgment of the Court was de

DIPAK MISRA, J. 1. Leave granted.

2. The factual score of the case in hand frescoes a scenario and reflects the mindset of the first respondent which would justifiably invite the statement "court is not a laboratory where children come to play". The action of the accused-respondent depicts the attitude where one calculatedly conceives the concept that he is entitled to play a game of chess in a court of law and the propriety, expected norms from a litigant and the abhorrence of courts to the issues of suppression of facts can comfortably be kept at bay. Such a proclivity appears to have weighed uppermost in his mind on the base that he can play in aid of technicalities to his own advantage and the law, in its essential substance, and justice, with its divine attributes, can unceremoniously be buried in the grave. But, an eloquent one, the complainant with his committed and adroit endeavour has allowed the cause to rise like a phoenix from the grave by invoking the jurisdiction of this Court assailing the order passed by the High Court of Judicature of Rajasthan at Jodhpur in Criminal Revision No. 327 of 2011 whereby the learned single Judge by order dated 13.8.2012 accepted the plea of the accused-respondent and quashed the charges framed against him for the offences punishable under Sections 323, 324 and 307 of the Indian Penal Code (for short "IPC") not on the substratum of merits but on the foundation that the order dated 19.11.2008 passed by the learned Additional Chief Judicial Magistrate taking cognizance and issuing summons had already been set aside by the Additional District and Sessions Judge, No. 1, Jodhpur, in Criminal Revision No. 7 of 2009 and, therefore, the principle "when the infrastructure collapses, the superstructure is bound to collapse" got attracted. As it appears, though the High Court noticed the various dates, the suppression of facts and the factum that the accused being fully aware that the charges had been framed in Sessions Case No. 9 of 2009 by the learned Additional Sessions Judge, No. 3, Jodhpur on 27.7. 2009, chose not to inform the revisional court, namely, the learned Additional

District and Sessions Judge, No. 1, Jodhpur, yet, possibly feeling legally helpless, interfered with the order of framing charges and quashed the same granting liberty to the prosecution to file an application under Section 319 of the Code of Criminal Procedure (for brevity "the Code") at the relevant stage.

3. Presently to the initial factual exposition. The appellant, as informant, lodged a First Information Report No. 428 of 2007 on 23.11.2007 at Police Station Pratap Nagar, District Jodhpur, on the basis of which investigation was carried on and, eventually, a charge sheet was placed for the offences punishable under Sections 341, 323, 324, 307 and 379 IPC against one Shyam Lal s/o Venaram. After the submission of the charge-sheet, the informant filed an application before the learned Additional Chief Judicial Magistrate No. 2, Jodhpur, asseverating that another accused, Prem Prakash, who had attacked his son with knife had deliberately not been made an accused. The learned Magistrate, as is manifest, after analyzing the materials on record, thought it appropriate to take cognizance against Prem Prakash @ Pappu for the offences punishable under Sections 323, 324, 307 and 379 IPC and, accordingly, summoned him through arrest warrant.

4. Being dissatisfied, accused Prem Prakash called in question the legal sustainability of the said order in Criminal Revision No. 7 of 2009 which came to be dealt with by the learned Additional District and Sessions Judge, No. 1, Jodhpur who, after referring to the rulings in *Kalamudeen and others v. State of Rajasthan and another*[1] and *Natthi Singh v. State of Rajasthan and another*[2], opined that when the offences were triable by a court of Session, the Magistrate could not have taken cognizance on the basis of a protest petition and, accordingly, set it aside vide order dated 14.10.2009.

---

1. 2005 (2) Crl.L.R. (Raj.) 1118.
2. 2007 (1) Cr.L.R. (Raj.) 621.

5. Be it noted, on that day, the Additional Public Prosecutor was present but, unfortunately, the informant who was arrayed as opposite party No. 2 in the revision petition was absent. The disturbing feature, as is perceptible, is that on the basis of the cognizance taken by the learned Additional Chief Judicial Magistrate, both the accused persons, namely, Shyam Lal and Prem Prakash, were sent up for trial and the matter was dealt with by the learned Additional District and Sessions Judge, No. 3, Jodhpur who, on 27.7.2009, heard the learned counsel for the parties, the Public Prosecutor and after dwelling upon the allegations in the FIR, considering the involvement of the accused persons in the crime in question, taking note of the nature of injuries, adverting to the ingredients of the offence under Section 307 IPC, prima facie appreciating the credibility of the witnesses and many other factors, held as follows: -

> ".....looking to the facts and circumstances of the case, in the perspective of the principle propounded in the abovementioned rulings, prima facie, it appears that due to the reason of old enmity the accused persons have inflicted a number of injuries by the sharp weapon on the body of the victim and therefrom it is clear that common intention of the accused persons was to attempt to commit the murder of the victim Dinesh Kumar. At this stage, it is not appropriate to minutely and critically appreciate the evidence. From the guidance sought from the abovementioned rulings, it is clear that at this stage compared to the result of the acts committed by the accused persons, criminal intention of the accused persons is more important. Any fatal injury has not been inflicted on any vital part of the body of the victim and only on that ground at this stage, it is not justified and lawful to discharge the accused persons from the offence punishable under Section 307 of the Indian Penal Code."

6. However, as far as the offence under Section 379 IPC is concerned, he discharged them of the said charge.

Ultimately, charges were framed for the offences under Section 341, 323/34, 324/34, 307 in the alternative under Section 307/304 IPC.

7. We have referred to the said order in detail to highlight that the matter was heard at length at the time of framing of charge and arguments were considered seeking discharge. However, for the reasons best known to the prosecution and to the accused-respondent, it was not brought to the notice of the learned Additional District and Sessions Judge No. 1, Jodhpur who allowed the revision holding that the order issuing summons was not justified. It is really unfathomable as to why the sustainability of the order taking cognizance when called in question was not heard by the learned Additional District and Sessions Judge No. 3, who was dealing with the Sessions Case No. 9 of 2009.

8. After the order taking cognizance was set aside in revision, an application was filed on 11.1.2010 seeking discharge. The learned trial Judge narrated the entire gamut of facts and observed that the fact of framing of charges was not brought to the notice of the learned Additional District and Sessions Judge, No.1, and further the High Court, in Criminal Revision No. 1046 of 2009 which was preferred against the order of framing of charge, neither set it aside nor modify it and, accordingly, did not think it appropriate to discharge the accused-respondent.

9. As the factual matrix would uncurtain, undeterred by his conduct, the respondent, Prem Prakash, preferred Criminal Revision before the High Court. The learned single Judge of the High Court, after chronicling the facts in detail, came to hold that when the order dated 14.10.2009 passed by the revisional court setting aside the order taking cognizance was not challenged, the very basis of the continuance of the proceeding had become extinct and, therefore, the order of framing of charges could not be sustained. However, as stated earlier, he

granted liberty to the prosecution to file an application under Section 319 of the Code for summoning the additional accused at the appropriate stage. Be it noted, the High Court has also observed that the order passed in revision setting aside the order of cognizance was not justified in law.

10. Ms. Madhurima Tatia, learned counsel for the appellant, has submitted that when the accused has not approached the court in clean hands and the High Court itself has observed that the order setting aside the order of cognisance was not justified, it should not have interfered with the order passed by the learned trial Judge declining to discharge the accused. Per contra, Mr. Rishabh Sancheti, learned counsel for the respondent No. 1, would contend that the order passed by the High Court in revision is absolutely impeccable inasmuch as once the order taking cognizance had gone unchallenged, it was obligatory on the part of the High Court to direct a discharge. That apart, it is urged by him that the learned Magistrate could not have taken cognizance in exercise of power under Section 190 of the Code of Criminal Procedure. Mr. Imtiaz Ahmed, learned counsel for the State, submitted that though the State has not challenged the order, yet it is a case where the accused-respondent should not have been discharged.

11. First, we shall advert to the legal propriety of the order taking cognizance by the learned Additional Chief Judicial Magistrate. The learned counsel for the accused-respondent has submitted with immense vehemence that in view of the conflicting views, the controversy relating to the power of the Magistrate under Section 190 of the Code has been referred to the larger Bench and, hence, the order of taking cognizance is invulnerable. To appreciate the said submission, we think it seemly to refer to certain pronouncements pertaining to the said issue. In *Ranjit Singh v. State of Punjab*[3], a three-Judge Bench was dealing with the issue whether the Sessions Court can add

3. (1998) 7 SCC 149.

a new person to the array of the accused in a case pending before it at a stage prior to collecting any evidence. The three-Judge Bench was dealing with the said issue as reservations were expressed by a two-Judge Bench in *Raj Kishore Prasad v. State of Bihar*[4] with regard to the ratio laid down in *Kishun Singh v. State of Bihar*[5]. The conclusion that has been recorded in *Ranjit Singh's* case is as follows: -

> "19. So from the stage of committal till the Sessions Court reaches the stage indicated in Section 230 of the Code, that court can deal with only the accused referred to in Section 209 of the Code. There is no intermediary stage till then for the Sessions Court to add any other person to the array of the accused.
>
> 20. Thus, once the Sessions Court takes cognizance of the offence pursuant to the committal order, the only other stage when the court is empowered to add any other person to the array of the accused is after reaching evidence collection when powers under Section 319 of the Code can be invoked. We are unable to find any other power for the Sessions Court to permit addition of new person or persons to the array of the accused. Of course it is not necessary for the court to wait until the entire evidence is collected for exercising the said powers."

12. In *Kishori Singh and others v. State of Bihar and another*[6], the learned Judges have opined thus: -

> "10. So far as those persons against whom charge-sheet has not been filed, they can be arrayed as "accused persons" in exercise of powers under Section 319 CrPC when some evidence or materials are brought on record in course of trial or they could also be arrayed as "accused persons" only when a reference is made either by the

4. (1996) 4 SCC 495.
5. (1993) 2 SCC 16.
6. (2004) 13 SCC 11

Magistrate while passing an order of commitment or by the learned Sessions Judge to the High Court and the High Court, on examining the materials, comes to the conclusion that sufficient materials exist against them even though the police might not have filed charge-sheet, as has been explained in the latter three-Judge Bench decision. Neither of the contingencies has arisen in the case in hand."

13. In *M/s. India Carat Pvt. Ltd. v. State of Karnataka and another*[7], a three-Judge Bench, after analyzing the provisions of the Code, referred to the decisions in *Abhinandan Jha v. Dinesh Mishra*[8] and *H.S. Bains v. State*[9] and, eventually, ruled thus: -

"The position is, therefore, now well settled that upon receipt of a police report under Section 173(2) a Magistrate is entitled to take cognizance of an offence under Section 190(1)(b) of the Code even if the police report is to the effect that no case is made out against the accused. The Magistrate can take into account the statements of the witnesses examined by the police during the investigation and take cognizance of the offence complained of and order the issue of process to the accused. Section 190(1)(b) does not lay down that a Magistrate can take cognizance of an offence only if the investigating officer gives an opinion that the investigation has made out a case against the accused. The Magistrate can ignore the conclusion arrived at by the investigating officer and independently apply his mind to the facts emerging from the investigation and take cognizance of the case, if he thinks fit, in exercise of his powers under Section 190(1)(b) and direct the issue of process to the accused."

7. (1989) 2 SCC 132.
8. AIR 1968 SC 117.
9. (1980) 4 SCC 631

14. In *Dharam Pal and others v. State of Haryana and another*[10], a three-Judge Bench was dealing with a reference to resolve the conflict of opinions in *Kishori Singh* (supra), *Rajinder Prasad v. Bashir*[11] and *SWIL Ltd. v. State of Delhi*[12]. At that juncture, the pronouncements in *Kishun Singh* (supra) and *Ranjit Singh* (supra) were brought to the notice of the Court. After referring to various provisions of the Code, the Bench of three learned Judges expressed as follows: -

"Prima facie, we do not think that the interpretation reached in Ranjit Singh case is correct. In our view, the law was correctly enunciated in Kishun Singh case. Since the decision in Ranjit Singh case is of three-Judge Bench, we direct that the matter may be placed before the Hon'ble the Chief Justice for placing the same before a larger Bench."

15. There is no dispute that the reference is still pending. In *Uma Shankar Singh v. State of Bihar and another*[13], a two-Judge Bench was dealing with the issue pertaining to the power of the Magistrate under Section 190(1)(b) of the Code. After taking note of the decisions and the reference order in *Dharam Pal* (supra), the Court accepted the submission that the law is well settled that the Magistrate is not bound to accept the final report filed by the investigating agencies under Section 173(2) of the Code and is entitled to issue process against an accused even though exonerated by the said authorities without holding any separate enquiry on the basis of the police report itself. The learned Judges proceeded to state that even if the investigating authority is of the view that no case has been made out against an accused, the Magistrate can apply his mind independently to the materials contained in the police report and take cognizance thereupon in exercise of his powers under

10. (2004) 13 SCC 9.
11. (2001) 8 SCC 522.
12. (2001) 6 SCC 670
13. (2010) 9 SCC 479.

