RAFIQUE @ RAUF & OTHERS
v.
STATE OF U.P.
(Criminal Appeal No. 752 of 2008)

JULY 2, 2013

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

PENAL CODE, 1860:

ss.302/149, 307/149, 452, 148 and 147 - Accused indulging in indiscriminate firing, causing death of one of their opponents and injuries to two others - Conviction and life sentence awarded by courts below - Held: The presence of the informant and injured witnesses at the place of occurrence has been sufficiently explained - Their evidence and the statement of the deceased recorded soon after the incident, the injury reports and the post-mortem report as well as the motive clearly bring home the guilt of accused-appellants -- Having regard to the extent of the injuries sustained by deceased, and the witnesses and the aggression with which the offence was committed, which resulted in the loss of life of one person considered along with the motive, there is absolutely no scope to reduce the gravity of the offence committed by the appellants and to modify the conviction and the sentence imposed - Code of Criminal Procedure, 1973 - s.161 and s.162(2) - Evidence Act, 1872 - s.32(1).

Evidence Act, 1872:

s.32(1) - Dying declaration - Statement of deceased recorded by police soon after the occurrence - Factors to be considered to place reliance upon such statement as dying declaration - Explained - Held: The grievous injuries sustained by the victim on his vital parts of body and his death within

24 hours, was sufficient to reach a conclusion that whether or not he was in the expectation of his death -- The further finding of courts below that there was no scope for any manipulation at the instance of police also strengthens the reliance placed upon by prosecution on the said statement by treating the same as a dying declaration - Sub-s. (2) of s.162, CrPC makes the position clear that the statement as a dying declaration would squarely fall within the said sub-section and has to only satisfy the stipulations contained in s. 32(1) of Evidence Act- High Court rightly relied upon the said statement as a dying declaration, squarely falling within the statutory prescription of s. 32(1) of Evidence Act - Penal Code, 1860 - s.302/149, 307/149, 452, 148 and 147 - Code of Criminal Procedure, 1973 - ss.161 and 162(2).

The eight appellants were prosecuted for commission of offences punishable u/ss 302/149, 149, s. 307/149, 452, 148 and 147 IPC. The case of the prosecution was that 7 days prior to the date of occurrence there was some dispute between the children of the complainant party and the accused persons over a goat belonging to the accused persons stated to have gone into the maize field of 'Z', the brother of PW-1; that pursuant to the said incident, on 05.09.1997 at about 3.00 pm, all the appellants-accused possessed with fire arms, entered the house of the 'Z', where P.Ws.1 to 3 were conversing with him, and made indiscriminate firing causing firearm injuries to 'Z' and P.Ws.2 and 3; that 'Z' and other injured were taken to Kotwali where P.W.1 lodged the written complaint and the Investigating Officer (PW-6) recorded the statement of 'Z' purportedly u/s 161 Cr.P.C (Ext. Ka-9); that the injured were sent to the hospital where 'Z' succumbed to his injuries on the following day. The trial court convicted all the accused persons u/ss 302/149, 307/149,452, 148 and 147 IPC and sentenced them to various terms of sentences including life imprisonment u/s 302/149. The High Court dismissed

their appeal.

In the instant appeal filed by the convicts, the arguments for the parties boiled down to the following questions:

(i) Whether the reliance placed by the High Court on Ext. K-9 (the recorded statement of the deceased) as a dying declaration and the confirmation of the conviction on that basis was justified?

(ii) Whether there was any controversy relating to place of occurrence in order to doubt the case of the prosecution?

(iii) Whether there was any doubt about the death of the deceased?

(iv) Whether the offence would fall u/s 304 and not u/s 302 IPC?

Dismissing the appeal, the Court.

HELD: 1.1 It is significant to note that as on date, there is no statutory prescription as to the manner or the procedure to be followed for recording a dying declaration to fall within the four corners of s. 32(1) of the Evidence Act. The presence of Magistrate; certification of the doctor as to the mental or the physical status of the person making the declaration, were all developed by judicial pronouncements. It will have to be found out whether the reliance placed upon by the prosecution on a statement alleged to have been made by the deceased prior to his death can be accepted as a dying declaration, will depend upon the facts and circumstances that existed at the time of making the statement. In that case it would mainly depend upon the date and time vis-à-vis the occurrence when the statement was alleged to have

been made; the place at which it was made, the person to whom the said statement was made; the sequence of events, which led the person concerned to make the statement; his physical and mental condition, the cogency with which any such statement was made; the attendant circumstances and, whether they throw any suspicion as to the factum of the statement said to have been made or any other factor existing in order to contradict the statement said to have been made as claimed by the prosecution; the nexus of the person who made the statement to the alleged crime and the parties involved in the crime; the circumstance which made the person to come forward with the statement and whether the said statement fully supports the case of the prosecution. Sub-s.(2) of s.162, CrPC makes the position clear that the statement as a dying declaration would squarely fall within the said sub-section and has to only satisfy the stipulations contained in s. 32(1) of the Evidence Act. [para 18 and 21] [311-A-E; 313-H; 314-A]

Cherlopalli Cheliminabi Saheb and Another v. State of Andhra Pradesh-**(2003) 2 SCC 571,** *Dhan Singh v. State of Haryana* **2010 (8) SCR 794 = (2010) 12 SCC 277;** *Srii Bhagwan v. State of U.P.* **2012 (11) Scale 734 - relied on.**

1.2 In the instant case, Ext.Ka-9, the statement of the deceased recorded u/s 161 Cr.P.C. by the Investigating Officer (P.W.6) at the police station when he was in the injured condition immediately after the incident, disclosed the specific overt act by the appellants. PW-6 deposed that the deceased was fully conscious when he was brought injured to the police station. The very fact that the deceased who sustained such grievous injuries on the vital parts of his body breathed his last in a matter of 24 hours, was sufficient to reach a conclusion whether or not he expected his death. There could not have been any scope to doubt the veracity of his statement as to the

manner in which the occurrence took place and the persons who were responsible for the incident in question. Taking into account the totality of the circumstances, namely, the motive behind the incident, the mentioning of the names of the appellants who were known to the deceased, as all of them belong to the same village, the use of the weapons by the assailants, the situation in which he was placed at the time when he made the statement before P.W.6, where he could not have been tutored to make the statement, having regard to the time factor, the statement of the doctor (PW-5) who issued the postmortem certificate having come forward with an expert opinion that in spite of the nature of injuries sustained the deceased was fully capable of and was in a mind set to make a statement, sufficiently demonstrated that Ext.Ka-9 was rightly relied upon by the High Court as a dying declaration, squarely falling within the statutory prescription of s. 32(1) of the Evidence Act. [para 8 and 22] [304-G-H; 305-A; 314-B-G]

Khushal Rao v. State of Bombay **1958 SCR 552= AIR 1958 SC 22;** *In ref: Guruswami Tevar* **ILR 1940 Mad = (AIR 1940 Mad 196;** *Mohamad Arif v. Emperor* **AIR 1941 Pat. 409 (J) and** *Gulabrao Krishnajee v. Emperor* **AIR 1945 Nag. 153(K) - referred to.**

2.1 There was no dispute about the fact that the occurrence took place in the premises of the deceased, as well as the complainant (PW-1) and other injured witnesses (P.Ws.2 and 3). It has come in the evidence of P.Ws.1 to 3 that the families of the deceased and his brother (P.W.1) were living in the same premises in two different portions. The presence of P.W.3, the niece of the deceased at the place and time of occurrence has also been sufficiently stated and corroborated by all the three witnesses. [para 7-8] [304-C; 305-D-E]

2.2 Nothing was let in on the side of the defence to contradict the presence of P.W.1 at the time of occurrence, as well as subsequently when the deceased along with the other injured persons, were taken to the police station immediately after the occurrence. There was no reason to doubt the presence of the deceased and the other injured witnesses at the police station when the alleged statement Ext.Ka-9 came to be recorded by P.W.6. A reference to the details contained in Ext.Ka-9 is in tune with what has been narrated by the eye-witnesses P.Ws.1 to 3 before the court. There was nothing to contradict the material available on record in the form of evidence either documentary or oral in order to hold that the deceased, could not have made the statement before P.W.6. As has been noted by the courts below, there was no delay involved in reporting the occurrence to the police and the registration of the FIR. [para 21] [313-D-G]

3. Keeping in view the evidence of P.Ws.4 and 5, it cannot be held that there was any doubt at all as to the death of the deceased or the injuries sustained by him as noted by P.W.4 in Exts.Ka-2, Ka-3 and Ka-4. The injury reports of the deceased, P.W.2 and P.W.3, read along with the evidence of the doctor, who had examined them, sufficiently establish the nature of injuries sustained by all the three. Ext.Ka-3 is related to the deceased. Ext.Ka-5 postmortem certificate was issued by P.W.5. Further nothing was put to the witnesses with reference to doubts relating to the death of the deceased. Therefore, the submission raising doubt in this regard at this stage cannot be entertained in order to find fault with the case of the prosecution. [para 8 and 26] [304-G; 318-F-H]

4. As regards the pleas that the offence would fall u/s 304 and not u/s 302 IPC and that no other offence was made out, this Court holds that having regard to the

extent of the injuries sustained by the deceased, P.Ws.2 and 3 and the aggression with which the offence was committed against the victims, which resulted in the loss of life of one person considered along with the motive, which was such a petty issue, there is absolutely no scope to reduce the gravity of the offence committed by the appellants and to modify the conviction and the sentence imposed. [para 27] [319-A-C]

Case Law Reference:

1958 SCR 552	**referred to**	**para 13**
ILR 1940 Mad	**referred to**	**para 14**
AIR 1941 Pat. 409 (J)	**referred to**	**para 14**
AIR 1945 Nag. 153(K)	**referred to**	**para 14**
2010 (8) SCR 794	**relied on**	**para 19**
(2010) 12 SCC 277	**relied on**	**para 19**
2012 (11) Scale 734	**relied on**	**para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 752 of 2008.

From the Judgment and Order dated 16.08.2007 of the High Court of Judicature at Allahabad in Criminal Appeal No. 5764 of 2006.

Jaspal Singh, Imtiaz Ahmed, Naghma Imtiaz, Mohd. Asad Khan (for Equity Lex Associates) for the Appellants.

Aarohi Bhalla, Ardhendumauli Kumar Prasad for the Respondent.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. This appeal by the eight accused who were proceeded against in

Crime No.397/97 in Sessions Case No.35/1998 in the Court of Second Additional Sessions Judge, District Kannauj, were charged and convicted for offences falling under Section 302 read with 149, 307 read with 149, as well as for offences under Sections 452, 148 and 147 IPC. All the accused were convicted and inflicted with the punishment of life imprisonment for the offence under Section 302 read with 149 IPC, 5 year rigorous imprisonment for the offence under Section 307 read with 149 IPC, 1 year rigorous imprisonment for the offence under Section 452 IPC, 6 months rigorous imprisonment for the offence under Section 148 IPC and 3 months rigorous imprisonment for the offence under Section 147 IPC.

2. The case of the prosecution as projected before the Court below was that 7 days prior to the date of occurrence there was some dispute between the children of the parties of the victim and the accused. A goat belonging to the accused persons stated to have gone into the maize field of the deceased Zahiruddin and when the son of the said deceased objected to that, he was caught by the father of the accused 1 to 6. When the deceased Zahiruddin came to know about the said conduct of Masook, father of the accused 1 to 6, he went and protested by questioning him as to how for the grazing of the maize crop by the goat belonging to Masook, the son of the deceased could be held in captivity. The said protest raised by deceased Zahiruddin was not liked by Masook and both stated to have abused each other. Pursuant to the said incident, on 05.09.1997 at about 3.00 pm, all the appellants-accused armed with country-made gun (Addhi) as well as country-made pistols and the first accused holding his gun, entered the house of the deceased where P.Ws.1 to 3 were conversing with the deceased, Zahiruddin and made indiscriminate firing towards the deceased and the other persons. The deceased, P.Ws.2 and 3 stated to have sustained firearm injuries and they raised alarm pursuant to which others rushed to the spot. The appellants stated to have escaped from the scene of occurrence after giving further threats.

3. The deceased and other injured were stated to have been brought to Kotwali Farrukhabad, where P.W.1 lodged the written complaint Ext. Ka-1. The crime was registered as Crime No.397/97, as was evident from the G.D. entry Ext.Ka-14. The Investigating Officer P.W.6 stated to have recorded the statement of the deceased Zahiruddin purportedly under Section 161 Cr.P.C under Ext. Ka-9. The injured along with the deceased stated to have been sent to the hospital where the injured persons including the deceased were examined by the doctor. The injury report of the deceased Zahiruddin was Ext. Ka-3, the injury report of P.W.2 was Ext. Ka-4 and the injury report of P.W.3 was Ext. Ka-2. The deceased Zahiruddin died on the next day, i.e. on 06.09.1997 at 3:30 pm. The inquest memo was Ext. Ka-15 and the postmortem report was Ext. Ka-5. P.W.4 Dr. Irfan Ahmad was the doctor who conducted the postmortem and issued the postmortem certificate. The Investigation was initially carried out by P.W.6 and was later on completed by P.W.8. The charge-sheet was Ext.Ka-12. P.W.2, the wife of the deceased suffered two injuries, while P.W.3, the niece of the deceased, suffered one injury. The deceased suffered as many as eight injuries. It was in evidence that all the injuries were due to gun shots. The distance between the place of occurrence and the police station was stated to be 20 kilometers. All the injured were examined by the doctor by 5:45 pm to 6.10 pm on 05.09.1997 itself. It is in the evidence of P.W.5, postmortem doctor that based on the injuries noted on the body of the deceased it could be stated that he was capable of speaking in spite of the injuries sustained by him. The prosecution examined P.Ws.1 to 9. Based on the evidence before the trial Court and the incriminating circumstances existed against the appellants, they were questioned under Section 313 Cr.P.C and all the appellants denied their involvement and stated that due to animosity the evidence had been adduced against them. It was also stated that all of them belong to one and the same family. They did not choose to let in any evidence in support of their defence. It is in the above-stated background the conviction and sentence came to be

imposed by the trial Court, which was also affirmed by the High Court in toto.

4. Assailing the judgment impugned, Mr. Jaspal Singh, learned senior counsel for the appellants after taking us through the relevant evidence on record, as well as the judgments impugned before us submitted that the presence of P.W.1 in the place of occurrence was doubtful; that there were prevaricating statements by the witnesses about the exact place of occurrence; that there were grave doubts as to whether all the accused opened fire or only few of them; that having regard to the position in which P.Ws.2, 3 and deceased were placed at the time of occurrence the occurrence could not have been witnessed by the said so called eye-witnesses as narrated by them and that though only fire shot injuries were said to have been caused, not even a single pellet or an empty cartridge was recovered from the scene of occurrence. According to the learned senior counsel, there were serious doubts as to whether the postmortem report related to the body of the deceased. The learned senior counsel also contended that the accused were not questioned with reference to the so called dying declaration of the deceased in the 313 questioning. The learned senior counsel, therefore, contended that all the above factors created lot of doubts as to the factum of the occurrence, as well as the crime and that in any event the offence under Section 302 IPC cannot be said to have been made out and at best it may fall under Section 304 Part I or II and that Section 148 will not apply. According to him, if at all the accused had any grievance it could have been only against Shamshuddin, but certainly none had any object to kill Zahiruddin, the deceased.

5. As against the above submissions, Mr. Aarohi Bhalla, learned counsel for the State by referring to the judgment of the trial Court contended that after a detailed consideration of the stand of the appellants, the trial Court was able to conclude with all certainty about the place of occurrence and, therefore, the

said submission made on behalf of the appellants do not merit any consideration. According to the learned State counsel, the family of P.W.1 and the deceased were only living in two different portions of the same building and, therefore, the submission raising doubts about the place of occurrence does not merit any consideration. According to him the medical evidence fully established the use of firearm in the incident. The learned State counsel by making reference to Ext.Ka-15, inquest report issued by Irshad Ahmad at 10:55, contended that there was no doubt about the death of the deceased and the postmortem report relating to his death was also proved.

6. Having heard learned counsel for the respective parties and having bestowed our serious consideration to the various submissions made before us, we find that the submissions of learned counsel for the appellants raise the following questions for consideration, namely:-

I. Whether the reliance placed upon by the High Court on Ext.Ka-9, the recorded statement of the deceased Zahiruddin, which was relied upon by the High Court as a dying declaration and the confirmation of the conviction on that basis was justified?

II. Whether there was any controversy relating to the place of occurrence in order to doubt the case of the prosecution?

III. Whether there was any doubt about the death of the deceased as submitted on behalf of the appellants?

IV. Whether there was any scope to hold that the offence would fall under Section 304 Part I or II and not under Section 302 and other offences for which they were convicted?

7. At the outset it will have to be noted that except mere denial of the offence alleged against the accused in their 313 questioning no other specific stand was taken on behalf of the

appellants nor was any defence evidence, oral or documentary, placed before the Court. The motive for the offence was stated to be the grazing of maize crop by the goat belonging to the father of the appellants-accused 1 to 6 and the grand-father of appellant-accused 8 in the field of the deceased seven days prior to the date of occurrence. Admittedly, all the accused were closely related. Most of them belong to one family, namely, Masook. P.W.2 Shamshuddin, the complainant is the brother of the deceased. As far as the grazing of the maize crop as alleged by the complainant party was concerned not much argument was raised on behalf of the appellants. Even in the evidence nothing was stated to have been brought out in order to reject the said case pleaded by the prosecution. There was also no dispute about the fact that the occurrence took place in the premises of the deceased, as well as the complainant and other injured witnesses, namely, P.Ws.2 and 3. As regards the presence of the deceased and the other injured witnesses, namely, P.Ws.2 and 3 in the police station at the instance of P.W.1 who was also an eye-witness to the occurrence, was also not seriously disputed. We also find that the occurrence, which was stated to have taken place at 3.00 pm on 05.09.1997, was brought to the notice of the police without further loss of time, which was located about 20 kilometers away from the place of occurrence. There was also no serious argument raised as regards the registration of the FIR relating to the occurrence. Both the Courts below, therefore, held in one voice that there was no chance of any manipulation at the instance of the police.

8. While the occurrence had taken place at 3.00 pm, the deceased who was seriously injured along with the other injured witnesses P.Ws.2 and 3, were rushed to the hospital from the police station who were examined by P.W.4 between 5.45 pm to 6.10 pm on 05.09.1997. The injury reports Ext.Ka-3, Ext.Ka-4 and Ext.Ka-2 of the deceased, P.W.2 and P.W.3, read along with the evidence of P.W.4 Dr. Irfan Ahmad, sufficiently establish the nature of injuries sustained by all the three of them. Ext.Ka-9 the statement of the deceased recorded under Section 161

Cr.P.C. by P.W.6 at the police station when he was in the injured condition immediately after the incident, disclose the specific overt act against the appellants-accused as revealed by the deceased himself. It is true that the trial Court declined to rely upon the said statement by treating it as a dying declaration, while the High Court fully relied upon the said statement as a dying declaration of the deceased. In that respect certain other factors, which are relevant to be stated are that the deceased was 45 years old at the time of his death, as noted by P.W.4 Dr. Irfan Ahmad. P.W.5, Dr. P.V.S. Chauhan, who conducted the postmortem of the deceased, in the course of the cross-examination, categorically stated that because of the injury it cannot be concluded that the injured was unconscious and was not able to speak. He further stated that after getting the injuries in the brain it is not necessary that the injured would immediately go to coma stage and that it cannot be definitely stated within which time a person would reach the state of coma. It is also relevant to state that it has come in the evidence of P.Ws.1 to 3 that the families of the deceased Zahiruddin, as well as his brother P.W.1 were living in the same premises in two different portions. The presence of P.W.3, the niece of the deceased Zahiruddin, at the place and time of occurrence has also been sufficiently stated and corroborated by all the three witnesses.

9. Keeping the above factors in mind when we examine the submissions made on behalf of the appellants, as far as the reliance placed upon by the High Court in the impugned judgment on Ext.Ka-9 by treating it as a dying declaration, the High Court has noted the details mentioned in the said exhibit by extracting the same in the judgment impugned, which is to the following effect:

> "On the west side of my house, there is field of corn crop wherein 7 days prior to today i.e. 5.9.97, the goats of my co-villager Massok s/o Altaf had entered. My younger son Ezaz, aged 7 years had caught goat and was taking the same away on which Massok had freed the goat and started to take away my son, on which we came to know and I asked him not to do so that you are making the goat to eat the crop and simultaneously you are taking my son also away, it is not the right thing, on which they hurled abuses. Today on 5.9.97 I was sitting in the verandah of my house that suddenly around 3 o'clock Rauf, Ishtiyaq, Ataullah, Ayub, Pauva alias Pappu, Latif sons of Massok, Nisar s/o Farukh and Karim s/o Rauf came there out of them Latif was carrying Adhi and Rauf was carrying desi gun and others were carrying tamancha, and they came to my house climbing the stairs, my brother Shamsuddin, my wife Zabira and Mushtaq's daughter Shehnaz also present there. All the accused persons after arriving started firing indiscriminately on myself and my family members with an intention to kill us, on sustaining injuries I fell down on the ground and my wife and Shehnaz d/o Mushtaq also sustained pellet injuries. Then we raised alarm, hearing the same Shamsuddin, who had gone out of the house and Mushtaq s/o Defendar and Majeed s/o Panna came there and challenged the accused persons on which the accused persons went away towards their house. The accused persons were threatening of dire consequences. The accused persons had fired from close distance. I have sustained grievous injuries on different part of my body. My voice is becoming unclear, and my brother Shamsuddin has brought me to Thana on jeep."

10. The said statement refers to the incident, which took place seven days prior to the date of occurrence, which formed the motive for the occurrence. It also refers to the presence of all the accused on 05.09.1997 at 3 O'clock in his house and the arms, which were in their possession. It also mentions the presence of P.Ws.1 to 3 at that time. It further states as to how indiscriminate firing was made by the accused, which resulted in the injuries sustained by him, as well as P.Ws.2 and 3. It also refers to the alarm raised by P.W.2 and the rushing in of

Mushtaq s/o Defendar and Majeed s/o Panna pursuant to which the appellants-accused went away after making further threats against the victim. Finally, it was stated that he was taken to the police station by his brother P.W.1 in a Jeep.

11. The important question for consideration, therefore, is whether the said statement made by the deceased can be taken as a dying declaration and reliance can be placed upon the same. The High Court while relying upon the said statement has noted certain circumstances, namely, the evidence of P.W.6, Investigating Officer, who deposed that the deceased was fully conscious when he was brought to the police station with injuries on his face, chest and other parts of the body and that he recorded his statement. It was also noted that after recording his statement the Investigating Officer referred him to the hospital for medical examination and treatment. The High Court, thereafter, noted the evidence of P.W.5 the postmortem doctor who categorically stated in his cross-examination that the injured was also in a position to speak and that it was not necessary that in all cases after sustaining injury in the brain a person cannot retain his conscience or will not be in a position to speak. The High Court noted the further statement of the doctor that it is not necessary that in every such case the patient would immediately go to a coma stage.

12. The High Court, therefore, reached a conclusion that the deceased Zahiruddin, was in a position to speak and that the statement under Ext.Ka-9 was given by him who expired on the next day evening. It further stated that since it was the last statement of the deceased to the Investigating Officer it can very well be treated as a dying declaration. The High Court was conscious of the fact that the trial Court did not place any reliance on the said statement which in the opinion of the High Court was erroneous.

13. In this context when we make reference to the statutory provisions concerning the extent of reliance that can be placed upon the dying declaration and also the implication of Section

162(2) Cr.P.C. vis-à-vis Section 32(1) of the Evidence Act, 1872, we feel that it will be appropriate to make a reference to the decision of this Court reported in *Khushal Rao vs. State of Bombay* - AIR 1958 SC 22. Justice Sinha speaking for the Bench after making further reference to a Full Bench decision of the High Court of Madras headed by Sir Lionel Leach, C.J., a decision of the Judicial Committee of the Privy Council and 'Phipson on Evidence' - 9th Ed., formulated certain principles to be applied to place any reliance upon such statements. We feel that the substance of the principles stated in the Full Bench decision and the Judicial Committee of the Privy Council and the author Phipson's view point on accepting a statement as dying declaration can also be noted in order to understand the principles ultimately laid down by this Court in paragraph 16.

14. The Full Bench of the Madras High Court reported in *In re, Guruswami Tevar* - ILR 1940 Mad 158 at page 170 (AIR 1940 Mad 196 at p.200) in its unanimous opinion stated that no hard and fast rule can be laid down as to when a dying declaration should be accepted, except stating that each case must be decided in the light of its own facts and other circumstances. What all the Court has to ultimately conclude is whether the Court is convinced of the truthfulness of the statement, notwithstanding that there was no corroboration in the true sense. The thrust was to the position that the Court must be fully convinced of the truth of the statement and that it should not give any scope for suspicion as to its credibility. This Court noted that the High Court of Patna and Nagpur also expressed the same view in the decisions reported in *Mohamad Arif vs. Emperor* - AIR 1941 Pat.409 (J) and *Gulabrao Krishnajee vs. Emperor* - AIR 1945 Nag. 153 (K).

15. The Judicial Committee of the Privy Council while dealing with a case, which went from Ceylon, which was based on an analogous provision to Section 32(1) of the Indian Evidence Act, took the view that apart from the evidence of the deceased the other evidence was not sufficient to warrant a

conviction. It was, however, held that in that case when the statement of the deceased was received and believed as it evidently was by the jury it was clear and unmistakable in its effect and thereby, the conviction was fully justified and was inevitable. The Judicial Committee noted that the factum of a murderous attack, though resulted in the cutting of the throat and the victim was not in a position to speak but yet by mere signs she was able to convey what she intended to speak out, and the said evidence was brought within the four corners of the concept of dying declaration, which formed the sole basis ultimately for the Court to convict the accused, which was also confirmed by the Supreme Court of Ceylon, as well as by the Judicial Committee of the Privy Council.

16. The author Phipson in his 9th Ed., of the book on Evidence made the following observations:

> ".....The deceased then signed a statement implicating the prisoner, but which was not elicited by question and answer, and died on March 20. It was objected that being begun in that form, it was inadmissible:- Held (1) the questions and answers as to his state of mind were no part of the dying declaration; (2) that even if they were, they only affected its weight, not its admissibility; and (3) that the declaration was sufficient, without other evidence, for conviction *R. v. Fitzpatrick,* (1910) 46 Ir. L.T. 173 (M)."

17. After considering the above legal principles, this Court has set down the following six tests to be applied for relying upon a material statement as a dying declaration:

> "16. On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is

> corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties." (Emphasis added)

18. We also wish to add that as on date, there is no statutory prescription as to in what manner or the procedure to be followed for recording a dying declaration to fall within the four corners of Section 32(1) of the Evidence Act. The presence of Magistrate; certification of the doctor as to the mental or the physical status of the person making the declaration, were all developed by judicial pronouncements. As has been repeatedly

stated in various decisions, it will have to be found out whether in the facts and circumstances of any case the reliance placed upon by the prosecution on a statement alleged to have been made by the deceased prior to his death can be accepted as a dying declaration, will depend upon the facts and circumstances that existed at the time of making the statement. In that case it would mainly depend upon the date and time vis-à-vis the occurrence when the statement was alleged to have been made, the place at which it was made, the person to whom the said statement was made, the sequence of events, which led the person concerned to make the statement, the physical and mental condition of the person who made the statement, the cogency with which any such statement was made, the attending circumstances, whether throw any suspicion as to the factum of the statement said to have been made or any other factor existing in order to contradict the statement said to have been made as claimed by the prosecution, the nexus of the person who made the statement to the alleged crime and the parties involved in the crime, the circumstance which made the person to come forward with the statement and last but not the least, whether the said statement fully support the case of the prosecution.

19. In this context, we can also make a reference to a decision of this Court reported in *Cherlopalli Cheliminabi Saheb and Another vs. State of Andhra Pradesh* - (2003) 2 SCC 571, where it was held that it was not absolutely mandatory that in every case a dying declaration should be recorded only by a Magistrate. The said position was reiterated in *Dhan Singh vs. State of Haryana* - (2010) 12 SCC 277 wherein, it was held that neither Section 32 of the Evidence Act nor Section 162(2) of the Cr.P.C., mandate that the dying declaration has to be recorded by a designated or particular person and that it was only by virtue of the development of law and the guidelines settled by the judicial pronouncements that it is normally accepted that such declaration would be recorded by a Magistrate or by a doctor to eliminate the chances of any

doubt or false implication by the prosecution in the course of investigation.

20. In a recent decision of this Court reported in *Sri Bhagwan vs. State of U.P.* - 2012 (11) SCALE 734, to which one of us was a party, dealt with more or less an identical situation and held as under in paragraphs 21 and 22:

> "21. As far as the implication of 162 (2) of Cr.P.C. is concerned, as a proposition of law, unlike the excepted circumstances under which 161 statement could be relied upon, as rightly contended by learned senior counsel for the respondent, once the said statement though recorded under Section 161 Cr.P.C. assumes the character of dying declaration falling within the four corners of Section 32(1) of Evidence Act, then whatever credence that would apply to a declaration governed by Section 32 (1) should automatically deemed to apply in all force to such a statement though was once recorded under Section 161 Cr.P.C. The above statement of law would result in a position that a purported recorded statement under Section 161 of a victim having regard to the subsequent event of the death of the person making the statement who was a victim would enable the prosecuting authority to rely upon the said statement having regard to the nature and content of the said statement as one of dying declaration as deeming it and falling under Section 32(1) of Evidence Act and thereby commend all the credence that would be applicable to a dying declaration recorded and claimed as such.
>
> 22. Keeping the above principle in mind, it can be stated without any scope for contradiction that when we examine the claim made on the statement recorded by PW-4 of the deceased by applying Section 162 (2), we have no hesitation in holding that the said statement as relied upon by the trial Court as an acceptable dying declaration in all force was perfectly justified. We say so because no other

conflicting circumstance was either pointed out or demonstrated before the trial Court or the High Court or before us in order to exclude the said document from being relied upon as a dying declaration of the deceased. We reiterate that having regard to the manner in which the said statement was recorded at the time when the crime was registered originally under Section 326 IPC within the shortest time possible within which it could be recorded by PW-4 in order to provide proper medical treatment to the deceased by sending him to the hospital, with no other intention pointed out at the instance of the appellant to discredit contents of the said statement, we hold that the reliance placed upon the said statement as the dying declaration of the deceased was perfectly justified. Having regard to our above conclusion, the said submission of the learned counsel for the appellant also stands rejected."

21. In the case on hand nothing was let in on the side of the defence to contradict the presence of P.W.1 at the time of occurrence, as well as subsequently when the deceased along with the other injured persons, were taken to the police station immediately after the occurrence. There was no reason to doubt the presence of the deceased and the other injured witnesses at the police station when the alleged statement Ext.Ka-9 came to be recorded by P.W.6. A reference to the details contained in Ext.Ka-9 is in tune with what has been narrated by the eye-witnesses P.Ws.1 to 3 before the Court. There was nothing to contradict from the material available on record in the form of evidence either documentary or oral in order to hold that the deceased, could not have made the statement before P.W.6. As has been noted by the courts below, there was no delay involved in reporting the occurrence to the police and the registration of the FIR. The further finding of the courts below that there was no scope for any manipulation at the instance of the police also strengthens the reliance placed upon by the prosecution on Ext.Ka-9, by treating the same as a dying declaration. When we apply Section 162(2), the statute makes

the position clear that the statement as a dying declaration would squarely fall within the said provision and has to only satisfy the stipulations contained in Section 32(1).

22. Keeping the above factors in mind, when we apply Section 32(1) to Ext.Ka-9 we find it, mentioned in every one of the details of the case of the prosecution, which ultimately resulted in the death of the deceased Zahiruddin, as well as the injuries sustained by P.Ws.2 and 3, which fell for consideration before the courts below. The very fact that the deceased who sustained such grievous injuries on the vital parts of his body on 05.09.1997 at 3:00 pm, breathed his last on 06.09.1997 at 3:30 pm, i.e. in a matter of 24 hours, was sufficient to reach a conclusion that whether or not he was in the expectation of his death, there could not have been any scope to doubt the veracity of his statement as to the manner in which the occurrence took place and the persons who were responsible for the incident in question. Taking into account the totality of the circumstances, namely, the motive behind the incident, the mentioning of the names of the appellants who were known to the deceased, as all of them belong to the same village, the use of the weapons by the assailants, the situation in which he was placed at the time when he made the statement before P.W.6, where he could not have been tutored to make the statement, having regard to the time factor, the further statement of the doctor who issued the postmortem certificate having come forward with an expert opinion that in spite of the nature of injuries sustained the deceased was fully capable of and was in a mind set to make a statement, sufficiently demonstrated that Ext.Ka-9 was rightly relied upon by the High Court as a dying declaration, squarely falling within the statutory prescription of Section 32(1) of the Evidence Act, in order to rely upon the same for convicting the appellants. We are, therefore, convinced that such reliance placed upon by the High Court was perfectly justified and we do not find any good grounds to differ from the same. We, therefore, conclude and answer the said question in favour of the prosecution.

23. When we come to the other question as to whether there was any controversy relating to the place of occurrence in order to doubt the case of the prosecution, Mr. Jaspal Singh, learned senior counsel appearing for the appellants contended that in the FIR the complainant P.W.1 himself stated that he came later and that the incident took place in his house; that the staircase in the house was leading upto the first floor; that the place where the incident took place was a narrow one; that he was not certain as to whether all the accused opened fire or one or two alone opened fire; that the firing took place only for a minute; that when the accused entered the place P.Ws.2 and 3, as well as the deceased were facing north and that in another place he stated that the deceased was present on the roof and that no pellets were seen on the wall, nor any empty cartridge was recovered. The learned counsel by referring to the evidence of P.W.2 submitted that according to her she was in her house and that P.W.1 came later. It was pointed out that the staircase inside the house led upto the second floor, while P.Ws.2 and 3 and the deceased were in the Verandah of the third floor, that the house of P.W.1 was on the eastern side of the house of P.W.2, that the directions mentioned by her as to how the parties were positioned at the time of occurrence, were all circumstances, which go to show that there was no cogency in the evidence of the so called eye-witnesses to confirm that the occurrence took place at the place and in the manner as narrated by them.

24. While making reference to the above submissions, we only state that all the above submissions were considered threadbare by both the courts below. In the High Court the so called contradictions referred to on behalf of the appellants were considered in detail in the following paragraphs and ultimately rejected by stating as under:

> "Much emphasis was laid on the contradictions regarding place of occurrence. According to the prosecution case, the incident took place in the verandah of the house. Some

> contradictory statements have been given by the eyewitnesses regarding the situation of verandah. The I.O. prepared the site plan, Ext.Ka-6, in which he has marked the place of occurrence by letter 'X'. From letter 'A' the accused persons had made fire, at place 'P' he got the pellets and from place A-1, L, B, the witnesses had seen the occurrence. According to the site plan Ext.Ka-6, the place of occurrence was the third floor of the house. This house was three storied. The I.O. has shown 1st floor, 2nd floor and 3rd floor in his site plan, meaning thereby, technically speaking, the ground floor has been shown as 1st floor and 1st floor as 2nd floor and 2nd floor as 3rd floor. There was also misunderstanding between eyewitnesses regarding narration of the storeyes of the house. The witnesses were the illiterate rustic villagers who did not know the difference between storey and floor. The ground floor is narrated as 1st storey or 1st floor. We are of the opinion that the I.O. had made negligence in preparing site plan and did not show important things in it. For example, he has not shown the house of PW-1 Shamshuddin in the site plan. He has also not described in the site plan that the 2nd and 3rd storey of the house was in the level of agricultural field situate towards west or the ground floor or 1st floor was situate on the low level of the agricultural field situate towards west or the ground floor or 1st floor was situate on the low level of the agricultural field situate towards west.
>
> PW-1 Shamshuddin, the real brother of the deceased has stated in his cross-examination that the house of the deceased was three storeyed. There was a 'Zeena' in the second storey of the house but there was no 'Zeena' in the 2nd storey. Further he has stated that in the 3rd storey there were three rooms and verandah but later on he has stated that three rooms and verandah were situated in the 2nd storey and in the 3rd storey there were two rooms and one verandah, in which the incident took place. Further, he has

stated that 'Zeena' was present on the second storey of the house from where the accused persons entered the Verandah.

PW-2 Smt. Zabira has stated in her cross-examination that the third storey of the house was in the level of agricultural field situate towards west. Further, she has stated that the incident had taken place in the 3rd storey of the house.

PW-3 Smt. Shahnaz has stated in her cross-examination that in the second storey of the house there was no room but it was in the shape of verandah. Further, she has stated that the incident had taken place in the 2nd storey of the house. Further, she has stated that the 'Zeena' was situate in the 2nd storey of the house, which was in the level of the agricultural field situate towards west.

The learned Trial Court has made a detailed discussion over the said contradictions and he has given a finding that due to illiteracy and rustic background some contradictions have come in their statements. The I.O. found blood in the 'Verandah' of the third storey. He also found some pellets there. He had prepared memo Ext.Ka-7. It is also said that the incient had taken place in the 'Verandah' of the third storey of the house. PW-2 Smt. Zabira has clearly stated in her cross-examination that at the time of the incident all the injured were sitting in the 'Verandah' of the third storey. Thus, the place of occurrence was not doubtful."

25. Having considered the various facts noted by the Trial Court and approved by the High Court in dealing with the above submissions, we hold that the said submission does not impress upon us in order to interfere with the judgment impugned in this appeal. The said question is also, therefore, answered against the appellants.

26. The next question that arises for consideration is as to whether there was any doubt about the death of the

deceased, as submitted on behalf of the appellants. Mr. Jaspal Singh, learned senior counsel in his submissions referred to the evidence of P.W.4, Dr. Irfan Ahmad, who examined the injured including the deceased at 5:45 pm on 05.09.1997 and contended that according to the doctor all the injuries were caused by firearm, that such injuries might have been caused from the distance of 40 feet, that the injuries were on the front side, that there was no injury on the head as compared to the evidence of P.W.5, the postmortem doctor, who stated categorically that injury No.1 was on the right side of the head, which might have been caused by Lathicharge, which was also the version of P.W.3. The learned counsel made further reference to Ext.A-18 by which the death of the deceased was communicated by the doctor to the police station for conducting a postmortem and the postmortem held on 07.09.1997. By making further reference to Ext.Ka-5, the postmortem report, which was issued by U.H.M. Hospital, Kanpur by one Dr. B.S. Chauhan while the name of P.W.5 the postmortem doctor who gave evidence was mentioned as Dr. P.V.S. Chauhan of Ursala Hospital, Kanpur, the learned counsel submitted that there were serious doubts as to whether it related to the corpse of the deceased and the concerned postmortem report really related to the deceased Zahiruddin in this case. Though, in the first blush, the said contention made on behalf of the appellants appear to be of some substance, on a close reading of the evidence of P.Ws.4 and 5, we find that such instances pointed out by learned counsel were all of insignificant factors and based on such factors it cannot be held that there was any doubt at all as to the death of the deceased or the injuries sustained by him as noted by P.W.4 in Exts.Ka-2, Ka-3 and Ka-4. Ext.Ka-3 is related to the deceased. Ext.Ka-5 postmortem certificate was issued by P.W.5. We should also state that nothing was put to the above said witnesses with reference to those alleged doubts relating to the death of the deceased Zahiruddin. We are not, therefore, inclined to entertain the said submission at this stage in order to find fault with the case of the prosecution.

27. With that when we come to the last of the submissions made on behalf of the appellants, namely, whether there was any scope to hold that the offence would fall under Section 304 Part I or II and not under Section 302 IPC and that no other offence was made out, we can straight away hold that having regard to the extent of the injuries sustained by the deceased, P.Ws.2 and 3 and the aggression with which the offence was committed as against the victims, which resulted in the loss of life of one person considered along with the motive, which was such a petty issue, we are of the firm view that there was absolutely no scope to reduce the gravity of the offence committed by the appellants. We are, therefore, not persuaded to accept the said feeble submission made on behalf of the appellants to modify the conviction and the sentence imposed.

28. For all the above stated reasons, we do not find any merit in this appeal. The appeal fails and the same is dismissed.

R.P. Appeal dismissed.

VATHSALA MANICKAVASAGAM & ORS.
v.
N. GANESAN & ANR.
(Civil Appeal No.1241 of 2005)

JULY 02, 2013

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

CODE OF CIVIL PROCEDURE, 1908:

s.96 - First appeal - Suit for partition decreed by trial court holding the suit properties as joint family properties relying on the statement made by first defendant in a letter as admissible - High Court reversed the judgment without examining implications of the said letter - Held: Non consideration of the letter by the Division Bench of the High Court, would certainly amount to total misreading of the evidence, while interfering with the judgment of the trial court - Similarly, the Division Bench miserably failed to examine the issue relating to gift as regards the first item of the suit scheduled properties - Though, such a claim was made by defendant, there was no iota of evidence to support the said claim -The ingredients of s.122 of the Transfer of Property Act relating to gifts were not shown to have been complied with - Judgment of High Court set aside and the judgment and decree of trial court restored - Transfer of Property Act, 1882 - s.122 - 'Gift' - Evidence Act, 1872 - s.17.

EVIDENCE ACT, 1872:

s. 17 - Admission - In a suit for partition, letter of defendant produced by plaintiff wherein he had stated the suit properties as joint family properties - Held: Once, there admission is in a statement either oral or documentary, onus would shift to the party who made such an admission and it

will become an imperative duty on such party to explain it -- In the absence of any satisfactory explanation, it will have to be presumed to be true - In the instant case, the letter written by defendant is a statement constituting a tacit admission -- Every ingredient of s.17 relating to the said document was fully complied with.

A dispute over property arose between a family consisting of five members, namely, the mother, three sons and one daughter. A suit for partition was filed by the mother, two sons and the daughter against the eldest son of the family (defendant no. 1/respondent no. 1) claiming 4/5th share in the suit properties which comprised three houses, namely, items nos. 1, 2 and 3. Item no. 1 was sold by defendant no. 1, and his vendee further sold it to defendant no. 2. As regards item no. 3, there was no dispute. With regard to item no. 1, the stand of defendant no. 1 was that it had been gifted to him by his deceased father and item no. 2 was purchased by him out of the funds arranged by him on his own. The trial court relying on the evidence of the mother (PWI) and Ext. A-17, a letter written by defendant no. 1 to plaintiff no. 3, held all the three items as joint family properties and decreed the suit, as prayed. However, the Division Bench of the High Court, in the first appeal, reversed the decree in respect of item nos. 1 and 2.

In the instant appeal, the question for consideration before the Court was "whether there was total misreading of evidence by the High Court by not considering or referring to Ext.A-17 while interfering with the judgment of the trial court and whether legal principles of gift were established in regard to the first item of the suit schedule property."

Allowing the appeal, the Court

HELD: 1.1 An admission, as defined in s.17 of the

Evidence Act, 1872 constitutes a substantial piece of evidence and can be relied upon for proving the veracity of the facts incorporated therein. Once the admission as noted in a statement, either oral or documentary, is found, then the whole onus would shift to the party who made such an admission and it will become an imperative duty on such party to explain it. In the absence of any satisfactory explanation, it will have to be presumed to be true. [Para 23 and 24] [332-D, F-G]

Union of India vs. Moksh Builders and Financiers Ltd. and Others **1977 (1) SCR 967 = AIR 1977 SC 409 - relied on.**

1.2 While examining the contents of Ext. A-17, the trial court concluded that the three houses referred to therein, only related to the suit scheduled properties. Going by the statements made by respondent no. 1 himself in the said letter Ext.A-17, it was explicit and apparent that he was fully aware that even though the properties were in his name, he was not responsible for purchasing the same in his name and that he was not interested in having all the three properties for himself. The conclusions arrived at by the trial court based on the contents of Ext.A-17, cannot be found fault with. Respondent no. 1 neither disowned Ext. A-17 nor did he lead any evidence to disprove it. Therefore, it was futile on his part to have come forward with any other story after the suit came to be filed by the plaintiffs. In view of s. 17 of the Evidence Act, Ext. A-17 is a statement and the details contained therein, which pertain to the suit scheduled properties, constituted a tacit admission at the instance of respondent no. 1. [para 26-28] [334-A-C, E-G; 335-D]

1.3 The specific case of the first respondent, as regards the first item of the suit property was that his father gifted the said property to him. Except for the said

plea ipse dixit, there was nothing on record to support the said stand. There was no gift deed by the deceased in favour of the respondent no. 1. Till his lifetime no evidence was placed before the court to demonstrate that he gifted away the said property in favour of respondent no. 1, absolutely and that the latter expressed his acceptance of the said gift. [Paras 30 and 32] [336-A, F-G]

1.4 In fact, at that time, when the property was purchased, the first respondent was a college going student. Merely because the property was purchased in the name of respondent no. 1, it cannot be held that there was a valid gift in his favour, without any other evidence supporting the said claim. Per contra, his own mother (P.W.1), made it clear that since her husband was in the service of the State and was aware that a purchase of property would result in a direct violation of the rules relating to his service, the couple decided to purchase it in the name of respondent no. 1. Exts.A1 and A2, tax receipts, were produced by the plaintiffs to show that the property was managed and maintained by the family and not by the first respondent. Respondent no. 1 was not able to produce any document connected with the property, to show that he was enjoying the property absolutely, without any hindrance from the other heirs of the deceased. Therefore, the claim of gift relating to the first item of the suit property was not proved to the satisfaction of the court, both on law as well as on facts. [Para 35-37] [337-C-H; 338-A-B]

1.5 The stand of the first respondent in his statement as regards the second item of the suit schedule property to have been purchased by him partly with the money paid by his father-in-law and the balance paid by selling his wife's jewels, the trial court has noted that in support of the said stand, no piece of evidence was led before it. Besides the stand contained in the written statement and

that taken in oral evidence, were fully contradictory and, therefore, the one belied the other. [Para 29] [335-E-H]

1.6 Having regard to the prevaricating stand taken by the respondent no. 1, as compared to his tacit admission made in Ext.A-17, this Court is of the considered view that the trial court was fully justified in holding that all the three items of the suit scheduled properties, were joint family properties, in which the plaintiffs and the first respondent were entitled for equal share. [Para 38] [338-B-C]

2.1 The Division Bench of the High Court has completely omitted to examine the implications of Ext.A-17 which has relevance in respect of all the three suit schedule properties. As noted by the trial court, Ext.A-17 was a very crucial piece of evidence, in as much as, it contains the tacit admission voluntarily made by respondent no. 1, while also establishing as to why the veracity of its nature was never questioned by him. Since, there was no contra evidence to disprove Ext.A-17, respondent no. 1 was totally bound by the said document. Since every ingredient of s.17 of the Evidence Act, relating to the said document, Ext.A-17 was fully complied with, the non-consideration of the same by the Division Bench of the High Court, would certainly amount to total misreading of the evidence, while interfering with the judgment of the trial court. [Para 39] [338-D-G]

2.2 Similarly, the Division Bench miserably failed to examine the issue relating to gift as regards the first item of the suit scheduled properties. Though, such a claim was made by respondent no. 1, there was no iota of evidence to support the said claim. The ingredients of s.122 of the Transfer of Property Act relating to gifts were not shown to have been complied with. [Para 39] [338-G-H; 339-A]

2.3 Besides, the Division Bench of the High Court

completely omitted to examine the material piece of evidence, (namely, the documents showing the availability of funds for purchase of the property), as also the fact that there was no evidence to support and provide credence to the version of respondent no. 1. which was considered in detail by the trial court, while decreeing the suit. The judgment of the Division Bench of the High Court cannot be sustained and, as such, is set aside and the judgment and decree of the trial court restored. [Para 40-41] [339-E-F]

Case Law Reference:

1977 (1) SCR 967 relied on Para 24

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1241 of 2005.

From the Judgment and Order dated 19.06.2003 of the High Court of Judicature at Madras in Appeal Suit No. 367 of 1985.

S. Nanda Kumar, R. Satish Kumar, Parivesh Singh, Anjali Chauhan, S.K. Bandyopadhyay, Rakesh K. Sharma for the Appellants.

A.T.M. Sampath, P.N. Ramalingam, T.S. Shanthi, Satya Mitra Garg for the Respondents.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. This appeal is directed against the Division Bench judgment of the Madras High Court dated 19.06.2003, in A.S.No.367 of 1985.

2. Originally the suit for partition was filed by one late Mrs.Nagarathnam, along with her two sons late Manickavasagam and Saravanamurthi as well as her daughter Sethulakshmi as plaintiffs 3, 2 and 4. The present first appellant is the wife of the late Manickavasagam, the third plaintiff, along

with her sons, the second appellant and the third appellant. The fourth appellant is the second plaintiff and the fifth appellant is the fourth plaintiff. The first defendant who is the first respondent herein is also the son of the first plaintiff. The second respondent was the second defendant in the suit, who purchased the property from one Barnabass Nadar, to whom the first defendant earlier sold the suit property on 11.11.1978.

3. The suit was for partition. The plaintiffs claim 4/5th shares in respect of three items of the suit properties, which was decreed by the Trial Court, as against which, the first respondent/first defendant, filed the first appeal before the High Court. The High Court by the impugned judgment, modified the judgment and decree of the Trial Court and held that the decree with reference to item Nos.1 and 2 of the suit properties, cannot be sustained and that the decree of the Trial Court for partition, was confirmed only in respect of the third item of the suit property and that the preliminary decree for partition in respect of the third item of the suit property was alone granted. It is against the said judgment and decree of the Division Bench of the High Court, the appellants have come forward with this appeal.

4. The simple case of the plaintiffs in the suit was that the plaintiffs and the first defendant, are the descendants of the late Nithyanandam, who died intestate on 22.09.1956. They filed the suit for partition for their 4/5th shares in respect of items 1 to 3. The first item of the suit property was sold by the first defendant to one Barnabass Nadar, on 11.11.1978, who in turn sold the property to the second defendant/second respondent. It was the common case that the deceased Nithyanandam had no ancestral property and that his wife, sons and daughter have got equal share in the property. Therefore, as regards the eligibility and extent of share, there was no dispute. According to the first defendant/first respondent herein, out of the three items of the suit properties, the first and second items of properties were the exclusive properties of the first defendant and therefore, others were not entitled for any share in it.

5. So far as the first item of the property was concerned, according to the first defendant, the said property was gifted to him by his father and that the second item of the property was purchased by him by selling the jewels of his wife, as well as from the money advanced by his father-in-law to him.

6. The trial Court framed as many as 8 issues for consideration. Issue Nos.1 to 3 related to the stand of the first respondent herein that the first item of the suit property was gifted in his favour by his father and that the second item of the property was purchased from the proceeds of the jewels belonging to his wife, as well as, from the money advanced by his father-in-law. The third issue related to the question as to whether items 1 to 3 of the suit schedule properties, were the joint family properties, as claimed by the plaintiffs. The question relating to limitation, with regard to the claim of items 1 and 2 of the suit properties, was the 4th issue. The 5th issue related to the question whether, proper Court Fee was mentioned in the plaint. The sixth issue related to the entitlement of equity claimed by the second defendant/second respondent herein, as regards the first item of the suit schedule property. The last two issues related to the entitlement of the plaintiff for partition and the relief to be granted.

7. The first item of the suit property is a house property, in a site measuring 10,000/- sq.ft. in T.S.No.2951/3, at Arulananda Nagar, Thanjavur. The said house site was allotted by a Housing Society called Little Flower Colony House Building Co-operative Society, and the same was purchased by late Nithyanandam, in the name of his eldest son viz., the first defendant/first respondent herein.

8. The second item of the suit property is also a house site bearing Door No.17/35, purchased in the name of the first defendant on 21.10.1964, from one Visalakshmi Ammal, which is located in Rajappa Nagar, Thanjavur. The third item of the suit property is also a house and since there is no dispute about

the status of the property as a joint family property, we need not deal with the same in detail.

9. The trial Court while answering the issues, considered the evidence both oral and documentary and reached a conclusion that even suit items 1 and 2 though were also purchased in the name of the first defendant yet they were joint family properties and therefore, the plaintiffs were entitled to claim a share in all the three items of the suit schedule properties.

10. Having heard the learned counsel for the appellants, as well as the respondents and having bestowed our serious consideration to the judgments of the Division Bench of the High Court, as well as that of the Trial Court and other material papers placed before us, we feel that the controversy, which centers around this appeal will have to be briefly stated to appreciate the respective contentions of the parties.

11. The appellants and the first respondent are the descendants of late Nithyanandham, who died intestate on 22.09.1956. His wife, the first plaintiff, along with her deceased son Manickavasagam, 4th and 5th appellants, filed a suit for partition, as against the first respondent herein. During the pendency of the litigation before the High Court, the first plaintiff viz., the wife of the late Nithyanandham, as well as one of her sons, the third plaintiff Manickavasagam also died. The wife and the children of late Manickavasagam viz., appellants 1 to 3, therefore, came to be impleaded along with appellants 4 and 5.

12. The suit was for partition in respect of three items of properties. As far as the third item of the property is concerned, the first respondent tacitly admitted the same to be a joint family property and conceded for partition of 4/5th share of the plaintiffs. As far as the first item of the suit schedule property is concerned, according to him, though funds were provided by the late Nithyanandham for purchasing the same from a Co-

operative Housing Society viz., Little Flower Colony House Building Co-operative Society, it was gifted to him by his father and therefore, it was purchased in his name. The first respondent, therefore, claimed that the suit property was his absolute property.

13. As far as the second item of the property is concerned, the first respondent claims that the suit property was purchased from out of the funds provided by his Father-in-law at the time of his marriage, which he kept in a Fixed Deposit in a Co-operative Bank, which got matured in 1964 and that the balance amount was paid by disposing of his wife's jewels. The first respondent therefore, claimed that the suit property was also his own property and, therefore, the appellants were not entitled for any share in the 1st and 2nd items of suit properties.

14. As already stated, the trial Court rejected the stand of the first respondent and held that the appellants were entitled for partition in respect of all the three properties, as they were joint family properties. The High Court however, held that except the suit third item of the property, the first and second items of properties were exclusive properties of the first respondent herein and therefore, the preliminary decree was restricted to the third item of property and in other respects the judgment of the trial Court was set aside.

15. The trial Court while granting the relief in favour of the appellants, considered the oral evidence of P.W.1, the mother and Ex.A-17 in particular. The High Court while reversing the judgment of the Trial Court placed reliance upon the release deed executed by the first respondent in the year 1959 viz., Ex.A-3 and partition deed of the year 1973, which was entered into between the four plaintiffs in which document the first respondent affixed his signature. The High Court took the view that having regard to the release deed of the year 1959 viz. Ex.A-3 and the partition deed of the year 1973 viz., Ex.A-28, it was established that the first and second items of the suit scheduled properties which were purchased in the name of the

first respondent were the exclusive properties of the first respondent and therefore, the appellants were not entitled for partition in those properties.

16. In light of the above factors, the question of law that arise for consideration in this appeal is as to "whether there was total misreading of evidence by the High Court by not considering or referring to Ex.A-17 while interfering with the judgment of the Trial Court and whether legal principles of gift were established in regard to the first item of the suit schedule property."

17. Mr.S.Nanda Kumar, learned counsel for the appellants vehemently contended that at the time when the first item of the suit scheduled property was purchased, the first respondent was only a student, that the evidence of the mother P.W.1, discloses that the property was purchased in his name after due deliberations by the husband and wife and in order to avoid any violation of service conditions of the late Nithyanandham, who was then working as a Joint Registrar of Co-operative Society. The learned counsel contended that the Trial Court considered the documents relating to the said properties as per Ex.No.A-10 produced by the plaintiffs, which persuaded the Trial Court to hold that the first item of the suit scheduled property was purchased by the late Nithyanandham in the name of his son only to avoid any violation of the rules relating to his service conditions and that the first respondent failed to show that it was gifted to him by his father as claimed by him. The learned counsel contended that none of the ingredients relating to gift was neither pleaded nor proved by the first respondent.

18. As far as the second items of the suit scheduled property is concerned, the learned counsel contended that in the first place, the trial Court had specifically found that the terminal benefits, which were settled pursuant to the demise of late Nithyanandham, were sufficient enough for the purchase of the second item of the suit scheduled property, as well as, the third item of the suit scheduled property and that the claim

of the first respondent that the same was purchased from the funds provided by his father-in-law and from the sale proceeds of the jewels of his wife, were not conclusively proved.

19. The learned counsel pointed out that while the first respondent in his submission claimed that for purchasing the second item of the suit schedule property, he utilized a sum of Rs.10,000/- advanced by his father-in-law at the time of his marriage and for the balance, he utilized the sale proceeds of his wife's jewels, in the oral evidence let in on his side was to the effect that the balance sale consideration was paid by his father-in-law and his brother-in-law in several installments, which was contradictory to his earlier stand in the written statement.

20. The learned counsel further contended that having regard to his prevaricating stand, one in the written statement and the other in the oral evidence, the trial Court rightly rejected the claim of the first respondent and chose to decree the suit. He further pointed out that de hors the above glaring contradiction in the written statement and the oral evidence let in by the first respondent, there was a tacit admission in Ex.A-17, which was relied upon by the Trial Court to conclude that all the three properties of the suit schedule were the joint family properties in which the plaintiffs and the first respondent were entitled for equal share. The learned counsel further contended that the High Court miserably failed to examine the above relevant material piece of evidence namely Ex.A17, while reversing the judgment of the trial Court.

21. As against the above submissions, Mr.A.T.M.Sampath, learned counsel appearing for the respondents contended that the Division Bench of the High Court was well justified in relying upon Exs.A-3 and A-28 apart from Ex B-11 viz. the sale deed which stood in the name of the first respondent, to hold that items 1 and 2 of the suit scheduled properties exclusively belonged to the first respondent. The learned counsel pointed out that if really items 1 and 2 of the suit scheduled properties were also part of the joint family properties, it was not known

as to why they were not part of the release deed executed by the first respondent under Ex.A-3 and also part of Ex.A-28 the partition deed, as between the four plaintiffs, in which document, the first respondent also affixed his signature.

22. The learned counsel further contended that the parties were well aware by 1959, as well as by 1973 that items 1 and 2 of the suit schedule properties, were the exclusive properties of the first respondent and, therefore, the parties never intended to include those two properties, either for the purpose of the release to be executed by the first respondent nor for the purpose of partition, as between the plaintiffs and the first respondent in the year 1973.

23. Having heard the learned counsel for the respective parties, we are of the considered opinion that at the forefront, it will be necessary to consider the effect of Ex.A-17, in as much as, the said document is fully controlled by Section 17 of the Evidence Act. Section 17 of the Evidence Act reads as under:

> "S.17. Admission defined:- An admission is a statement, oral or documentary or contained in electronic form, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned."

24. As far as the principle to be applied in Section 17 is concerned, the Section as it reads is an admission, which constitutes a substantial piece of evidence, which can be relied upon for proving the veracity of the facts, incorporated therein. When once, the admission as noted in a statement either oral or documentary is found, then the whole onus would shift to the party who made such an admission and it will become an imperative duty on such party to explain it. In the absence of any satisfactory explanation, it will have to be presumed to be true. It is needless to state that an admission in order to be complete and to have the value and effect referred to therein, should be clear, certain and definite, without any ambiguity,

vagueness or confusion. In this context, it will be worthwhile to refer to a decision of this Court in *Union of India Vs. Moksh Builders and Financiers Ltd. and Others* - AIR 1977 SC 409 wherein it is held as under:

> "…It has been held by this Court in *Bharat Singh v. Bhagirath* [1966] 1 SCR 606 = AIR 1966 SC 405 that an admission is substantive evidence of the fact admitted, and that admissions duly proved are "admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party when appearing as witness was confronted with those statements in case it made a statement contrary to those admissions." In taking this view this Court has noticed the decision in *Ajodhya Prasad Bhargava v. Bhawani Shanker* - AIR 1957 All 1 (FB) also."

25. Keeping the said statutory provision in mind, when we consider the contents of Ex.A-17, which is in Tamil, is a letter written by the first respondent himself on 24.06.1974. The said letter was addressed to the third plaintiff Mr.Manickavasagam. The contents of the said letter read as under:

> "The second plaintiff Saravanamurthi, came to my house the day before yesterday at around 09.30 p.m. He stated that something should be immediately arranged, as regards the house properties. He also asked what is the justification in all the three house properties in my name. I told him that you can be called and some arrangement can be made. I am not able to explain everything in this letter. He was in a very rash mood and was behaving in an unruly manner. At one stage, I was driven to the position that he can do whatever he likes. At 10.00 clocks in the night, I told him what arrangement could be made. But he was not in a sane mood. However much I told him that it was not my fault in purchasing all the three properties in my name and that I am not keen to have all the three properties. I was terribly upset by his behavior. At one stage, I asked him to get out. While going out, he expressed that the relationship cannot be continued thereafter. About this you need not inform mother or murthi himself."

26. While examining the contents of the said letter, the Trial Court concluded that the three house properties, referred to therein, only related to the suit scheduled properties. Going by the statements made by the first respondent himself in the said letter Ex.A-17, it was explicit and apparent that the first respondent was fully aware that even though the properties were in his name, he was not responsible for purchasing the same in his name and that he was not interested in having all the three properties for himself.

27. When we examine the said document, we find that the conclusions arrived at by the trial Court based on the contents of Ex.A-17, cannot be found fault with. In fact, Ex.A-17, came into existence only on 24.06.1974. It is not as if the first respondent disowned the said document. The contents of the said document were also not disputed by the first respondent. It is not the case of the first respondent that the three houses referred to in the said document, related to any other properties other than the suit-scheduled properties. It is also not his case that the name and persons mentioned therein, related to somebody else other than his own brother, the second plaintiff and his mother. The first respondent had also not lead any evidence to disprove Ex.A-17.

28. Keeping the above factors in mind, when we apply Section 17 of the Evidence Act, we find that Ex.A-17 is a statement and the details contained therein, which pertains to the suit scheduled properties, constituted a tacit admission at the instance of the first respondent. If after Ex.A-3, release deed of 1959 and the partition deed, Ex.A-28 of 1973, in 1974, the first respondent on his own, came forward with the said letter to the third plaintiff admitting in so many words as to the status of the suit scheduled properties, vis-à-vis the concerned parties themselves, we fail to understand as to what wrong was

committed by the Trial Court in placing reliance upon the same to decree the suit. If in reality, the first respondent had his own reservations as to the ownership of the suit scheduled properties, in particular items 1 and 2, no one prevented him from stating so in uncontroverted terms, while communicating the same in the form of writing, to one of his own brothers. In fact, the grievance of the second plaintiff Saravanamurthi, was that since the properties were purchased in the name of the first respondent and he being the eldest son of the family, was having an upper hand over all the others and was trying to snatch away the properties. The tone and tenor of the letter viz., Ex.A-17, authored by the first respondent, discloses that he too was not very keen to grab all the three properties, simply because those properties were purchased in his name. He went to the extent of stating that he was not responsible for purchasing all the three house properties in his name. He went one step further and stated that he did not want to possess all the three properties all time to come. If, such a clear-cut mindset was expressed by the first respondent though Ex.A-17, it was futile on his part to have come forward with any other story after the suit came to be filed by the plaintiffs.