Section 190(1)(b) CrPC.

16. In the said case, while dealing with the pendency of a reference before a larger Bench and also adverting to the pending reference in relation to the lis, the Court observed as follows: -

> "...it is not necessary to wait for the outcome of the result of the reference made to a larger Bench in Dharam Pal case. The reference is with regard to the Magistrate's power of enquiry if he disagreed with the final report submitted by the investigating authorities. The facts of this case are different and are covered by the decision of this Court in India Carat (P) Ltd. following the line of cases from Abhinandan Jha v. Dinesh Mishra onwards."

17. In view of the aforesaid enunciation of law, we are of the considered view that the order taking cognizance cannot be found fault with. We may hasten to clarify that the learned Additional Chief Judicial Magistrate has taken cognizance on the basis of facts brought to his notice by the informant and, therefore, he has, in fact, exercised the power under Section 190(1)(b) of the Code.

18. The second limb of the submission is whether in the obtaining factual matrix, the order passed by the High Court discharging the accused-respondent is justified in law. We have clearly stated that though the respondent was fully aware about the fact that charges had been framed against him by the learned trial Judge, yet he did not bring the same to the notice of the revisional court hearing the revision against the order taking cognizance. It is a clear case of suppression. It was within the special knowledge of the accused. Any one who takes recourse to method of suppression in a court of law, is, in actuality, playing fraud with the court, and the maxim supressio veri, expression faisi, i.e., suppression of the truth is equivalent to the expression of falsehood, gets attracted. We are compelled to say so as there has been a calculated

concealment of the fact before the revisional court. It can be stated with certitude that the accused-respondent tried to gain advantage by such factual suppression. The fraudulent intention is writ large. In fact, he has shown his courage of ignorance and tried to play possum. The High Court, as we have seen, applied the principle "when infrastructure collapses, the superstructure is bound to collapse". However, as the order has been obtained by practising fraud and suppressing material fact before a court of law to gain advantage, the said order cannot be allowed to stand. That apart, we have dealt with regard to the legal sustainability of the order in detail. Under these circumstances, we are disposed to think that the power under Article 142 of the Constitution is required to be invoked to do complete justice between the parties. Cognizance of the offences had been rightly taken by the learned Magistrate and charges, as we find, have been correctly framed by the learned trial Judge. A victim of a crime has as much right to get justice from the court as an accused who enjoys the benefit of innocence till the allegations are proven against him. In the case at hand, when an order of quashment of summons has been obtained by suppression, this Court has an obligation to set aside the said order and restore the order framing charges and direct the trial to go on. And we so direct.

19. Consequently, the appeal is allowed, the order passed by the High Court in Criminal Revision No. 327 of 2011 and the order passed by the learned Additional District and Sessions Judge, No.1, Jodhpur, in Criminal Revision No. 7 of 2009 are set aside and it is directed that the trial which is pending before the learned Additional District and Sessions Judge, No. 3, Jodhpur, shall proceed in accordance with law.

B.B.B. Appeal allowed.

RAVIRALA LAXMAIAH
v.
STATE OF A.P.
(Criminal Appeal No. 2038 of 2011)

MAY 28, 2013

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Penal Code, 1860 - ss.302 & 404 - Homicidal death by strangulation - Conviction of appellant for killing his wife - Propriety - Held: Appellant had been doubting the character of his wife and therefore, had adequate motive to eliminate her - In spite of the fact that he had been in the same room, he failed to furnish any explanation as under what circumstances his wife was found dead - Particularly, in view of the fact that the courts below excluded the theory of suicide - Same conclusion stands fully fortified by the fact that the saree of deceased was lying in the corner of the room and the version given by the appellant that he had found his wife hanging with a saree around her neck and he cut the same by knife stands fully falsified as in such a fact-situation, part of the saree should have been found hanging with the ceiling of the room - Conduct of the appellant that he had given a false information to his in-laws and while dead body was lying in his house he stayed in a Guest House; and further that he had absconded from the city itself, suggest that he is guilty - Conviction of appellant accordingly upheld.

Evidence - Circumstantial evidence - Appreciation - Held: In a case based on circumstantial evidence, where no eye-witness's account is available, when an incriminating circumstance is put to the accused and the said accused either offers no explanation for the same, or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete.

Evidence - Last seen theory - Duty of the accused to give explanation -Held: In cases where the accused has been seen with the deceased victim (last seen theory), it becomes the duty of the accused to explain the circumstances under which the death of the victim has occurred.

Evidence - Medical evidence - Strangulation - Proof of.

The prosecution case was that the appellant had killed his wife by strangulation. The appellant had been with the deceased at the time of her death. The deceased's nose and ears were viciously cut, and all her gold ornaments and anklets had been stolen. On the basis of the disclosure statement made by the appellant, the ornaments of the deceased had been recovered in the presence of two panch witnesses, namely, PW.8 and PW.9. The trial court rejected the defence plea that the deceased had committed suicide by hanging herself at their residence, and convicted the appellant under Sections 302 and 404 of IPC and sentenced him to undergo rigorous imprisonment for life. The conviction and sentence was upheld by the High Court, and therefore the present appeal.

Dismissing the appeal, the Court

HELD: 1. PW.8 and PW.9 do not support the recoveries of the ornaments. However, they have admitted to their signature/thumb impression(s) being present on the recovery memos. PW.2 is a circumstantial witness, and has deposed that being a neighbour of the couple, he was fully aware of the fact that the appellant had in fact ill-treated his wife, and that quarrels often arose between them. The deceased would cry a lot. PW3, the paternal uncle of deceased deposed that he had taken the deceased and her sister alongwith him from Hyderabad, and the same had become an issue with respect to which the appellant would

the deceased, as he doubted her character and he presumed that PW.3 had taken her alone from Hyderabad. Thus, it is indirectly suggested that owing to the suspicious mind of the appellant, he had believed that there had existed a questionable relationship between the deceased and PW.3. [Paras 6, 7 & 8] [519-G-H; 520-A-D]

2. Existence of a fracture on the hyoid bone leads to a conclusive proof of strangulation. The postmortem has revealed that the fracture of the hyoid bone is characterised by the absence of hemorrhage in the tissues around the fracture. Modi's Medical Jurisprudence and Toxicology states that, "hyoid bone and superior cornuae of the thyroid cartilage are not, as a rule, fractured by any other means other than by strangulation", although the larynx and the trachea may, in rare cases, be fractured as a result of a fall. PW.1 (father of the deceased) deposed that the sari of the deceased had been thrown into a corner of the room, and that it had not been cut into two pieces as was suggested by the appellant accused. The appellant had suggested that he had cut the sari with a knife, and had let the dead body of his wife onto the floor. An observation of the scene of the offence does not indicate that the remaining piece of sari had been found on the ceiling, and the prosecution has established the other facts regarding them last being seen and living together. The case against the appellant stands fully proved, and the theory that the deceased had committed suicide by hanging herself, is a false plea taken by the appellant, which in itself is an additional link connecting the appellant to the commission of offence. [Para 11] [522-B-G]

Ponnusamy v. State of Tamil Nadu **AIR 2008 SC 2110: 2008 (6) SCR 303 - relied on.**

3. It is a settled legal proposition that in a case based

on circumstantial evidence, where no eye-witness's account is available, the principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation for the same, or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. In cases where the accused has been seen with the deceased victim (last seen theory), it becomes the duty of the accused to explain the circumstances under which the death of the victim has occurred. [Paras 15, 17] [527-A-B, F]

State of U.P. v. Dr. Ravindra Prakash Mittal **AIR 1992 SC 2045: 1992 (2) SCR 815;** *Gulab Chand v. State of M.P.* **AIR 1995 SC 1598: 1995 (3) SCR 27;** *State of Tamil Nadu v. Rajendran* **AIR 1999 SC 3535: 1999 (3) Suppl. SCR 89;** *State of Maharashtra v. Suresh* **(2000) 1 SCC 471: 1999 (5) Suppl. SCR 215;** Ganesh Lal v. State of Rajasthan **(2002) 1 SCC 731: 2001 (4) Suppl. SCR 619;** *Neel Kumar @ Anil Kumar v. State of Haryana* **(2012) 5 SCC 766: 2012 (5) SCR 696;** *Nika Ram v. The State of Himachal Pradesh* **AIR 1972 SC 2077: 1973 (1) SCR 428;** *Ganeshlal v. State of Maharashtra* **(1992) 3 SCC 106: 1992 (2) SCR 502;** *Trimukh Maroti Kirkan v. State of Maharashtra* **(2006) 10 SCC 681: 2006 (7) Suppl. SCR 156 and** *Prithipal Singh & Ors. v. State of Punjab & Anr.* **(2012) 1 SCC 10: 2012 (14) SCR 862 - relied on.**

4. The appellant had been doubting the character of his wife and therefore, had adequate motive to eliminate her. In spite of the fact that he had been in the same room, he failed to furnish any explanation as under what circumstances his wife was found dead. Particularly, in view of the fact that the courts below had excluded the theory of suicide. The same conclusion stands fully fortified by the fact that the saree of deceased was lying in the corner of the room and the

appellant that he had found his wife hanging with a saree around her neck and he cut the same by knife stands fully falsified as in such a fact-situation, part of the saree should have been found hanging with the ceiling of the room. The conduct of the appellant that he had given a false information to his in-laws and while dead body was lying in his house he stayed in a Guest House; further that he had absconded from the city itself, suggest that he is guilty of the offence. [Para 19] [528-D-F]

Case Law Reference:

2008 (6) SCR 303	**relied on**	**Para 12**
1992 (2) SCR 815	**relied on**	**Para 15**
1995 (3) SCR 27	**relied on**	**Para 15**
1999 (3) Suppl. SCR 89	**relied on**	**Para 15**
1999 (5) Suppl. SCR 215	**relied on**	**Para 15**
2001 (4) Suppl. SCR 619	**relied on**	**Para 15**
2012 (5) SCR 696	**relied on**	**Para 16**
1973 (1) SCR 428	**relied on**	**Para 17**
1992 (2) SCR 502	**relied on**	**Para 17**
2006 (7) Suppl. SCR 156	**relied on**	**Para 18**
2012 (14) SCR 862	**relied on**	**Para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2038 of 2011.

From the Judgment and Order dated 13.07.2010 of the High Court of Andhra Pradesh at Hyderabad in Criminal Appeal No. 302 of 2007.

Dr. Aman Hingorani, Swati Sumbly, Suveni Banerjee for the Appellant.

Gagandeep Sharma, D. Mahesh Babu for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order dated 13.7.2010, passed by the High Court of Andhra Pradesh at Hyderabad in Criminal Appeal No. 302 of 2007, concurring with the judgment and order dated 5.2.2007 of the Ist Additional Sessions Judge, Mahabubnagar, Andhra Pradesh, in Sessions Case No. 83 of 2006, whereby and whereunder the appellant was found guilty of the offences punishable under Sections 302 and 404 of the Indian Penal Code, 1860 (hereinafter referred to as 'the IPC'), and was sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.100/-, in default of payment of which, simple imprisonment for a period of three months under Section 302 IPC; and for the offence punishable under Section 404 IPC, rigorous imprisonment for a period of three years, was imposed on him. However, both the sentences were directed to run concurrently.

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

A. Balamani (deceased) was the second wife of the appellant. Their marriage was solemnized in 2002, for which her father had given dowry of Rs.20,000/-, gold earrings, a ring and silver anklets etc. Appellant became suspicious of the fidelity of his wife, and began to beat her up at times. The deceased went to live in the house of her parents because of the ill-treatment meted out to her by the appellant. However, upon the advice of the elders in her family, she decided to go back to the appellant. The appellant and the deceased were taken by G. Balaiah (PW.3), the paternal uncle of deceased to Hyderabad, and there he was engaged in coolie work. Here too, the appellant and Balamani (deceased) would often quarrel, and the appellant would beat her. They

their village, and 15 days prior to the said incident, the appellant had taken Balamani (deceased) to Srisailam and here they had worked at Eagalapenta, attending to the petty works in and around the colony for some time. D.V. Subbaiah (PW.2), a neighbour, had seen the appellant and the deceased quarrelling, and as a result thereof, had also noticed Balamani (deceased) weeping.