29. As rightly pointed out by the learned counsel for the appellants, the stand of the first respondent in his statement as regards the second item of the suit schedule property, was that the sale consideration of Rs.18,200/- was paid partly from a sum of Rs.10,000/-, paid to him by his father-in-law and the remaining sum by disposing of his wife's jewels. The Trial Court has noted that in support of the said stand, no piece of evidence was lead before it. On the other hand, giving a go-by to the said stand that the balance sale consideration was met by disposing of his wife's jewels, evidence was lead to show as though the remaining sale consideration was paid by his father-in-law and brother-in-law in installments. The above stand contained in the written statement and lead by way of oral evidence, were fully contradictory and, therefore, the one belied the other.

30. The specific case of the first respondent, as regards the first item of the suit property was that his father gifted the said property to him. Except for the said plea ipse dixit, there was nothing on record to support the said stand. Reliance was placed upon Exs.B1 to B6, which were the communications between Nithyanandam and Little Flower Colony House Building Society Ltd., Thanjavur in the year 1955-56. Ex.B4, was a letter by the said Society dated 24.02.1955, which informed Nithyanandam about the allotment of plot in his favour and also asking him to deposit the sale value of Rs.300/- and a sum of Rs.150 for reclamation and charges for transfer of land in his favour. On the same day, under Ex.B5, he wrote a letter expressing his acceptance. Under Ex.B6, he deposited a sum of Rs.150/- towards charges for transfer of the land in his favour.

31. P.W.1, the wife of Nithyanandam, the first plaintiff, deposed that both of them discussed together and ultimately decided to purchase the first item of the suit property in the name of the first respondent. Through her, Exs.A1 and A2 were produced to show that the house tax were paid in the year 1971-72, 1972-73 and 1973-74 by the family members, in respect of the said property though it stood in the name of the first respondent.

32. It has also come in evidence that at that point of time, the first respondent was undergoing his graduation. There was no gift deed by the late Nithyanandam in favour of the first respondent. Till the lifetime of Nithyanandam, no evidence was placed before the Court to demonstrate that Nithyanandam gifted away the said property in favour of the first respondent, absolutely and that the first respondent expressed his acceptance of the said gift.

33. Keeping the above facts in mind, when we examine the law relating to gift, under Section 122 of the Transfer of Property Act, a "gift" is defined as 'transfer of certain existing movable or immovable property made voluntarily and without

consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee". The section also mandates that "such acceptance must be made during the lifetime of the donor and while he is still capable of giving. If the donee dies before acceptance, the gift is void."

34. We are not concerned with the last part of the section. Going by the facts placed before the Court as stated earlier, except the ipse dixit statement made in the written statement, that late Nithyanandam gifted away the first item of the suit property in his favour, there was no other evidence lead in support of the said claim of gift.

35. In fact, at that time, when the property was purchased, the first respondent was a college going student. Merely because the property was purchased in the name of the first respondent, it cannot be held that there was a valid gift in his favour, without any other evidence supporting the said claim.

36. Per contra, his own mother P.W.1, made it clear that since her husband Nithyanandam, was in the service of the State and was aware that a purchase of property would result in a direct violation of the rules relating to his service, the husband and wife viz., the father and mother of the first respondent, discussed about it and after great deliberation, decided to purchase it in the name of the first respondent. If the property as contested by the first respondent had been gifted away to him in the year 1955, then it was not known, as to why he was not able to produce any other document connected with the property, such as tax receipts or other revenue records to show that he was enjoying the property absolutely, without any hindrance from the other heirs of late Nithyanandam.

37. Per contra, Exs.A1 and A2, tax receipts, were produced by the plaintiffs to show that the property was managed and maintained by the family and not by the first

respondent. That apart, under Ex.A17, the first respondent himself admitted that purchase of the said property, along with the other two properties in his name, was not his fault. In the said document, he also made it abundantly clear that he was not interested in retaining the property, simply because the property stood in his name. Therefore, the claim of gift relating to the first item of the suit property was not proved to the satisfaction of the Court, both on law as well as on facts.

38. Having regard to such a prevaricating stand taken by the first respondent, as compared to his tacit admission made in Ex.A-17, we are of the considered view that the Trial Court was fully justified in holding that all the three items of the suit scheduled properties, were joint family properties, in which the plaintiffs and the first respondent were entitled for equal share.

39. Having regard to our above conclusions, when we examine the judgment of the Division Bench impugned in this appeal, we find that the Division Bench has completely omitted to examine the implications of Ex.A-17 which has relevance in respect of all the three suit schedule properties. As noted by the Trial Court, Ex.A-17 was a very crucial piece of evidence, in as much as, it contains the tacit admission voluntarily made by the first respondent, while also establishing as to why the veracity of it's nature was never questioned by him. Since, there was no contra evidence to disprove Ex.A-17, the first respondent was totally bound by the said document. Since every ingredient of Section 17 of the Evidence Act, relating to the said document, Ex.A-17 was fully complied with, the non-consideration of the same by the Division Bench of the High Court, in our considered opinion, would certainly amount to total misreading of the evidence, while interfering with the judgment of the trial Court. Similarly, the Division Bench miserably failed to examine the issue relating to gift as regards the first item of the suit scheduled properties. Though, such a claim was made by the first respondent, there was no iota of evidence to support the said claim. The ingredients of Section 122 of the

Transfer of Property Act relating to gifts were not shown to have been complied with in order to support the said claim.

40. In fact, while considering the relevance of Ex.A-17 and its application to the case on hand, the Trial Court noted the contradictory statement of the first respondent made in his written statement, vis-à-vis the oral evidence. The Trial Court has specifically noted the funds, which were available with the first respondent pursuant to his father's demise, which was to the tune of Rs.20,887.93/- and which was kept in deposit in two accounts in the name of the first respondent himself. One account was under Ex.A-25, which was a current account in which a sum of Rs.10,919.44/- was available and the other one was under Ex.A.26, which was a savings bank account, where a sum of Rs.9,968.49/- was available. Both put together a sum of Rs.20,887.93/- was available and therefore, even after the purchase of the third item of the suit schedule property, the first respondent had a further sum available with him. The trial Court has also noted that except the ipse dixit of D.W.2 and 3 that a sum of Rs.10,000/- was paid to the first respondent by way of gift at the time of marriage of the first respondent with his daughter, there was no other evidence to support and provide credence to the said version. Unfortunately, the Division Bench of the High Court completely omitted to examine the above material piece of evidence, which was considered in detail by the trial Court, while decreeing the suit.

41. In the light of our above conclusions, the judgment of the Division Bench cannot be sustained. The appeal stands allowed and the judgment of the Division Bench is set aside and the judgment and decree of the Trial Court shall stand restored.

R.P. Appeal allowed.

JASVINDER SAINI & ORS.

v.

STATE (GOVT. OF NCT OF DELHI)

(Criminal Appeal No. 819 of 2013)

JULY 2, 2013

[T.S. THAKUR AND RANJANA PRAKASH DESAI, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

*s.216 - Court's power to alter charge - Trial court subsequent to order in Rajbir's case, adding charge for offence punishable u/s 302 to that already framed for offences punishable u/ss 304-B and 498-A IPC etc. - Held: A charge u/s 304B IPC is not a substitute for a charge of murder punishable u/s 302 - Ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients - If there is evidence direct or circumstantial to prima facie support a charge u/s 302 IPC, trial court can and indeed ought to frame such a charge, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters -Order in **Rajbir's** case, explained - In the instant case, trial court acted mechanically, for it framed an additional charge u/s 302 IPC without adverting to evidence adduced in the case and simply on the basis of direction issued in **Rajbir's** case - Order passed by High Court and that passed by the trial court framing the charge u/s 302 IPC are set aside and the matter is remitted to trial court for a fresh order keeping in view the observations made in the judgment.*

Charges were framed by the Addl. Sessions Jude against the appellants for offences punishable u/ss 498-A and 304-B read with s.34 IPC. Subsequently after the

order of Supreme Court in *Rajbir Singh's* case[1], the trial court added a further charge u/s 302 IPC. The appellants challenged the order in a writ petition which was dismissed by the High Court.

The question for consideration before this Court was: whether the trial court was justified in framing a charge u/s 302, IPC against the appellants and whether the High Court was justified in affirming that order and dismissing the writ petition.

Allowing the appeal, the Court

HELD: 1.1 Court's power u/s 216, CrPC to alter or add any charge is unrestrained provided such addition and/ or alteration is made before the judgment is pronounced. The circumstances in which such addition or alteration may be made are not, however, stipulated in s.216. It is all the same trite that the question of any such addition or alternation would generally arise either because the court finds the charge already framed to be defective for any reason or because such addition is considered necessary after the commencement of the trial having regard to the evidence that may come before the court. [para 11] [347-G; 348-A-C]

1.2 The direction in Rajbir to add a charge u/s 302 IPC where the accused are charged with s.304-B, was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. All that this Court meant was that in a case where a charge alleging dowry death is framed, a charge u/s 302 IPC can also be framed if the evidence otherwise permits. No other meaning could be deduced from the order of this Court. If there is evidence whether direct or circumstantial to prima facie support a charge u/s 302

1. Rajbir @ Raju & Anr. v. State of Haryana 2010 (13) SCR 886.

IPC, the trial court can and indeed ought to frame a charge of murder punishable u/s 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the court can look into the evidence to determine whether the alternative charge of dowry death punishable u/s 304B is established. A charge u/s 304-B IPC is not a substitute for a charge of murder punishable u/s 302 IPC. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial court, in that view of the matter, acted mechanically for it framed an additional charge u/s 302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in Rajbir's case. The High Court no doubt made a half hearted attempt to justify the framing of the charge independent of the directions in Rajbir's case, but it would have been more appropriate to remit the matter back to the trial court for fresh orders rather than lending support to it in the manner done by it. [para 13] [349-F-H; 350-A-E]

Rajbir @ Raju & Anr. v. State of Haryana **2010 (13) SCR 886 =AIR 2011 SC 568 - explained.**

Satya Narayan Tiwari @ Jolly & Anr. v. State of U.P. **2010 (12) SCR 1137 = (2010) 13 SCC 689 - referred to.**

1.3 The order passed by the trial court and so also that passed by the High Court are clearly untenable and, as such, are set aside. That would not, however, prevent the trial court from re-examining the question of framing a charge u/s 302 IPC against the appellant and passing an appropriate order if upon a prima facie appraisal of the evidence, it comes to the conclusion that there is any room for doing so, keeping in view the decision of this Court in Hasanbhai Valibhai Qureshi. [para 14] [350-F-H]

Hasanbhai Valibhai Qureshi v. State of Gujarat and Ors. **2004 (3) SCR 762 = (2004) 5 SCC 347;** *Ishwarchand Amichand Govadia and Ors. v. State of Maharashtra and Anr.* **2006 (7) Suppl. SCR 229 = (2006) 10 SCC 322 - relied on.**

Rajendra Singh Sethia v. State and Ors. **1989 Cri.L.J.255; and** *Shiv Nandan and Ors. v. State of U.P.* **2005 Cri. L.J 3047 - approved.**

Case Law Reference:

2010 (13) SCR 886	**explained**	**para 5**
2010 (12) SCR 1137	**referred to**	**para 6**
2004 (3) SCR 762	**relied on**	**para 14**
2006 (7) Suppl. SCR 229	**relied on**	**para 14**
1989 Cri.L.J. 255	**approved**	**para 14**
2005 Cri. L.J 3047	**approved**	**para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 819 of 2013.

From the Judgment and Order dated 13.10.2011 of the High Court of Delhi at New Delhi in Writ Petition (Crl.) No. 413 of 2011.

R.N. Sharma, Rameshwar Prasad Goyal for the Appellants.

P.P. Malhotra, ASG, B. Sunita Rao, Shadman Ali, D.S. Mahra (for B.V. Balaram Das) for the Respondent.

The Judgment of the Court was delivered by

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

2. The short question that falls for consideration in this appeal by special leave is whether the trial Court was justified in framing a charge under Section 302 of the IPC against the

appellants and whether the High Court was justified in affirming that order of the trial Court and dismissing the writ petition filed by the writ petitioners against the same. The question arises in the following background.

3. FIR No. 765/2007 was registered against the appellants alleging commission of offences punishable under Sections 498A, 304-B, 406 and 34 of IPC in connection with the demise in unnatural circumstances of Ms. Chandni wife of appellant No.1-Mr. Jasvinder Saini. The case was registered on a complaint filed Ajay Gautam, father of the deceased. The matter was investigated and a charge sheet filed before the Jurisdictional Magistrate alleging commission of offences mentioned above against the appellants 1 to 4. A supplementary charge sheet followed in which appellants 5 to 8 were also implicated in the case to which Section 302 was also added by the Investigating Officer.

4. The case was soon committed to the Sessions and assigned to the Additional Sessions Judge, Rohini, Delhi, who heard the matter for framing of charges and came to the conclusion that there was no evidence or material on record to justify framing of a charge under Section 302 IPC. Charges were accordingly framed against the appellants under Sections 498A, 304B read with Section 34 IPC.

5. At the trial the prosecution had examined as many as eighteen witnesses, when a two-Judges Bench of this Court passed an order on 22nd November 2010 in *Rajibir @ Raju & Anr. v. State of Haryana* AIR 2011 SC 568 by which this Court directed all trial Courts in India to add Section 302 in every case alleging commission of an offence punishable under Section 304B of the IPC. This direction, it appears, came because the Court felt strongly about the commission of heinous and barbaric crimes against women in the country.

6. In *Rajbir's* case (supra) the appellant had been convicted under Section 304-B IPC and sentenced to

imprisonment for life by the trial Court apart from offences under other sections. The High Court had, however, reduced the sentence to ten years rigorous imprisonment in so far as Rajbir was concerned and to two years rigorous imprisonment in the case of his mother Appellant No.2 in that case. This Court on a prima facie basis felt that the reduction in the sentence was not justified. Relying upon an earlier decision rendered in *Satya Narayan Tiwari @ Jolly & Anr. v. State of U.P.* (2010) 13 SCC 689, Criminal Appeal No.1168 of 2005 decided on 28th October, 2010 this Court issued notice to Rajbir to show cause why his sentence be not enhanced to life imprisonment as awarded by the trial Court.

7. It was in the above background, that this Court in para 11 of the interim order passed by it directed all the trial Courts in India to ordinarily add Section 302 to the charge under Section 304B "so that death sentences could be imposed in such heinous and barbaric crimes against women." Para 11 may be extracted at this stage:

> "We further direct all trial Courts in India to ordinarily add Section 302 to the charge of Section 304B, so that death sentences can be imposed in such heinous and barbaric crimes against women."

8. In the case at hand the trial Court noticed the above direction and considering itself duty bound to abide by the same added a charge under Section 302 IPC to the one already framed against the appellant. While doing so, the trial Court simply placed reliance upon Section 216 of Cr.P.C. which empowers the Court to add or alter the charge at any stage and the direction of this Court in *Rajbir's* case (supra). This is evident from the following passage from the order passed by the trial Court:

> "… I have considered the submissions made before me. It is settled law that charges can be modified/amended at any stage of the proceedings and even if at the initial stage the Court is of the view that there is no material for framing the charge under Section 302 IPC. The same can be added/altered at any later stage (Section 216 Cr.P.C.) which cannot be termed as a review of the earlier order. Even otherwise, the directions of the Hon'ble Apex Court in the case of *Rajbir @ Raju & Anr. Vs. State of Haryana* in Special Leave Petition bearing No. 9507/2010 decided on 22-11-2010 duly circulated vide No. 33760-69/DHC/Gaz/G-X/SCJ/2010 dated 3-12-2010, specific directions have been issued to all the subordinate Courts in India to ordinarily add Section 302 IPC to the charge under Section 304B IPC.
>
> Therefore, this being the background, charge under Section 302 IPC is being framed in alternative against the accused persons against whom charge under Section 304 B IPC had been framed. The accused pleaded not guilty and claimed trial."

9. Aggrieved by the above direction, the appellant preferred Writ Petition (Crl.) No.413 of 2011 before the High Court of Delhi which failed and was dismissed by the High Court in terms of the order impugned in the present appeal. Placing reliance upon Section 216 of Cr.P.C. the High Court observed that appearance of additional evidence at the trial was not essential for framing of an additional charge or altering a charge already framed though it may be one of the grounds to do so. The High Court apart from placing reliance upon the order passed by this Court in *Rajbir's* case (supra) held that a perusal of the Autopsy Surgeon's Report provided prima facie evidence to the effect that the death of the deceased "could be homicidal" in nature and that the earlier order passed by the trial Court holding that no case for offence under Section 302 IPC was made out did not constitute any impediment for the trial Court to take a different view at a later stage. The present appeal assails the correctness of the above orders.

10. Section 216 of the Code of Criminal Procedure deals with alteration or addition of any charge and empowers the Court to do so at any time before the judgment is pronounced. The section runs as follows:

"216. Court may alter charge -

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defense or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct a new trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded."

11. A plain reading of the above would show that the Court's power to alter or add any charge is unrestrained provided such addition and/or alteration is made before the judgment is pronounced. Sub-sections (2) to (5) of Section 216 deal with the procedure to be followed once the Court decides

to alter or add any charge. Section 217 of the Code deals with the recall of witnesses when the charge is altered or added by the Court after commencement of the trial. There can in the light of the above be no doubt about the competence of the Court to add or alter a charge at any time before the judgment. The circumstances in which such addition or alteration may be made are not, however, stipulated in Section 216. It is all the same trite that the question of any such addition or alternation would generally arise either because the Court finds the charge already framed to be defective for any reason or because such addition is considered necessary after the commencement of the trial having regard to the evidence that may come before the Court. In the case at hand the evidence assembled in the course of the investigation and presented to the trial Court was not found sufficient to call for framing a charge under Section 302 IPC. The trial Court recorded a specific finding to that effect in its order dated 18th March 2009 while framing charges against the appellants before us. The trial Court said:

> "The two witnesses Kiran Devi and Smt. Dharam Kaur were at the spot when the deceased fell down from the second floor and did not notice anyone on the roof of the house. Thus there is no material for framing of charge Under Section 302 IPC against the accused persons. However, there are specific allegations of dowry demand and torture in the statement given by Sh. Ajay Gautam to the SDM and as also in the statements given by his wife Manisha Gautam and his son Vishal Gautam. The deceased had died under unnatural circumstances. Her death took place at her matrimonial home within seven years of her marriage. There is a presumption Under Section 113-B of the Indian Evidence Act of dowry death. Hence on the basis of material on record, I am of the view that prima facie offence Under Section 498A/304B/34 IPC is made out against all the accused persons."

12. A reading of the order which the trial Court

subsequently passed on 23rd February 2011 directing addition of a charge under Section 302 IPC makes it abundantly clear that the addition was not based on any error or omission whether inadvertent or otherwise in the matter of framing charges against the accused. Even the respondents did not plead that the omission of a charge under Section 302 IPC was on account of any inadvertent or other error or omission on the part of the trial Court. The order passed by the trial Court, on the contrary directed addition of the charge under Section 302 IPC entirely in obedience to the direction issued by this Court in *Rajbir's* case (supra). Such being the position when the order passed by the trial Court was challenged before the High Court the only question that fell for determination was whether the addition of a charge under Section 302 IPC was justified on the basis of the direction issued by this Court in *Rajbir's* case (supra). The High Court has no doubt adverted to that aspect and found itself to be duty bound to comply with the direction in the same measure as the trial Court. Having said so, it has gone a step further to suggest that the autopsy surgeon's report was prima facie evidence to show that the offence was homicidal in nature. The High Court has by doing so provided an additional reason to justify the framing of a charge under Section 302 IPC.

13. Be that as it may the common thread running through both the orders is that this Court had in *Rajbir's* case (supra) directed the addition of a charge under Section 302 IPC to every case in which the accused are charged with Section 304-B. That was not, in our opinion, the true purport of the order passed by this Court. The direction was not meant to be followed mechanically and without due regard to the nature of the evidence available in the case. All that this Court meant to say was that in a case where a charge alleging dowry death is framed, a charge under Section 302 can also be framed if the evidence otherwise permits. No other meaning could be deduced from the order of this Court. It is common ground that a charge under Section 304B IPC is not a substitute for a charge of murder punishable under Section 302. As in the case of murder in every case under Section 304B also there is a death involved. The question whether it is murder punishable under Section 302 IPC or a dowry death punishable under Section 304B IPC depends upon the fact situation and the evidence in the case. If there is evidence whether direct or circumstantial to prima facie support a charge under Section 302 IPC the trial Court can and indeed ought to frame a charge of murder punishable under Section 302 IPC, which would then be the main charge and not an alternative charge as is erroneously assumed in some quarters. If the main charge of murder is not proved against the accused at the trial, the Court can look into the evidence to determine whether the alternative charge of dowry death punishable under Section 304B is established. The ingredients constituting the two offences are different, thereby demanding appreciation of evidence from the perspective relevant to such ingredients. The trial Court in that view of the matter acted mechanically for it framed an additional charge under Section 302 IPC without adverting to the evidence adduced in the case and simply on the basis of the direction issued in *Rajbir's* case (supra). The High Court no doubt made a half hearted attempt to justify the framing of the charge independent of the directions in *Rajbir's* case (supra), but it would have been more appropriate to remit the matter back to the trial Court for fresh orders rather than lending support to it in the manner done by the High Court.

14. In the light of what we have said above, the order passed by the trial Court and so also that passed by the High Court are clearly untenable and shall have to be set aside. That would not, however, prevent the trial Court from re-examining the question of framing a charge under Section 302 IPC against the appellant and passing an appropriate order if upon a prima facie appraisal of the evidence adduced before it, the trial Court comes to the conclusion that there is any room for doing so. The trial Court would in that regard keep in view the decision of this Court in *Hasanbhai Valibhai Qureshi v. State of Gujarat*

and Ors. (2004) 5 SCC 347 where this Court has recognized the principle that in cases where the trial Court upon a consideration of broad probabilities of the case based upon total effect of the evidence and documents produced, is satisfied that any addition or alteration of the charge is necessary, it is free to do so. Reference may also be made to the decisions of this Court in *Ishwarchand Amichand Govadia and Ors. v. State of Maharashtra and Anr.* (2006) 10 SCC 322 and the decision of the Calcutta High Court in *Rajendra Singh Sethia v. State and Ors.* 1989 Cri.L.J. 255 and that delivered by the Allahabad High Court in *Shiv Nandan and Ors. v. State of U.P.* 2005 Cri. L.J 3047 which too are to the same effect. In any such fresh exercise which the trial Court may undertake, it shall remain uninfluenced by the observations made by the High Court on merits of the case including those touching the probative value of the autopsy surgeon's opinion.

15. In the result, we allow this appeal, set aside the order passed by the High Court and that passed by the trial Court framing the charge under Section 302 IPC and remit the matter back to the trial Court for a fresh order keeping in view the observations made above. No costs.

R.P. Appeal allowed.

ASSOCIATION FOR ENVIRONMENT PROTECTION
v.
STATE OF KERALA AND OTHERS
(Civil Appeal No. 4941 of 2013)

JULY 02, 2013

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

CONSTITUTION OF INDIA, 1950:

Arts. 48-A and 51-A(g) read with Art. 21 - Protection and improvement of environment including forests, rivers, lakes and wildlife - Held: The constitutional mandate and the "doctrine of public trust" enjoins upon the Government to protect the resources for enjoyment of general public rather than to permit their use for private ownership or commercial exploitation to satisfy the greed of few - In the instant case, execution of the project, including construction of restaurant on the bank of river, is ex- facie contrary to the mandate of G.O. dated 13.1.1978, which was issued by State Government in discharge of its Constitutional obligation under Art. 48-A - - Respondents are directed to demolish the structure raised - Doctrine of public trust - G.O. dated 13.7.1978 issued by Government of Kerala - Environmental law.

Aluva Municipality in Kerala reclaimed a part of Periyar river within its jurisdiction. The District Tourism Promotion Council, decided to construct a restaurant on the reclaimed land by citing convenience of the public coming on Sivarathri festival as the cause. The proposal of the project at an estimated cost of Rs.55,72,432/- was accorded administrative sanction by the State Government. When construction of the building was started, the appellant, a registered body engaged in the protection of environment in the State of Kerala, filed a writ petition before the High Court and prayed that the

respondents be restrained from continuing with the construction of the hotel building on the banks of river Periyar. The Division Bench of the High Court dismissed the writ petition observing that only a restaurant was being constructed and not a hotel, as claimed by the appellant.

Allowing the appeal, the Court

HELD: 1.1 "Doctrine of the Public Trust" enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial exploitation to satisfy the greed of few. The courts in different jurisdictions have, time and again, invoked the public trust doctrine for giving judicial protection to environment, ecology and natural resources. This Court also recognized the importance of the public trust doctrine and applied the same in several cases for protecting natural resources which have been treated as public properties and are held by the Government as trustee of the people. [Para 3 and 5] [356-B-C, F-G]

M.C. Mehta v. Kamal Nath **1996 (10) Suppl. SCR 12 = (1997) 1 SCC 388;** *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu* **1999 (3) SCR 1066 (1999) 6 SCC 464;** *Intellectuals Forum, Tirupathi v. State of A.P.* **2006 (2) SCR 419 (2006) 3 SCC 549; and** *Fomento Resorts and Hotels Ltd. v. Minguel Martins* **2009 (3) SCR 1 = (2009) 3 SCC 571- relied on.**

Illinois Central Railroad Co. v. People of the State of Illinois, **146 US 387;** *Gould v. Greylock Reservation Commission* **350 Mass 410 (1966);** *Sacco v. Development of Public Works,* **532 Mass 670;** *Robbins v. Deptt. of Public Works* **244 NE 2d 577 and** *National Audubon Society v. Superior Court of Alpine County* **33 Cal 3d 419 - referred to.**

1.2 Art. 48-A as inserted in Part IV of the Constitution

of India, casts upon the State the responsibility of making an endeavour to protect and improve the environment and to safeguard forests and wildlife of the country. By the same amendment, Fundamental Duties of the citizens were enumerated in Art. 51-A, inter alia, the duty to protect and improve the natural environment including forests, lakes, rivers, wildlife and to have compassion for living creatures [Article 51-A(g)]. The G.O. dated 13.1.1978 is illustrative of the State Government's commitment to protect and improve the environment as enshrined in Art. 48A. The object of the G.O. is to ensure that no project costing more than Rs.10 lakhs should be executed and implemented without a comprehensive evaluation by an expert body which can assess possible impact of the project on the environment and ecology of the area including water bodies, i.e., rivers, lakes etc. There is nothing on record to show that the G.O. dated 13.1.1978 has been amended or conditions embodied therein have been relaxed. By omitting to refer the project to the Environmental Planning and Co-ordination Committee, the District Tourism Promotion Council and the Department of Tourism avoided scrutiny of the project in the light of the parameters required to be kept in view for protection of environment of the area and the river. The subterfuge employed by the District Promotion Council and the Department of Tourism has resulted in violation of the fundamental right to life guaranteed to the people of the area under Art. 21 of the Constitution. [Para 4, 19 and 20] [356-D-F; 368-A, D-F, G-H; 369-A]

1.3 Therefore, it must be held that the execution of the project including construction of restaurant is ex facie contrary to the mandate of G.O. dated 13.1.1978, which was issued by the State Government in discharge of its Constitutional obligation under Art. 48-A. The impugned order is set aside. The respondents are directed to demolish the structure raised. [Para 19 and 21] [368-C; 369-B-C]

Case Law Reference:

1996 (10) Suppl. SCR 12	**relied on**	**para 5**
1146 US 387	**referred to**	**para 5**
350 Mass 410 (1966)	**referred to**	**para 5**
532 Mass 670	**referred to**	**para 5**
244 NE 2d 577	**referred to**	**para 5**
33 Cal 3d 419	**referred to**	**para 5**
1999 (3) SCR 1066	**relied on**	**para 6**
2006 (2) SCR 419	**relied on**	**para 7**
2009 (3) SCR	**relied on**	**para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4941 of 2013.

From the Judgment and Order dated 21.03.2006 of the High Court of Kerala at Ernakulam in W.P. (C) No. 436 of 2006.

Deepak Prakash, Haritha for the Appellant.

Liz Mathew, M.F. Philip, R. Sathish, M. Gireesh Kumar, Khwairakpam Nobin Singh for the Respondents.

The Judgment of the Court was delivered by

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

2. Since time immemorial, people across the world have always made efforts to preserve and protect the natural resources like air, water, plants, flora and fauna. Ancient scriptures of different countries are full of stories of man's zeal to protect the environment and ecology. Our sages and saints always preached and also taught the people to worship earth, sky, rivers, sea, plants, trees and every form of life. Majority of people still consider it as their sacred duty to protect the plants,

trees, rivers, wells, etc., because it is believed that they belong to all living creatures.

3. The ancient Roman Empire developed a legal theory known as the "Doctrine of the Public Trust". It was founded on the premise that certain common properties such as air, sea, water and forests are of immense importance to the people in general and they must be held by the Government as a trustee for the free and unimpeded use by the general public and it would be wholly unjustified to make them a subject of private ownership. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial exploitation to satisfy the greed of few.

4. Although, the Constitution of India, which was enforced on 26.1.1950 did not contain any express provision for protection of environment and ecology, the people continued to treat it as their social duty to respect the nature, natural resources and protect environment and ecology. After 26 years, Article 48-A was inserted in Part IV of the Constitution and the State was burdened with the responsibility of making an endeavour to protect and improve the environment and to safeguard the forest and wildlife of the country. By the same amendment, Fundamental Duties of the citizens were enumerated in the form of Article 51-A (Part-IV A). These include the duty to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures [Article 51-A(g)].

5. The Courts in different jurisdictions have, time and again, invoked the public trust doctrine for giving judicial protection to environment, ecology and natural resources. This Court also recognized the importance of the public trust doctrine and applied the same in several cases for protecting natural resources which have been treated as public properties and are held by the Government as trustee of the people. The judgment in *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388 is

an important milestone in the development of new jurisprudence by the Courts in this country for protection of environment. In that judgment, the Court considered the question whether a private company running tourists resort in Kullu-Manali valley could block the flow of Beas river and create a new channel to divert the river to at least one kilometer down stream. After adverting to the theoretical and philosophical basis of the public trust doctrine and judgments in *Illinois Central Railroad Co. v. People of the State of Illinois,* 146 US 387; *Gould v. Greylock Reservation Commission* 350 Mass 410 (1966); *Sacco v. Development of Public Works,* 532 Mass 670; *Robbins v. Deptt. of Public Works* 244 NE 2d 577 and *National Audubon Society v. Superior Court of Alpine County* 33 Cal 3d 419, this Court observed:

> "Our legal system - based on English common law - includes the public trust doctrine as part of its jurisprudence. The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary of the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership.
>
> We are fully aware that the issues presented in this case illustrate the classic struggle between those members of the public who would preserve our rivers, forests, parks and open lands in their pristine purity and those charged with administrative responsibilities who, under the pressures of the changing needs of an increasingly complex society, find it necessary to encroach to some extent upon open lands heretofore considered inviolate to change. The resolution of this conflict in any given case is for the legislature and not the courts. If there is a law made by Parliament or the State Legislatures the courts can serve as an instrument of determining legislative intent in the exercise of its powers of judicial review under the Constitution. But in the absence of any legislation, the executive acting under the doctrine of public trust cannot abdicate the natural resources and convert them into private ownership, or for commercial use. The aesthetic use and the pristine glory of the natural resources, the environment and the ecosystems of our country cannot be permitted to be eroded for private, commercial or any other use unless the courts find it necessary, in good faith, for the public good and in public interest to encroach upon the said resources."