B. On 12.7.2003, Dasu Krishnaiah (PW.1), father of the deceased, received a telephone call from the appellant, wherein he was informed that Balamani was suffering from a severe stomach ache. The next day, the appellant again made a call to the neighbours of Dasu Krishnaiah (PW.1) and asked them to give a message to Dasu Krishnaiah (PW.1), asking him to come to Eagalapenta. However, Dasu Krishnaiah (PW.1) was unable to reach there. The next day, at about 10.30 A.M., the appellant telephonically informed Dasu Krishnaiah (PW.1) that Balamani had committed suicide. Dasu Krishnaiah (PW.1) immediately rushed by jeep, alongwith his family. On the way, they met the appellant at Santa Bazar at Achampet. The appellant then informed them that Balamani had committed suicide by hanging herself in the 'G' Type Labour Quarters, Near the Krishna Guest House, Eagalapenta. Even on being requested by Dasu Krishnaiah (PW.1), the appellant refused to accompany them and instead, escaped from there. The family of Balamani (deceased) had thereafter reached the 'G' type quarters, and here they found that the dead body of Balamani (deceased) was smelling, and that from it, blood was flowing out of the house over its threshold. The dead body of the deceased was lying on the floor, and two granite stones lay near the head of the dead body. There were tears on certain parts of the body of deceased, which clearly indicated that there had been attempts made to forcibly snatch off her gold ornaments.

C. Dasu Krishnaiah (PW.1) filed an FIR regarding the incident on 15.7.2003, alleging that the appellant had killed

Balamani on the night of 12.7.2003, by strangulation. Her nose and ears were viciously cut, and all her gold ornaments and anklets had been stolen.

D. The police had recovered the dead body of Balamani, and had got the autopsy performed upon it. The appellant had been absconding, and thus could be arrested only on 15.7.2003. On the basis of the disclosure statement that was made by the appellant, the ornaments of Balamani, deceased, had been recovered in the presence of two panch witnesses, namely, Ganjai Niranjan (PW.8) and Syed Aktharali (PW.9). After completion of the investigation, a chargesheet was filed on 28.10.2005. Charges were framed on 17.8.2006 against the appellant, for the offences punishable under Sections 302 and 404 IPC.

E. After the conclusion of the trial, the learned Additional Sessions Judge convicted and sentenced the appellant vide impugned judgment and order dated 5.2.2007, as has been referred to hereinabove.

F. Aggrieved, the appellant preferred an appeal before the High Court, which was dismissed vide impugned judgment and order dated 13.7.2010.

Hence, this appeal.

3. Dr. Aman Hingorani, learned counsel appearing for the appellant has submitted, that the present case was one of suicide by hanging, and that the same most certainly did not involve homicide by strangulation, as it is evident from the post-mortem report, as well as from the deposition of Dr. K. Padmavathi (PW.10), both of which clearly suggest, that death had been caused as a result of suicide by hanging. Even otherwise, there exist serious discrepancies and inconsistencies in the depositions of the witnesses. There was no motive whatsoever, for the appellant to commit the murder of his wife. All the recoveries are fake, a[illegible]s,

particularly jewellery and other items have been planted by the police to falsely implicate the appellant in the case, as recovery witnesses of the jewellery, particularly Ganjai Niranjan (PW.8) and Syed Aktharali (PW.9), do not support the recovery of the aforementioned items. The mere appearance and admission of their signature/thumb impression on the memo of recovery, does not prove the recovery. Thus, the appeal deserves to be allowed.

4. Per contra, Shri Gagandeep Sharma, learned counsel appearing for the respondent, has opposed the appeal, contending that opinion of Dr. Padmavathi (PW.10) could not be a piece of conclusive evidence. It is not necessary that the medical report, as well as the deposition of Dr. K. Padmavathi (PW.10) suggest the theory of suicide by hanging, and not of homicidal death by strangulation. The inconsistencies in the depositions of the witnesses are minor, and the same natural, as the evidence of the said witnesses was recorded after the lapse of a long period from the date of incident. The appellant had doubted the fidelity of his wife, and had therefore nursed a grudge when she had gone alongwith her paternal uncle G. Balaiah (PW.3) alone. However, she had been taken by G. Balaiah (PW.3) alongwith her sister. The concurrent findings of fact recorded by the courts below do not warrant any interference. The appeal lacks merit and is thus, liable to be dismissed.

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

6. The Trial Court has appreciated the evidence of all the witnesses, including medical evidence.

So far as the recoveries are concerned, undoubtedly, Ganjai Niranjan (PW.8) and Syed Aktharali (PW.9), do not support the recoveries of the ornaments. However, they have admitted to their signature/thumb impression(s) being present on the recovery memos.

7. D.V. Subbaiah (PW.2) is a circumstantial witness, and has deposed that being a neighbour of the couple referred to herein, he was fully aware of the fact that the appellant had in fact ill-treated his wife, and that there quarrels often arose between them. The deceased Balamani would cry a lot.

8. G. Balaiah (PW.3), the paternal uncle of deceased has deposed that he had taken the deceased and her sister alongwith him from Hyderabad, and the same had become an issue with respect to which the appellant would quarrel bitterly with the deceased Balamani, as he doubted her character and he presumed that G. Balaiah (PW.3) had taken her alone from Hyderabad. Thus, it is indirectly suggested that owing to the suspicious mind of the appellant, he had believed that there had existed a questionable relationship between the deceased and G. Balaiah (PW.3).

9. The Trial Court, after considering the entire evidence on record has recorded the following findings:

(i) The conduct of the appellant towards his wife was not cordial, and there existed adequate material on record to prove that the accused had in fact been beating and harassing his wife intentionally.

(ii) The evidence on record conclusively proves that the appellant had a deep rooted motive to somehow eliminate his wife, and the reason for this was the suspicion he had with respect to her character, particularly after she had travelled with G. Balaiah (PW.3) alone (in his opinion), from Hyderabad to Bommanapally.

(iii) The recovery witnesses Ganjai Niranjan (PW.8) and Syed Aktharali (PW.9) particularly as regards the recovery of the jewellery of the deceased, do not support the case of the prosecution, but they have admitted to their signature/thumb impression(s) appearing on the panchnama Ext.P-4.

(iv) Indisputably, the panchnama Ext.P-4 is in relation to material objects 1 to 3, i.e. in relation to the ornaments belonging to the deceased Balamani.

(v) The appellant has not offered any explanation as regards the gold ornaments of his wife being in his possession. He had been fully aware of the death of his wife from the very beginning.

(vi) The appellant had been in the company of his wife at the time of her death, and had been last seen with her. It is not the case of the appellant that any other person could have come and committed the crime.

(vii) The evidence on record fully excludes the theory of suicide, and establishes the cause of death as homicidal.

(viii) The appellant had been giving misleading information to Dasu Krishnaiah (PW.1), the father of the deceased.

(ix) The appellant had stayed in a guest house, leaving the dead body of his deceased wife lying in the house, and had subsequently, after meeting the family members of the deceased, absconded, and could only be apprehended after several days.

(x) Any inconsistencies, embellishments or discrepancies in the evidence are minor, and do not go to the root of the case.

10. The High Court has re-appreciated the entire evidence on record, and has concurred with the conclusions arrived at by the Trial Court, observing as under:

That the appellant had been with the deceased at the time of her death. He had furnished false information to the family members of the deceased, and the recovery of the jewellery of the deceased from the house of the accused had been made at his behest. The defence put forward by the appellant stating

that the deceased had committed suicide by hanging herself at their residence, was not acceptable. The tears present on the body of the deceased indicated the forcible snatching of her ornaments.

11. So far as the medical evidence is concerned, the High Court has dealt with the opinion of Dr. K. Padmavathi (PW.10), who has referred to Modi's Medical Jurisprudence and Toxicology, wherein it has been stated that, "hyoid bone and superior cornuae of the thyroid cartilage are not, as a rule, fractured by any other means other than by strangulation", although the larynx and the trachea may, in rare cases, be fractured as a result of a fall. The postmortem has revealed that the fracture of the hyoid bone is characterised by the absence of hemorrhage in the tissues around the fracture.

Furthermore, the High Court has dealt with the factual matrix of the case and has relied upon the statement of Dasu Krishnaiah (PW.1), who has deposed that the sari of the deceased had been thrown into a corner of the room, and that it had not been cut into two pieces as was suggested by the appellant accused. The appellant has suggested that he had cut the sari with a knife, and had let the dead body of his wife onto the floor. As an observation of the scene of the offence does not indicate that the remaining piece of sari had been found on the ceiling, and the prosecution has established the other facts regarding them last being seen and living together. The case against the appellant stands fully proved, and the theory that the deceased had committed suicide by hanging herself, is a false plea taken by the appellant, which in itself is an additional link connecting the appellant to the commission of offence.

12. So far as the medical evidence is concerned, the issue involved herein is no more *res integra.*

This Court dealt with the issue in *Ponnusamy v. State of Tamil Nadu,* AIR 2008 SC 2110, and c

"20-21. It is true that the autopsy surgeon, PW 17, did not find any fracture on the hyoid bone. Existence of such a fracture leads to a conclusive proof of strangulation but absence thereof does not prove contra. In Taylor's Principles and Practice of Medical Jurisprudence, 13th Edn., pp. 307-08, it is stated:

'The hyoid bone is 'U' shaped and composed of five parts: the body, two greater and two lesser horns. It is relatively protected, lying at the root of the tongue where the body is difficult to feel. The greater horn, which can be felt more easily, lies behind the front part of the strip muscles (sternomastoid), 3 cm below the angle of the lower jaw and 1.5 cm from the midline. The bone ossifies from six centres, a pair for the body and one for each horn. The greater horns are, in early life, connected to the body by cartilage but after middle life they are usually united by bone. The lesser horns are situated close to the junction of the greater horns in the body. They are connected to the body of the bone by fibrous tissue and occasionally to the greater horns by synovial joints which usually persist throughout life but occasionally become ankylosed.

Our own findings suggest that although the hardening of the bone is related to age there can be considerable variation and elderly people sometimes show only slight ossification.

From the above consideration of the anatomy it will be appreciated that while injuries to the body are unlikely, a grip high up on the neck may readily produce fractures of the greater horns. Sometimes it would appear that the local pressure from the thumb causes a fracture on one side only.

While the amount of force in manual strangulation would often appear to be greatly in excess of that required to cause death, the application of such force, as evidenced

by extensive external and soft tissue injuries, make it unusual to find fractures of the hyoid bone in a person under the age of 40 years.

As stated, even in older people in which ossification is incomplete, considerable violence may leave this bone intact. This view is confirmed by Green. He gives interesting figures: in 34 cases of manual strangulation the hyoid was fractured in 12 (35%) as compared with the classic paper of Gonzales who reported four fractures in 24 cases. The figures in strangulation by ligature show that the percentage of hyoid fractures was 13. Our own figures are similar to those of Green.'

22. In Journal of Forensic Sciences, Vol. 41 under the title — Fracture of the Hyoid Bone in Strangulation: Comparison of Fractured and Unfractured Hyoids from Victims of Strangulation, it is stated:

'The hyoid is the U-shaped bone of the neck that is fractured in one-third of all homicides by strangulation. On this basis, post-mortem detection of hyoid fracture is relevant to the diagnosis of strangulation. However, since many cases lack a hyoid fracture, the absence of this finding does not exclude strangulation as a cause of death. The reasons why some hyoids fracture and others do not may relate to the nature and magnitude of force applied to the neck, age of the victim, nature of the instrument (ligature or hands) used to strangle, and intrinsic anatomic features of the hyoid bone. We compared the case profiles and xeroradiographic appearance of the hyoids of 20 victims of homicidal strangulation with and without hyoid fracture (n = 10, each). The fractured hyoids occurred in older victims of strangulation (39 ± 14 years) when compared to the victims with unfractured hyoids (30 ± 10 years). The age dependency of hyoid fracture correlated with the degree of ossification or fusion of the hyoid

synchondroses. The hyoid was fused in older victims of strangulation (41 ± 12 years) whereas the unfused hyoids were found in the younger victims (28 ± 10 years). In addition, the hyoid bone was ossified or fused in 70% of all fractured hyoids, but, only 30% of the unfractured hyoids were fused. The shape of the hyoid bone was also found to differentiate fractured and unfractured hyoids. Fractured hyoids were longer in the anterior-posterior plane and were more steeply sloping when compared with unfractured hyoids. These data indicate that hyoids of strangulation victims, with and without fracture, are distinguished by various indices of shape and rigidity. On this basis, it may be possible to explain why some victims of strangulation do not have fractured hyoid bones.'

23. Mr Rangaramanujam, however, relied upon Modi's Medical Jurisprudence and Toxicology, 23rd Edn. at p. 584 wherein a difference between hanging and strangulation has been stated. Our attention in this connection has been drawn to Point 12 which reads as under:

Hanging	*Strangulation*
Fracture of the larynx and trachea- Very rare and that too in judicial hanging	*Fracture of the larynx and trachea – Often found also hyoid bone.*

24. A bare perusal of the opinion of the learned author by itself does not lead to the conclusion that fracture of hyoid bone, is a must in all the cases."

13. Dr. Aman Hingorani has submitted that in the present case, the post mortem report is completely silent about the ligature mark and its characteristics, as a result of which it cannot be said that the present case was one of homicidal strangulation/throttling as alleged by the prosecution. Dr.

Hingorani has placed a very heavy reliance on Modi's Medical Jurisprudence and Toxicology wherein after emphasizing that "hyoid bone and superior cornuae of the thyroid cartilage are not, as a rule, fractured by any other means other than by strangulation", has given the differences between hanging and strangulation in tabulated form, two of them being as follows:

Hanging	*Strangulation*
Ligature Mark – Oblique, non-continuous placed high up in the neck between the chin and the larynx, the base of the groove of furrow being hard, yellow and parchment like	*Ligature Mark – Horizontal or transverse continuous, round the neck, low down in the neck below the thyroid, the base of the groove or furrow being soft and reddish*
Scratches, abrasions and bruises on the face, neck and other parts of the body –	*Scratches, abrasions and bruises on the face, neck and other parts of the body –*
Usually not present	*Usually not present*

14. However, in view of the binding decision referred to hereinabove, we concur with the reasoning that has been given by the Trial Court, as well as by the High Court and are not in a position to accept the submissions made by Dr. Aman Hingorani.

15. It is a settled legal proposition that in a case based on circumstantial evidence, where no eye-witness's account is available, the principle is that when an incriminating circumstance is put to the accused and the said accused either offers no explanation for the same, or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstances to make it complete. (Vide: *State of U.P. v. Dr. Ravindra Prakash Mittal,* AIR 1992 SC 2045*; Gulab Chand v. State of M.P.*, AIR 1995 SC 1598; *State of Tamil Nadu v. Rajendran,* AIR 1999 SC 3535; *State of Maharashtra v. Suresh,* (2000) 1 SCC 471; and *Ganesh Lal v. State of Rajasthan,* (2002) 1 SCC 731).

16. In *Neel Kumar @ Anil Kumar v. State of Haryana,* (2012) 5 SCC 766, this Court observed :

> *"30. It is the duty of the accused to explain the incriminating circumstance proved against him while making a statement under Section 313 CrPC. Keeping silent and not furnishing any explanation for such circumstance is an additional link in the chain of circumstances to sustain the charges against him. Recovery of incriminating material at his disclosure statement duly proved is a very positive circumstance against him. (See also: Aftab Ahmad Anasari v. State of Uttaranchal,* AIR 2010 SC 773)*"*

17. In cases where the accused has been seen with the deceased victim (last seen theory), it becomes the duty of the accused to explain the circumstances under which the death of the victim has occurred. (Vide: *Nika Ram v. The State of Himachal Pradesh,* AIR 1972 SC 2077; *Ganeshlal v. State of Maharashtra,* (1992) 3 SCC 106; and *Ponnusamy* (supra).

18. In *Trimukh Maroti Kirkan* v**.** *State of Maharashtra,* (2006) 10 SCC 681, this Court held as under:

"Where an accused is alleged to have committed the

murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

(See also: *Prithipal Singh & Ors. v. State of Punjab & Anr.,* (2012) 1 SCC 10)

19. In view of the above discussion, we reach the inescapable conclusion that appellant had been doubting the character of his wife and therefore, had adequate motive to eliminate her. In spite of the fact that he had been in the same room, he failed to furnish any explanation as under what circumstances his wife was found dead. Particularly, in view of the fact that the courts below had excluded the theory of suicide. The same conclusion stands fully fortified by the fact that the saree of deceased was lying in the corner of the room and the version given by the appellant that he had found his wife hanging with a saree around her neck and he cut the same by knife stands fully falsified as in such a fact-situation, part of the saree should have been found hanging with the ceiling of the room. The conduct of the appellant that he had given a false information to his in-laws and while dead body was lying in his house he stayed in a Krishna Guest House; further that he had absconded from the city itself, suggest that he is guilty of the offence.

20. In view of the above, we do not find any cogent reason to interfere with the judgments and orders of the courts below. The appeal lacks merit, and is accordingly dismissed.

B.B.B. Appeal dismissed.

BHADRAGIRI VENKATA RAVI
v.
PUBLIC PROSECUTOR HIGH COURT OF A.P., HYDERABAD
(Criminal Appeal No. 248 of 2007)

MAY 29, 2013

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Penal Code, 1860 - s.302 - Death of woman due to burn injuries - Acquittal of accused-appellant (divorced husband of deceased) by trial court - But conviction by High Court u/s.302 - On appeal, held: There were three dying declarations - First two declarations did not implicate the appellant - The third declaration dated 28.4.2000 implicated the appellant but the same being full of contradictions does not inspire confidence - Settled legal proposition that in case there are apparent discrepancies in two dying declarations, it would be unsafe to convict the accused - In such a fact-situation, the accused gets the benefit of doubt - Trial Court found material inconsistencies in the case of the prosecution and did not see any reason to rely upon the dying declaration dated 28.4.2000 - High Court did not consider the matter in correct perspective nor observed the parameters laid down by Supreme Court to interfere against the order of acquittal - Order of trial court restored.

Evidence Act, 1872 - s.32 - Multiple dying declarations - Appreciation of.

Appeal - Appeal against acquittal - Scope of interference.

A woman died due to burn injuries. One day after the incident, on 15-4-2000, the statement / complaint of the deceased was recorded by the head constable of police wherein she stated that a stove full of kerosene oil fell

upon her and thus, she suffered burn injuries. On the same day, her dying declaration was recorded by the Executive Magistrate after getting certificate of fitness from the Doctor, wherein a similar statement had been recorded.

A fortnight later, on 28.4.2000, her another dying declaration was recorded by the Executive Magistrate wherein she alleged that while she was cooking food and all the students had gone home, the appellant (the divorced husband of the deceased) poured kerosene on her body and threw the burning stove on her, due to which she received severe burn injuries.

The trial Court acquitted the appellant, but on appeal by the State, the High Court reversed the acquittal and convicted the appellant under Section 302 IPC and sentenced him to undergo life imprisonment. Hence, the instant appeal.

Allowing the appeal, the Court

HELD: 1. The first two dying declarations were made in the Government Headquarter Hospital, Vijianagaram and the Magistrate had reached there on being called by the police. There is no inconsistency between the first two dying declarations and it is evident from the said dying declarations recorded on 15.4.2000 that both of them had been recorded in the Government Headquarter Hospital, Vijianagaram. The third dying declaration makes it evident that on 15.4.2000 she had not been taken to the Government Hospital and her in-laws were not available on 14.4.2000. Her husband had been treating her at home and had also given her injections for two-three days. Her parents-in-laws reached on 15.4.2000 from Rajahmundry and then she was admitted to the private hospital on 16.4.2000. As she could not recover therein, then she was transferred to Government Hea[illegible]l,

Vijianagaram on that day. [Para 8] [539-D-F]

2. The Trial Court found material inconsistencies in the case of the prosecution and did not see any reason whatsoever to rely upon the dying declaration dated 28.4.2000 as the contents thereof were admittedly false and could not be relied upon. If the dying declaration has been recorded by the Executive Magistrate on 15.4.2000 in the Government hospital, the question of her being treated by her husband for 2-3 days and then her admission in a private hospital did not arise at all. Her version that she was admitted to the Government Headquarter hospital, Vijianagaram on 16.4.2000 could not be true. The contents of the dying declaration dated 28.4.2000 being full of contradiction do not inspire confidence. [Para 13] [541-A-C]

3. Admittedly, there was a divorce between the parties. Therefore, the question of demand of dowry or ill-treatment or harassment could not arise after 8 years of divorce decree by the court. The mother of the deceased has deposed about the illicit relationship of the appellant and another woman and the appellant wanted to marry that woman. In case the parties had separated by a divorce through court, one fails to understand how the deceased or her parents were concerned about such a relationship. [Para 14] [541-D-E]

4. It is a settled legal proposition that in case there are apparent discrepancies in two dying declarations, it would be unsafe to convict the accused. In such a fact-situation, the accused gets the benefit of doubt. In case of plural/multiple dying declarations, the court has to scrutinise the evidence cautiously and must find out whether there is consistency particularly in material particulars therein. In case there are inter-se discrepancies in the depositions of the witnesses given in support of one of the dying declarations, it would not

be safe to rely upon the same. In fact it is not the plurality of the dying declarations but the reliability thereof that adds weigh to the prosecution case. If the dying declaration is found to be voluntary, reliable and made in a fit mental condition, it can be relied upon without any corroboration. But the statements should be consistent throughout. In case of inconsistencies, the court has to examine the nature of the same, i.e. whether they are material or not and while scrutinising the contents of various dying declarations, the court has to examine the same in the light of the various surrounding facts and circumstances. In case of dying declaration, as the accused does not have right to cross-examine the maker and not able to elicit the truth as happens in the case of other witnesses, it would not be safe to rely if the dying declaration does not inspire full confidence of the court about its correctness, as it may be result of tutoring, prompting or product of imagination. The court has to be satisfied that the maker was in a fit state of mind and had a clear opportunity to observe and identify the assailant (s). [Paras 15, 16 & 17] [541-F-H; 542-A-D]

Sanjay v. State of Maharashtra **(2007) 9 SCC 148: 2007 (3) SCR 644;** *Heeralal v. State of Madhya Pradesh* **(2009) 12 SCC 671: 2009 (4) SCR 283;** *Smt. Kamla v. State of Punjab* **AIR 1993 SC 374: 1993 (1) SCC 1;** *Kishan Lal v. State of Rajasthan* **AIR 1999 SC 3062: 1999 (1) Suppl. SCR 517;** *Lella Srinivasa Rao v. State of A.P.* **AIR 2004 SC 1720: 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* **AIR 2010 SC 408: 2009 (16) SCR 441 - relied on.**

5. This court has time and again laid down parameters for interference by a superior court against the order of acquittal. In exceptiona

are compelling circumstances and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference. [Para 18] [542-G-H]

6. The High Court did not consider the matter in correct perspective nor observed the parameters laid down by this court to interfere against the order of acquittal. The judgment of the High Court is set aside. The judgment of the trial Court is restored. [Paras 19, 20] [543-A-B]

Case Law Reference:

2007 (3) SCR 644	**relied on**	**Para 15**
2009 (4) SCR 283	**relied on**	**Para 15**
1993 (1) SCC 1	**relied on**	**Para 17**
1999 (1) Suppl. SCR 517	**relied on**	**Para 17**
2004 (2) SCR 659	**relied on**	**Para 17**
2008 (8) SCR 956	**relied on**	**Para 17**
2009 (6) SCR 660	**relied on**	**Para 17**
2009 (16) SCR 441	**relied on**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 248 of 2007.

From the Judgment and Order dated 13.09.2006 of the High Court of Judicature of Andhra Pradesh, Hyderabad in Criminal Revision Appeal No. 863 of 2004.

Rameshwar Prasad Goyal for the Appellant.

D. Mahesh Babu for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been filed against the judgment and order dated 13.9.2006, passed by the High Court of Andhra Pradesh at Hyderabad in Criminal Appeal No.863 of 2004, by way of which the High Court reversed the judgment and order of the Sessions Judge, Vijianagaram dated 19.10.2001, passed in Sessions Case No.40 of 2001, by way of which and whereunder the appellant stood acquitted of the charges under Section 302 read with Section 201 of the Indian Penal Code 1860 (hereinafter referred to as the 'IPC').

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

A. The appellant had developed intimacy with Ratna Kumari (deceased) and got an inter caste marriage, registered on 26.10.1991 under the Hindu Marriage Act, 1955. Their married life was not very happy, therefore, Divorce Petition being O.P. No.37/92 was filed and the same was rejected by the Family Court on the ground that one year had not elapsed after their marriage.

B. Thus, a fresh Divorce Petition, i.e., O.P. No.65 of 1992 was filed on 31.12.1992. Their marriage was dissolved and the appellant and deceased stood separated. There was no child out of the said wedlock.