6. In *M.I. Builders Pvt. Ltd. v. Radhey Shyam Sahu* (1999) 6 SCC 464, the Court applied public trust doctrine for upholding the order of Allahabad High Court which had quashed the decision of Lucknow Nagar Mahapalika permitting appellant - M.I. Builders Pvt. Ltd. to construct an underground shopping complex in Jhandewala Park, Aminabad Market, Lucknow, and directed demolition of the construction made on the park land. The High Court had noted that Lucknow Nagar Mahapalika had entered into an agreement with the appellant for construction of shopping complex and given it full freedom to lease out the shops and also to sign agreement on its behalf and held that this was impermissible. On appeal by the builders, this Court held that the terms of agreement were unreasonable, unfair and atrocious. The Court then invoked the public trust doctrine and held that being a trustee of the park on behalf of the public, the Nagar Mahapalika could not have transferred the same to the private builder and thereby deprived the residents of the area of the quality of life to which they were entitled under the Constitution and Municipal Laws.

7. In *Intellectuals Forum, Tirupathi v. State of A.P.* (2006) 3 SCC 549, this Court again invoked the public trust doctrine in a matter involving the challenge to the systematic destruction of percolation, irrigation and drinking water tanks in Tirupati town, referred to some judicial precedents including *M.C.*

Mehta v. Kamal Nath (supra), *M.I. Builders Pvt. Ltd.* (supra), *National Audubon Society* (supra), and observed:

> "This is an articulation of the doctrine from the angle of the affirmative duties of the State with regard to public trust. Formulated from a negatory angle, the doctrine does not exactly prohibit the alienation of the property held as a public trust. However, when the State holds a resource that is freely available for the use of the public, it provides for a high degree of judicial scrutiny on any action of the Government, no matter how consistent with the existing legislations, that attempts to restrict such free use. To properly scrutinise such actions of the Government, the courts must make a distinction between the Government's general obligation to act for the public benefit, and the special, more demanding obligation which it may have as a trustee of certain public resources....."

8. In *Fomento Resorts and Hotels Ltd. v. Minguel Martins* (2009) 3 SCC 571, this Court was called upon to consider whether the appellant was entitled to block passage to the beach by erecting fence in the garb of protecting its property. After noticing the judgments to which reference has been made hereinabove, the Court held:

> "The public trust doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes. This doctrine puts an implicit embargo on the right of the State to transfer public properties to private party if such transfer affects public interest, mandates affirmative State action for effective management of natural resources and empowers the citizens to question ineffective management thereof.
>
> The heart of the public trust doctrine is that it imposes limits and obligations upon government agencies and their administrators on behalf of all the people and especially

> future generations. For example, renewable and non-renewable resources, associated uses, ecological values or objects in which the public has a special interest (i.e. public lands, waters, etc.) are held subject to the duty of the State not to impair such resources, uses or values, even if private interests are involved. The same obligations apply to managers of forests, monuments, parks, the public domain and other public assets. Professor Joseph L. Sax in his classic article, "The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention" (1970), indicates that the public trust doctrine, of all concepts known to law, constitutes the best practical and philosophical premise and legal tool for protecting public rights and for protecting and managing resources, ecological values or objects held in trust.
>
> The public trust doctrine is a tool for exerting long-established public rights over short-term public rights and private gain. Today every person exercising his or her right to use the air, water, or land and associated natural ecosystems has the obligation to secure for the rest of us the right to live or otherwise use that same resource or property for the long-term and enjoyment by future generations. To say it another way, a landowner or lessee and a water right holder has an obligation to use such resources in a manner as not to impair or diminish the people's rights and the people's long-term interest in that property or resource, including down slope lands, waters and resources.
>
> xxxx xxxx xxxx
>
> We reiterate that natural resources including forests, water bodies, rivers, seashores, etc. are held by the State as a trustee on behalf of the people and especially the future generations. These constitute common properties and people are entitled to uninterrupted use thereof. The State cannot transfer public trust properties to a private party, if

such a transfer interferes with the right of the public and the court can invoke the public trust doctrine and take affirmative action for protecting the right of people to have access to light, air and water and also for protecting rivers, sea, tanks, trees, forests and associated natural ecosystems."

9. We have prefaced disposal of this appeal by discussing the public trust doctrine and its applicability in different situations because the Division Bench of the Kerala High Court, which dealt with the writ petition filed by the appellant for restraining the respondents from constructing a building (hotel/restaurant) on the banks of river Periyar within the area of Aluva Municipality skirted the real issue and casually dismissed the writ petition only on the ground that while the appellant had questioned the construction of a hotel, the respondents were actually constructing a restaurant as part of the project for renovation and beautification of Manalpuram Park.

10. The people of the State of Kerala, which is also known world over as the 'God's Own Country' are very much conscious of the imperative of protecting environment and ecology in general and the water bodies, i.e., the rivers and the lakes in particular, which are integral part of their culture, heritage and an important source of livelihood. This appeal is illustrative of the continuing endeavour of the people of the State to ensure that their rivers are protected from all kinds of man made pollutions and/or other devastations.

11. The appellant is a registered body engaged in the protection of environment in the State of Kerala. It has undertaken scientific studies of environment and ecology, planted trees in public places and published magazines on the subjects of environment and ecology. In 2005, Aluva Municipality reclaimed a part of Periyar river within its jurisdiction and the District Tourism Promotion Council, Ernakulam decided to construct a restaurant on the reclaimed

land by citing convenience of the public coming on Sivarathri festival as the cause. The proposal submitted by the District Tourism Promotion Council was forwarded to the State Government by the Director, Department of Tourism by including the same in the project for renovation and beautification of Manalpuram Park. Vide order dated 20.5.2005, the State Government accorded administrative sanction for implementation of the project at an estimated cost of Rs.55,72,432/-.

12. When the District Promotion Council started construction of the building on the reclaimed land, the appellant filed Writ Petition (C) No.436/2006 and prayed that the respondents be restrained from continuing with the construction of building on the banks of river Periyar and to remove the construction already made. These prayers were founded on the following assertions:

(a) Periyar river is a holy river called "Dakshin Ganga", on the banks of which famous Sivarathri festival is conducted.

(b) The river provides water to lakhs of people residing within the jurisdiction of 44 local bodies on its either side.

(c) In 1989, a study was conducted by an expert body and Periyar Action Plan was submitted to the Government for protecting the river but the latter has not taken any action.

(d) In December, 2005, Aluva Municipality reclaimed the land which formed part of the river and in the guise of promotion of tourism, efforts are being made to construct a hotel.

(e) The construction of hotel will adversely affect the flow of water as well as the river bed.

(f) The construction of the building will adversely affect Marthanda Varma Bridge.

(g) The respondents have undertaken construction without conducting any environmental impact assessment and in violation of the provisions of Kerala Protection of River Banks and Regulation of Removal of Sand Act, 2001.

(h) The construction of hotel building is ultra vires the provisions of notification dated 13.1.1978 issued by the State Government, which mandates assessment of environmental impact as a condition precedent for execution of any project costing more than Rs.10,00,000/-.

13. In the written statement filed on behalf of the respondents, the following averments were made:

(i) District Tourism Promotion Council has undertaken construction of a restaurant and not a hotel as part of the project involving redevelopment and beautification of Manalpuram Park.

(ii) The State Government has accorded sanction vide G.O. dated 20.5.2005 for construction of a restaurant.

(iii) The restaurant is meant to serve large number of people who come during Sivarathri celebrations.

(iv) The construction of restaurant will neither obstruct free flow of water in the river nor cause damage to the ecology of the area.

(v) There will be no diversion of water and the strength of the pillars of Marthanda Varma Bridge will not be affected.

14. The Division Bench of the High Court took cognizance of the sanction accorded by the State Government vide order dated 20.5.2005 for renovation and beautification of Manalpuram Park and dismissed the writ petition by simply observing that only a restaurant is being constructed and not a hotel, as claimed by the appellant. The cryptic reasons recorded by the High Court for dismissing the writ petition are extracted below:

> "From the facts as gathered above, it transpires that no hotel at all is being constructed in the river belt. The petitioner does not appear to have ascertained the correct facts before filing the present petition. Main allegation by the petitioner that a hotel is being constructed on the banks of Periyar river is found to be incorrect. There is no merit in this writ petition. It is hereby dismissed."

15. Shri Deepak Prakash, learned senior counsel for the appellant invited the Court's attention to order dated 13.1.1978 issued by the State Government and argued that the sanction accorded by the State Government on 20.5.2005 for renovation and beautification of Manalpuram Park did not have the effect of modifying G.O. dated 13.1.1978 which mandates that all development schemes costing Rs.10 lakhs or more should be referred to the Environmental Planning and Coordination Committee for review and assessment. Learned counsel submitted that unless the project was reserved for consideration by the Committee constituted by the State Government, the respondents could not have undertaken construction of the restaurant.

16. Learned counsel for the respondents could not draw our attention to any document to show that the construction of restaurant building was undertaken after obtaining clearance from the Environmental Planning and Coordination Committee as per the requirement of G.O. dated 13.1.1978. She, however, submitted that the construction of restaurant which is an integral part of the project relating to renovation and beautification of

Manalpuram Park is not going to adversely impact the flow of Periyar river or otherwise affect the environment and ecology of the area.

17. We have considered the respective arguments and scrutinized the record. On 13.1.1978, the Government of Kerala accepted the recommendations made by the State Committee on Environmental Planning and Coordination and issued an order, which was published in Official Gazette dated 7.2.1978 for review and assessment of environmental implications of various projects. The relevant portions of that order are reproduced below:

"In the light of the recommendation of the State Committee on Environmental Planning and Co-operation in their second meeting held on 23.7.1977, Government are pleased to order as follows:

1. All development schemes costing Rs.10 lakhs and above will be referred to the Committee on Environmental Planning and Co-ordination for review and assessment of environmental implications in order to integrate environmental concerns and the clearance of the committee will be obtained before the scheme share sanctioned and taken up for execution.

2. In the case of projects costing Rs.25 lakhs and above the Department concerned will while referring the projects for review and clearance by the committee furnish detailed and comprehensive environmental impact statement for the project prepared with the help of experts.

3. In the case of schemes costing less than Rs.10 lakhs, the Environmental implication will be assessed by the concerned department in the light of guidelines formulated by the committee and the concerned department will be responsible to ensure that suitable remedial measures for protecting the environment are incorporated in the scheme

itself before the schemes are sanctioned and taken up for implementation. If the department concerned feels certain that with the safeguards provided in the scheme, the ecological stability and purity of environment will be maintained they can go ahead with the scheme without reference to the committee. Doubtful cases will however be referred to the committee for clearance.

By order of the Government.
SD/-
P.K. Rajasekharan Nair
Under Secretary."

18. By G.O. dated 20.5.2005, the State Government accorded administrative sanction for renovation and beautification of Manalpuram Park and construction of a restaurant at Aluva at an estimated cost of Rs.55,72,432/-. That order reads as under:

"GOVERNMENT OF KERALA

Abstract

Department of Tourism -Working Group on Plan Schemes - Renovation of Manalppuram Park and construction of Restaurant at Aluva - Administrative Sanction accorded - Orders issued.

TOURISM (A) DEPARTMENT

G.O.(Rt) No.3974/05/GAD. Dated, Thiruvananthapuram 20.05.2005

Read:

Letter No.C2-22446/04, dated 11.04.2005 from the Director, Department of Tourism, Thiruvananthapuram.

ORDER

The Aluva Manalppuram is a significant pilgrim centre as well as tourism spot. The Aluva Manalppuram is famous for Shivarathri celebrations. The pilgrims visiting Kalady, the birthplace of Shri Shankaracharya include this spot also in the schedule of visit. The Director, Department of Tourism as per the letter read above has forwarded a proposal submitted by the District Collector and Chairman, DTPC, Ernakulam for the renovation of the Manalppuram Park and construction of Restaurant at Aluva and has requested for Administrative Sanction for the project at an estimated cost of Rs.55,72,432/- as detailed below.

1. Beautification of Manalppuram Park	Rs.24,10,421/-
2. Construction of Restaurant	Rs.3l,62,011/-
TOTAL	**Rs.55,72,432/-**

The Working Group that met on 29.04.2005 considered the proposal of the Director, Department of Tourism and approved it. Sanction is therefore accorded for the Project for the renovation of Manalppuram Park and construction of Restaurant at Aluva at an estimated cost of Rs.55,72,432 /-(Rupees Fifty Five Lakhs Seventy Two Thousand Four Hundred and Thirty two only) .

The expenditure on this account will be met from the head of account "3452-80-800-90(29)-Upgradation and creation of infrastructure facilities at Tourist Centres (Plan)". The work will be executed through DTPC, Ernakulam and will be completed within a period of six months.

By Order of the Governor

D. Saraswathy Amma,
Deputy Secretary."

19. There is nothing in the language of G.O. dated 20.5.2005 from which it can be inferred that while approving the proposal forwarded by the Director, Department of Tourism for renovation and beautification of Manalpuram Park at an estimated cost of Rs.55,72,432/-, the State Government had amended G.O. dated 13.1.1978 or otherwise relaxed the conditions embodied therein. The record also does not show that the Department of Tourism had furnished a detailed comprehensive environmental impact statement for the project so as to enable the Committee to make appropriate review and assessment. Therefore, it must be held that the execution of the project including construction of restaurant is ex facie contrary to the mandate of G.O. dated 13.1.1978, which was issued by the State in discharge of its Constitutional obligation under Article 48-A. Unfortunately, the Division Bench of the High Court ignored this crucial issue and casually dismissed the writ petition without examining the serious implications of the construction of a restaurant on the land reclaimed by Aluva Municipality from the river.

20. G.O. dated 13.1.1978 is illustrative of the State Government's commitment to protect and improve the environment as envisaged under Article 48A. The object of this G.O. is to ensure that no project costing more than Rs.10 lakhs should be executed and implemented without a comprehensive evaluation by an expert body which can assess possible impact of the project on the environment and ecology of the area including water bodies, i.e., rivers, lakes etc. If the project had been referred to the Environmental Planning and Co-ordination Committee for review and assessment of environmental implications then it would have certainly examined the issue relating to desirability and feasibility of constructing a restaurant, the possible impact of such construction on the river bed and the nearby bridge as also its impact on the people of the area. By omitting to refer the project to the Committee, the District Tourism Promotion Council and the Department of Tourism conveniently avoided scrutiny of the project in the light of the

parameters required to be kept in view for protection of environment of the area and the river. The subterfuge employed by the District Promotion Council and the Department of Tourism has certainly resulted in violation of the fundamental right to life guaranteed to the people of the area under Article 21 of the Constitution and we do not find any justification to condone violation of the mandate of order dated 13.1.1978.

21. In the result, the appeal is allowed and the impugned order is set aside. As a sequel to this, the writ petition filed by the appellant is allowed and the respondents are directed to demolish the structure raised for establishing a restaurant as part of renovation and beautification of Manalpuram Park at Aluva. The needful be done within a period of three months from today.

R.P. Appeal allowed.

RAJINDER SINGH

v.

STATE OF HARYANA

(Criminal Appeal No. 14 of 2007 etc.)

JULY 3, 2013

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

PENAL CODE, 1860:

ss. 304-B, 498-A and 201 read with s.34 - Dowry death - Death of bride in matrimonial home - Cremation hurried - Conviction of husband u/ss 304-B, 498-A and 201 and of other accused u/s 201/34 - Held: Prosecution has proved that the death of the bride occurred otherwise than under normal circumstances -- Statements of witnesses are trust-worthy and they stated that the deceased was subjected to harassment by her husband and other accused relatives in connection with demand for dowry just prior to her death - Further, cremation was hurried without informing the parents of bride - Accused failed to explain about presence of pesticide in the vomiting of deceased -- Therefore, the trial court rightly drew an inference of the guilt of the accused-appellants - Evidence Act, 1872 - s.113-B read with s.106.

The appellants and two other persons were prosecuted for committing the offences punishable u/ss 304-B, 498-A and 201 IPC with s/34 IPC. The prosecution case was that marriage of the appellant (in Crl. A. No. 14 of 2007) with the daughter of PW-2 was solemnized on 22.4.1992; that on 11.12.1992, the appellant left his wife in her parents' house for one month, when she told that the accused persons had been harassing her for bringing less dowry and she was told to bring Rs.25,000/-; that on 15.1.1993, when PW-3, the brother of the bride, was taking

her to her in-laws house, PW-2 asked him to convey the accused persons that some money would be sent by 20.1.1993; that on 24.1.1993, PW-7 came to PW-2 and informed him that his daughter had died on the previous night and had been cremated in the morning of 24.1.1993. PW-2 lodged a report with the police, who took possession of ashes and bones from cremation ground and sent the same along with the clothes of the deceased for chemical examination. As per the FSL report "Organ Phosphorus Pesticide" was detected on the said clothes and in the vomiting of the deceased. The trial court convicted the husband of the deceased u/s 304-B, 498-A and 201 IPC and the other accused-appellants u/s 201/ 34 IPC. The High Court dismissed the appeals of the accused-appellants.

Dismissing the appeals, the Court

HELD: 1.1 The ingredients necessary for application of s.304-B IPC and the applicability of s.113-B of the Evidence Act were culled out by this Court in *Jaggu Ram's* case. In the instant case, the prosecution proved that the death of the bride occurred otherwise than under normal circumstances within a period of 9 months of her marriage i.e. much before seven years. The statements of PW-2 and PW-3 are trust-worthy and they stated that the deceased was subjected to harassment by her husband and other accused relatives in connection with demand for dowry just prior to her death. The prosecution having established essential ingredients, it becomes the duty of the court to raise a presumption that the accused caused dowry death. [para 16-17] [379-D; 380-E-G]

State of Rajasthan v. Jaggu Ram **(2008)12 SCC 51 - relied on.**

1.2 Section 106 of the Evidence Act does not relieve

the burden of prosecution to prove guilt of the accused beyond reasonable doubt but where the prosecution has succeeded to prove the facts from which a reasonable inference can be drawn regarding the existence of certain other facts and the accused by virtue of special knowledge regarding such facts fails to offer any explanation then the court can draw a different inference. [para 15] [379-B-C]

1.3 In the instant case, the accused have failed to explain as to why they were in a hurry to cremate the deceased in the early morning of 24.1.1993 while she died in the mid night of 23/24.1.1993 i.e. within few hours. The village of deceased's parents was not far from the village of the accused but the reason as to why they were not informed about the incident and why the accused did not wait for them to come was not explained. The accused have also failed to explain the presence of the 'Organo Phosphorus Pesticide' in the vomiting of the deceased, as was noted in the F.S.L. Report. Therefore, the trial court rightly drew an inference of the guilt of the accused-appellants. [para 18] [380-G-H; 381-A-B]

Case Law Reference:

(2008) 12 SCC 51	**relied on**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 14 of 2007.

From the Judgment and Order dated 9.12.2005 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 392-SB of 1995.

WITH

Crl. A. No. 15 of 2007.

Kanwaljit Kochar, Kusum Chaudhary for the Appellant.

Roopansh Purohit, Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. These two appeals are directed against the common judgment dated 9th December, 2005 passed by the learned Single Judge of the Punjab and Haryana High Court at Chandigarh in two separate Criminal Appeal Nos. 392-SB of 1995 and 151-SB of 1995, whereby the learned Single Judge dismissed the appeals preferred by the accused and affirmed the conviction and sentence awarded by the Additional Session Judge, Yamuna Nagar at Jagadhri.

2. The appellants were tried for offences under Sections 498-A , 304-B and 201/34 IPC and after hearing the parties the learned Additional Session Judge, Jagadhri by its judgment dated 22nd February, 1995 convicted the appellant Rajinder Singh for the offences under Sections 498-A , 304-B and 201 IPC whereas other appellants, namely, Surinder Singh, Pritam Singh, Gurvinder Singh were convicted for offences under Section 201/34IPC. Accused-Appellant Rajinder Singh was sentenced to undergo RI for a period of two years and to pay a fine of Rs.500/- for offence under Section 498-A IPC, in default of payment of fine, he had to undergo further RI for six months; for offence under Section 304-B IPC he was sentenced to undergo RI for a period of seven years and for the offence under Section 201 IPC, he was sentence to undergo RI for a period of two years and to pay a fine of Rs.500/- in default of payment of fine, he was to undergo further RI for a period of six months. The other accused, namely, Surinder Singh, Pritam Singh and Gurvinder Singh were sentenced to undergo RI for a period of 2 years and to pay a fine of Rs.500/- each for the offence under Section 201/34 IPC, in default of payment of fine they were to undergo RI for a period of six months. Accused, Madan Lal had been acquitted by that judgment.

During the pendency of the appeal before the High Court, appellant-Pritam Singh died and his case got abated. Thus the case was confined to rest of the accused.

3. The case of the prosecution against the accused-appellant- Rajinder Singh is that Santosh Kaur, daughter of Nahar Singh was married with the accused-appellant on 22nd April, 1992. Sufficient dowry articles were given. On 11th December, 1992, accused-appellant left his wife Santosh Kaur in her parents house for one month when Santosh Kaur told her father- Nahar Singh that her father-in-law; Pritam Singh, husband-Rajinder Singh, brother-in-laws; Gurvinder Singh and Surinder Singh and Madan Lal, brother-in-law of her husband has been harassing her for bringing less dowry. She also told that they were demanding Rs.25,000/- and asked her to bring that amount when she came back to her in-law's house on Lohri. Nahar Singh was not in a position to pay the amount demanded and assured his daughter that he might arrange some money when she would go back to her-in-law's house. On 15th January, 1993, when Sukhbir Singh, brother of Santosh Kaur, was taking her to her-in-law's house, his father-Nahar Singh told him to make the accused understand that some money would be sent by 20th January,1993 and that they should not harass her. He also informed this fact to Sucha Singh, Sarpanch of the village. Finally, money could not be arranged by 20th January, 1993. On 24th January, 1993, one Pritam Singh came to the house of Nahar Singh and informed him that his daughter-Santosh Kaur had died during the intervening night of 23rd/24th January, 1993 and she had also been cremated in the morning of 24th January, 1993. On 25th January, 1993, Nahar Singh, Sucha Singh, Sukhbir Singh and some other family members went to Mamliwala to the house of the accused and after verifying the facts, lodged a report before Police Station, Chhachhrauli. A case was registered and accused were sent for trial.

4. After trial, case was found to be proved against Rajinder

Singh for the offence under Sections 498-A,304-B and 201 IPC and against Surinder Singh, Pritam Singh and Gurvinder Singh for the offence under Section 201/34 IPC; hence they were convicted for the same whereas Madan Lal was acquitted.

5. Learned counsel for the appellant submitted that no demand of dowry and threat was ever made to the deceased or her family members. In fact no complaint in this regard was ever made by the complainant or the deceased or by anybody else to the police. No letter was written by the deceased about the demand of dowry or cash. Therefore, the impugned order is liable to be set aside.

6. Learned Counsel for the appellant further submitted that the Court below failed to consider the fact that the cremation was never done secretly. Cremation ceremony was attended by persons very much close to the complainant family. The deceased- Santosh Kaur never complained to anybody at neighborhood about her-in-laws or about torture or harassment or demand of dowry or cash by them. Therefore, the present case was a false and concocted story made by the prosecution. Further, according to him PW-2, Nahar Singh, father of the deceased in his deposition stated that his daughter after marriage never complained about the accused-appellant.

7. Learned counsel for the prosecution per contra relied upon the evidence and submitted that the ingredients necessary for the application of Section 304-B IPC were established beyond reasonable doubt. Therefore, the presumption under Section 113-B of the Indian Evidence Act arises and hence it is proved that the accused-appellant caused the dowry death.

8. The admitted position in the present case is that the deceased was married with the accused-appellant on 22nd April, 1992. She died in the night intervening by 23rd/24th January, 1993. The cremation of the dead body was done in the morning of 24th January, 1993 without waiting for the parents of the deceased. Pritam Singh(PW-7) stated in his deposition

that about about 12.00 noon, he was standing on the bus stand of Khizrabad and was talking with some people. Then he came to know that Santosh Kaur, daughter-in-law of Pritam Singh had died and was cremated. Then he told this fact to Nahar Singh(PW-2), father of the deceased who stayed in the Village Kotian. On the next day, PW-2 alongwith Sucha Singh and other persons went to Village Mamliwala and verified the fact that Santosh Kaur had died and has also been cremated. The distance between the villages Mamliwala and Kotian was not so much and it was only about 17-18 kms. It was winter season; month of January but it has not been made clear why the accused-appellant cremated the body of the deceased in the early morning of 24th January, 1993 without even calling the parents of the deceased which shows that there was something which the accused-appellant wanted to conceal.

9. As per statement of Nahar Singh(PW-2), Sukhbir Singh(PW-3) who were the father and the brother of the deceased, accused-appellant Rajinder Singh left deceased in her parents' house for about one month in December, 1992. PW-2 stated that her daughter-Santosh Kaur told him that her father-in-law; Pritam singh, husband, Rajinder Singh, brother-in-laws; Gurvinder Singh and Surinder Singh and Madan Lal, brother-in-law of her husband were harassing her for bringing less dowry. She also told that they were demanding Rs. 25,000/- and told her to bring that amount when she came back on Lohri. Nahar Singh(PW-2) was not in a position to meet the said demand at that stage. He assured his daughter that he would arrange some money and give her by the time she leaves back to her matrimonial house. On 15th January, 1993, his son Sukhbir Singh took Santosh Kaur to her-in-laws house. He told him to make the accused understand that they would pay some money by 20th January, 1993 and they should not harass her. This fact was also informed to Sucha Singh, Sarpanch of the village. But the money could not be arranged by 20th January, 1993 and after about 3-4 days, i.e. on 24th January, 1993, Pritam Singh (PW-7) came to PW-2 and told about the death

of Santosh Kaur whose death took place during the intervening night of 23rd/24th January, 1993.

10. Sukhbir Singh (PW-3), brother of the deceased also corroborated the statements made by his father Nahar Singh(PW-2). He stated that the deceased told them that her husband Rajinder Singh, brother-in-laws; Gurvinder Singh and Surinder Singh, father-in-law; Pritam Singh and Madan Lal, brother-in-law of her husband were harassing her for not bringing sufficient dowry. He further told that they were demanding Rs.25,000/-. PW-3 then told her sister that they would pay the amount by 20th January, 1993. Then on 15th January, 1993 he took her sister to the house of her-in-laws and came back next day after telling his sister that the amount of 25,000 will be paid by 20th January, 1993. PW-3 further stated that the accused were harassing his sister even prior to 11th December, 1992. He also stated that on hearing about her death, he alongwith his father, Pritam Singh (PW-7), Sucha Singh, Sarpanch of the village, went to the village Mamliwala. They found the accused weeping and it was found that the dead body of his sister had already been cremated before they reached there. Then his father reported the matter to the police.

11. Pritam Singh(PW-7) stated that on 24th January, 1993 he came to Khizrabad to see his brother-in-law. At 12.00 noon while standing on the bus stand of Khizrabad, he heard some people talking that Pritam's Singh dauther-in-law Santosh Kaur died and had been cremated. Therefore, he told this fact to Nahar Sing(PW-2) at Kotian. Then on next day he came to the village Mamliwala alongwith 10 other persons where they came to know that Santosh Kaur had been cremated. Then all of them went to Police Station and lodged the report.

12. Nar Singh (PW-9), SHO, Police station Parakhpur, stated that on 25th January, 1993 he was posted as SI/SHO of Police Station, Chhachhrauli. On that day, complainant (PW-2) came to police station and lodged the FIR (Ex.P.B.). He recorded statement, inspected the spot and the place of

occurrence and took into possession the clothes of the deceased vide memo(Ex.P.E.) which was stained with "vomiting and latrine". Clothes were sealed into a parcel with the seal of the 6-B.R., which was handed over to Sucha Singh(PW-4). Ex.P.E. was attested by Sucha Singh(PW-4) and Sukhbir Singh(PW-3). Thereafter he went to the place of cremation and prepared the rough site plan of the cremation ground (Ex.P.M.). The ash and bones were taken into possession vide recovery memo (Ex.P.E.) which was also attested by PW-4 and PW-3. Statements of PW-3 and PW-4 were recorded (Ex.P.N.). He arrested the accused. The parcel of clothes and ash & bones were sent to forensic laboratory.

No contradiction could be found during the cross examination of prosecution witnesses.

13. The accused in their examination under Section 313 Cr.P.C. admitted the factum of marriage but denied the allegation relating to demand of dowry. In reply to question no. 14, accused-Rajinder Singh stated that his wife Santosh Kaur died a natural death on account of heavy vomiting and loose motions. He also stated that they neither demanded any dowry nor pressurized her to bring Rs.25,000/- from her father and that they were falsely implicated in the case.

14. Admittedly, Santosh Kaur died in the intervening night of 23rd/24th January, 1993 and she was cremated in the early morning of 24th January, 1993. The distance between Village Mamliwala and Kotian was not much and it was just 17-18kms. It was the month of January and winter season, the necessity of the accused-appellant to cremate the dead body within few hours of death in the early morning of 24th January, 1993 without informing the parents of the Santosh Kaur has not been explained. The Police took into possession the ash and bones from the cremation ground and clothes of the deceased and sent the same to the Deputy Director-cum-Assistant Chemical Examiner to the Government of Haryana, F.S.L. Madhuban. As per report an "Organo Phosphorus Pesticide" was detected on

the salwar stained with dirty brown material, one printed lady's shirt stained with dirty brown material and one green coloured woolen shawl of the deceased. As per report of F.S.L. (Ex P.L.1), the bones were found of the human being. Therefore, it is clear that Santosh Kaur died other than under normal circumstances. The accused-appellants have also failed to explain the presence of an "Organo Phosphorus Pesticide" in the vomiting of the deceased.

15. Section 106 of the Evidence Act does not relieve the burden of prosecution to prove guilt of the accused beyond reasonable doubt but where the prosecution has succeeded to prove the facts from which a reasonable inference can be drawn regarding the existence of certain other facts and the accused by virtue of special knowledge regarding such facts fail to offer any explanation then the Court can draw a different inference.

16. The ingredients necessary for application of Section 304-B IPC and the applicability of Section 113-B of the Evidence Act was discussed by this Court in *State of Rajasthan v. Jaggu Ram,* (2008)12 SCC 51. In the said case, this Court held as follows:

"11.The ingredients necessary for the application of Section 304-B IPC are:

1. that the death of a woman has been caused by burns or bodily injury or occurs otherwise than under normal circumstances;

2. that such death has been caused or has occurred within seven years of her marriage; and

3. that soon before her death the woman was subjected to cruelty or harassment by her husband or any relative of her husband in connection with any demand for dowry.

12. Section 113-B of the Evidence Act lays down that if soon before her death a woman is subjected to cruelty or

harassment for, or in connection with any demand for dowry by the person who is accused of causing her death then the court shall presume that such person has caused the dowry death. The presumption under Section 113-B is a presumption of law and once the prosecution establishes the essential ingredients mentioned therein it becomes the duty of the court to raise a presumption that the accused caused the dowry death.

13. A conjoint reading of Section 304-B IPC and Section 113-B, Evidence Act shows that in order to prove the charge of dowry death, prosecution has to establish that the victim died within 7 years of marriage and she was subjected to cruelty or harassment soon before her death and such cruelty or harassment was for dowry. The expression "soon before her death" has not been defined in either of the statutes. Therefore, in each case the court has to analyse the facts and circumstances leading to the death of the victim and decide whether there is any proximate connection between the demand of dowry, the act of cruelty or harassment and the death."

17. In the present case, the prosecution proved that the death of Santosh Kaur has occurred otherwise than under normal circumstances. Such death has occurred within a period of 9 months of her marriage i.e. much before seven years. The statements of PW-2 and PW-3 are trust-worthy and they stated that Santosh Kaur was subjected to harassment by her husband and other accused relatives in connection with demand for dowry just prior to death. The prosecution having established essential ingredients, it becomes the duty of the Court to raise a presumption that the accused caused dowry death.

18. In the present case, the accused has failed to explain as to why he was in a hurry to cremate the deceased in the early morning of 24th January, 1993 while she died in the mid night of 23rd/24th January, 1993 i.e. within few hours. The

village of deceased's parents was just 17-18kms far from the village of the accused but the reason as to why they were not informed about the incident on the same day and why the accused had not waited for them to come is not explained. The accused has also failed to explain as to why according to the F.S.L. Report, an Organo Phosphorus Pesticide was found in the vomiting of the deceased. Therefore, the Trial Court rightly drew an inference that the accused-appellants were guilty of the offence for which they were charge.