C. The deceased was a well qualified woman as she has obtained M.Com., LL.B. qualification. In order to earn her livelihood, she had been giving tuitions to the students in a rented premises i.e. House no.754, Phoolbagh Colony, Vijianagaram. The appellant, as alleged, in spite of their divorce, was having visiting terms with the dece

D. On 15.4.2000, Ratna Kumari was admitted in the Govt. Headquarter Hospital, Vijianagaram at 1.30 p.m. with 44% burns. Her statement/complaint was recorded by the head constable of police wherein she had stated that a stove full of kerosene oil fell upon her and thus, she suffered burn injuries. On the basis of the same an FIR was registered.

E. On the same day, her dying declaration was recorded by the Executive Magistrate after getting certificate of fitness from the Doctor, wherein a similar statement had been recorded. She remained admitted in the hospital.

On 28.4.2000, her another dying declaration was recorded by the Executive Magistrate wherein she alleged that on 14.4.2000 at about 1.30 p.m. while the deceased was cooking food and all the students had gone home, the appellant poured kerosene on her body and threw the burning stove on her, due to which she received severe burn injuries. The deceased raised hue and cry which attracted some of the neighbours.

F. Ratna Kumari (deceased) expired on 3.6.2000 in the hospital and on getting the information, the police altered the FIR into Section 302 and 498A IPC. The doctor conducted the post mortem and opined that the cause of death was septicemia shock due to ante-mortem burns.

G. After necessary investigation, the police filed charge sheet on 2.12.2000 against the appellant and his parents for offences under Sections 302 and 498A IPC. After committal of the proceedings, the trial commenced on 6.8.2001. After conclusion of the trial, the Trial Court vide judgment and order dated 19.10.2001 acquitted all the accused observing that prosecution could not prove any case whatsoever against either of them as there was no iota of evidence to show the involvement of either of them.

H. Aggrieved, the State preferred Criminal Appeal No.863 of 2004 before the High Court of Andhra Pradesh at

Hyderabad. The court dismissed the appeal against the parents of the appellant at the stage of admission itself. The appeal was admitted only qua the appellant. The appeal of the State has been allowed by the High Court vide judgment and order dated 13.9.2006, convicting the appellant under Section 302 IPC and awarding the sentence to undergo life imprisonment and to pay fine of Rs.5,000/-, in default, to undergo further S.I. for a period of one year. Appellant was acquitted of all other charges.

Hence, this appeal.

3. Shri H.S. Phoolka, learned senior counsel appearing for the appellant has submitted that admittedly after the marriage the parties had separated themselves and therefore, there was no question of living as husband and wife even after 8 years of their divorce. Just immediately after the incident when Ratna Kumari, deceased was taken to the hospital, she lodged a complaint/FIR which was recorded by the Head Constable though after her death the same was treated as her dying declaration. On the same day, her dying declaration was also recorded by the Executive Magistrate and both these dying declarations clearly speak non-involvement of the appellant or anybody else. It is a clear case of accident. The deceased was tutored by her mother and hence in third dying declaration, the appellant and his parents were enroped, in the offence. The declaration dated 28.4.2000 is self contradictory. The appeal deserves to be allowed.

4. Per contra, Shri Nachiketa Joshi, learned counsel appearing for the State has submitted that the High Court has appreciated the evidence and the dying declarations of Ratna (deceased) recorded on 15.4.2000 and on 28.4.2000, and the latter clearly involved the appellant and his parents. The High Court has taken a lenient view and did not admit the appeal against the parents of the appellant. While deciding the appeal, the High Court has met all the parameters laid down by this Court for interfering against the order of acquittal. Hence, the appeal is liable to be dismissed.

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

The FIR/dying declaration recorded on 15.4.2000 reads as under:-

> "I belong to Phoolbagh Colony, Vijianagaram. I married 10 years back with Ramana of Kamma while I was studying at Tirupathi. After one year living together, we got divorced through Vijianagaram District. I am living alone and gave tuitions to children and studying law. I forgone my relation with my own people. There are nobody of my own. Yesterday on 14.04.2000 night at about 8 hours time the current was cut off. I lit my kerosene stove and prepared tea. In the darkness my polyster saree worned by me got fire and my entire body, chest, hands, face, legs, foot and some portion of the stomach were burnt. I phoned to my known friend i.e. Bhadragin Lalita of Pradeep Nagar. She came and took me to the Pradeep Nagar. By then I purchased ointment and applied it. Not cured. Today i.e. 15.04.2000 morning by 10 hours I came to Government Hospital, Vijianagaram with the help of my friend Bhadragin Lalitha. Nobody is aware due to air and rain while I was burning. I poured water and put of. Then I felt nothing. Doctor gave medicines." (Emphasis added)

The Doctor has put an endorsement on the declaration that she was fit to make the declaration and signed the same. The declaration bears signature of the maker (deceased) and the person recording the same.

6. The dying declaration recorded by the Executive Magistrate dated 15.4.2000 reads as under:

> "Yesterday night at about 8 hours when I was litting the kerosene stove to prepare tea, huge winds are coming in the meanwhile my saree was burnt and flames came out. Likewise my body was burnt. I have no children. I got

> divorced with my husband through Court ten years back. I alone present when this happened. There are no disputes in between myself and my husband. My husband never came to my house after divorce. There are no disputes between myself and neighbours. Though I raised cries none of neighbours came as huge winds are flowing. Hence it might not be heard. My friend Lalitha took me to the Hospital. As myself has poured water vessel on me available in the kitchen. The flames were put of. I have no relationship with my parent-in-law's house. This is happened unexpectedly. No body did this." (Emphasis added)

This declaration also contains the endorsement by the Doctor in respect of the fit condition of the maker. It bears the signature of the deceased and the Executive Magistrate.

7. However, in the third dying declaration made on 28.4.2000 before the Magistrate, she has stated that she had been brought to the hospital by her husband Ravi, mother-in-law Lolitha, and father-in-law Gangaraju. That they got married on 26.10.1991. She was preparing food on kerosene stove in the mid day between 1.30 to 2.00 p.m. on 14.4.2000. Her husband asked her whether she had paid the electricity bill. She replied that she could not deposit as the office was closed. Her husband sent one student, namely Matcha Basava Raju to the electricity office to see whether it was opened or closed. He came back and answered that it was closed. However, there was exchange of words between them. He took up a kerosene tin lying there and poured the kerosene on her shoulders and immediately threw her on the burnt stove. She got burn injuries. Her husband took the water from the bath room and poured on her. Srinu, a next door neighbour came there and also poured water on her. The flames were put of. No neighbour came except Srinu. Her husband requested Srinu not to reveal anything about the incident to anybody. Her husband arranged some medicines and gave injections to h[illegible]s

frequently. He had given six injections within a period of 3 days at home. Her parents-in-law came from Rajahmundry on 15.4.2000. They also requested the deceased not to reveal anyone about the incident. On 16.4.2000, her husband and parents-in-law took her to a private hospital. The doctor gave her glucose and one injection. On the same day at about 12 noon, she was taken to Government hospital on cot by her husband and in-laws and thereafter, none of them could be found. She had earlier made a statement before the police as narrated by her husband and in-laws. She has no consciousness to such extent, but the persons were visible. Previously, the police or Magistrate had not taken any statement forcibly from her.

8. The first two dying declarations were made in the Government Headquarter Hospital, Vijianagaram and the Magistrate had reached there on being called by the police. There is no inconsistency between the first two dying declarations and it is evident from the said dying declarations recorded on 15.4.2000 that both of them had been recorded in the Government Headquarter Hospital, Vijianagaram.

The third dying declaration makes it evident that on 15.4.2000 she had not been taken to the Government Hospital and her in-laws were not available on 14.4.2000. Her husband had been treating her at home and had also given her injections for two-three days. Her parents-in-laws reached on 15.4.2000 from Rajahmundry and then she was admitted to the private hospital on 16.4.2000. As she could not recover therein, then she was transferred to Government Headquarter Hospital, Vijianagaram on that day.

9. Satyavarapu Anasuya (PW.1), mother of the deceased has deposed that Ratna (deceased) used to tell her that she was harassed by her husband to bring dowry, though she had given sufficient dowry at the time of marriage. She came to know about the burn injuries of her daughter on 15.4.2000 and immediately went to the Government Hospital. There she found

the appellant and his parents. On being asked, Ratna Kumari told her that she suffered the burn injuries by accident. Ten days later, she told the witness that the appellant poured kerosene on her and pushed her on a burning stove, that is why she sustained burn injuries. That her another daughter was a police constable and therefore, the appellant apprehended some action by the police against him and his parents. She has further deposed that prior to the death of her daughter, the appellant had developed illicit relationship with another woman just after Sankranthi festival and she had been informed about this by her daughter that appellant wanted to marry that woman.

10. Kondru Srinivasrao (PW.7), a second year student and neighbour of the deceased used to come for tuition to the deceased. He deposed that he had heard shrieks coming from the house of Ratna and reached the place of occurrence. He found Ratna in bath room and appellant was pouring water on her. On her request, the witness also brought water from the well and given to the appellant who poured the water on her. He has further deposed that he had not told about this incident to anybody.

11. Matcha Basavaraju (PW.8), a young student coming for tuition to the deceased deposed that he was not knowing the husband of Ratna but he had seen the appellant going on his scooter in Phoolbagh colony. He had never seen the appellant in the house of Ratna.

12. Dr. Ch. Suryanarayana (PW.16) deposed that he had signed the dying declaration dated 28.4.2000. That Ratna was having 44% of burns. The record of the hospital revealed that she had been admitted in the hospital on 14.5.2000 and had been given regular treatment and blood many times between 14.5.2000 and 31.5.2000. As per the hospital record she had been brought there by Lalita, a friend of Ratna (deceased). She had given the name of her husband as Ramana and it has further been mentioned in the hospital record that the patient herself had stated that she suffere[illegible]s

accidentally.

13. The Trial Court has found material inconsistencies in the case of the prosecution and did not see any reason whatsoever to rely upon the dying declaration dated 28.4.2000 as the contents thereof were admittedly false and could not be relied upon. If the dying declaration has been recorded by the Executive Magistrate on 15.4.2000 in the Government hospital, the question of her being treated by her husband for 2-3 days and then her admission in a private hospital did not arise at all. Her version that she was admitted to the Government Headquarter hospital, Vijianagaram on 16.4.2000 could not be true. The contents of the dying declaration dated 28.4.2000 being full of contradiction do not inspire confidence.

14. Admittedly, there was a divorce between the parties. Therefore, the question of demand of dowry or ill-treatment or harassment could not arise after 8 years of divorce decree by the court. The mother of Ratna has deposed about the illicit relationship of the appellant and another woman and the appellant wanted to marry that woman. In case the parties had separated by a divorce through court, we fail to understand how Ratna (deceased) or her parents were concerned about such a relationship.

15. It is a settled legal proposition that in case there are apparent discrepancies in two dying declarations, it would be unsafe to convict the accused. In such a fact-situation, the accused gets the benefit of doubt. (Vide: *Sanjay v. State of Maharashtra,* (2007) 9 SCC 148; and *Heeralal v. State of Madhya Pradesh,* (2009) 12 SCC 671).

16. In case of plural/multiple dying declarations, the court has to scrutinise the evidence cautiously and must find out whether there is consistency particularly in material particulars therein. In case there are inter-se discrepancies in the depositions of the witnesses given in support of one of the dying declarations, it would not be safe to rely upon the same. In fact

it is not the plurality of the dying declarations but the reliability thereof that adds weigh to the prosecution case. If the dying declaration is found to be voluntary, reliable and made in a fit mental condition, it can be relied upon without any corroboration. But the statements should be consistent throughout.

17. In case of inconsistencies, the court has to examine the nature of the same, i.e. whether they are material or not and while scrutinising the contents of various dying declarations, the court has to examine the same in the light of the various surrounding facts and circumstances. In case of dying declaration, as the accused does not have right to cross-examine the maker and not able to elicit the truth as happens in the case of other witnesses, it would not be safe to rely if the dying declaration does not inspire full confidence of the court about its correctness, as it may be result of tutoring, prompting or product of imagination. The court has to be satisfied that the maker was in a fit state of mind and had a clear opportunity to observe and identify the assailant (s).

(Vide: *Smt. Kamla v. State of Punjab,* AIR 1993 SC 374; *Kishan Lal v. State of Rajasthan,* AIR 1999 SC 3062; *Lella Srinivasa Rao v. State of A.P.,* AIR 2004 SC 1720; *Amol Singh v. State of Madhya Pradesh,* (2008) 5 SCC 468; *State of Andhra Pradesh v. P. Khaja Hussain,* (2009) 15 SCC 120; and *Sharda v. State of Rajasthan,* AIR 2010 SC 408).

18. This court has time and again laid down parameters for interference by a superior court against the order of acquittal. In exceptional cases where there are compelling circumstances and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The appellate court should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of his innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons

19. The High Court did not consider the matter in correct perspective nor observed the parameters laid down by this court to interfere against the order of acquittal.

20. In view of the above, the appeal is allowed and the judgment and order of the High Court is set aside. The judgment and order of the Sessions Court is restored. The appellant is on bail. His bail bonds stand discharged.

B.B.B. Appeal allowed.

DEEPAK GULATI

v.

STATE OF HARYANA

(Criminal Appeal No. 2322 of 2010)

MAY 20, 2013

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Penal Code, 1860 - ss. 376, 365 and 90 - Rape and consensual sex - Distinction between - Allegation that appellant enticed the prosecutrix, wrongfully confined her and had sexual intercourse with her in lieu of his promise to marry her - Conviction of appellant by Courts below u/ss. 365 & 376 - Challenge to - Held: In a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception - Distinction between mere breach of a promise, and not fulfilling a false promise - An accused can be convicted for rape only if his intention was mala fide, and he had clandestine motives -s.90 IPC cannot be called into aid to pardon the act of the girl in entirety, and fasten criminal liability on the accused, unless the court is assured that from the very beginning, the accused had never really intended to marry her - In the instant case, the prosecutrix had left her home voluntarily, of her own free will to get married to the appellant - She was 19 years of age at the relevant time and was, hence, capable of understanding the complications and issues surrounding her marriage to the appellant - Prosecutrix voluntarily became intimate with the appellant on a number of occasions and made no complaints to anyone - In fact, while she was proceeding with the appellant so that the two of them could get married in the court, they were apprehended by the police - Allegation of "false promise of marriage" raised by the prosecutrix, thus, has no basis -

Charge of deceit/rape cannot be leveled against the appellant - Appellant entitled to benefit of doubt - His conviction set aside - Evidence Act, 1872 - s. 114-A.

The prosecution case was that the appellant enticed the 19 year old daughter of PW8, wrongfully confined her and had sexual intercourse with her in lieu of his promise to marry her. The trial court convicted the appellant under Sections 365 and 376 IPC and sentenced him to undergo rigorous imprisonment for three years under Section 365 IPC; and rigorous imprisonment for seven years under Section 376 IPC. Both the sentences were ordered to run concurrently. The conviction and sentence was affirmed by the High Court, and therefore the instant appeal.

The question which arose for consideration in the present appeal was whether the appellant had an intention to deceive the prosecutrix from the very beginning and the consent of the prosecutrix had been obtained on the false promise of marriage.

Allowing the appeal, the Court

HELD: 1.1. Section 114-A of the Indian Evidence Act, 1872 provides, that if the prosecutrix deposes that she did not give her consent, then the Court shall presume that she did not in fact, give such consent. The facts of the instant case do not warrant that the provisions of Section 114-A of the Act 1872 be pressed into service. [Para 15] [554-G-H; 555-A]

1.2. However, consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had

actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of mis-representation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives. [Para 18] [556-A-F]

1.3. There must be adequate evidence to show that at the relevant time, i.e. at initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term misconception of fact, the fact must have an immediate relevance." Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and faste

the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her. [Para 21] [558-A-D]

Uday v. State of Karnataka **AIR 2003 SC 1639: 2003 (2) SCR 231;** *Deelip Singh @ Dilip Kumar v. State of Bihar* **AIR 2005 SC 203: 2004 (5) Suppl. SCR 909;** *Yedla Srinivasa Rao v. State of A.P.* **(2006) 11 SCC 615: 2006 (6) Suppl. SCR 760;** *Pradeep Kumar Verma v. State of Bihar & Anr.* **AIR 2007 SC 3059: 2007 (9) SCR 58 and** *N. Jaladu, Re ILR* **(1913) 36 Mad 453 - referred to.**

2. In the instant case, the prosecutrix had left her home voluntarily, of her own free will to get married to the appellant. She was 19 years of age at the relevant time and was, hence, capable of understanding the complications and issues surrounding her marriage to the appellant. According to the version of events provided by her, the prosecutrix had called the appellant on a number given to her by him, to ask him why he had not met her at the place that had been pre-decided by them. She also waited for him for a long time, and when he finally arrived she went with him to the Karna lake where they indulged in sexual intercourse. She did not raise any objection at this stage and made no complaints to any one. Thereafter, she also went to Kurukshetra with the appellant, where she lived with his relatives. Here too, the prosecutrix voluntarily became intimate with the appellant. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the appellant at the Birla Mandir. Thereafter, she even proceeded with the appellant to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married in court at Ambala. However, here they were apprehended by the police. If the prosecutrix was in fact going to Ambala to marry the appellant, as stands fully established from the evidence on record, one fails to understand on what basis the

allegation of "false promise of marriage" has been raised by the prosecutrix. One also fails to comprehend the circumstances in which a charge of deceit/rape can be leveled against the appellant, in light of the afore-mentioned fact situation. [Paras 23, 24] [559-A-F]

3. The appellant, who has already served more than 3 years sentence, is entitled to the benefit of doubt. His conviction and sentences awarded by the courts below are set aside. [Para 25] [559-G-H]

Case Law Reference:

2003 (2) SCR 231	**referred to**	**Para 16**
2004 (5) Suppl. SCR 909	**referred to**	**Para 16, 19**
2006 (6) Suppl. SCR 760	**referred to**	**Para 16**
2007 (9) SCR 58	**referred to**	**Para 16, 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2322 of 2010.

From the Judgment and order dated 28.01.2010 of the High Court of Punjab & Haryana at Chandigarh in CRA No. 960-SB of 1998 (O&M).

Amit Pawan for the Appellant.

Kamal Mohan Gupta for the Respondent.

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 28.1.2010, passed by the Punjab & Haryana High Court at Chandigarh in CRA No. 960-SB of 1998 by way of which, the High Court has affirmed the judgment and order of the Additional Sessions Judge, Karnal dated 13.11.1998 passed in Sessions Case No. 7 of 1995, by way of which the appella

the offences punishable under Sections 365 and 376 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC') and sentenced to undergo rigorous imprisonment for a period of three years, alongwith a fine of Rs.2,000/- under Section 365 IPC; and rigorous imprisonment for a period of seven years, alongwith a fine of Rs.5,000/- under Section 376 IPC. Both the sentences were ordered to run concurrently.

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

A. The appellant and Geeta, prosecutrix, 19 years of age, student of 10+2 in Government Girls Senior Secondary School, Karnal, had known each other for some time. Appellant had been meeting her in front of her school in an attempt to develop intimate relations with her. On 10.5.1995, the appellant induced her to go with him to Kurukshetra, to get married and she agreed. En route Kurukshetra from Karnal, the appellant took her to Karna lake (Karnal), and had sexual intercourse with her against her wishes, behind bushes. Thereafter, the appellant took her to Kurukshetra, stayed with his relatives for 3-4 days and committed rape upon her.

B. The prosecutrix was thrown out after 4 days by the appellant. She then went to one of the hostels in Kurukshetra University, and stayed there for a few days. The warden of the hostel became suspicious and thus, questioned the prosecutrix. The prosecutrix thus narrated the incident to the warden, who informed her father. Meanwhile, the prosecutrix left the hostel and went to a temple, where she once again met the appellant. Here, the appellant convinced her to accompany him to Ambala to get married. When they reached the bus stand, they found her father present there alongwith the police. The appellant was apprehended.

C. Baldev Raj Soni, father of the prosecutrix, had lodged a complaint on 16.5.1995 under Sections 365 and 366 IPC,

which was later converted to one under Sections 365 and 376 IPC.

D. The prosecutrix was medically examined on 17.5.1995. Her statement was recorded by the Magistrate under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.') on 20.5.1995. After completing the investigation, a chargesheet was filed against the appellant, and in view of the material on record, charges under Sections 365 and 376 IPC were framed against him by the Sessions Court, vide order dated 3.5.1996.

E. The prosecution examined 13 witnesses in support of its case and in view thereof, the Sessions Court convicted the appellant under Sections 365/376 IPC, vide judgment and order dated 13.11.1998 and awarded him the sentence for the said charges as has been referred to hereinabove.

F. Aggrieved, the appellant preferred Criminal Appeal No. 960-SB of 1998 (D & M) in the High Court of Punjab and Haryana at Chandigarh, which stood dismissed by the impugned judgment and order dated 18.11.1998.

Hence, this appeal.

3. None present for the appellant. In view thereof, the Court has examined the material on record and gone through both the impugned judgments with the help of Shri Kamal Mohan Gupta, learned counsel appearing on behalf of the State.

4. The statement of the prosecutrix (PW.7) was recorded under Section 164 Cr.P.C. on 20.5.1995, wherein she has clearly stated that she had gone alongwith the appellant to get married and for such purpose, she had also obtained a certificate from her school as proof of her age. On the said date i.e. 10.5.1995, as the appellant had been unable to reach the pre-decided place, the prosecutrix had telephoned him on the number provided by him. She has further deposed that the appellant had asked her to have a physic[illegible]n,

but that she had not agreed to do so before marriage. When they reached Kurukshetra and stayed with his relatives there, the appellant had sexual intercourse with her for 3 days. On the 4th day, she was thrown out of the house by the appellant and thus, she had gone to the Girls Hostel in Kurukshetra University, where she had stayed under the pretext of getting admitted to the university. However, the university personnel became suspicious, and after making enquiries from her, they telephoned her house. She then left the university and had gone to the Birla Mandir at Kurukshetra, where she had met appellant. Here he lured her once again, and thus, she had agreed to accompany him to Ambala to get married in court there. However, when they reached the old bus stand Kurukshetra, she had found her father and several police officials present there, and thereafter the appellant had been arrested and the prosecutrix was taken to Karnal.

5. The prosecutrix was examined in court as PW.7 on 5.7.1996, wherein she deposed that on 10.5.1995, as per the agreed plan, she had left her house to go alongwith the appellant to Kurukshetra to get married in court. However, she had not found the appellant at the place decided upon by them, and had thus telephoned him at the number provided to her by him. She was then informed that the appellant had already left for Kurukshetra and hence, waited for him from 12.00 noon till 1.30 p.m. When he arrived, she went alongwith the appellant at 2.30 p.m. to Karna lake (Karnal) by bus. Here, she was taken into some bushes behind the restaurant at Karna lake, and thereafter raped by the appellant. At the said time, she neither raised any objection, nor any hue and cry. The prosecutrix did not even mention the said incident to any person, despite going to Kurukshetra and staying there for 3-4 days. She raised no grievance in this regard before any person or authority at the bus stand. She continued to stay with the appellant in the house of his relatives and was raped there. The appellant continued to postpone their marriage on one pretext or the other. Thereafter, she was thrown out of the house. She thus went and

stayed in the University hostel and on being questioned, she disclosed details regarding her treatment to the warden, who informed her family. After this, she went to the Birla Mandir at Kurukshetra, and here she met the appellant once again. The appellant made another attempt to convince her to go to Ambala with him to get married in court there. Upon reaching the old Bus Stand, she found her brother Rajinder there alongwith a police party, who had been accompanying them in a jeep to Karnal.

6. In his statement, Baldev Raj Soni (PW.8), father of the prosecutrix has deposed that on 10.5.1995, her daughter Geeta did not come home. He thus lodged a complaint and contacted Rajni, a friend of Geeta, who told him that the appellant Deepak had taken her to Kurukshetra. On 17.5.1995, the police had gone alongwith him to Kurukshetra to locate Geeta, where they had found the prosecutrix and the appellant sitting at the old bus stand in Kurukshetra. Both of them had been caught hold of by them, and were brought to Karnal.

7. Smt. P. Kant Vashisht (PW.10), Warden of Saraswati Bhawan Kurukshetra University, though did not support the case of the prosecution, and was declared hostile, has deposed in her examination in chief that Geeta, prosecutrix, had been brought to her office by one person, namely, Shri Ashwini, student of the engineering college, and that he had left Geeta in her office, stating that he would inform her parents. After sometime, her brother had come and taken her away. She was cross-examined by the prosecution, and she has deposed that the prosecutrix had in fact stayed in the hostel without any authority/permission. One Nirmla, attendant therein had allowed her to stay in the hostel without any such requisite permission.

8. Smt. Krishana Chawla (PW.3), Lecturer of Political Science in Government Senior Secondary School, Karnal, has deposed before court, and has proved the school register to show that the date of birth of the prosecutrix was 26.6.1976.

9. Dr. (Mrs.) Amarjeet Wadhwa (PW.11), Medical Officer, Government Hospital, Karnal, who examined the prosecutrix on 17.5.1995, has deposed that the prosecutrix had indulged in sexual intercourse and was habitual to the same.