19. Hence, we find no merit in these appeals. These are accordingly, dismissed. Bail bonds of the appellants are cancelled. They shall surrender within a period of two weeks to undergo the remaining sentence.

R.P. Appeals dismissed.

KAZI AKILODDIN SUJAODDIN
v.
STATE OF MAHARASHTRA & ORS.
(Civil Appeal No. 5084 of 2013)

JULY 03, 2013

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

LAND ACQUISITION:

Rental compensation for pre-acquisition period - Entitlement to as per award of Land Acquisition Officer or on the amount as enhanced by reference court - HELD: During the pendency of a reference proceeding or appeal before a higher court, rental compensation is to be determined on the basis of award passed by Land Acquisition Officer - Subsequently, if there is upward revision of amount, consequences will follow and re-determination of the rental compensation can be made.

The respondent-State took possession of the land of the appellant on 15.11.1998 for construction of flood protection wall for the city of Akola. Notification u/s. 4 of the Land Acquisition Act, 1894, was published on 3.06.1999 followed by Notification u/s. 6 of the Act published on 18.11.1999. The Special Land Acquisition Officer by his award dated 04.08.2000 determined the compensation. The State Government paid to the appellant rental compensation for pre-acquisition period on the compensation determined by the Land Acquisition Officer, whereas the reference court allowed the rental compensation to be paid on the award value as enhanced by it in the reference case. Since the rental compensation as directed by the reference court was not

paid, the appellant filed a writ petition before the High Court which was allowed on 5.10.2010. However, on the review petition filed by the respondents, the High Court directed the State Government to deposit rental compensation at the rate of 8% of the amount as awarded by the reference court and allowed the appellant to withdraw half of the amount so deposited.

In the instant appeal, the question for consideration before the Court was: Whether the High Court was justified in directing the State to deposit the rental compensation with the appellate court at the rate of 8% per annum on the award value passed by the reference court for the period of occupation before formal acquisition, and in allowing the appellant to withdraw only 50% of such rental compensation during the pendency of the appeal.

Dismissing the appeal, the Court

HELD: 1.1 The Land Acquisition Act, 1894 does not contemplate the payment of any rental compensation. The entitlement of rental compensation is on the basis of resolutions and instructions issued by the State of Maharashtra from time to time. From the decision of this Court, *Maimuma Banu it is clear that during the pendency of a reference proceeding or appeal before a higher court the rental compensation is to be determined on the basis of award passed by the Land Acquisition Officer. Subsequently, if there is upward revision of amount, consequences will follow and, if necessary, re-determination of the rental compensation can be made and after adjustment of the amount paid, if any, balance can be paid. [Para 3 and 18] [385-E-F; 392-E-F]**

State of Maharashtra and Others vs. Maimuma Banu and Others,* **2003 Supp. 2 SCR 228 = (2003) (7) SCC 448 - relied on.

1.3 In the instant case, both the State Government and the appellant are not satisfied with the award passed by the reference court and, therefore, two appeals against the said award by both parties are pending before the High Court for determination. Giving reference to the decision in Maimuma Banu, it was not open to the High Court to direct the authorities to pay rental compensation as per award passed by the reference court. Therefore, the order of the High Court recalling the order dated 5.10.2010 and directing the State Government to deposit with the appellate court rental compensation at the rate of 8% of the amount awarded by the reference court, allowing the appellant to withdraw the half of the amount, calls for no interference. [Para 19] [392-F-H; 393-A-B]

Case Law Reference:

2003 (2) Suppl. SCR 228	**relied on**	**Para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5084 of 2013.

From the Judgment and Order dated 15.09.2011 of the High Court of Judicature at Bombay, Nagpur Bench, Nagpur in M.C.A. No. 774 of 2011 in Writ Petition No. 3883 of 2010.

Manish Pitale, Sunil Kumar, Chander Shekhar Ashri for the Appellant.

Madhvi Diwan, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. Leave granted. The appellant is aggrieved by impugned order dated 15th September, 2011 passed by the Division Bench of the High Court of Bombay, Nagpur Bench, Nagpur in a Review Application, MCA No.774/2011. By the impugned order the Division Bench reviewed and recalled the judgment and order

dated 5th October, 2010 passed in Writ Petition No.3883/2010(D) filed by the appellant. The High Court further directed the State of Maharashtra to deposit rental compensation at the rate of 8% of the amount of Rs.1,07,82,270/- as enhanced and awarded by the Reference Court, in First Appeal No.06/2010, as the same is pending against the award passed by the Reference Court. The High Court by the impugned order also allowed the appellant to withdraw only half of the amount deposited by the State upon furnishing security to the satisfaction of the Registrar and to keep remaining amount in FDR of a Nationalised Bank pending the litigation.

2. The only question involved in this appeal is whether the High Court of Bombay, Nagpur Bench was justified in directing the State to deposit the rental compensation with the Appellate Court at the rate of 8% per annum on the award value passed by the Reference Court for the period of occupation before formal acquisition, allowing the appellant to withdraw only 50% of such rental compensation during the pendency of the appeal.

3. The factual matrix giving rise to this appeal are as follows:-

The matter relates to payment of rental compensation with regard to land occupied by State before the formal acquisition. The Land Acquisition Act, 1894 does not contemplate the payment of any rental compensation. The entitlement of rental compensation is on the basis of resolutions and instructions issued by the State of Maharashtra from time to time since 7th February, 1949 including Resolutions dated 2nd May, 1961, 1st December, 1972, 2nd April, 1979 and 24th March, 1988.

4. By the aforesaid Resolutions, the State of Maharashtra has empowered the Irrigation and Power Department/Buildings and Communication Department Officers to take possession of lands required for its development works by private negotiations, wherever possible, as it was apprehended that the speed of acquisition of lands under the Land Acquisition

Act, 1894(hereinafter referred to as the 'Act'), would not be, in view of its procedural requirements, commensurate with the speed of work planned by the Department, thus resulting in delay in execution of works. It was also indicated that prompt payment of such compensation should be done.

5. By Resolution dated 2nd May, 1961 it was decided by the State Government that in cases where awards have been declared by the Revenue authorities, rental compensation should be paid at the rate of 4% per annum on the award value for the period of occupation before the formal acquisition plus the adjustment which has been paid by the owner of the land for that period in respect of that land. Subsequently, by Resolution dated 1st December, 1972 while procedure for taking possession of the land by private negotiations were notified, the determination of rental compensation was enhanced to 6-1/2% per cent of the final award value, as apparent from the paragraph 6 of the said Resolution quoted hereunder:

> "6. Payment of rental compensation: The responsibility of payment of rental compensation of to the title holder of the lands taken over by I.& P.D./B & C.D. officers through private negotiations rests with I.&P.D. /B.&C.D. Officers for the period from the date on which possession of the land is taken over till the date on which the full amount of final Award is paid. Government has now decided that the rental compensation payable shall be 6-1/2% of the final award value in respect of both Non-Agricultural land and Agricultural land. With a view to avoiding any inconvenience to the owners of the land who have willingly parted with their land and to ensure timely and regular payments of rental compensation, the following procedure should be adopted."

6. By the subsequent Resolution dated 2nd April, 1979 the State Government decided to increase the percentage from 6-1/2% to 8% for working out the amount for payment

of rental compensation, which reads as follows:

"GOVERNMENT OF MAHARASHTRA
Irrigation Department,
Resolution No.IND.1078/1014/IMG-(3)
Sachivalaya, Bombay 400032,
Dated 2nd April, 1979.

Read: Government Resolution, Irrigation and Power Department, No.IPM. 1069/20083/I(5), dated Ist December, 1972

Resolution: The question of raising the percentage of rental compensation admissible to the title holders of the lands during the period from the date of taking over the possession of their lands by private negotiations till the payment of final award was under the consideration of Government for some time past. Government is now pleased to increase the percentage from 6-1/2% to 8% laid down for working out the amount for payment of rental compensation in paras 6 and 7 of Government Resolution, Irrigation and Power Department, No.IPM.1069/20083-I(5), dated Ist December, 1972 with effect from Ist January, 1979."

7. The State Government by its Resolution dated 24th March, 1988 directed the authorities to pay rental compensation on time else the amount is payable towards interest. The relevant portion of the said Resolution is quoted hereunder:

"3. It has come to the notice of the Government that the directions given in the aforesaid Government Resolutions are not being followed properly. As a result, the land owners are facing harassment and inconvenience. Due to the delay in sending proposal for acquisition of lands where possession has been taken through private negotiations, the amounts payable towards interest and rental compensation have increased.

4. In view of the amendment of the Land Acquisition Act, 1894 and the time limits specified for the acquisition of land as also in view of Section 4(1) of the Act and the increase in the amount of solatium from 15% to 30%, special attention is required to be given to the completion of process of acquisition quickly."

8. The respondent-State required the land of the appellant for construction of flood protection wall for the city of Akola and after negotiations the appellant handed over the possession of his land on 15th November, 1998 to the State. Subsequently, Notification under Section 4 of the Land Acquisition Act, 1894, was published on 3rd June, 1999 in respect of said land, followed by Notification under Section 6 of the Act published on 18th November, 1999. The Special Land Acquisition Officer by his award dated 4th August, 2000 determined the compensation at the rate of Rs.5,61,000/- per hectare and awarded total compensation of Rs.9,45,173/- in favour of appellant.

9. Aggrieved by the award, the appellant filed an application under Section 18 of the Act which on reference registered as LAC No.140/2000 in the Court of District Judge, Akola. During the pendency of the said reference case, the appellant received a sum of Rs.59,998/- on 7th August, 2001 towards rental compensation. The amount was calculated at the rate of 8% of the compensation awarded by the Land Acquisition Officer. The Reference Court by its award dated 2nd August, 2008 allowed the application and enhanced the rental compensation @ 8% per annum on Rs.1,07,82,270/- with interest at the rate of 9% from 12th October, 2000 to 11th October, 2001 that is for one year and interest at the rate of 15% per annum, thereafter, till the date of actual payment.

10. Aggrieved by the enhancement, the State Government preferred First Appeal No.06/2009 before the High Court of Bombay. In the said appeal, the High Court passed interim

order on 28th January, 2009 staying operation, implementation and execution of the order passed by the Reference Court on the condition of depositing 50% of the amount granted by the Reference Court. The First Appeal No.06/2009 is still pending before the High Court for its decision.

11. The appellant was also not happy with the award passed by the Reference Court, therefore, he preferred First Appeal No.1210/2008, which is also pending before the High Court.

12. During the pendency of the appeals, the appellant applied to the 3rd respondent for grant of rental compensation on the basis of enhanced compensation awarded by the Reference Court by its order dated 2nd August, 2008. As no reply was received by the appellant he filed a Writ Petition No.2763/2009 before the High Court of Bombay, Bench at Nagpur. The said writ petition was disposed of on 6th July, 2009 recording the statement of the Assistant Government Pleader that the application of the appellant would be decided on merits at the earliest. Thereafter, the 3rd respondent on consideration of the said application, by his letter dated 5th October, 2009 rejected the prayer on the ground that the order of Reference Court was under challenge before the High Court. Against the order of rejection the appellant preferred Writ Petition No.3883/2010, before the High Court of Bombay, Bench at Nagpur. In the said case, the Special Land Acquisition Officer, 4th respondent filed an affidavit assailing the order passed by Reference Court. According to the appellant, there is no statement made in the said reply that the appellant was not entitled for enhanced rental compensation on the basis of compensation awarded by the Reference Court. The High Court allowed the said writ petition by order dated 5th October, 2010 referring to the decision of this Court in *State of Maharashtra and Others vs. Maimuma Banu and Others,* (2003) 7 SCC 448. As the Division Bench ordered to pay enhanced rental compensation to the appellant as per award passed by the

Reference Court, the respondents filed a review petition for recalling the order dated 5th October, 2010. It was submitted that the order was passed by the High Court on wrong interpretation of decision in *Maimuma Banu* (supra) and that there is an error apparent on the face of the record.

13. On notice and hearing the parties, the High Court passed the impugned order dated 15th September, 2011, recalling its earlier order dated 5th October, 2010. The following direction has been issued in place of earlier order:

> "In the result, the judgment and order dated 5/10/2010 is reviewed and set aside. Instead we direct the State of Maharashtra to deposit as rental compensation 8% of the amount of Rs.1,07,82,270/-, in First Appeal No.6/2010, which is the compensation as enhanced by the Reference Court in this Court for the period from 15/11/1998 i.e. the date of taking possession till the date of the award i.e. 4/8/2000. The original petitioner Kazi Akiloddin Sujaoddin may withdraw the half amount deposited by the State upon furnishing security to the satisfaction of the Registrar. The remaining amount shall be kept in F.D.R. of a nationalized bank pending the litigation.
>
> 6. Four weeks time is granted to deposit the above said amount.
>
> 7. Order accordingly."

14. Learned counsel for the appellant contended that the appellant is entitled for the enhanced rental compensation proportionate to the increase in compensation awarded by the Reference Court. As per the policy of the respondent-State, the claimant is entitled to rental compensation at the rate of 8% of the amount of compensation awarded to the claimant for acquisition of his land. Circulars issued by the State do not limit the rental compensation to 8% of the amount awarded by the Land Acquisition Officer. The resolutions do not stipulate that

the rental compensation should not be enhanced proportionate to the enhancement of compensation awarded by the Reference Court or higher courts.

15. Learned counsel for the appellant further contended that the High Court committed a grave error in deciding against the appellant by reviewing its own order on the basis of judgment of this Court in State of *Maharashtra and Others vs. Maimuma Banu and Others,* (2003) (7) SCC 448.

16. Per contra, according to the respondents, the Reference Court enhanced the compensation exorbitantly. Therefore, the State Government was left with no other option but to challenge the award by filing the first appeal, registered as First Appeal No.06/2009.

17. In *Maimuma Banu* (supra) this Court noticed that the State of Maharashtra by its resolutions and instructions, contained in the circulars dated 1st December, 1972, 17th September, 1977, 2nd April, 1979 and 24th March, 1988 provided for rental compensation, payable to the title-holders of the lands. Apart from those resolutions, the provisions of the Land Acquisition Act, 1894 do not contemplate payment of any rental compensation. In the said case of *Maimuma Banu* (supra) the Court decided the question relating to the 'payment of interest on rental compensation'awarded to the persons whose lands were acquired under the Land Acquisition Act, 1894; this Court in the said case also held as follows:

> "9.....It is not in dispute that in most of the cases the rental compensation has not been paid. If that factual position continues, it clearly is a case where the amount to which a person is entitled is withheld without any legitimate excuse. The learned counsel for the appellants strenuously urged that in most of the cases the proceedings have not yet attained finality and are pending either before the Reference Court or in appeal. **That does not provide a legitimate excuse to the appellants to withhold payment of the rental compensation. The amount calculated on the basis of award by the Land Acquisition Officer cannot be below than the amount to be ultimately fixed. If in appeal or the reference proceeding, there is any variation, the same can be duly taken note of as provided in law. There is no difficulty and we find none as to why the compensation on the basis of value determined by the Land Acquisition Officer cannot be paid. If there is upward revision of the amount, the consequences will follow and if necessary, redetermination of the rental compensation can be made and after adjustment of the amount paid, if any, balance can be paid. If, however, the Land Acquisition Officer's award is maintained then nothing further may be required to be done. In either event, payment of the rental compensation expeditiously would be an appropriate step.** Looking at the problem from another perspective, one thing is clear that authorities have clearly ignored the sense of urgency highlighted in the various resolutions."

18. From the aforesaid decision of this Court, it is clear that during the pendency of a reference proceeding or appeal before a Higher Court the rental compensation is to be determined on the basis of award passed by the Land Acquisition Officer. Subsequently, if there is upward revision of amount, consequences will follow and if necessary, re-determination of the rental compensation can be made and after adjustment of the amount paid, if any, balance can be paid.

19. In the present case, we find that the State Government along with the appellant is not satisfied with the award passed by the Reference Court and hence, two appeals against the said award by both parties are pending before the High Court of Bombay, Nagpur Bench for determination. Giving reference to the decision in *Maimuma Banu* (supra) it was not open to

the High Court to direct the authorities to pay rental compensation as per award passed by the Reference Court. For the reason aforesaid, if the High Court recalled the order dated 5th October, 2010 and directed the State Government to deposit rental compensation at the rate of 8% of the amount awarded by the Reference Court with the appellate Court, allowing the appellant to withdraw the half of the amount, no interference is called for. However, this order will not stand in the way of appellant to claim proportionate higher rental compensation, if the order of the Reference Court is upheld or further enhancement of compensation is made by the Appellate Court.

20. We find no merit in this appeal. It is, accordingly, dismissed with observations as made above. No costs.

R.P. Appeal dismissed.

RANJIT SINGH

v.

STATE OF PUNJAB

(Criminal Appeal No. 510 of 2007)

JULY 3, 2013

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

PENAL CODE, 1860:

ss.304-B and 498-A - Dowry death - Bride found dead in her matrimonial home within 4 months of marriage - Conviction of husband and sentence of life imprisonment affirmed by High Court - Held: Prosecution has successfully proved the ingredients necessary to attract s. 304-B -- There is no reason to differ with conclusion of trial court as affirmed by appellate court that appellant is guilty of the offences punishable u/ss. 304-B and 498-A -- However, taking into consideration the fact, that appellant has got re-married and has three children including one handicapped son, and his mother is also paralysed, the sentence awarded u/s 304-B is reduced to seven years.

EVIDENCE ACT, 1872:

s.113-B - Presumption as to dowry death - Explained - Held: In the instant case, prosecution has successfully proved ingredients of s.304-B IPC and, as such, s.113-B of the Evidence Act automatically comes into play.

EVIDENCE:

Dowry death - Evidence of independent witnesses - Held: Instances of cruelty and harassment for dowry, generally remain within personal knowledge of near relations, and their evidence is not to be discarded for independent corroboration or for not reporting the matter to Panchayat.

The appellant and his parents were prosecuted for committing offences punishable u/s 302 IPC, with alternative charges u/s 304-B/34, and u/s. 498-A IPC. The case of the prosecution was that soon after the marriage of the appellant with the daughter of PW4, the accused started harassing the bride for more dowry and on 30.05.1996, i.e., within 4 months of her marriage, she was found dead in her matrimonial home. The post-mortem report indicated that the death was caused due to asphyxia by throttling. The father of appellant of died pending trial. The trial court convicted the appellant and his mother u/s 304-B/34 IPC and 498-A IPC. On appeal, the High Court affirmed the conviction of the appellant u/s 304-B IPC with sentence of R1 for life and u/s. 498-A with sentence of R1 for two years. His mother was, however, acquitted.

Disposing the appeal, the Court

HELD: 1.1 The death of the bride took place just within four months of her marriage. The case of the prosecution mainly rests on the evidence of PW-4 and PW-5, the parents of the deceased. Their statements indict the series of incidents forming part of the same transaction which culminated in the death of the bride. She was disrespected by her-in-laws right from the very beginning and from time to time was being harassed on demand of dowry. The sequence of events suggested that cruelty and harassment on account of such demands were present till her death. Just a day before the death, the bride informed her mother (PW-5) that the accused were torturing her and demanding Maruti Car. From the statements of PW-2, the post-mortem doctor, it is apparent that the death of the deceased was caused by bodily injury which is otherwise than under the normal circumstances. The prosecution has successfully proved ingredients of s.304-B IPC and, as such, s.113-B of the

Evidence Act, 1872 automatically comes into play. The statement of the accused corroborates the materials particularly in relation to harassment and demand of dowry and death by torture. Therefore, the case squarely falls within the meaning of dowry death for the purpose to attract s. 304-B IPC. There is no reason to differ with the conclusion of the trial court as affirmed by the appellate court that the appellant is guilty of the offences punishable u/ss 304-B and 498-A IPC. [para 19 and 22-25] [405-B-C, G-H; 406-A-B, D-E, F-H; 407-A-C, D]

1.2 It is, but natural, that instance of cruelty, harassment of demand of dowry generally would remain within the personal knowledge of near relations and they would be the best persons to depose about the same. Therefore, the evidence of physical and mental torture of the deceased from the accused is not to be discarded simply on the score of independent corroboration. [para 20] [405-D-E]

1.3 The plea of the appellant that no Panchayat was convened, cannnot be a ground to discard the evidence of PW-4 and PW-5 who are material witnesses. About the harassment meted to a girl normally, the matter is first reported to the parents and not to the Panchanayat. It is not necessary that such matter is required to be reported to the Panchayat. [para 21] [405-F-G]

2. Taking into consideration the fact, that the appellant has got re-married and has three children including one handicapped son, and his mother is also paralysed, the sentence awarded u/s 304B IPC is reduced to seven years. [para 25] [407-D-E]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 510 of 2007.

From the Judgment and Order dated 17.01.2007 of the

High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 303-DB of 2006.

Mahabir Singh, Rakesh Dahiya, Mohit Mudgil, Satyapal Khushal Chand Pasi for the Appellant.

V. Madhukar, AAG, Anvita Gowshish, Srajita Mathur, Kuldip Singh for the Respondent.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. This appeal is directed against the judgment and order dated 17th January, 2007 passed by the Division Bench of the Punjab and Haryana High Court at Chandigarh in Criminal Appeal No. 303-DB of 2006. By its impugned judgment the Division Bench while acquitting one of the accused-Baldev Kaur, mother-in-law of the deceased, of the charges framed against her, affirmed the sentence awarded by the Additional Session Judge, Barnala against the appellant under Section 304-B, 498-A IPC.

The accused-appellant-Ranjit Singh has been sentenced to undergo RI for life under Section 304-B IPC and further sentenced to undergo RI for two years with a fine of Rs.2,000/-, in default thereof to go RI for a further period of six months under Section 498-A IPC.

2. The facts necessary for disposal of the present appeal are as follows:-

The informant Bahadur Singh got recorded his statement on 30th May, 1996 to ASI Gurcharan Singh, Police Station Tapa to the effect that he had performed marriage of his daughter Jaswinder Kaur with Ranjit Singh @ Makhan, son of Raghbir Singh, resident of Roorki Kalan in the month of January, 1996. He gave 14 tolas gold, Rs.55,000/- cash, one scooter, fridge, cooler, sofa set, bed, almirah, etc. as dowry. In total he spent 1.5 lakh in the said marriage and fulfilled all the demands so raised by Raghbir Singh, father-in-law of his

daughter. After about 7 days of marriage, his daughter came to her parents house, she complained about the demand of money as "Shagun", upon which he handed over a sum of Rs.8,000/- to her daughter which she handed over to her husband-Ranjit Singh (appellant herein). The complainant Bahadur Singh in his statement further narrated as to how and when his daughter again came to them after 20 days of marriage and told about the demand made by her in-laws and pursuant thereto he again purchased articles worth Rs.1500/- and sent to her daughter's matrimonial house at Roorki Kalan. The complainant further stated that even thereafter also demands were made by her daughter's in-laws asking for articles of good quality as the earlier purchased articles were not upto their satisfaction. The complainant, Bahadur Singh further mentioned the episode of 29th May, 1998 when his wife Gurmail Kaur went to her daughter's matrimonial house at Village Roorki Kalan where her daughter narrated her about the harassment made by her in-laws on account of demand of a car. She further informed her mother that she apprehended that she might be killed by her-in-laws and requested to take her alongwith her. However, his wife consoled her daughter and went back to her house at village Kale Ka. On 30th May, 1996, at about 3.30P.M., they came to know about the death of their daughter Jaswinder Kaur and on reaching village Roorki Kalan they found their daughter Jaswinder Kaur lying on a cot in the courtyard of her in-laws house with injuries on her person. The complainant suspected that Raghbir Singh, father-in-law, Baldev Kaur, mother-in-law, Raj Kaur, sister-in-law and Ranjit Singh, husband of his daughter murdered her.

3. On the basis of the statement, FIR No. 60 dated 30th May, 1996 (Ex.PE) for an offence under Section 304-B/34 IPC was registered at Police Station Tapa, District Sangrur.

4. The Police Office Gurcharan Singh, ASI (PW-6) reached the spot and prepared inquest report (Ex.PC) of the dead body of Jaswinder Kaur. He took the dead body to Civil Hospital,

Barnala for post-mortem examination where Dr. Bhalinder Singh(PW-2) conducted the post-mortem examination and by report (Ex.PA), he noticed as many as six injuries on the dead body and opined that the cause of death was due to asphyxia by throttling.

5. Gurcharan Singh, ASI(PW-6) recorded the statement of the witnesses under Section 161 Cr.P.C. The accused were arrested and thereafter on completion of usual formalities of investigation, final report under Section 173 Cr.P.C. was filed against Raghbir Singh, Baldev Kaur and Ranjit Singh for trial. In the absence of any evidence against Raj Kaur, sister-in-law of the deceased, her case was dropped.

6. After commitment of the case, the Trial Court framed charges against the accused-appellant for commission of an offence punishable under Section 302 IPC with the alternative charges under Section 304-B read with Section 34 IPC and under Section 498-A as well.

7. The prosecution in all, examined as many as six witnesses viz. Gurjant Singh, son of Pritam Singh as PW-1, Dr. Bhalinder Singh as PW-2, Dev Raj, Draftsman as PW-4, Bahadur Singh, Gurmail Kaur, father and mother of the deceased as PW-4 and PW-5 respectively and Gurcharan Singh as PW-6.

8. The accused denied the prosecution allegations. Their stand was that the deceased, in a disturbed mental state committed suicide by hanging herself. On behalf of the defence as many as five witnesses were examined. Rajinder Singh, constable as DW-1, Jagtar Singh @ Avtar Singh as DW-2, Gurcharan Singh son of Harchand as DW-3, Major Singh, son of Sukhdev Singh as DW-4 and DSP Darshan Singh as DW-5.

9. The Trial Court on conclusion of its trial, vide its judgment dated 26.11.1998 convicted and sentenced the

accused Baldev Kaur, mother-in-law, Ranjit Singh, husband and Raghbir Singh, father-in-law for commiting an offence under Section 304-B IPC. Pursuant to an order passed in criminal appeal No. 563-DB of 1998 filed by the accused in the High Court of Punjab and Haryana, the Division Bench by its order dated 1st February, 2006 set aside the conviction and sentence recorded by the Trial Court, remanded back the case to the Trial Court with direction to proceed with the trials from the stage of Section 235Cr.P.C. and to pass order afresh in accordance with law. Separate Criminal Appeal as well as revision petition preferred by the State of Punjab and the complainant were dismissed by the same order, for having become infructuous.

10. Pursuant to the direction of the High Court, the matter was again taken up by the Trial Court and during the re-hearing of the case before the Trial Court, accused Raghbir Singh was reported to have died on 19th April, 2003 and thereby the proceedings were abated against him by order dated 25th March, 2006.

11. Thereafter, on appreciation of evidence led by the prosecution, the Trial Court held both Baldev Kaur, mother-in-law and Ranjit Singh, husband, guilty of offence under Section 304-B read with Section 34 and Section 498-A IPC and sentenced as noticed earlier. On appeal, the Division Bench of the High Court by impugned judgment acquitted Baldev Kaur, mother-in-law but affirmed the judgment passed by the Trial Court so far as it relates to appellant-Rajnit Singh, husband of the deceased.

12. Learned counsel appearing on behalf of the appellant assailed the judgment mainly on the ground that in the FIR, no specific allegation about the demand of dowry or harassment or cruelty was made against the appellant, Ranjit Singh, husband of the deceased. Even during the trial, the demand for dowry was not attributed to the appellant. Neither the Trial Court nor the High Court considered the defence evidence which appellant produced to rebut the presumption. Further,

learned counsel appearing on behalf of the appellant submitted that Section 113-B of the Evidence Act is not applicable in the present case. Baldev Kaur, mother-in-law of the deceased has been acquitted considering the same evidence as is available in the case of Ranjit Singh,husband and the same cannot be relied upon to hold the appellant guilty. It was also alleged that the prosecution witnesses made major improvements in their evidence and Trial Court failed to notice the defence evidence which is more probable.

13. Gurjant Singh,PW-1 stated that the deceased Jaswinder Kaur, daughter of his sister was married to Ranjit Singh at Kaleke in January, 1996. On the date of occurrence i.e. 30th May, 1996 he had gone to visit at the house of accused Ranjit Singh where all family members including Jaswinder Kaur were present there. They were openly threatening Jaswinder Kaur since she had not brought maruti car in dowry. They started abusing her followed by Baldev Kaur, mother-in-law who took her into a room by holding her from her neck. Ranjit singh, husband caught hold of her legs and Raghbir Singh , father-in-law exhorted them to kill her by pressing her neck and similar exhortation was also given by Raj Kaur, sister-in-law and in his presence all of them strangulated her to death.

On behalf of the appellant it was contended that Gurjant Singh(PW-1) is a maternal uncle of the deceased and, therefore, his statement was not worthy of any credence as he would not allow anybody to commit such crime in his presence. If he would have present there at that time, he must have intervened to save his niece or raised an alarm which he admitted that he did not do so.

14. Bahadur Singh(PW-4) is the father of the deceased, Jaswinder Kaur. He stated that on 30th May, 1996 at about 3.30P.m., he received information of his daughter's death at her -in-law's house at Village Roorki Kalan. He along with others visited the Village where he found his daughter, Jaswinder Kaur

was lying dead on a cot then he visited Police Station Tapa and lodged an FIR. He stated that on demand of the accused-Raghvir Singh, father-in-law, he spent Rs, 1,50,000/- on the marriage of her daughter. She was given 14 tolas of gold, scooter and Rs.55,000/- in cash. In addition to it he gave cooler, fridge, dressing table, etc. as dowry to his daughter. After 7-8days of marriage, Jaswinder Kaur came to Vilage Kaleke to meet her parents and told them that the accused were demanding more money as dowry and they also demanded the amount of "Shaguns". On this, he gave Rs.8,000/- as an amount of "Shaguns" to his daughter which she handed over to her husband-Ranjit Singh who had accompanied Jaswinder Kaur to Kaleke. After about 20 days, when he brought her daughter in Kaleke, she informed that her-in-laws were demanding more dowry. She further informed that she was being harassed by the accused. All the accused including Raj Kaur, sister-in-law, were demanding dowry articles of good quality. Gurmel Kaur(PW-5), mother of the deceased went to her daughter's matrimonial home one day prior to the date of occurrence of death when her daughter narrated her woeful stories and requested her mother to take her back as she was apprehending death from the accused. She further informed that the accused was demanding Maruti Car as dowry. Gurmail Kaur(PW-5) assured her daughter to she would tell the entire story to her father and she came back in the evening of the same day at Village Kaleke. Bahadur Singh(PW-4) further stated that his brother-in-law (wife's brother) went to meet Jaswinder Kaur at about 12/12.30 P.M. on the day of occurrence and saw that all the accused including Raj Kaur, sister-in-law were scolding Jaswinder Kaur as she had not brought Maruti Car for them.

15. Gurmail Kaur(PW-5), mother of the deceased, deposed in her statement that her daughter was married to accused-Ranjit Singh about 4 months before the date of the occurrence of her death. Sufficient dowry was given in the marriage as per the demand of the accused. She had gone to

the Village Roorki Kalan to meet her daughter where she told her that she was being maltreated by her-in-laws as they were demanding Maruti Car and the demand was made by Baldev Kaur, mother-in-law, Ranjit Singh, husband, Raghbir Singh, father-in-law and Raj Kaur, sister-in-law of the deceased. She also told her mother that they were threatening to kill her in case she did not bring Maruti car. She requested her mother to take her back to Kaleke as she apprehended danger to her life at the hands of the accused. She consoled her daughter and assured her that she would narrate the matter to her father. She came to the Village Kaleke and narrated the entire matter to Bahadur Singh(PW-4). Next day at about 3.30 P.M. they received a message that their daughter had been killed by her-in-laws.

16. Dr. Bhalinder Singh(PW-2) conducted the post mortem examination on the dead body of Jaswinder Kaur @ Baljinder Kaur w/o Ranjit Singh @ Makhan Singh, R/o Roorke. The deceased was shown aged about 30 years.

The following injuries were found on the body of the deceased:

1. Abrasion on the right side of neck 1x.25 cm in size 8cm away from right angle of mouth 0.5 cm away from right ear. Horozontal in position.

2. Contusion on right side of neck measuring 5x1½cm, 1cm below injury no. 1 and oblique in position.

3. Contusion on right side of neck measuring 5x1½cm ½cm below injury no. 2.

4. Contusion on right side of neck measuring 4x1½cm ½cm below injury no. 3.

5. Contusion on left side 3x2cm in the middle.

6. Upper eye-lid of left eye was swollen and blushed. On

dissection of neck soft tissue ecchomised.

He stated that Hyoid bone was fractured. Right lung and left lung were congested with punctiform hemorrhage. Right heart contained blood and left heart was empty. Pericardium was congested. Doctor opined that the cause of death was due to asphyxia by throttling.

17. In his cross-examination, he also stated that there is a possibility that if a ligature like a Parna was used for hanging through ling it would cause ligature marks.

18. Dev Raj (PW-3) draftsman prepared a site plan for the same.

19. Gurcharan Singh(PW-6), ASI, P.S. Kotwali, Barnala who was the AIO, recorded the FIR and stated that he inspected the spot and prepared the rough site of the spot (Ex.PK) with correct marginal note. Cot on which the dead body was lying was also taken into possession vide memo (Ex.PF). On 31st May, 1996, he arrested the accused; Baldev Kaur, Raghbir Singh and Ranjit Singh. He recorded the statement of Bahadur Singh(PW-4) as (Ex.DA)and Gurmail Kaur(PW-5) as (Ex.DB) without any omission or addition. He noted down the brief according to the facts contained in the FIR.

It was given in the evidence of PW-4 that one day before the death of Jaswinder Kaur, Gurmail Kaur(PW-5) mother of the deceased went to meet her daughter where she expressed her apprehension of threat to her life and requested to take her alongwith her (Gurmail Kaur PW-5). She also conveyed that there was a demand of Maruti Car from the accused for which Gurmel Kaur (PW-5) assured her daughter that she would bring the matter to the notice of Bahadur Singh(PW-4), father of the deceased. The statements of PW-4 and PW-3(parents of the deceased) were duly corroborated with respect to the demand of dowry and harassment immediately prior to the date of occurrence and the event of her visit a day prior to her death.

They were subjected to lengthy cross examination. Apart from minor discrepancies, which do not go to the root of the case, their statements are corroborated on material particulars so far as the demands of harassment to Jaswinder Kaur is concerned. Their statements indict the series of incidents forming part of the same transaction which culminated in the death of Jaswinder Kaur. The deceased was disrespected by her-in-laws right from the very beginning and from time to time was being harassed on demand of dowry. The sequence of events, discussed above, suggested that cruelty and harassment on account of such demands were present till her death.

20. Learned counsel for the appellant laid much stress that there is no independent eye witness to corroborate the statements of PW-4 and PW-5 who are closely related to the deceased. The contention is again meritless. It is, but natural, that instance of cruelty, harassment of demand of dowry generally would remain within the personal knowledge of near relations and they would be the best persons to depose about the same. Therefore, the evidence of physical and mental torture of the deceased from the accused is not to be discarded simply on the score of independent corroboration.

21. One of the stand taken by the appellant that no Panchayat was convened and the matter was not reported to the police cannnot be the ground to discard the evidence of PW-4 and PW-5 who are material witnesses. About the harassment meted to a girl normally in Indian family, the matter is first reported to the parents and not to the Panchanayat. It is not necessary that such matter is required to be reported to the Panchayat.

22. From the statements of Dr.Bhalinder Singh(PW-2), it is apparent that the death of Jaswinder Kaur was caused by bodily injury which is otherwise than under the normal circumstances. The death took place within few months of the date of marriage i.e. much before seven years of marriage. It

is shown that soon before her death she was subjected to cruelty and harassment by her husband in connection with the demand of dowry. Therefore, the present case squarely falls within the meaning of dowry death for the purpose to attract Section 304-B IPC. Section 113-B of the Indian Evidence Act deals with the presumption of "dowry death" and proclaims that when the question is whether a person has committed a dowry death of a woman and it is shown that soon before her death, such woman had been subjected by such person to cruelty or harassment, for or in connection with demand of a dowry, the Court shall presume that such person had caused "dowry death". It can, therefore, be understood that irrespective of the fact whether the accused had any direct connection with the death or not, he shall be presumed to have committed the "dowry death" provided the other requirements mentioned above are satisfied.

23. In the present case, we have noticed that the prosecution has successfully proved the ingredients necessary to attract the Provision of Section 304B IPC. Such ingredients having been proved, Section 113-B of the Indian Evidence Act automatically comes into play.

In the facts and circumstances, the death of Jaswinder Kaur had taken place just within four months of her marriage. The case of the prosecution mainly rests on the evidence of PW-4 and PW-5, parents of the deceased. They have made statements that even at the time of marriage they spent Rs,1,50,000 and even after 7-8 days of marriage when Jaswinder Kaur came to their parents house and conveyed that the accused were demanding dowry as the amount of "shagun" for which Rs.8,000/- was given her to hand-over to her husband who accompanied her. Their statement further suggested that upon subsequent visit of their daughter after about 20 days, a sum of Rs.1500 was spent by PW-4 for purchase of certain articles, which his daughter took to her matrimonial home in a tractor. Just a day before the death, she informed her mother

Gurmail Kaur(PW-5) that the accused were torturing her and demanding Maruti Car.

24. The statement of the accused corroborates the materials particularly in relation to harassment and demand of dowry and death by torture. The accused being the husband and direct beneficiary of the said demand of Maruti Car, we find no reason to differ with the conclusion of the Trial Court as affirmed by the Appellate Court that the appellant is guilty of the offence under Section 304B IPC.

25. At the end of the argument, learned counsel for the appellant made an alternative submission and requested to take a lenient view in view of the fact that after the death of Jaswinder Kaur (first wife), the appellant got married second time and from his second wife he has three children out of which one son is handicapped and his mother is also paralysed. Taking into consideration the aforesaid fact, we affirm the conviction under Section 304B IPC and 498-A IPC and reduce the sentence awarded under Section 304B IPC to seven years alongwith the sentence of two years imposed under Section 498-A IPC and fine of Rs.2,000/- as imposed by the Trial Court and affirmed by the Division Bench of the High Court with direction that both sentences shall run concurrently. Bail bonds of the appellant are cancelled and he is directed to be taken into custody forthwith to serve out the remainder of the sentence.

R.P. Appeal disposed of.

S. ANIL KUMAR @ ANIL KUMAR GANNA
v.
STATE OF KARNATAKA
(Criminal Appeal No. 937 of 2006)

JULY 3, 2013

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

PENAL CODE, 1860:

ss. 304-B and 498-A - Suicide committed by bride in her matrimonial home - Acquittal by trial court - Conviction of husband by High Court - Held: Once prosecution failed to prove the basic ingredients of harassment or demand of dowry and the evidence brought on record was doubted by trial court, it was not open to High Court to convict the appellant on presumption referring to s. 113-A or s. 113-B of Evidence Act -- Presumption of innocence of accused being primary factor, in absence of exceptional compelling circumstances and perversity of the judgment, it was not open to High Court to interfere with the judgment of trial court in a routine manner - Impugned judgment of High Court set aside - Evidence Act, 1872 - ss.113-A and 113-B.

APPEAL:

Judgment of acquittal - Interference with, by appellate court - Scope of - Explained.

The appellant and 4 others were prosecuted for offences punishable u/ss 304-B, 498-IPC and ss. 3, 4 and 6 of Dowry Prohibition Act, 1961. The prosecution case was that the marriage of the sister of PW1 was solemnized with the appellant on 13.12.1990; that she was treated with cruelty and was harassed for bringing insufficient dowry and not fulfilling the further demand of

the accused; that on 20.01.1992 she was found hanged inside the house. The trial court noticed that accused no. 2 was the neighbour's wife. It held that statements of material witnesses and some others were contradictory, and acquitted all the accused persons. On appeal, the High Court held that the trial court did not consider the provisions of ss. 113-A and 113-B of the Evidence Act, and convicted the appellant u/ss 304-B and 498 IPC and sentenced him to RI for 7 years and 2 years, respectively, under the two counts.

Allowing the appeal, the Court.

HELD: 1.1 In the case of Rohtash* this Court has held that only in exceptional cases where there are compelling circumstances and where the judgment in appeal is found to be perverse, the High Court can interfere with the order of acquittal. In the instance case, the evidence of the prosecution witnesses PWs.1, 10 to 16 and 21 shows that there are contradictory statements which cannot be stated to be a minor contradiction. The improvement in the statements of PW.1 and 12 is clear. The allegation about the demand of dowry and harassment and torture made by accused No.1 on deceased was not disclosed/ mentioned either in the FIR or before the Tahsildar (PW.21) who recorded the initial evidence. Further, payment of stated cash and gold to accused No.1 as dowry was also not established beyond reasonable doubt. [para 12 and 13] [417-G-H; 418-A, D-G]

Rohtash Vs State of Haryana **2012 (6) SCR 62 = 2012 (6) SCC 589 - relied on.**

1.2 Once the prosecution failed to prove the basic ingredients of harassment or demand of dowry and the evidence brought on record were doubted by the trial court, it was not open to the High Court to convict the appellant on presumption referring to s. 113-A or s.113-

B of the Evidence Act. The presumption of innocence of the accused being primary factor, in absence of exceptional compelling circumstances and perversity of the judgment, it was not open to the High Court to interfere with the judgment of the trial court in a routine manner. The impugned judgment of the High Court is set aside. [para 14-15] [418-G-H; 419-A-B]

Case Law Reference:

2012 (6) SCR 62 relied on para 12

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 937 of 2006.

From the Judgment and Order dated 04.01.2006 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 1042 of 1999.

Brijesh Kalappa, Gopal Singh, Divya Nair, N. Ganpathy for the Appellant.

K. Parameshwar, V. Raghupathy, Sanjay R. Hegde for the Respondent.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. This appeal has been preferred by the appellant against the judgment dated 4th January, 2006 in Criminal Appeal No.1042 of 1999 passed by the learned Single Judge of the High Court of Karnataka at Bangalore, whereby the learned Single Judge reversed the judgment of acquittal dated 2nd August, 1999 passed by the Xth Additional City Sessions Judge at Bangalore in S.C.No.86 /96 and convicted and sentenced the appellant for the offences under Section 304-B and Section 498-A of the IPC.

The Appellate Court imposed sentence of rigorous imprisonment for seven years for the offence punishable under Section 304-B of the IPC and rigorous imprisonment for two

years and to pay a fine of Rs.10,000/-, in default, to undergo simple imprisonment for three months for the offence punishable under Section 498-A of the IPC. The Appellate Court further ordered that the sentences shall run concurrently.

2. The case of the prosecution is briefly stated below:

The complainant-Parasmal's sister Meena Kumari was married to accused No.1, Anil Kumar on 13th December, 1990. In relation to the said marriage a demand was made by accused Nos.1 and 3 to 5 for dowry of an amount of Rs.1,50,000/- and gold weighing 800 gms. It was agreed by the bride's party to pay a sum of Rs.50,000/- and 500 gms. of gold as dowry and, accordingly, the marriage was performed. After the marriage, Meena Kumari came to know that her husband Anil Kumar, accused No.1 (appellant herein) had developed illicit intimacy with accused No.2, Sumithra alias Savitri, wife of Kailaschand, (PW-8). After some time, accused Nos.1 and 3 to 5 began to treat Meena Kumari with cruelty since she failed to bring the amount demanded by accused No.1 for expansion of his business. Whenever Meena Kumari came to her brother's house, she complained about ill treatment meted out to her by accused No.1. After some days, the amount demanded by accused No.1 was given, but his demand did not subside. On 20th January, 1992 at about 7.00 a.m., Meena Kumari took milk and went inside her house. After some time, accused No.1, Anil Kumar left the house. Thereafter Meena Kumari came out of the house and requested Smt. Kamalamma, a neighbour to bring a nipple for putting the same to tap. When Kamalamma brought the nipple, she found the door of the house closed. Meena Kumari did not open the door in spite of knocking by Kamalamma. At that time, Sarojamma, (PW-6) was also present. At about 9.00 a.m. the mother of PW-6, Kailas and Anil Kumar came and knocked the door, but the door was not opened. Despite their efforts, door was not opened and there was no response from inside. Therefore, Anil Kumar put his hand through the ventilator and unlatched the door

and opened it. When they went inside, they found that Meena Kumari had hanged herself from the fan and had committed suicide. The news spread and later, a friend of the accused Sri Shanthilal (PW-9) came and he gave on phone a message to Meena Kumari's elder brother S. Parasmal (PW-1), who was residing in Mysore. Intimation sent to him was that Meena Kumari was seriously ill and they should come immediately. On their way to Bangalore, Parasmal (PW-1), learnt that Meena Kumari had committed suicide. They reached the house of the accused at about 5.00 p.m. and after ascertaining the matter, Parasmal (PW-1) went to the Police Station and informed the Police. The Police came to the house and after inspecting the spot, took the complaint of PW-1. On the basis of the same, he registered a case in Cr.No.33/92 against the accused Nos.1 and 2. Sri. M.V. Chengappa, PSI, Hebbal Police Station (PW-23) started with the investigation and further investigation was taken up by, Praveena, ACP, Yeshwanthpur Sub-Division (PW-24). The investigation disclosed that accused Nos.3 to 5 were also involved in the matter. Therefore, they were added in the list of the accused. After further investigation by S.V.D. Souza (PW-25), Police Inspector, ADC, COD, Bangalore and his successor, B. Venkataramana, Police Inspector, ADC, COD, Bangalore (PW-26) a chargesheet was placed against the accused for the offences punishable under Section 498-A and 304-B of the IPC and Sections 3,4 and 6 of the Dowry Prohibition Act, 1961.

3. The accused pleaded not guilty of the charges and claimed to be tried. The prosecution examined in all 26 witnesses and closed its case. As per prosecution PWs-1, 10,11,12,13,15 and 18 were examined with regard to the payment of dowry. To substantiate the allegation of the dowry harassment they examined PWs-10,11,12,13,14,16 and 21 and other witnesses who saw the body hanging with fan. PWs-2, 7 and 19 were Panch witnesses. PW-17, Dr. Thirunavakkarasu was the Professor, Forensic Medicine, who conducted the post-mortem examination. PW-21, was the Taluk Executive

Magistrate, who conducted inquest proceedings. PWs.22 to 26 are the Police Officers.

4. The accused in their statements under 313 Cr.P.C. denied the allegations made against them. On behalf of defence one Vimal Kumar (DW-1) was examined to show that there was no demand for dowry and no harassment was made to Meena Kumari. It was suggested on behalf of the defence that Meena Kumari had extra affinity towards PW-10, Ashok Kumar Jain and perhaps on the objection raised by the accused she might have committed suicide.

5. The trial court on appreciation of evidence on record came to hold that the statements of material witnesses, PW-1 and PW-12 and some others are contradictory and there statements are not trustworthy. In view of such finding the trial court acquitted the accused of all the charges levelled against them.

6. One of the reasons shown by the trial court to come to the conclusion that the statements are not trustworthy, was that PW-1, complainant nowhere mentioned in the complaint that demand of Rs.1,50,000/- in cash and 800 gms. of gold as dowry was made as pre-condition to marry Meena Kumari. Such allegations were also not made before the Tahsildar (PW.21), as evident from the observation of the trial court:

> "12.....It is an undisputed fact that nowhere in the complaint Ex.P3, it is mentioned that the accused persons demanded Rs.1.5 lacks and 800 grams of gold as dowry as a pre-condition to marry the deceased Meenakumari. In the second para of the complaint, Ex.P.3, it is mentioned that the marriage was done as per their request and that to their satisfaction. At the time of marriage, they gave 500 grams of gold ornaments and Rs.50,000/- cash and household articles, further, nowhere in the complaint Ex.P.3 any mentioned is made with regard to the payment of Rs.10,000/- during 1991 to the first accused and

> subsequent payment of Rs.25,000/- to the first accused in the house of PW. at Mysore..... Now I will see the cross-examination of PW.21, the Tahsildar. He states that PW.1 has not stated before him that the accused persons demanded 800 grams of gold and Rs.1.50 lacks of as dowry. Likewise, PW.1 has not stated before him that the first accused and his family members participated in the marriage talks. He admits that PW.10 stated before him vide Ex.D.2. He admits that PW.1 has not stated before him that the third accused sent deceased Meenakumari to bring the balance of Rs.1.00 lack and 300 grams of gold. Likewise PW.1 has not stated before him that he gave Rs.10,000/- to accused Nos.1 and 3 and sent deceased Meenakumari. He also admits that PW.1 has not stated before him that PW.1 went to Devgarh and requested accused No.3 to send Meenakumari with him for which he refused. He also states that PW.1 has not stated before him that he sent his brother Sampathlal to bring Meenakumari and that he brought her to his house at Mysore in June, 1991. Likewise, he has also not stated that the first accused did not take back Meenakumari to his house and therefore she stayed in her house for about 2 ½ months, PW.1 has not stated before PW.21 that Meenakumari was telling before him that she was insulted by her in-laws for having not taken the dowry articles. It is also admitted by PW.21 Tahsildar that PW.1 has not stated before him during November, 1991, accused Nos.1 and 2 and one Sampathlal came to his house and his father PW.22 gave Rs.25,000/- to the first accused. PW.21 also states that PW.1 Parasmal has not specifically stated phone that the second accused was ill-treating her. PW.10 also not stated before PW.21 the Tahsildar on 13.01.1992. He sent Mohanlal to Bangalore to see Meenakumari and that in turn they told him about the harassment given to her by the first accused. PW.21 also states that PW.18 A. Suresh Jain has not stated before him that deceased Meenakumari came to Mysore

six months after the marriage and stayed in the house of PW.1 for about 1 ½ months and that she complained of harassment by her in-laws for the same of dowry.

13. From the evidence of PW-21 the Tahsildar it is crystal clear that at no point of time, either PW-1 or as matter of fact, this PW-18 never stated that the accused persons made a demand for Rs.1.5 lakhs and 800 grams of gold as dowry. Likewise, whatever PW-1 states in the chief examination are all omissions which were not stated before PW-21 the Tahsildar immediately after this incident. Absolutely there is no substance in PWs-1 and 12 telling that they paid Rs.10,000/- at Benali and Rs.25,000/- in the house of PW-1 at Mysore to the first accused"

7. The High Court relied substantially on the submission made by the learned Addl. SPP appearing for the prosecution who stated that there are abundant material placed on the record by the prosecution including depositions of PWs-1,10 to 16 and 21, many of whom spoke about the demand of dowry, payment of dowry and dowry harassment. It was contended that the learned Sessions Judge because of minor discrepancies in the statements of the prosecution witnesses has given the benefit of doubt in acquitting all the accused. The Sessions Judge had not considered the provisions of Sections 113-A and 113-B of the Evidence Act to be drawn against the accused. In view of such argument, the Appellate Court re-appreciated the evidence and observed as follows:

"8.Though it is submitted by the learned Addl.SPP that there is abundant material regarding demand for dowry and payment of dowry for the settlement of marriage, on perusal of the depositions of PWs.1,10,11,12,13,15 and 18, we are unable to agree with his view. It is an admitted fact that an amount of Rs.50,000/- and gold ornaments weighing about 500 gms were given at the time of marriage. The evidence is not sufficient to raise a presumption that this payment of money as dowry was on

demand by the accused nos.1 and 3 to 5. As rightly observed by the learned Sessions Judge, they appear to be customary presents given from the bride's side."

Again on re-appreciation of evidence of PWs.1,10,11,12,13,14,15,16 and 21, the Appellate Court while holding that it was unable to find the allegations involve accused Nos.2 to 5 observed as follows:

"9.....It is not the case of the prosecution that from those distant places the accused Nos.3 to 5 tutored accused No.1 to demand dowry or ill-treat Meena Kumari. Therefore, we do not find sufficient ground to interfere in the conclusion of the learned Sessions Judge with regard to the demand for dowry payment of dowry and dowry harassment so far as the allegations relate to accused Nos.3 to 5."

8. So far as accused No.2 is concerned she being a neighbour's wife the trial court held that she cannot be held responsible for any demand of dowry or dowry harassment. The trial court acquitted all the accused No.1 to 5 for offences punishable under Sections 3,4 and 6 of the Dowry Prohibition Act and accused Nos.2 to 5 for an offence punishable under Section 498-A of the IPC with the following observation:

"10.....Of course, a suggestion has been made that as informed by Meena Kumari, there was illicit relationship between the accused nos.1 and 2. But this has not been substantiated by any material. Merely because some witness says that they learned from Meena Kumari that there was illicit relationship between accused Nos.1 and 2 and of that it was the cause for marital discord between accused nos.1 and Meena Kumari, that cannot be accepted. Considering all these materials, we hold that the acquittal of accused nos. 1 to 5 for offences punishable under Sections 3,4 and 6 of the Dowry Prohibition Act and accused nos.2 to 5 for an offences punishable under

Sections 498-A of the IPC does not need interference."

9. In spite of such finding referring to the statements made by PWs.1,10 to 16 and 21 the Appellate Court held that accused No.1-appellant herein is liable to be convicted for the offences for dowry harassment and dowry death and made the following observations:

> "The learned Sessions Judge lost sight of the presumption that is available in Sections 113-A and 113-B of the Evidence Act and ignoring the evidence of PWs.1, 10 to 16 and 21, held that there was no dowry harassment, so far as the allegation relates to the accused no.1. We find absolutely no reason to discard the evidence of these witnesses so far as the allegations relate to the accused no.1 and consequently he is liable to be convicted for the offences under Sections 498-A, 304-B of the IPC. Since the dowry harassment by the accused nos.2 to 5 has not been proved, the acquittal granted to them does not need any interference."

10. Learned counsel for the appellant submitted that if one view has been taken by the trial court which is not perverse, it was not open to the Appellate Court to substitute such view to re-appreciate the evidence for coming to a different conclusion.

11. Per contra, according to the learned counsel for the State, the High Court was right in reversing the judgment of acquittal passed by the trial court in view of sufficient evidence of PWs.10 to 16 and 21 recorded to show that the appellant has subjected deceased to harassment due to which she was compelled to commit suicide.

12. This Court in the case of *Rohtash vs. State of Haryana,* (2012) 6 SCC 589, held that only in exceptional cases where there are compelling circumstances and where the judgment in appeal is found to be perverse, the High Court can interfere with the order of acquittal. In the said case the following

observation was made by this Court:

> "27. The High Court interfered with the order of acquittal recorded by the trial court. The law of interfering with the judgment of acquittal is well settled. It is to the effect that only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate court can interfere with the order of the 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 innocence. Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference."

13. We have gone through the evidence of the prosecution witnesses PWs.1, 10 to 16 and 21 relied on by the prosecution. We find that there are contradictory statements which cannot be stated to be a minor contradiction as was suggested by the learned Addl.SSP before the Appellate Court. The improvement in the statements of PW.1 and 12 is clear. The allegation about the demand of dowry of Rs.1,50,000/- and 800 gms. of gold ornaments and harassment and torture made by accused No.1 on deceased was not disclosed and mentioned in the First Information Report or before the Tahsildar(PW.21) who recorded the initial evidence. In Ex.P.2 and complaint Ex.P.3 absolutely there is no evidence to show that Rs.25, 000/- was demanded and Rs.10,000/- was given to accused No.1 either at Benali or at Mysore. Further, payment of Rs.50,000/- and 500 gms. of gold to accused No.1 as dowry was also not established beyond reasonable doubt.

14. Once the prosecution failed to prove the basic ingredients of harassment or demand of dowry and the evidence brought on record were doubted by the trial court, it was not open to the High Court to convict accused No.1 on presumption referring to Section 113-A or 113-B of the Evidence Act. The presumption of innocence of the accused

being primary factor, in absence of exceptional compelling circumstances and perversity of the judgment, it was not open to the High Court to interfere with the judgment of the trial court in a routine manner.

15. For the reasons aforesaid, we set aside the impugned judgment dated 4th January, 2006 in Criminal Appeal No.1042 of 1999 passed by the High Court, allow the appeal by restoring the judgment dated 2nd August, 1999 of the trial court. The appellant is on bail, his bail bonds stand discharged.

R.P. Appeal allowed.

RAJARAM PRASAD YADAV

v.

STATE OF BIHAR & ANR.

(Criminal Appeal No. 830 of 2013)

JULY 04, 2013

[T.S. THAKUR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

s.311 - Power of court to re-examine a witness - Principles to be followed while dealing with an application u/s 311 - Culled out - Held: In the instant case, the application of complainant for his re-examination has no bona fides -- Trial court had the opportunity to observe the demeanour of complainant while tendering evidence which persuaded it to reach the conclusion and that deserves more credence while examining the correctness of the order passed by it -- Order of trial court did not call for any interference, in any event, behind the back of appellant - The trial shall be completed expeditiously -- Evidence Act, 1972 - s.138.

The second respondent, filed a written complaint on 8.7.1999, alleging that on 07.07.1999, there arose a dispute between him and his brother over raising a construction and that at the instance of his brother, latter's son (appellant), fired at him, whereafter he was taken to the hospital for treatment. A charge sheet was filed against the appellant and his father for the offences punishable u/ss. 324, 307 read with s. 34, IPC. In the trial, the second respondent was examined as PW-9 on 16.3.2007 and the evidence of the prosecution was closed on 4.4.2007. In the meantime, yet another altercation took place as between the second respondent (PW9) and his son on the one side and the appellant and his father on the other. In the said incident, the father of the appellant was stated

to have been beaten. This led to registration of FIR in case Crime No.78 of 2007. Thereafter the second respondent filed a petition dated 24.8.2007, u/s. 311 Cr.P.C. seeking permission for his re-examination. A similar petition was filed by the Additional Public Prosecutor on 5.12.2007. The trial court dismissed both the applications. However, the High Court allowed the prayer of the second respondent.

Allowing the appeal, the Court

HELD: 1.1 Under s. 311, Cr.P.C. widest of the powers have been invested with the courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. This is clear from the expression "any" used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". Section 138 of the Evidence Act, prescribes the order of examination of a witness in the court, which will have to necessarily be in consonance with the prescription contained in s. 311 Cr.P.C. The power u/s. 311, Cr.P.C. can be exercised by any court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. [Para 14] [431-B-C, E-H]

1.2 While dealing with an application u/s. 311 Cr.P.C. read along with s. 138 of the Evidence Act, the following principles, as emerging from various decisions of this Court, will have to be borne in mind by the courts:

(a) Whether the court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in u/s. 311 is needed

by the court for a just decision of a case?

(b) The exercise of the widest discretionary power u/s. 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive or speculative presentation of facts, as thereby the ends of justice would be defeated.

(c) If evidence of any witness appears to the court to be essential to the just decision of the case, it is the power of the court to summon and examine or recall and re-examine any such person.

(d) The exercise of power u/s. 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

(e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

(f) The wide discretionary power should be exercised judiciously and not arbitrarily.

(g) The court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

(h) The object of s. 311 Cr.P.C. simultaneously imposes a duty on the court to determine the

truth and to render a just decision.

(i) The power u/s 311 Cr.PC should be exercised where the court arrives to the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

(j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the court should be magnanimous in permitting such mistakes to be rectified.

(k) The court should be conscious of the position that after all the trial is basically for the prisoners and the court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

(l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

(m) The power must be exercised keeping in mind

that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

(n) The power u/s. 311 Cr.P.C. must therefore, be invoked by the court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right. [Para 23] [438-D-H; 439-A-H; 440-A-G]

Jamatraj Kewalji Govani vs. State of Maharashtra **1967 SCR 415 = AIR 1968 SC 178;** *Mohanlal Shamji Soni vs. Union of India and Another* **1991 (1) SCR 712 = 1991 Suppl.(1) SCC 271;** *Raj Deo Sharma (II) vs. State of Bihar* **1999 (3) Suppl. SCR 124 = 1999 (7) SCC 604;** *U.T. of Dadra and Nagar Haveli and Anr. vs. Fatehsinh Mohansinh Chauhan* **2006 (4) Suppl. SCR 522 = 2006 (7) SCC 529;** *Iddar & Ors. vs. Aabida & Anr.* **2007 (8) SCR 518 = AIR 2007 SC 3029;** *P. Sanjeeva Rao vs. State of A.P.* **2012 (6) SCR 787 = AIR 2012 SC 2242; and** *Sheikh Jumman vs. State of Maharashtra* **(2012) 9 SCALE 80 - referred to.**

1.3 In the case on hand, the High Court, while passing the impugned order has completely ignored the principal objectives with which the provision u/s. 311 Cr.P.C. has been brought into the statute book. At the foremost, the appellant who was facing criminal trial was not impleaded as a party to the proceedings in the High Court. Further, the High Court appears to have passed orders on the very first hearing date, unmindful of the consequences

involved. The order of the High Court does not reflect any of the issues dealt with by the Sessions Judge while rejecting the application of the respondents in seeking to re-examine the second respondent. [Para 24] [440-H; 441-A-D]

1.4 The trial Judge has recorded that contrary to the complaint preferred by the second respondent on 8.7.1999 registered as case No. 71/1999, wherein offences u/ss. 324/307/34 IPC were reported alongwith s. 27 of the Arms Act, based on the report of the doctor, the chargesheet came to be filed u/ss. 324/307/34 IPC and no charge u/s. 27 of the Arms Ac was laid. In the course of the trial, the turn of examination of PW-9, (second respondent) came on 16.3.2007, nearly after eight years from the date of occurrence and he categorically deposed that he never made any statement to the police nor was he beaten on the date of occurrence, nor was he hit by any bullet shot. Further he made a clear statement that the injury sustained by him was due to the fall into the hole. He also made a categorical statement that his sons PWs-4 and 5 were not present at the place of occurrence. [Para 25] [441-F-H; 442-A-B]

1.5 The application of the second respondent, seeking the permission of the court u/s. 311 Cr.P.C. for his re-examination has no bona fides. It was quite apparent that the complaint, which emanated at the instance of the appellant based on the subsequent incident, which took place on 30.5.2007 and resulted in the registration of the FIR in case No.78/2007, seems to have weighed with the second respondent to present the application u/s. 311 Cr.P.C., by way of an afterthought. The trial court, had the opportunity to observe the demeanour of the second respondent, while tendering evidence which persuaded it to reach the conclusion and that deserves more credence while examining the correctness of the order passed by it. The order of the

trial court did not call for any interference, in any event, behind the back of the appellant. The order of the High Court is set aside and that of the trial court restored. The trial shall be completed expeditiously. [Para 29-30] [444-F-H; 445-A, F-G]

Case Law Reference:

1967 SCR 415	**referred to**	**para 15**
1991 (1) SCR 712	**referred to**	**para 16**
1999 (3) Suppl. SCR 124	**referred to**	**para 17**
2006 (4) Suppl. SCR 522	**referred to**	**para 18**
2007 (8) SCR 518	**referred to**	**para 19**
2012 (6) SCR 787	**referred to**	**para 20**
(2012) 9 SCALE 80	**referred to**	**para 21**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 830 of 2013.

From the Judgment and Order dated 09.12.2010 of the High Court of Judicature at Patna in Crl. Misc. No. 12454 of 2010.

Mohit Kumar Shah for the Appellant.

Gopal Singh, Anant Sharma, Amlan Kumar Ghosh for the Respondents.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. Leave granted.