10. Shri Bhagwan Chand (PW.12), ASI, the Investigating Officer, has deposed that after recording the statement of the father of the prosecutrix on 17.5.1995, he had taken her father to Kurukshetra to search for the prosecutrix alongwith one constable. At about 12.00 noon, when they reached the old bus stand at Kurukshetra, the father of the prosecutrix noticed Geeta, sitting with the appellant Deepak in one corner of the bus stand, and thereafter, they had apprehended them. He has also disposed that he had recorded the statement of the prosecutrix.

11. There exist in the statements of the witnesses material contradictions, improvements and embellishments. In the cross-examination, Baldev Raj Soni (PW.8) has deposed that he had gone to Kurukshetra with his relatives i.e. Ashwini Kumar and Surinder, and has stated that his son Rajinder was not with him at such time. He has not deposed that he had received any telephone call from the warden of any hostel, as has been suggested by the prosecutrix. Furthermore, the prosecutrix in her statement under Section 164 Cr.P.C., has not mentioned the incident involving her indulging in sexual contact with the appellant at the Karna lake at Karnal. Bhagwan Chand (PW.12) has not mentioned that any relatives of the prosecutrix had accompanied them while they were traveling from Kurukshetra to Karnal.

12. The FIR in the present case has been registered under Sections 365 and 366 IPC, by Baldev Raj Soni (PW.8), father of the prosecutrix, naming several persons, including the appellant, accusing them of enticing his daughter and wrongfully confining her at an unknown place. Thus, he has expressed his apprehension with respect to danger to the life of his daughter.

13. Admittedly, the prosecutrix has never raised any grievance before any person at any stage. In fact, she seems to have submitted to the will of the appellant, possibly in lieu of his promise to marry her. . Thus, a question arises with respect to whether, in light of the facts and circumstances of the present case, the appellant had an intention to deceive her from the very beginning when he had asked the prosecutrix to leave for Kurukshetra with him from Karnal.

14. The undisputed facts of the case are as under:

I. The prosecutrix was 19 years of age at the time of the said incident.

II. She had inclination towards the appellant, and had willingly gone with him to Kurukshetra to get married.

III. The appellant had been giving her assurance of the fact that he would get married to her.

IV. The physical relationship between the parties had clearly developed with the consent of the prosecutrix, as there was neither a case of any resistance, nor had she raised any complaint anywhere at any time despite the fact that she had been living with the appellant for several days, and had travelled with him from one place to another.

V. Even after leaving the hostel of Kurukshetra University, she agreed and proceeded to go with the appellant to Ambala, to get married to him there.

15. Section 114-A of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Act 1872') provides, that if the prosecutrix deposes that she did not give her consent, then *the Court shall presume that she did not in fact, give such consent.* The facts of the instant case do not warrant that the provisions of Section 114-A of the Act [illegible] o

service. Hence, the sole question involved herein is whether her consent had been obtained on the false promise of marriage. Thus, the provisions of Sections 417, 375 and 376 IPC have to be taken into consideration, alongwith the provisions of Section 90 of the Act 1872. Section 90 of the Act 1872 provides, that any consent given under a misconception of fact, would not be considered as valid consent, so far as the provisions of Section 375 IPC are concerned, and thus, such a physical relationship would tantamount to committing rape.

16. This Court considered the issue involved herein at length in the case of *Uday v. State of Karnataka,* AIR 2003 SC 1639; *Deelip Singh* @ Dilip Kumar *v. State of Bihar,* AIR 2005 SC 203; *Yedla Srinivasa Rao v. State of A.P.,* (2006) 11 SCC 615; and *Pradeep Kumar Verma v. State of Bihar & Anr.,* AIR 2007 SC 3059, and came to the conclusion that in the event that the accused's promise is not false and has not been made with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act(s) would not amount to rape. Thus, the same would only hold that where the prosecutrix, under a misconception of fact to the extent that the accused is likely to marry her, submits to the lust of the accused, such a fraudulent act cannot be said to be consensual, so far as the offence of the accused is concerned.

17. Rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim, and therefore a rape victim is placed on a higher pedestal than an injured witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, rape tantamounts to a serious blow to the supreme honour of a woman, and offends both, her

esteem and dignity. It causes psychological and physical harm to the victim, leaving upon her indelible marks.

18. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of mis-representation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.

19. In *Deelip Singh* (supra), it has been observed as under:

> "20. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in [illegible] of

injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology."

20. This Court, while deciding *Pradeep Kumar Verma* (Supra), placed reliance upon the judgment of the Madras High Court delivered in *N. Jaladu, Re* ILR (1913) 36 Mad 453, wherein it has been observed:

> "We are of opinion that the expression "under a misconception of fact" is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In Section 3 of the Evidence Act Illustration (d) states that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married…….. "thus … if the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person". … Although in cases of contracts a consent obtained by coercion or fraud is only voidable by the party affected by it, the effect of Section 90 IPC is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence."

21. Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term misconception of fact, the fact must have an immediate relevance." Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, *unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.*

22. The instant case is factually very similar to the case of *Uday* (Supra), wherein the following facts were found to exist:

I. The prosecutrix was 19 years of age and had adequate intelligence and maturity to understand the significance and morality associated with the act she was consenting to.

II. She was conscious of the fact that her marriage may not take place owing to various considerations, including the caste factor.

III. It was difficult to impute to the accused, knowledge of the fact that the prosecutrix had consented as a consequence of a misconception of fact, that had arisen from his promise to marry her.

IV. There was no evidence to prove conclusively, that the appellant had never intended to marry the prosecutrix.

23. To conclude, the prosecutrix had left her home voluntarily, of her own free will to get married to the appellant. She was 19 years of age at the relevant time and was, hence, capable of understanding the complications and issues surrounding her marriage to the appellant. According to the version of events provided by her, the prosecutrix had called the appellant on a number given to her by him, to ask him why he had not met her at the place that had been pre-decided by them. She also waited for him for a long time, and when he finally arrived she went with him to the Karna lake where they indulged in sexual intercourse. She did not raise any objection at this stage and made no complaints to any one. Thereafter, she also went to Kurukshetra with the appellant, where she lived with his relatives. Here to, the prosecutrix voluntarily became intimate with the appellant. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the appellant at the Birla Mandir. Thereafter, she even proceeded with the appellant to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married in court at Ambala. However, here they were apprehended by the police.

24. If the prosecutrix was in fact going to Ambala to marry the appellant, as stands fully established from the evidence on record, we fail to understand on what basis the allegation of "false promise of marriage" has been raised by the prosecutrix. We also fail to comprehend the circumstances in which a charge of deceit/rape can be leveled against the appellant, in light of the afore-mentioned fact situation.

25. In view of the above, we are of the considered opinion that the appellant, who has already served more than 3 years sentence, is entitled to the benefit of doubt. Therefore, the appeal succeeds and is allowed. His conviction and sentences awarded by the courts below are set aside. The appellant is on bail. His bail bonds stand discharged.

B.B.B. Appeal allowed.

SUCHA SINGH
v.
STATE OF HARYANA
(Criminal Appeal No. 1190 of 2007)

JUNE 20, 2013

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

Penal Code, 1860 - ss. 302 & 394 - Conviction under, of the appellant - Propriety - Held: On facts, proper - Evidence of PW-1, PW-2, PW-3, PW-8 and PW-11 sufficient to unfold the prosecution story and prove beyond reasonable doubt that appellant had killed the deceased and committed theft of his mule cart - Appellant made extra-judicial confession to PW-8 - Motive of the appellant was to take possession of the mule cart and sell the same and make money - Recoveries of articles pursuant to the disclosure statement made by the appellant clearly point to the guilt of the appellant.

Evidence - Witness - Appreciation of - Held: All witnesses of the prosecution need not be called - But witnesses essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution.

Evidence - Confession - Extra-judicial confession - Admissibility of.

PW1 found the dead body of PW2's son lying in a pit in the road side. The dead body had multiple injuries. The trial court held that there was no eye-witness to the incident in which the deceased was killed, but the chain of circumstances established by the prosecution proved beyond reasonable doubt that the appellant killed the deceased and stole his mule cart. These circumstances were that the appellant had hired the mule cart of the deceased and the deceased left for the house of the

appellant as deposed by PW-2. Further, the appellant made extra-judicial confession to PW-8 that he had killed the deceased. He also made a statement before the police pursuant to which the weapon of offence (Kassi Ex.P-22) and other articles (Exts.P-23 and P-24) were recovered. The Kassi (Ex.P-22), bed-sheet (Ex.P-23) and Khes (Ex.P-24) were found to be stained with human blood of the same group of blood, which was detected on the clothes of the deceased (Shirt, Ex.P-2, Jersey, Ex.P-4 and Underwear Ex.P-5) worn by him at the time of the occurrence. On the basis of the aforesaid circumstantial evidence, the trial court convicted the appellant under Sections 302 and 394 IPC, holding that the case of the prosecution was a full-proof case, and sentenced him to undergo rigorous imprisonment for life. The conviction and sentence was upheld by the High Court, and therefore the instant appeal.

In the instant appeal, contentions were raised on behalf of the appellant: 1) that the prosecution did not examine all the witnesses cited in the charge-sheet; 2) that the extra-judicial confession alleged to have been made by the appellant to PW-8 ought not to have been believed; 3) that the disclosure statement made by the appellant to the police was under pressure from the police and there were no independent witnesses to the recovery made pursuant to the statement; 4) that the FIR was not proved through the policeman who received the FIR; 5) and that the motive of the appellant to kill the deceased was not established by the prosecution.

Dismissing the appeal, the Court

HELD: 1.1. All the witnesses of the prosecution need not be called but witnesses who were essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution whether the

effect of their testimony is for or against the case for the prosecution and failure to examine such a witness might affect a fair trial. However, whether an examination of a particular witness was essential to the unfolding of the prosecution story will depend upon the facts and circumstances of each case. [Para 6] [568-A-C]

1.2. In the facts of the present case, the witnesses who are essential for unfolding the prosecution case against the appellant have been examined. The evidence of PW-1, PW-2, PW-3, PW-8 and PW-11 are sufficient to unfold the prosecution story against the appellant and prove beyond reasonable doubt that it is the appellant who had killed the deceased and committed theft of his mule cart. On the facts of this case, it is difficult to hold that non-examination of other witnesses cited by the prosecution in the charge-sheet adversely affects the prosecution case or in any way was unfair to the accused. [Para 7] [568-D; 569-G-H; 570-A]

Tej Parkash v. State of Haryana **(1996) 7 SCC 322 - relied on.**

Stephen Seneviratne v. The King **AIR 1936 PC 289 - referred to.**

2. A confession is a direct piece of evidence but before such evidence can be accepted, it must be established by cogent evidence what were the exact words used by the accused and even if the confession was established, prudence and justice demand that such evidence should not be used as the sole ground of conviction and it may be used as a corroborative piece of evidence. In the instant case, PW-8 has stated that on 05.02.1997, the appellant came to his residence and told him that with a bad intention he had murdered the deceased and he had brought the mule cart to village Kamalpur. This was a clear confe e

appellant to PW-8. That apart, this extra-judicial confession only corroborates the other circumstances which establish the guilt of the appellant beyond reasonable doubt. [Para 8] [570-B-D]

Sahoo v. State of Uttar Pradesh **AIR 1966 SC 40: 1965 SCR 86 - relied on.**

3. Pursuant to the information furnished by the appellant the Kassi, Khes and Bed-sheet were recovered from the pit under the road pulia. The recovery has also been witnessed by PW-3, who has clearly stated in his evidence that the accused got recovered Kassi, one Khes and a bed-sheet. These articles which were recovered were sent to the Forensic Science Laboratory and the results of the Forensic Science Laboratory are that the Kassi, Bed-sheet and Khes were stained with large and small blood stains. These recoveries of the aforesaid articles pursuant to the disclosure statement made by the appellant clearly point to the guilt of the appellant. [Para 10] [571-C-D]

State of Uttar Pradesh v. Deoman Upadhyaya **AIR 1960 SC 1125 - relied on.**

4. PW-1, the informant, has been examined and he has stated that he lodged the FIR on 01.02.1997 and PW-11 has stated that on the basis of the information furnished by PW-1 he registered the FIR which was written by HC Ranbir Singh. Hence, the FIR (Ex.PE/2) has been duly proved. Further, from the extra judicial confession made by the appellant to PW-8, it is clear that the motive of the appellant was to take possession of the mule cart and sell the same and make money. [Paras 11, 12] [571-F, G; 572-A]

5. In the result, no infirmity is found in the judgment of the trial court and the High Court. [Para 13] [572-B]

Case Law Reference:

(1996) 7 SCC 322	**relied on**	**Para 6**
AIR 1936 PC 289	**referred to**	**Para 6**
1965 SCR 86	**relied on**	**Para 8**
AIR 1960 SC 1125	**relied on**	**Para 9**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1190 of 2007.

From the Judgment and Order dated 06.04.2006 of the High Court of Punjab & Haryana at Chandigarh CRLA No. 294 of 2003.

Dr. Sushil Balwada (A.C.) for the Appellant.

Rajeev Gaur Naseem, Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is an appeal against the judgment dated 06.04.2006 of the Division Bench of the Punjab and Haryana High Court in Criminal Appeal No.294-DB of 2003.

2. The facts very briefly are that Amrik Singh, son of Fakir Singh, resident of Azad Nagar, Patiala (Punjab), used to ply a mule cart. On 31.01.1997, the appellant contacted him and hired his mule cart for Rs.600/- for carrying his household luggage from village Kamalpur, Police Station Rajound, to village Chambo Kheri, District Patiala. Accordingly, Amrik Singh left for the village Kamalpur on 31.01.1997 and was to return on the night of the same day, but did not return. His family members waited till the morning of 01.02.1997 but when Amrik Singh did not return, they became apprehensive and Fakir Singh went to the house of the appellan o

assured him that his son will return back by evening. When Amrik Singh did not return in the evening of 01.02.1997, Fakir Singh, Kaka Singh and Hardev Singh visited the house of the appellant and again they were assured by the wife of the appellant that Amrik Singh will return soon. In the meanwhile, on 01.02.1997 at about 11.30 am, one Rajinder Kumar noticed the dead body of a young man lying in a pit in the road side near village Kichhana and informed the police of Police Station, Rajound, and FIR was registered in Police Station, Rajound, under Section 302 of the Indian Penal Code (for short 'IPC'), and when inquest proceedings were carried out on the dead body, a purse and a slip were recovered from the dead body and from the slip the police was able to trace the family of Amrik Singh and informed Fakir Singh who reached the Civil Hospital, Kaithal, and identified the dead body to be that of his son Amrik Singh (hereinafter referred to as "the deceased"). Investigation was carried out and a charge-sheet was filed under Sections 302 and 394, IPC, against the appellant.

3. As the appellant pleaded not guilty, he was tried. At the trial, the prosecution examined as many as 11 witnesses. The trial court found that there was no eye-witness to the incident in which the deceased was killed, but the chain of circumstances established by the prosecution proved beyond reasonable doubt that the appellant killed the deceased and stole his mule cart. These circumstances were that the appellant hired the mule cart of the deceased and the deceased left for the house of the appellant as has been deposed by Fakir Singh (PW-2). The appellant made an extra-judicial confession to Sher Singh (PW-8) who accompanied the appellant along with the mule cart that he had killed the deceased and the mule cart was produced before the police by Sher Singh (PW-8) as per recovery memo (Ex.PF). The appellant made a statement before the police pursuant to which the weapon of offence (*Kassi* Ex.P-22) and other articles (Exts.P-23 and P-24) were recovered. As per the reports of the Forensic Science Laboratory, Haryana, Ex.PH and Ex.PH/1, the *Kassi* (Ex.P-22),

bed-sheet (Ex.P-23) and *Khes* (Ex.P-24) were found to be stained with human blood of the same group of blood, which was detected on the clothes of the deceased (Shirt, Ex.P-2, Jersey, Ex.P-4 and Underwear Ex.P-5) worn by him at the time of the occurrence. On the basis of the aforesaid circumstantial evidence, the trial court convicted the appellant under Sections 302 and 394 IPC, saying that the case of the prosecution was a full-proof case, and sentenced him to undergo rigorous imprisonment for life and fine of Rs.2000/- for the offence under Section 302 IPC and for a period of 7 years rigorous imprisonment and fine of Rs.1000/- for the offence under Section 394 IPC. The trial court further ordered that the sentences were to run concurrently. Aggrieved, the appellant filed the Criminal Appeal No. 294-DB of 2003 in the High Court, but by the impugned judgment the High Court dismissed the appeal and maintained the conviction and sentences against the appellant.

4. Learned counsel for the appellant submitted that there was no eye witness to the occurrence and the conviction of the appellant was solely based on circumstantial evidence. He submitted that the trial court was not right in convicting the appellant for the following reasons:

(i) Though the prosecution cited many witnesses in the charge-sheet, it examined only 11 witnesses.

(ii) The extra-judicial confession alleged to have been made by the appellant to Sher Singh (PW-8) ought not to have been believed.

(iii) The statement of the appellant to the police on the basis of which disclosure was made, was made under pressure from the police and there were no independent witnesses to the recoveries made pursuant to the statement.

(iv) The FIR has not been proved through the policeman who has received the FIR, namely, Ranbir Singh.

(v) The motive of the appellant to kill the deceased has not been established by the prosecution.

Learned counsel for the appellant submitted that this is, therefore, a fit case in which the appellant should be acquitted of the charges.

5. Learned counsel for the State, on the other hand, submitted in his reply that:

(i) It was not necessary for the prosecution to examine all the witnesses cited in the charge-sheet if the 11 witnesses who have been examined were sufficient to prove the case of the prosecution against the appellant beyond reasonable doubt.

(ii) The circumstantial evidence in this case including the medical evidence of PW-6 and the Forensic Science Laboratory Report were sufficient to establish that it is the appellant and the appellant alone who had committed the offences.

(iii) The FIR had been proved by the prosecution by examining the informant, Rajinder Kumar (PW-1) and, therefore, it was not necessary to examine the policeman Ranbir Singh.

(iv) The extra-judicial confession was corroborated by other circumstantial evidence and therefore was rightly believed by the trial court.

(v) Where the circumstantial evidence established the guilt of the accused beyond reasonable doubt, the Court cannot refuse to convict only on the ground that the motive of the accused is not proved.

6. We may first deal with the contentions on behalf of the appellant that the prosecution has not examined all the witnesses cited in the charge-sheet. This Court has held in *Tej Parkash v. State of Haryana* [(1996) 7 SCC 322] relying on the Privy Council's decision in *Stephen Seneviratne v. The King* (AIR 1936 PC 289) that all the witnesses of the prosecution need not be called but witnesses who were essential to the unfolding of the narrative on which the prosecution is based must be called by the prosecution whether the effect of their testimony is for or against the case for the prosecution and that failure to examine such a witness might affect a fair trial. However, whether an examination of a particular witness was essential to the unfolding of the prosecution story will depend upon the facts and circumstances of each case.

7. In the facts of the present case, we find that the witnesses who are essential for unfolding the prosecution case against the appellant have been examined. PW-1, Rajinder Kumar, is the informant who has stated that he noticed the dead body of a young man aged 26-27 years lying in a pit in the road side and the dead body had multiple injuries and he proceeded towards Police Station, Rajound and on the way, he noticed a police jeep and he stopped the jeep and gave his statement to ASI Balwan Singh. PW-2, Fakir Singh, is the father of the deceased and his evidence is that on 31.01.1997, the appellant whom he knew earlier hired the mule cart for bringing household articles from village Kamalpur and the deceased accordingly went on the mule cart with the appellant and all this happened in his presence. He has further stated that the deceased did not come back on the evening of 31.01.1997 and on the morning of 01.02.1997, and on 01.02.1997 between 5.00 p.m. and 6.00 p.m., an ASI along with a constable came to him and showed him the documents which were recovered from the dead body and asked him whether the documents belonged to his son and he replied in the affirmative. He has further stated

that he went to the Civil Hospital, Kaithal, and identified the dead body to be that of his son. PW-3, Kaka Singh, corroborated the statement of PW-2. PW-8 has deposed that on 05.02.1997, the appellant told him that he had murdered the deceased with a bad intention and he brought the mule cart to village Kamalpur and he had tried to sell the same. PW-8 has further deposed that the appellant requested him to produce him before the police with a view to avoid third degree method of interrogation by the police and on 06.02.1997, he produced him before the police. PW-11 (Balwan Singh), the Investigating Officer, has stated that on 01.02.1997, he recorded the statement of PW-1 (Ex.PE) and he registered the formal FIR (Ex.PE/2) which was recorded by HC Ranbir Singh. He has further deposed that he prepared the inquest report (Ex.PK) of the dead body of the deceased and during the inquest proceedings recovered the purse (Ex.P-25) along with the identity slip (Ex.P-26) and sent an application (Ex.PJ) for *post-mortem* of the dead body at the Civil Hospital, Kaithal. He has also deposed that on 06.02.1997, the appellant accompanied by PW-8 came from the side of village Kithana and was produced before him along with the mule cart by PW-8. He has further stated that on the number plate of the mule cart the name of the deceased was written with white paint in Punjabi language. He has further stated that on 07.02.1997, the appellant was interrogated and he made a disclosure statement (Ex.PG) and pursuant to the said disclosure statement (Ex.PG), the *Khes* (Ex.P-24), Bed-sheet (Ex.P-23) and *Kassi* (Ex.P-22) were recovered after digging the pit in which these articles were lying concealed. In our considered opinion, the evidence of PW-1, PW-2, PW-3, PW-8 and PW-11 are sufficient to unfold the prosecution story against the appellant and prove beyond reasonable doubt that it is the appellant who had killed the deceased and committed theft of his mule cart and on the facts of this case, it is difficult to hold that non-examination of other witnesses cited by the prosecution in the charge-sheet adversely affects the prosecution case or in any way was unfair

to the accused.

8. There is also no merit in the contention of the learned counsel for the appellant that the extra-judicial confession alleged to have been made by the appellant to PW-8 ought not to have been believed. In *Sahoo v. State of Uttar Pradesh* (AIR 1966 SC 40), this Court has held that a confession is a direct piece of evidence but before such evidence can be accepted, it must be established by cogent evidence what were the exact words used by the accused and even if the confession was established, prudence and justice demand that such evidence should not be used as the sole ground of conviction and it may be used as a corroborative piece of evidence. As we have already noticed, PW-8 has stated that on 05.02.1997, the appellant came to his residence and told him that with a bad intention he had murdered the deceased and he had brought the mule cart to village Kamalpur. This was a clear confession made by the appellant to PW-8. That apart, this extra-judicial confession only corroborates the other circumstances which establish the guilt of the appellant beyond reasonable doubt.

9. We may next consider the submission of learned counsel for the appellant that the disclosure statement made by the appellant to the police was under pressure from the police and there were no independent witnesses to the recovery made pursuant to the statement. In *State of Uttar Pradesh v. Deoman Upadhyaya* (AIR 1960 SC 1125), a five judge bench of this Court has held:

> "Section 27 is founded on the principle that even though the evidence relating to confessional or other statements made by a person, whilst he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore declared provable in so far as it distinctly relates

to the fact thereby discovered."

The argument of the learned counsel for the appellant that the statement of the appellant to the police on the basis of which disclosure was made was under pressure from the police is thus misconceived if the truth of the statement was established through recoveries made pursuant to the statement.

10. In the instant case, pursuant to the information furnished by the appellant the *Kassi, Khes* and Bed-sheet were recovered from the pit under the road *pulia*. The recovery has also been witnessed by PW-3, Kaka Singh, who has clearly stated in his evidence that the accused got recovered *Kassi*, one *Khes* and a bed-sheet. These articles which were recovered were sent to the Forensic Science Laboratory and the results of the Forensic Science Laboratory are that the *Kassi*, Bed-sheet and *Khes* were stained with large and small blood stains. These recoveries of the aforesaid articles pursuant to the disclosure statement made by the appellant clearly point to the guilt of the appellant and there is no merit in the contention of learned counsel for the appellant that the statement of the appellant and the recoveries made pursuant to the statement of the appellant are of no evidentiary value.

11. We also do not find any merit in the argument of the learned counsel for the appellant that the FIR has not been proved through HC Ranbir Singh, the policeman who received the FIR. We find that PW-1, the informant, has been examined and he has stated that he lodged the FIR on 01.02.1997 and PW-11 has stated that on the basis of the information furnished by PW-1 he registered the FIR which was written by HC Ranbir Singh. Hence, the FIR (Ex.PE/2) has been duly proved.

12. We also find that the contention of the learned counsel for the appellant that the motive of the appellant to kill the deceased has not been established by the prosecution is misconceived in facts. From the extra judicial confession made

by the appellant to PW-8, it is clear that the motive of the appellant was to take possession of the mule cart and sell the same and make money.

13. In the result, we do not find any infirmity in the judgment of the trial court and the High Court and we accordingly dismiss this appeal.

B.B.B. Appeal Dismissed.