2. This appeal is directed against the order of the High Court of Judicature at Patna, in Criminal Miscellaneous Petition No. 12454 of 2010, dated 9.12.2010.

3. By a short order dated 18.11.09, passed in Sessions Trial No. 425 of 2009, the trial Court disallowed the applications of the Respondents filed under Section 311 of the Code of Criminal Procedure (Cr.P.C.), to re-examine PW-9, the informant. The High Court directed the trial Court to allow the 2nd Respondent to examine himself as a witness on a specified date by its order dated 9.12.2010.

4. To narrate the brief facts, the 2nd Respondent (PW-9), herein filed a written complaint, alleging that on 07.07.1999, at about 5 p.m. in the evening, as regards the construction of a latrine in his land in front of his house, a dispute arose as between him and his brother Bindeshwar Yadav and that at the instance of his brother Bindeshwar Yadav, his son Rajaram Yadav, brought a country made pistol and fired at the 2nd respondent (PW-9) on the left side of the back, whereafter he was taken to the hospital for treatment.

5. At the instance of the second respondent, based on a complaint dated 8.7.1999, a case in Crime No. 71 of 1999 was registered in Khizersarai Police Station for the offences punishable under Sections 324, 307 read with Section 34 Indian Penal Code, 1860 and also under Section 27 of the Arms Act, 1959. Investigation was held and an injury report was brought on record, in which the doctor opined that the injury was caused by a hard blunt substance and was single in nature. It was stated that the second Respondent (PW-9) was able to secure another report later on.

6. The appellant was enlarged on bail on 13.10.1999. A charge sheet bearing No. 127 of 1999, dated 31.10.1999 was filed against the appellant and the other accused for the offences under Sections 324, 307 read with 34 of IPC. Significantly, there was no charge framed under Section 27 of the Arms Act. Cognizance was taken and the case was committed and after framing of the charges, the trial commenced. After the examination of the other witnesses, the 2nd Respondent was examined as PW-9 on 16.3.2007.

7. In his evidence, the 2nd Respondent (PW9), categorically stated that he never gave any statement to the police; that nobody beat him on the date of occurrence and that he was not hit by any bullet. He further stated in his evidence that he accidently fell into the hole of the latrine, while looking into it and that some instrument, which was lying inside the hole, caused the injury on his body. As far as the evidence of PW-4 and PW-5, namely, his sons, Babloo and Munna Kumar was concerned, the 2nd Respondent (PW9) stated that they were not present at the place of occurrence, since Babloo was staying in a hospital at Hulasganj and Munna Kumar was at Ranchi. The evidence of the prosecution was closed on 4.4.2007 and thereafter, the evidence of the defense side stated to have commenced.

8. In the meantime, it is stated that yet another altercation took place as between, the 2nd Respondent (PW9), his son Babloo on the one side and the appellant and his father on the other side, regarding the flowing of water from the latrine, constructed by the 2nd Respondent into the field of the father of the appellant.

9. Pursuant to the said issue, it is stated that the father of the appellant was beaten with bamboo sticks, injuring him seriously. In connection with the said incident, Bindeshwar Yadav filed a complaint before the police on 7.6.2007, leading to the registration of the FIR on the same date in Khizersarai Police Station in case No.78 of 2007. Subsequently, the second respondent came forward with a petition dated 24.8.2007, under Section 311 Cr.P.C. and sought for permission for his re-examination. For the same purpose, the Additional Public Prosecutor also filed a petition on 5.12.2007, in the above applications. The trial Court passed a common order on 18.11.2009, dismissing both the applications and posted the case for evidence of investigation officers and the doctors on 18.12.2009. The second respondent approached the High Court by filing the present Criminal Misc. Case

No.12454/2010, in which the impugned order was passed by the High Court on 9.12.2010.

10. We heard Mr. Mohit Kumar Shah, learned counsel for the appellant and Mr. Gopal Singh, learned counsel for the first respondent and Mr. Amlan Kumar Ghosh, learned counsel for the second respondent. We also perused the order impugned, as well as the order of the trial Court and other material papers placed on record.

11. Mr. Mohit Kumar Shah, learned counsel for the appellant in his submission contended that while the trial Court passed a reasoned order after hearing both parties extensively, the Hon'ble High Court passed the impugned order in the absence of the appellant. According to the learned counsel, the second respondent even without impleading the appellant, persuaded the High Court to pass the impugned order, which according to the learned counsel is on the face of it, not sustainable under Section 311 Cr.P.C. Learned counsel further contended that by permitting the second respondent to get himself re-examined, every attempt has been made to fill up the lacunae in the case of the prosecution, which the High Court ought not to have permitted. According to the learned counsel, when the trial Court had examined the pros and cons, while dealing with the prayer of the second respondent, as well as the first respondent for re-examination of the second respondent and gave well-founded reasons for rejecting the applications, the High Court ought not to have interfered with the same by passing a cryptic order. Learned counsel further contended that the application, which came to be allowed by the High Court was vexatious and would only encourage the malicious designs of the second respondent to get over his own earlier version deposed before the Court, which fully supported the case of the appellant.

12. As against the above submissions, learned counsel for the respondents contended that as enormous powers are vested in the Court under Section 311 Cr.P.C., in the matter of

examination or re-examination of a witness in order to arrive at a just conclusion and the High Court having exercised its powers in pursuance of the said power, the order of the High Court does not call for interference.

13. Having heard the learned counsel for the respective parties and having bestowed our serious consideration to the issue involved, we find force in the submission of the counsel for the appellant, as the same merits acceptance. In order to appreciate the stand of the appellant it will be worthwhile to refer to Section 311 Cr.P.C., as well as Section 138 of the Evidence Act. The same are extracted hereunder:

Section 311, Code of Criminal Procedure

311. **Power to summon material witness, or examine person present:** Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

Section 138, Evidence Act

138. **Order of examinations**- witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination- The re-examination shall be directed to the explanation of matters referred to in cross-

examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

14. A conspicuous reading of Section 311 Cr.P.C. would show that widest of the powers have been invested with the Courts when it comes to the question of summoning a witness or to recall or re-examine any witness already examined. A reading of the provision shows that the expression "any" has been used as a pre-fix to "court", "inquiry", "trial", "other proceeding", "person as a witness", "person in attendance though not summoned as a witness", and "person already examined". By using the said expression "any" as a pre-fix to the various expressions mentioned above, it is ultimately stated that all that was required to be satisfied by the Court was only in relation to such evidence that appears to the Court to be essential for the just decision of the case. Section 138 of the Evidence Act, prescribed the order of examination of a witness in the Court. Order of re-examination is also prescribed calling for such a witness so desired for such re-examination. Therefore, a reading of Section 311 Cr.P.C. and Section 138 Evidence Act, insofar as it comes to the question of a criminal trial, the order of re-examination at the desire of any person under Section 138, will have to necessarily be in consonance with the prescription contained in Section 311 Cr.P.C. It is, therefore, imperative that the invocation of Section 311 Cr.P.C. and its application in a particular case can be ordered by the Court, only by bearing in mind the object and purport of the said provision, namely, for achieving a just decision of the case as noted by us earlier. The power vested under the said provision is made available to any Court at any stage in any inquiry or trial or other proceeding initiated under the Code for the purpose of summoning any person as a witness or for examining any person in attendance, even though not summoned as witness or to recall or re-examine any person already examined. Insofar as recalling and re-examination of any person already examined, the Court must necessarily

consider and ensure that such recall and re-examination of any person, appears in the view of the Court to be essential for the just decision of the case. Therefore, the paramount requirement is just decision and for that purpose the essentiality of a person to be recalled and re-examined has to be ascertained. To put it differently, while such a widest power is invested with the Court, it is needless to state that exercise of such power should be made judicially and also with extreme care and caution.

15. In this context, we also wish to make a reference to certain decisions rendered by this Court on the interpretation of Section 311 Cr.P.C. where, this Court highlighted as to the basic principles which are to be borne in mind, while dealing with an application under Section 311 Cr.P.C. In the decision reported in *Jamatraj Kewalji Govani vs. State of Maharashtra* - AIR 1968 SC 178, this Court held as under in paragraph 14:-

"14. It would appear that in our criminal jurisdiction, statutory law confers a power in absolute terms to be exercised at any stage of the trial to summon a witness or examine one present in court or to recall a witness already examined, **and makes this the duty and obligation of the Court provided the just decision of the case demands it.** In other words, where the court exercises the power under the second part, the inquiry cannot be whether the accused has brought anything suddenly or unexpectedly but whether the court is right in thinking that the new evidence is needed by it for a just decision of the case. **If the court has acted without the requirements of a just decision, the action is open to criticism but if the court's action is supportable as being in aid of a just decision the action cannot be regarded as exceeding the jurisdiction.**"

(Emphasis added)

16. In the decision reported in *Mohanlal Shamji Soni vs. Union of India and Another* - 1991 Suppl.(1) SCC 271, this

Court again highlighted the importance of the power to be exercised under Section 311 Cr.P.C. as under in paragraph 10:-

> "10….In order to enable the court to find out the truth and render a just decision, the salutary provisions of Section 540 of the Code (Section 311 of the new Code) are enacted whereunder any court by exercising its discretionary authority at any stage of enquiry, trial or other proceeding can summon any person as a witness or examine any person in attendance though not summoned as a witness or recall or re-examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined who are expected to be able to throw light upon the matter in dispute; because if judgments happen to be rendered on inchoate, inconclusive and speculative presentation of facts, the ends of justice would be defeated."

17. In the decision in *Raj Deo Sharma (II) vs. State of Bihar* - 1999 (7) SCC 604, the proposition has been reiterated as under in paragraph 9:-

> "9. We may observe that the power of the court as envisaged in Section 311 of the Code of Criminal Procedure has not been curtailed by this Court. Neither in the decision of the five-Judge Bench in A.R. Antulay case nor in Kartar Singh case such power has been restricted for achieving speedy trial. In other words, even if the prosecution evidence is closed in compliance with the directions contained in the main judgment it is still open to the prosecution to invoke the powers of the court under Section 311 of the Code. **We make it clear that if evidence of any witness appears to the court to be essential to the just decision of the case** it is the duty of the court to summon and examine or recall and re-examine any such person."
>
> (Emphasis added)

18. In *U.T. of Dadra and Nagar Haveli and Anr. vs. Fatehsinh Mohansinh Chauhan* - 2006 (7) SCC 529, the decision has been further elucidated as under in paragraph 15:-

> "15. A conspectus of authorities referred to above would show that the principle **is well settled that the exercise of power under Section 311 CrPC should be resorted to only with the object of finding out the truth or obtaining proper proof of such facts which lead to a just and correct decision of the case,** this being the primary duty of a criminal court. Calling a witness or re-examining a witness already examined for the purpose of **finding out the truth in order to enable the court to arrive at a just decision of the case cannot be dubbed as "filling in a lacuna in the prosecution case"** unless the facts and circumstances of the case make it apparent that the exercise of power by the court would result in causing serious prejudice to the accused resulting in miscarriage of justice."
>
> (Emphasis added)

19. In *Iddar & Ors. vs. Aabida & Anr.* - AIR 2007 SC 3029, the object underlying under Section 311 Cr.P.C., has been stated as under in paragraph 11:-

> "11. The object underlying Section 311 of the Code is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. **The determinative factor is whether it is essential to the just decision of the case.** The section is not limited only for the benefit of the accused, and it will not be an improper exercise of the powers of the court to summon a witness under the section merely because the evidence supports the case for the

prosecution and not that of the accused. The section is a general section which applies to all proceedings, enquiries and trials under the Code and empowers Magistrate to issue summons to any witness at any stage of such proceedings, trial or enquiry. In Section 311 the significant expression that occurs is 'at any stage of inquiry or trial or other proceeding under this Code'. **It is, however, to be borne in mind that whereas the section confers a very wide power on the court on summoning witnesses, the discretion conferred is to be exercised judiciously, as the wider the power the greater is the necessity for application of judicial mind.**"

(Emphasis added)

20. In *P. Sanjeeva Rao vs. State of A.P.*- AIR 2012 SC 2242, the scope of Section 311 Cr.P.C. has been highlighted by making reference to an earlier decision of this Court and also with particular reference to the case, which was dealt with in that decision in paragraphs 13 and 16, which are as under:-

"13. Grant of fairest opportunity to the accused to prove his innocence was the object of every fair trial, observed this Court in *Hoffman Andreas v. Inspector of Customs, Amritsar* (2000) 10 SCC 430. The following passage is in this regard apposite:

"In such circumstances, if the new counsel thought to have the material witnesses further examined, **the Court could adopt latitude and a liberal view in the interest of justice, particularly when the court has unbridled powers in the matter as enshrined in Section 311 of the Code. After all the trial is basically for the prisoners and courts should afford the opportunity to them in the fairest manner possible.**"

16. We are conscious of the fact that recall of the witnesses is being directed nearly four years after they

were examined-in-chief about an incident that is nearly seven years old. Delay takes a heavy toll on the human memory apart from breeding cynicism about the efficacy of the judicial system to decide cases within a reasonably foreseeable time period. To that extent the apprehension expressed by Mr. Rawal, that the prosecution may suffer prejudice on account of a belated recall, may not be wholly without any basis. Having said that, we are of the opinion that on a parity of reasoning and looking to the consequences of denial of opportunity to cross-examine the witnesses, we would prefer to err in favour of the appellant getting an opportunity rather than protecting the prosecution against a possible prejudice at his cost. Fairness of the trial is a virtue that is sacrosanct in our judicial system and no price is too heavy to protect that virtue. A possible prejudice to prosecution is not even a price, leave alone one that would justify denial of a fair opportunity to the accused to defend himself."

(Emphasis added)

21. In a recent decision of this Court in *Sheikh Jumman vs. State of Maharashtra* - (2012) 9 SCALE 80, the above referred to decisions were followed.

22. Again in an unreported decision rendered by this Court dated 08.05.2013 in *Natasha Singh vs. CBI (State)* - Criminal Appeal No.709 of 2013, where one of us was a party, various other decisions of this Court were referred to and the position has been stated as under in paragraphs 14 and 15:

"14. The scope and object of the provision is to enable the Court to determine the truth and to render a just decision after discovering all relevant facts and obtaining proper proof of such facts, to arrive at a just decision of the case. Power must be exercised judiciously and not capriciously or arbitrarily, as any improper or capricious exercise of such power may lead to undesirable results. An application

under Section 311 Cr.P.C. must not be allowed only to fill up a lacuna in the case of the prosecution, or of the defence, or to the disadvantage of the accused, or to cause serious prejudice to the defence of the accused, or to give an unfair advantage to the opposite party. Further the additional evidence must not be received as a disguise for retrial, or to change the nature of the case against either of the parties. Such a power must be exercised, provided that the evidence that is likely to be tendered by a witness, is germane to the issue involved. An opportunity of rebuttal, however, must be given to the other party.

The power conferred under Section 311 Cr.P.C. must, therefore, be invoked by the Court only in order to meet the ends of justice, for strong and valid reasons, and the same must be exercised with great caution and circumspection.

The very use of words such as 'any Court', 'at any stage', or 'or any enquiry', trial or other proceedings', 'any person' and 'any such person' clearly spells out that the provisions of this section have been expressed in the widest possible terms, and do not limit the discretion of the Court in any way. There is thus no escape if the fresh evidence to be obtained is essential to the just decision of the case. The determinative factor should, therefore, be whether the summoning/recalling of the said witness is in fact, essential to the just decision of the case.

15. Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized. Adducing evidence in support

of the defence is a valuable right. Denial of such right would amount to the denial of a fair trial. Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same. (Vide *Talab Haji Hussain v. Madhukar Purshottam Mondkar & Anr.,* AIR 1958 SC 376; *Zahira Habibulla H. Sheikh & Anr. v. State of Gujarat & Ors.* AIR 2004 SC 3114; *Zahira Habibullah Sheikh & Anr. v. State of Gujarat & Ors.,* AIR 2006 SC 1367; *Kalyani Baskar (Mrs.) v. M.S. Sampoornam (Mrs.)* (2007) 2 SCC 258; *Vijay Kumar v. State of U.P. & Anr.,* (2011) 8 SCC 136; and *Sudevanand v. State through C.B.I.* (2012) 3 SCC 387.)"

23. From a conspectus consideration of the above decisions, while dealing with an application under Section 311 Cr.P.C. read along with Section 138 of the Evidence Act, we feel the following principles will have to be borne in mind by the Courts:

(a) Whether the Court is right in thinking that the new evidence is needed by it? Whether the evidence sought to be led in under Section 311 is noted by the Court for a just decision of a case?

(b) The exercise of the widest discretionary power under Section 311 Cr.P.C. should ensure that the judgment should not be rendered on inchoate, inconclusive speculative presentation of facts, as thereby the ends of justice would be defeated.

(c) If evidence of any witness appears to the Court to be essential to the just decision of the case, it is the power of the Court to summon and examine or recall and re-examine any such person.

(d) The exercise of power under Section 311 Cr.P.C. should be resorted to only with the object of finding out the truth or obtaining proper proof for such facts, which will lead to a just and correct decision of the case.

(e) The exercise of the said power cannot be dubbed as filling in a lacuna in a prosecution case, unless the facts and circumstances of the case make it apparent that the exercise of power by the Court would result in causing serious prejudice to the accused, resulting in miscarriage of justice.

(f) The wide discretionary power should be exercised judiciously and not arbitrarily.

(g) The Court must satisfy itself that it was in every respect essential to examine such a witness or to recall him for further examination in order to arrive at a just decision of the case.

(h) The object of Section 311 Cr.P.C. simultaneously imposes a duty on the Court to determine the truth and to render a just decision.

(i) The Court arrives at the conclusion that additional evidence is necessary, not because it would be impossible to pronounce the judgment without it, but because there would be a failure of justice without such evidence being considered.

(j) Exigency of the situation, fair play and good sense should be the safe guard, while exercising the discretion. The Court should bear in mind that no party in a trial can be foreclosed from correcting errors and that if proper evidence was not adduced or a relevant material was not brought on record due to any inadvertence, the Court should be

magnanimous in permitting such mistakes to be rectified.

(k) The Court should be conscious of the position that after all the trial is basically for the prisoners and the Court should afford an opportunity to them in the fairest manner possible. In that parity of reasoning, it would be safe to err in favour of the accused getting an opportunity rather than protecting the prosecution against possible prejudice at the cost of the accused. The Court should bear in mind that improper or capricious exercise of such a discretionary power, may lead to undesirable results.

(l) The additional evidence must not be received as a disguise or to change the nature of the case against any of the party.

(m) The power must be exercised keeping in mind that the evidence that is likely to be tendered, would be germane to the issue involved and also ensure that an opportunity of rebuttal is given to the other party.

(n) The power under Section 311 Cr.P.C. must therefore, be invoked by the Court only in order to meet the ends of justice for strong and valid reasons and the same must be exercised with care, caution and circumspection. The Court should bear in mind that fair trial entails the interest of the accused, the victim and the society and, therefore, the grant of fair and proper opportunities to the persons concerned, must be ensured being a constitutional goal, as well as a human right.

24. Keeping the above principles in mind, when we examine the case on hand, at the very outset, it will have to be stated that the High Court, while passing the impugned order

has completely ignored the principal objectives with which the provision under Section 311 Cr.P.C. has been brought into the statute book. As rightly argued by the learned counsel for the appellant, at the foremost when the trial was very much in the grip of the trial Court, which had every opportunity to hear the appellant, the State, as well as the second respondent, had not even bothered to verify whether the appellant, who was facing criminal trial was impleaded as a party to the proceedings in the High Court. A perusal of the order discloses that the High Court appears to have passed orders on the very first hearing date, unmindful of the consequences involved. The order does not reflect any of the issues dealt with by the Learned Sessions Judge, while rejecting the application of the respondents in seeking to re-examine PW-9, the second respondent herein. Though orders could have been passed in this appeal by remitting the matter back to the High Court, having regard to the time factor and since the entire material for passing final orders, are available on record and since all parties were before us, the correctness of the order of the Sessions Judge dated 18.11.2009, can be examined and final orders can be passed one way or the other in the present criminal appeal itself.

25. With that view, when we examine the basic facts, we find them as noted by the learned trial Judge being indisputably contrary to the complaint preferred by the second respondent on 8.7.1999, in the police station in case No. 71/1999, wherein offences under Section 324/307/34 IPC were reported alongwith Section 27 of the Arms Act. Based on the report of the doctor, the chargesheet came to be filed bearing No.127/99, dated 31.10.1999, under Sections 324/307/34 IPC and no charge under Section 27 of the Arms Ac was laid. The said case was put to trial and parties were participating. In the course of the trial, the turn of examination of PW-9, the second respondent came on 16.3.2007, nearly after eight years from the date of occurrence. Second respondent made a categorical statement in his evidence that he never made any statement

to the police nor was he beaten on the date of occurrence, nor was he hit by any bullet shot. Further he made a clear statement that the injury sustained by him was due to the fall into the hole dug for constructing a latrine, where some instruments caused the injury sustained by him. He also made a categorical statement that his sons PWs-4 and 5, Babloo and Munna Kumar, were not present at the place of occurrence since one was staying in a hostel in Hulasganj and the other was at Ranchi on the date and time of occurrence, namely, on 07.07.1999, at about 5 p.m. While the said version of the second respondent was stated to have been recorded by the Court below on 16.3.2007, and the evidence of the prosecution was stated to have been closed on 4.4.2007, the defence evidence seem to have also commenced.

26. In that scenario, the second respondent filed the present application under Section 311 Cr.P.C. on 24.8.2007, i.e., nearly after five months after his examination by the trial Court. While filing the said application, the second respondent claimed that his evidence tendered on 16.3.2007, was not out of his own free will and volition, but due to threat and coercion at the instance of the accused persons, including the appellant. It was contended on behalf of the second respondent that the accused persons posed a threat by going to the extent of eliminating him and that such threat was meted out to him on 15.3.2007, when he was kidnapped from his wheat field by the accused, along with two unknown persons.

27. The trial Court having examined all the above factors in its order dated 18.11.2009, has held as under:

> "....Either at the time of his evidence in Court or subsequent to his evidence he never made any complaint to the court or any other officer viz. the C.J.M. or any police officer that accused persons had yielded any pressure upon him to turn hostile to the prosecution and to give a go by to the prosecution case. He has also argued that he did not also file any affidavit or case in this regard.

Rather when on the basis of the information dated 30.5.2007 given by the accused Bindeshwar Yadav Khizersarai Police Station case No.78/2007 dated 7.6.2008 was registered by the police the informant Suresh Prasad has filed this petition and has also got the similar petition filed through the Additional Public Prosecutor which has got no legs to stand and the same is fit to be rejected. He also filed a photocopy of the FIR to Khizersarai Police Station case No.78/2007 in support of his argument."

28. After noting the above submissions made on behalf of the accused, the trial Court held as under:

"….After the evidence of the informant, Suresh Prasad (PW-9) on 16.03.2007 the Court of Addl. Sessions Judge, F.T.C.-5 closed the evidence of prosecution on 04.04.2007 after giving opportunity to the learned Addl. P.P. to produce the remaining witness on 26.03.2007 and 04.04.2007 which he could not do on the ground that the time limited by the Hon'ble Court has expired. The Lordships of Supreme Court have held in *Dohiyabhai Vs. State,* AIR 1964 SC 1563 that "Right to re-examine a witness arises only after the conclusion of cross examination and S.C. 138 says it shall be directed to the explanation of any part of his evidence given during cross examination which is capable of being construed unfavourably too his own side. The object is to give an opportunity to reconcile the discrepancies if any between the statements in examination in chief and cross examination or to explain any statement inadvertently made in cross examination or to remove any ambiguity in the deposition or suspicion cast on the evidence by cross examination. Where there is no ambiguity or where there is nothing to explain, question put in re-examination with the sole object of giving a change to the witness to unto the effect of the previous statement should not be asked

during re-examination (S.142). Section 154 is wide in its scope and court can permit a person calling a witness to but question in the nature of cross examination at the stage of re-examination provided it take care to give opportunity to the adverse party to cross examine the witness in the such case". It is clear from the afore quoted principles decided by the Hon'ble Apex Court and from the evidence of PW-9 as well as from the instant two aforesaid petitions filed on behalf of the PW-9 and the Additional P.P. that the cross examination of PW-9 does not contain any evidence against his evidence in chief which could be explained or made clear by re-examination of PW-9 through his re-examination vide Section 138 Evidence Act or Section 311 of the Criminal Procedure Code. It is also clear that PW-9 had filed petition after filing of the case against him by the accused. As such the two instant petitions are not maintainable. However, whether the hostility of PW-9 would have been tested on the touch stone of Section 145 Evidence Act by examining the I.O. as some other prosecution witness have supported the prosecution case. The evidence of the I.O. of the case is taken would have sufficed the end of justice."

29. We find that the factors noted by the trial Court and the conclusion arrived at by it were all appropriate and just, while deciding the application filed under Section 311 Cr.P.C. We do not find any bonafides in the application of the second respondent, while seeking the permission of the Court under Section 311 Cr.P.C. for his re-examination by merely alleging that on the earlier occasion he turned hostile under coercion and threat meted out to him at the instance of the appellant and other accused. It was quite apparent that the complaint, which emanated at the instance of the appellant based on the subsequent incident, which took place on 30.5.2007, which resulted in the registration of the FIR in Khizersarai Police Station in case No.78/2007, seem to have weighed with the second respondent to come forward with the present

application under Section 311 Cr.P.C., by way of an afterthought. If really there was a threat to his life at the instance of the appellant and the other accused, as rightly noted by the Court below, it was not known as to why there was no immediate reference to such coercion and undue influence meted out against him at the instance of the appellant, when he had every opportunity to mention the same to the learned trial Judge or to the police officers or to any prosecution agency. Such an indifferent stance and silence maintained by the second respondent herein and the categorical statement made before the Court below in his evidence as appreciated by the Court below was in the proper perspective, while rejecting the application of the respondents filed under Section 311 Cr.P.C. In our considered opinion, the trial Court, had the opportunity to observe the demeanour of the second respondent, while tendering evidence which persuaded the trial Court to reach the said conclusion and that deserves more credence while examining the correctness of the said order passed by the trial Court.

30. In the light of the above conclusion, applying the various principles set out above, we are convinced that the order of the trial Court impugned before the High Court did not call for any interference in any event behind the back of the appellant herein. The appeal, therefore, succeeds. The order impugned dated 9.12.2010, passed in Crl. M.P. 12454/2010 of the High Court is set aside. The order of the trial Court stands restored. The trial Court shall proceed with the trial. The stay granted by this Court in the order dated 7.3.2011, stands vacated. The trial Court shall proceed with the trial from the stage it was left and conclude the same expeditiously, preferably within three months from the date of receipt of the copy of this order.

R.P. Appeal allowed.

THE STATE OF KARNATAKA & ANR.

v.

THE ASSOCIATED MANAGEMENT OF (GOVT. RECOGNIZED UNAIDED ENGLISH MEDIUM) PRIMARY AND SECONDARY SCHOOLS & ORS.

(Civil Appeal Nos. 5166-5190 of 2013)

JULY 05, 2013

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

EDUCATION:

Primary education - Medium of instruction from 1st to 4th standard - Held: In view of the fact, that a two-Judge Bench in English Medium Students Parents Association has already arrived at a decision as to the question whether the medium of instruction should be that of mother tongue, it is not appropriate to decide the very same issue under different grounds by a coordinate Bench -- Besides, the vital question involved in the instant matters has a far-reaching significance on the development of children -- Further, the issue concerns about the fundamental rights of not only the present generation but also the generations yet to be born -- Considering the constitutional importance of the matter, the same is referred to a Constitution Bench for consideration of the questions enumerated in the judgment - Reference to larger Bench.

The Government of Karnataka, in pursuance of Constitutional mandate under Art. 350A of the Constitution of India, by Government Order dated 19.06.1989, specified the mother tongue as the medium of instruction at the primary school level making it mandatory for every child who had not opted for 'Kannada' as the first language to take it as a second

language. The said GO was upheld by the Supreme Court in English Medium Students Parents Association . Subsequently, in supersession of all the earlier orders, the Government of Karnataka issued Government Order dated 29.04.1994 in terms of order dated 22.04.1994 mandating that the medium of instruction from 1st to 4th standard in all schools recognized by the State Government should be either the mother tongue or Kannada from the Academic Year 1994-1995. However, permission was granted to the students studying in 2nd, 3rd and 4th standards to continue in the medium of language they were studying at that time. It was also ordered to close down all the unauthorized schools that were not fulfilling the prescribed conditions. Several writ petitions, including the one by the respondent-Primary and Secondary Schools Association, were filed. The full Bench of the High Court, by order dated 02.07.2008, partly allowed the writ petitions while upholding the Government Order dated 29.04.1994, and quashed clause Nos. 2, 3, 6 and 8 thereof in its application to schools other than the schools run or aided by the Government.

Aggrieved, the State of Karnataka preferred the instant appeals. Besides, 15 residents of the State of Karnataka, claiming as eminent educationists, deeply interested in the subject, namely, that primary education from 1st to 4th standard in all Government recognized schools should be in the mother tongue of the children, filed Writ Petition No. 290 of 2009 under Art. 32 of the Constitution of India praying to declare that the Government Order dated 29.04.1994 is constitutionally valid in respect of unaided government recognized primary schools also and to issue a writ of mandamus directing the State Government to implement its order dated 29.04.2004. Civil Appeals nos. 5191-5199 of 2013 were filed by various officers of the Education Department of the State of Karnataka against the order

dated 03.07.2009, passed by Single Judge of the High Court, directing them to accord permission to the respondents in the said appeals to start an *English Medium School* in the State.

Referring the matter to a Constitution Bench, the Court

HELD: 1.1 The crux of all the grounds raised in the instant matters is whether the mother tongue or the regional language can be imposed by the State as the medium of instruction at the primary education stage. The issue pertaining to the medium of instruction contemplated in the writ petition before the High Court is not untouched by the decision in English Medium Students Parents Association* wherein this Court upheld the mother tongue as the medium of instruction in the primary education. [Para 29 and 34] [465-B-D; 467-C]

English Medium Students Parents Association vs. The State of Karnataka & Ors. **1993 (3) Suppl. SCR 934 = 1994 (1) SCC - referred to.**

1.2 However, it is equally correct that the impugned GOs dated 22.04.1994/ 29.04.1994 were not similar to GO dated 19.06.1989. The said impugned order reframed the earlier order by adding few additional clauses, which were the matter of dispute in the writ petition before the High Court and this Court. Therefore, the State is partly correct when it says that the impugned GOs viz., 22.04.1994/29.04.1994 are in substance similar to GO dated 19.06.1989 since both the GOs stipulated the need for the child to acquire the primary education in the mother tongue. However, the additional clauses inserted in the impugned order, viz., Clause Nos. 2, 3, 6 and 8 compel the child to study in mother tongue or regional language which was seriously contested before the High Court and this Court. [Para 30] [465-E; 466-C-E]

1.3 While deciding the validity of these additional clauses in the impugned GO, the High Court further went on to state that the question whether a student, a parent or a citizen has a right to choose a medium of instruction at primary stage other than mother tongue or regional language was not decided in the English Medium Students Parents Association case and took the liberty to decide the same. In view of the fact, that a two-Judge Bench of this Court in English Medium Students Parents Association has already arrived at a decision as to the question whether the medium of instruction should be that of mother tongue, it is not appropriate to decide the very same issue under different grounds by a Bench of same number of judges. Therefore, it is a fit case for consideration by a larger bench. [Paras 31-33] [466-E-H; 467-B]

1.4 The vital question involved in the instant matters has a far-reaching significance on the development of the children in our country who are the future adults. Likewise, the importance of a language cannot be understated; reorganization of States was primarily based on language. Further, the issue involved in the instant matters concerns about the fundamental rights of not only the present generation but also the generations yet to be born. [Para 35] [467-D, E-F]

1.5 Considering the constitutional importance of the matter, it should be heard by a Constitution Bench. The following questions are relevant for consideration by the Constitution Bench:

(i) What does Mother tongue mean? If it referred to as the language in which the child is comfortable with, then who will decide the same?

(ii) Whether a student or a parent or a citizen has a right to choose a medium of instruction at primary stage?

(iii) Does the imposition of mother tongue in any way affects the fundamental rights under Arts. 14, 19, 29 and 30 of the Constitution?

(iv) Whether the Government recognized schools are inclusive of both government-aided schools and private and unaided schools?

(v) Whether the State can by virtue of Article 350-A of the Constitution compel the linguistic minorities to choose their mother tongue only as medium of instruction in primary schools? [Para 36] [467-G-H; 468-A-D]

General Secretary, Linguistic Minorities Protection Committee vs. State of Karnataka **AIR 1989 Kant 226 - referred to**

Case Law Reference:

1993 (3) Suppl. SCR 934	**referred to**	**para 3**
AIR 1989 Kant 226	**referred to**	**para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5166-5190 of 2013.

From the Judgment and Order dated 02.07.2008 of the High Court of Karnataka in Writ Petition Nos. 14363 of 1994 (Education) with Writ Petition Nos. 14377, 15491, 19453, 22563 of 1994, 30645 of 1999, 25647, 18571, 19331, 17337, 18787, 19469, 20165, 17338 of 1994, Writ Appeal No. 2415 of 1995, Writ Petition Nos. 11785, 29540 of 1995, 22752, 19434 of 1994, 900 of 2000, 17677, 19346 of 1994 34396, 34684 and 34185 of 1996.

WITH

W.P. (C) No. 290 of 2009, C.A. Nos. 5191-5199 of 2013.

P.P. Rao, H. Subrmanya Jois, K.N. Bhat, T.S, Doabia, K.M. Nataraj, AAG, Anitha Shenoy, Visruti Vijay, K.V. Bharathi Upadhyaya, Ashwih Koltemath, Mohan V. Katarki, Shailesh Madiyal, Ravi R.S., Jagjit Singh Chhabra, P.R. Ramasesh, Sunita Sharma, Manpreet Singh Doabia, S.N. Bhat, T.V. Ratnam, K.V. Dhananjay, Shekhar G. Devasa, M.P. Srikanth, V.N. Raghupathy, Anitha Shenoy, Rameshwar Prasad Goyal, G.R. Mohan, Prabha Swami, Gurudatta Ankolekar, Kirit S. Javali, Azeem A. Kalebudde, Y. Rajagopala Rao, B.K. Pal for the appearing parties.

The Judgment of the Court was delivered by

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

SLP (C) Nos. 18139-18163 of 2008

2. These appeals have been filed against the final judgment and order dated 02.07.2008 passed by the High Court of Karnataka at Bangalore in Writ Petition No. 14363 of 1994 connected with Writ Petition Nos. 14377, 15491, 19453, 22563, 25647, 18571, 19331, 17337, 18787, 19469, 20165, 17338, 22752, 19434, 17677, 19346 of 1994, Writ Appeal No. 2415 of 1995, Writ Petition Nos. 11785, 29540 of 1995, Writ Petition Nos. 34396, 34684, 34185 of 1996, Writ Petition No. 30645 of 1999 and Writ Petition No. 900 of 2000 whereby the High Court partly allowed the writ petitions filed by the respondents herein.

3. Brief facts:

(a) The Associated Management of Govt. Recognized Primary and Secondary Schools Association is a society registered under the Karnataka Societies Registration Act, 1960 (in short 'the Society')-Respondent herein, consisting of

recognized, unaided, English medium, primary and secondary schools in the State of Karnataka. On 19.06.1989, the Government of Karnataka, in pursuance of Constitutional mandate under Article 350A of the Constitution of India, spelt out its language policy by way of a Government Order specifying the mother tongue as the medium of instruction at the primary school level and making it mandatory for every child who has not opted for 'Kannada' as the first language to take it as a second language. The aforesaid order was challenged before this Court in *English Medium Students Parents Association vs. The State of Karnataka & Ors.* 1994 (1) SCC 550, wherein, by order dated 08.12.1993, this Court, while upholding the Government Order dated 19.06.1989, declined to interfere in the matter.

(b) In the light of the aforesaid order dated 08.12.1993, the Government of Karnataka issued a revised Government Order dated 22.04.1994 purporting to re-affirm its policy set out in its earlier order dated 19.06.1989. The Government of Karnataka, having regard to the difficulties and hardships involved in converting English medium schools to Kannada medium schools, resorted to make the policy applicable to the English medium schools from the year 1989. In supersession of all the earlier orders, the Government of Karnataka issued subsequent Government Order dated 29.04.1994 indicating the language policy to be followed in the State with effect from the Academic Year 1994-1995. As per the said order, the medium of instruction from 1st to 4th standard in all schools recognized by the State Government shall be either the mother tongue or Kannada from the Academic Year 1994-1995, however, permission was granted to the students studying in 2nd, 3rd and 4th standards to continue in the medium of language they were studying at that time. It was also ordered to close down all the unauthorized schools that were not fulfilling the prescribed conditions.

(c) In pursuance of the impugned Government Order,

consequential orders were issued to several schools calling upon them to change the medium of instruction and to effect other consequential changes. Being aggrieved of the impugned orders, various linguistic and religious minorities, religious denominations, parents, parents' associations, children through their parents and educational institutions run by the majority filed Writ Petition being No. 14363 of 1994 and connected writ petitions before the High Court of Karnataka questioning the constitutional validity of the Government Orders dated 22.04.1994 and 29.04.1994 as being violative of Articles 14, 19(1)(a), 21, 29(2) and 30(1) of the Constitution of India.

(d) The full Bench of the High Court, by order dated 02.07.2008, partly allowed the writ petition and the connected petitions while upholding the Government Order and quashed clause Nos 2, 3, 6 and 8 of the impugned Government Order dated 29.04.1994 in its application to schools other than the schools run or aided by the Government.

(e) Being aggrieved, the State of Karnataka has preferred these appeals by way of special leave before this Court.

Writ Petition (C) No. 290 of 2009

4. Apart from the above appeals, 15 residents of the State of Karnataka, claiming as eminent educationists, deeply interested in the subject, namely, that primary education from 1st to 4th standard in all Government recognized schools should be in the mother tongue of the children concerned filed Writ Petition No. 290 of 2009 under Article 32 of the Constitution of India praying to declare that the Government Order dated 29.04.1994 is constitutionally valid in respect of unaided government recognized primary schools also and to issue a writ of mandamus directing the State Government to implement its order dated 29.04.2004 accordingly.

SLP (C) Nos. 15640-15648 of 2009

The above said petitions have been filed by various officers of

the Education Department of the State of Karnataka-the appellants herein against the order dated 03.07.2009, passed by learned Single Judge of the Karnataka High Court, directing them to accord permission to Shubodaya Vidya Samsthe and Saraswathi Education Society-the respondents herein to start an English Medium School in the State during the pendency of the appeal before this Court.

5. Since the relief sought for in the appeals and the writ petition pertains to the same subject-matter, they are being dealt with by the present order.

6. Heard Mr. P.P. Rao, Mr. H. Subramanya Jois, learned senior counsel for the appellants and Mr. Mohan V. Katarki, learned counsel for the respondents and Mr. T.S. Doabia, learned senior counsel for the Union of India.

7. The Government of Karnataka, by order dated 20.07.1982, prescribed that Kannada shall be the sole first language from 1st standard of primary school itself. The constitutional validity of this order was challenged in a number of writ petitions before the High Court of Karnataka by linguistic minorities contending that they have a right to have primary education in their respective mother tongue and, therefore, prescription of Kannada as the sole language in which education should be imparted from 1st standard itself is unconstitutional and violative of Articles 14, 19, 21, 29 and 30 of the Constitution.

8. Considering the importance of the matter, the same was heard by a Full Bench of the Karnataka High Court in *General Secretary, Linguistic Minorities Protection Committee vs. State of Karnataka* AIR 1989 Kant 226. After considering the claim of all the parties concerned and also the opinion of various committees, the Full Bench, by order dated 25.01.1989, held that the Government Order dated 20.07.1982 is unconstitutional to the extent that it made Kannada a compulsory and sole subject for all children in the State of Karnataka from 1st

standard and deprived the petitioners therein whose mother tongue was not Kannada to have primary education in their mother tongue. Along with the said petitioner(s), a writ petition was also filed by English Medium Students Parents Association claiming that they have the right to have primary education in English language as substantial number of members of the said organization were converted Christians and, therefore, they have the right to have primary education in English. The said request was negatived by the full Bench, however, liberty was given to the State to formulate its language policy. Aggrieved of the said order of the full Bench of the Karnataka High Court, the State Government preferred an appeal before this Court. However, after having preferred an appeal, the State Government accepted the principle that primary education from 1st to 4th standard should be in mother tongue and issued a Government Order (GO) dated 19.06.1989 in conformity with the judgment of the Full Bench of the Karnataka High Court, inter alia, prescribing that mother tongue shall be the medium of instruction from 1st to 4th standard while the appeal was pending before this Court.

9. The English Medium Students Parents Association filed a writ petition under Article 32 before this Court questioning the constitutional validity of the GO dated 19.06.1989 on the ground that prescription of mother tongue as the sole language of instruction from 1st to 4th standard was unconstitutional and violative of Articles 29 and 30 of the Constitution as it interfered with the right to have primary education at that level in English.

10. The appeals filed by the Government of Karnataka and the writ petition filed by the English Medium Students Parents Association were heard together and decided by a common judgment of this Court in *English Medium Students Parents Association* (supra). By order dated 08.12.1993, this Court upheld the decision of the Full Bench of the Karnataka High Court. Thereafter, the State Government made an order dated 22.04.1994 in conformity with the judgment of this Court

prescribing that mother tongue of the children or the regional language shall be the language in which education shall be imparted from 1st to 4th standard. In the said order, the State Government exempted the educational institutions to which permission had been granted earlier to 1989 from giving instruction in primary education from 1st to 4th standard in mother tongue. This created incongruity for the reason that in view of the said exemption, there would be two categories of primary schools in that one set started prior to 1989 with English medium would continue primary education in English whereas primary schools started after 1989 were bound to impart primary education in mother tongue. When this contradiction was brought to the notice of the Government, the Government immediately modified the order dated 22.04.1994 by another order dated 29.04.1994 removing the exemption.

11. The Associated Management of Primary and Secondary Schools, Karanataka filed Writ Petition No. 14363 of 1994 before the High Court challenging the constitutional validity of the aforesaid two GOs dated 22.04.1994 and 29.04.1994. The State Government filed its statement of objection to the writ petition stating that by judgment dated 08.12.1993, the policy of the State Government prescribing mother tongue as the language in which the primary education from 1st to 4th standard should be imparted was constitutionally held valid by this Court and the impugned orders were similar in that both prescribed that primary education from 1st to 4th shall be the mother tongue of the children. The Full Bench before which the said writ petition was posted ultimately concluded on 02.07.2008 holding that the Government orders dated 22.04.1994 and 29.04.1994 were applicable only to Government and government aided private schools but not to private and unaided primary schools, though they were also government recognized schools.

Contentions of the Appellants:

12. Mr. P.P. Rao, learned senior counsel for the State of

Karnataka, by taking us through various articles of the Constitution and the provisions of the Karnataka Education Act, 1983 and the Right of Children to Free and Compulsory Education Act, 2009 (in short 'the RTE Act') as well as various decisions of this Court submitted that the High Court committed an error in not following the decision of this Court in *English Medium Students Parents Association* (supra) in which this Court upheld the Government Order prescribing that primary education shall be in mother tongue. He also pointed out that the High Court has equally committed an error in holding that this Court did not go into the question as to whether a parent or a student has a right to choose the medium of instruction at the primary school stage when that was the very question raised by the petitioners therein and rejected by this Court. He further pointed out that the High Court erred in holding that the parent and the child ("pupil") have a fundamental right of the choice of medium of instruction at primary level as against the policy decision taken by the State in larger national and educational interest of the children. According to him, the High Court failed to take note of Article 350A of the Constitution which stipulates that every endeavor shall be made by the State and Local Authority to provide adequate facilities for instructions in mother tongue at the primary stage of education and empower the State to lay down its education policy that primary education shall be in the mother tongue of the children concerned. He further contended that the High Court equally committed an error in holding that primary education shall be in mother tongue only in respect of government and government aided schools notwithstanding the fact that all schools belonged to one category as recognized schools and alone can impart education. Finally, he submitted that the policy of the Government to have uniform policy in the matter of primary education is not only applicable to Government and Government Aided institutions but also to unaided institutions which was approved by this Court in *English Medium Students Parents Association* (supra).

13. The individuals claiming as educationalists fighting for Kannada language who filed writ petition under Article 32 of the Constitution also adopted the similar arguments.

Contentions of the Respondents:

14. On the other hand, various learned counsel appearing for unaided Management Schools, Linguistic Minority Institutions, Parents and Students submitted that the earlier decision of this Court, namely, *English Medium Students Parents Association* (supra) did not go into the medium of instruction and the issue therein was mother tongue/Kannada as one of the language and parents/children have every right to choose the medium according to their choice. In their view, the High Court is fully justified in quashing those offending clauses and there is no merit in any of the contentions raised by the State and other persons who are all supporting the stand of the State.

Discussion:

15. We have carefully considered the rival contentions, perused the constitutional provisions, various clauses in the impugned orders and decisions relied on by both sides.

16. The entire argument of both the sides is whether in *English Medium Students Parents Association* (supra) the issue pertaining to medium of instruction was contested and a decision was arrived at in that regard? In light of the above, it is essential to comprehend the ratio laid down in the said decision to arrive at a decision in this matter.

17. At the cost of repetition, it is useful to reiterate the factual background of the *English Medium Students Parents Association* (supra) for better comprehension. Government of Karnataka, wedded to the cause of promotion of Kannada language, appointed a Committee of six persons with Dr. V.K. Gokak as the Chairman and referred the following questions :

(i) Should Sanskrit remain as the subject for study in the school syllabus?

(ii) If so, how to retain it without its being an alternative for Kannada?

(iii) Would it be proper to have Kannada as a compulsory subject as per the three language formula and should the option of selecting the remaining two languages be left to students themselves?

18. The Committee submitted its report dated 27th January, 1981 which is popularly known as Dr. Gokak Committee Report. The gist of the recommendations is as under :

(i) Kannada should be introduced as a compulsory subject for all children from 3rd Standard;

(ii) Kannada should be the sole first language for the Higher Secondary Schools (i.e., 8th, 9th and 10th Standards) carrying 150 marks, and this should be implemented for Kannada speaking people from 1981-82 itself and in respect of others from 1986-87, after taking necessary steps to teach Kannada to them from the 3rd standard from the academic year 1981-82 itself.

19. On a consideration of the abovesaid report, the State Government passed an order dated 30.04.1982 drafting a language policy, which stated that Kannada or mother tongue, shall be the first language. Since it was felt that the order dated 30.04.1982 did not sufficiently reflect the aspirations of the Kannada speaking people, the Government thought it expedient to place the entire matter before the State Legislature. The State Legislature resolved that in the High Schools, Kannada must be the sole first regional language carrying 125 marks. In addition, a student might study any two languages carrying 100 marks each. In accordance with the

above Resolution, the State Government made an order dated 20.07.1982 wherein the government directed that Kannada shall be the sole first language. Aggrieved by the abovesaid order, some of the educational institutions preferred writ petitions in the High Court of Karnataka. It was contended that the order was violative of the rights of minorities under Articles 29 and 30 of the Constitution of India. Initially, when the writ petitions came up for hearing before a Single Judge, the matters were referred to a Division Bench. The Division Bench, by order dated 27.01.1984 referred the abovesaid question to the Full Bench. The full Bench in *General Secretary, Linguistic Minorities Protection Committee* (supra) expressed its opinion as follows:-

> "8. ….The Govt. **Order dated 20th July, 1982** in so far it relates to the making of study of Kannada as a compulsory subject to children belonging to linguistic minority groups from the first year of the Primary School and compelling the Primary Schools established by Linguistic Minorities to introduce it as a compulsory subject from the first year of the Primary School and also in so far it compels the students joining High Schools to take Kannada as the sole first language and **compelling the high schools established by linguistic minorities to introduce Kannada as the sole first language in the Secondary Schools, is violative of Articles 29(1), 30(1) and 14 of the Constitution.**"

After rendering such opinion, the matter was sent back to the Division Bench for disposal in accordance with the same and, accordingly, the cases were dismissed by judgment dated 25.01.1989. Against this judgment, the State of Karnataka came up in appeal in Civil Appeal Nos. 2856-57 of 1989.

20. After the decision of the full Bench, pending the civil appeal before this Court, the Government of Karnataka issued a GO dated 19.06.1989, prescribing the mother tongue shall

be the medium of instruction from Ist to 4th standard. The relevant paragraph of the said order is as under:-

> "9. .....Govt., are pleased to order that the following language policy shall be implemented in the primary and Secondary Schools pending final decision of the Supreme Court."
>
> **"From 1st Standard to IVth Standard, mother tongue will be the medium of instruction,** where it is expected that normally only one language from Appendix-1 will be the compulsory subject of study…."

The validity of the abovesaid GO was questioned in the Writ Petition No. 536 of 1991 before this Court on the ground that it is violative of Articles 29, 30 and 14 of the Constitution of India.

21. In the meantime, a corrigendum came to be issued on 22.06.1989, which reads as under:

> "16…For para (i) of Order portion of the above said Govt. order dated 19.6.1989 i.e., from the words "From 1st standard...subject to study" the following para shall be substituted: -
>
> **"From 1st standard to IVth standard, where it is expected that normally mother tongue will be the medium of instruction,** only one language from Appendix-I will be compulsory subject of study."

22. With this background, by order dated 08.12.1993, this Court while upholding the GO dated 19.06.1989 dismissed the writ petition being No. 536 of 1991 as devoid of merits.

23. As regards the Civil Appeal Nos. 2856-57 of 1989 filed against the full Bench decision of the High Court of Karnataka, it was held that the majority opinion of the High Court has

approached the matter in a proper perspective and concluded as under:-

> "25……We have no difficulty in upholding the well-considered judgment of the High court. In fact, the State has accepted the position and issued G.O. dated 19.6.89 which is impugned in W.P. No. 536 of 1991. Therefore, the civil appeals will also dismissed. However, in the circumstances of the case, there shall be no order as to costs."

24. In the light of the aforesaid order dated 08.12.1993, the Government of Karnataka issued revised Government Orders dated 22.04.1994/29.04.1994 purporting to re-affirm its policy set out in its earlier order dated 19.06.1989. Now, let us test the contentions of the appellants and the respondents in light of the above verdict.

25. Learned senior counsel for the appellants contended that GO dated 29.04.1994 is based on the judgment of the full Bench of the Karnataka High Court as affirmed in *English Medium Students Parents Association* (supra) by this Court, therefore, there is no infirmity in the same which came to be passed in the light of GO dated 19.06.1989.

26. While it is argued from the side of the respondents that judgment in *English Medium Students Parents Association* (supra) is with reference to the GO dated 19.06.1989 whereas the subject matter of the present writ petition is the GO dated 29.04.1994. Further, it was submitted that in *English Medium Students Parents Association* (supra) it was held that the order dated 19.06.1989 is not open to challenge because there was no element of compulsion in studying Kannada at the primary stage and that from standard 1st to 4th where mother tongue will be the medium of instruction, only one language from Schedule I thereof will be compulsory and further from standard 3rd onwards Kannada will be an optional subject for non-Kannada speaking students whereas the GO impugned in this

writ petition departs and deviates from the GO dated 19.06.1989, the validity of which was upheld by this Court. Kannada is covertly made compulsory by the present impugned order under clause 2, 3, 6 & 8. Hence, the judgment of this Court does not and cannot come in the way of considering the present writ petition on merits. Therefore, the contention of the respondents is that the fundamental rights of citizens cannot be infringed by the State taking shelter under the policy.

27. The full Bench of the High Court, by order dated 02.07.2008, decided the issue in the following words in the impugned judgment:-

> "79. It cannot be disputed these clauses were conspicuously missing in the Government order dated 19.06.1989. They are introduced for the first time in Government Order dated 29.04.1994. the validity of these clauses were not the subject matter of earlier proceeding either before this Court or Apex Court. The Constitutional validity of these clauses was not challenged earlier, no arguments were addressed for or against the said clauses, neither this court nor the Apex Court considered the validity of these clauses nor any decision was rendered. It is for the first time, the aforesaid clauses are challenged before this Court. Therefore, the aforesaid decisions do not conclude the matter in issue in this writ petition.
>
> 90. As is clear from the facts set out above in the aforesaid Full Bench Judgment, the question for consideration was, whether the Government Order making study of kannada compulsory from the First Year of primary School in addition to mother tongue of the land was violative of Article 14, 29 and 30 of the Constitution and the Government Order prescribing Kannada as sole First language at High School level was also violative of Article 14, 19 and 30 of the Constitution. In the Government Order dated 19.06.1989, which was also the subject matter of

> the Writ petition under 32 of the Constitution of India before the Supreme Court, the question was again only one language from Appendix-I could be the compulsory subject of study. The full Bench struck down the earlier Government Order as there was compulsion to study Kannada and therefore violative of Article 19, 21 and 30 which finding was upheld by the Supreme Court. For the same reason the Supreme Court declined to interfere with the subsequent Government Order dated 19.06.1989 as there was no compulsion to study any particular language from I to IV Standard, as is clear from Clause I of the Government Order. Therefore, the ratio decedendi, of the Judgment of the Apex Court as well as the full bench is "If there is an element of compulsion in the Government policy, which infringes the fundamental rights guaranteed to the citizens of this country under the Indian Constitution, such policy is void and the fundamental rights have to prevail over such governmental policy. In the absence of such compulsion the courts should not interfere with the policy decision of the Government. The question whether a student, a parent or a citizen has a right to choose a medium of instruction at primary stage other than mother tongue or regional language was not the subject matter of the aforesaid proceedings and the said question was not considered either by this court or by the Apex Court and no decision rendered in the aforesaid proceedings on the said point. The casual expressions, observations, conclusions and the suggestions made in the earlier full bench judgment cannot be construed as a ratio decidendi, especially in constitutional matters, as the said question did not arise for consideration in the said case. Therefore the contention that the question involved in this Writ Petition are squarely covered by the earlier decisions of this Court and Apex Court is without any substance and accordingly it is rejected."

28. In the line of above observation, the High Court

accepted the contentions of the respondents that this Court in *English Medium Students Parents Association* (supra) did not consider the issue raised in the present writ petition and went on to deliver the impugned judgment.

29. After due consideration of the contentions of the appellants and the respondents and reasoning of the High Court in the impugned judgment dated 02.07.2008, we are of the view that issue contemplated in the writ petition before the High Court is not untouched by the decision in *English Medium Students Parents Association* (supra). As already mentioned, Writ Petition No. 536 of 1991 was filed in order to challenge the validity of the GO dated 19.06.1989 which proposed to introduce mother tongue as the medium of instruction and the same has been dismissed as devoid of merits. Hence, in view of the above, this Court upheld the mother tongue as the medium of instruction in the primary education.

30. However, it is equally correct that the impugned GOs dated 22.04.1994/29.04.1994 were not similar to GO dated 19.06.1989. Since the said impugned order reframed the earlier order by adding few additional clauses, which were the matter of dispute in the writ petition before the High Court and this Court, a reference to the contested clauses in the impugned order shall be timely:-

"Proceedings of Government of Karnataka
Sub: Regarding implementation of languages Policy in the primary and high schools.
Government Order No. ED 28 PGC 94
Bangalore dated 29.04.1994

1. xxx

2. The medium of instruction should be mother tongue or Kannada, with effect from the academic year 1994-95 in all Government recognized schools in classes 1 to 4.

3. The students admitted to 1st standard with effect from the academic year 94-95, should be taught in mother tongue or Kannada medium.

6. Permission can be granted to only students whose mother tongue is English, to study in English medium in classes 1 to 4 in existing recognized English medium schools.

8. It is directed that all unrecognized schools which do not comply with the above conditions, will be closed down."

Therefore, the contention of the State is partly correct when it says that the impugned GOs viz., 22.04.1994/29.04.1994 are in substance similar to GO dated 19.06.1989 since both the GOs stipulated the need for the child to acquire the primary education in the mother tongue. However, the additional clauses inserted in the impugned order, viz., Clause Nos. 2, 3, 6 and 8 compels the child to study in mother tongue or regional language which was seriously contested before the High Court and this Court.

31. While deciding the validity of these additional clauses in the impugned GO, the High Court further went on to state that the question whether a student, a parent or a citizen has a right to choose a medium of instruction at primary stage other than mother tongue or regional language was not decided in the *English Medium Students Parents Association* (supra) case and took the liberty to decide the same.

32. Observing the fact that a two-Judge Bench of this Court has already arrived at a decision as to the question whether the medium of instruction should be that of mother tongue in *English Medium Students Parents Association* (supra), we are of the view that it is not appropriate to decide the very same issue under different grounds by a Bench of same number of judges. If we decide to accept the argument of the respondent that a student or a parent or a citizen has a right to choose a

medium of instruction at primary stage, we in substance will be contradicting the judgment in *English Medium Students Parents Association* (supra), which upholds the mother tongue as the medium of language.

33. Having given our most anxious consideration, we are of the opinion that it is a fit case for consideration by a larger bench.

34. The crux of all the grounds raised in the petition is that whether the mother tongue or the regional language can be imposed by the State as the medium of instruction at the primary education stage.

35. The vital question involved in this petition has a far-reaching significance on the development of the children in our country who are the future adults. The primary school years of a child is an important phase in a child's education. Besides, it moulds the thinking process and tutors on the communication skills. Thus, primary education lays the groundwork for future learning and success. Succinctly, the skills and values that primary education instills are no less than foundational and serve as bases for all future learning. Likewise, the importance of a language cannot be understated; we must recollect that reorganization of States was primarily based on language. Further, the issue involved in this case concerns about the fundamental rights of not only the present generation but also the generations yet to be born.

36. Considering the constitutional importance of these questions, we are of the firm view that all these matters should be heard by a Constitution Bench. With regard to the above, the following questions are relevant for consideration by the Constitution Bench which are as under:-

(i) What does Mother tongue mean? If it referred to as the language in which the child is comfortable with, then who will decide the same?

(ii) Whether a student or a parent or a citizen has a right to choose a medium of instruction at primary stage?

(iii) Does the imposition of mother tongue in any way affects the fundamental rights under Article 14, 19, 29 and 30 of the Constitution?

(iv) Whether the Government recognized schools are inclusive of both government-aided schools and private & unaided schools?

(v) Whether the State can by virtue of Article 350-A of the Constitution compel the linguistic minorities to choose their mother tongue only as medium of instruction in primary schools?

Apart from the above said issues, the Constitution Bench would also take into consideration any other ancillary or incidental questions which may arise during the course of hearing of the case.

37. With regard to the above, all the connected matters including petitions/applications shall be placed before the Constitution Bench. Since the matter in issue started in the year 1994, early disposal of the case is desirable. Hence, the Registry is directed to place the same before Hon'ble the Chief Justice of India for necessary directions.

R.P. Matter referred to Constitution Bench.

MOHD. JAMAL
v.
UNION OF INDIA & ANR.
(Civil Appeal No. 5228 of 2013 etc.)

JULY 8, 2013.

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

ADMINISTRATIVE LAW:

Policy regarding retail outlets of petroleum products - Earlier Policy recognizing land-owners as one of the categories to be offered dealership - Applications of land-owners processed - Meanwhile policy suspended, lease deeds for definite terms entered into and by subsequent Policy, offering of dealership to land owners of Company Owned and Company Operated (COCO) outlets abandoned - Claim of landowners for dealership - Held: Concept of a dealership in respect of a retail outlet is completely alien to concept of a COCO unit - While the former deals with the right of dealer to independently operate the retail outlet, in the case of a COCO unit, the entire set up of retail outlet is owned by Oil Companies and only day-to-day operation thereof is outsourced to Maintenance and Handling Contractor - With the discontinuance of the earlier policy of granting dealerships in respect of retail outlets and the introduction of a new policy of awarding M&H Contracts in respect of the COCO outlets, the land owners who had entered into fresh lease agreements after the policy to grant dealerships had been suspended, cannot claim any right on the basis of the earlier policy in the absence of any Letter of Intent having been issued thereunder - Doctrines of promissory estoppel and legitimate expectation are not applicable - Claims of appellants/petitioners have to be treated on the basis of agreements subsequently entered into by Oil Companies - It will be open to appellants/ petitioners to approach the proper forum in the event they

have suffered any damages and loss, which they are entitled to recover in accordance with law - Promissory estoppel - Doctrine of legitimate expectation.

The case of the appellant in CA No. 5228 of 2013 was that in terms of the advertisement as per Policy/MDPM No.319/02 dated 8.10.2002, he applied for a retail outlet dealership for his land in the 'land owner's category'. Based on the recommendation dated 15.1.2003, made by the Dealer Selection Committee, the General Manager (ER) of the respondent No.2 Company recommended, on 25th January, 2003, that the dealership be given to the appellant and directed that a Letter of Intent be issued in his favour on receipt of the explosive licence. Meanwhile, as claimed by the appellant, it was mutually agreed that till the issuance of the Letter of Intent, as an interim arrangement, a nominee of the appellant would be appointed as the Maintenance and Handling Contractor to run the petrol pump. The appellant offered his land on lease to the Oil Company on 14.3.2003, and on 29.3.2003, a contract for Maintenance and Handling was executed between the Oil Company and the brother and nominee of the appellant, for running the said petrol pump. Rs.25,00,000/- were spent in setting up the infrastructure. On 31.3.2003, the petrol pump was commissioned and started operating. The appellant executed a lease deed in favour of the Oil Company at Rs. 21,000/- per month for a period of 15 years. However, by a policy circular No. 05/0405 dated 30.3.2005, introduced by the Oil Company, existing land owners of the Jubilee Retail Outlets and the Company Owned and Company Operated Outlets were disqualified from being appointed as dealers. It was the case of the appellant that on 6.9.2006, the Oil Company formulated a new policy whereby the concept of offering dealership to land owners was abandoned to the prejudice of the land owners whose Letters of Intent for dealership were pending and where lands had also been

taken on long term lease by the Oil Company at low rates of rent, on the assurance that dealership under the 'land owners category' would be given to them. By virtue of the new policy, the Oil Company proposed to run outlets on their own and/or through Labour Contractors, in supersession of all earlier policy guidelines. The appellant challenged the Notification dated 6.9.2006 in a writ petition, which was dismissed by the High Court. The other appeals, writ petitions and transferred cases involved the similar issues.

It was, *inter alia*, contended on behalf of the land-holders that having acted on the basis of a policy by which the respondent Oil Companies had offered full dealership to land owners and having caused such land owners to alter their position to their disadvantage, the Oil Companies were estopped from going back on their promise.

Disposing of the matters, the Court

HELD: 1.1 Upon deregularisation of the distribution of petroleum products, the Oil Companies issued guidelines dealing with the procedure for locations outside the marketing plans. The said guidelines referred to grant of dealership, which is completely different from the grant of long-term leases by the land owners to the Oil Companies upon the condition that the same could be used by the lessees in any way they liked, which included the right to sublet the demised plot. The concept of Company Owned and Company Operated (COCO) outlets was sought to be introduced on 6.9.2003, in supersession of Policy No.MDPM-319/02 dated 8.10.2002 and the two cannot be co-related unless a link can be established by the appellants that they had entered into the leas e agreements with the Oil Companies upon the understanding that once the earlier policy was restored, the land owners would be given the option of having the

COCO units converted into regular retail outlets. [para 56-57] [502-B-C, D-F]

1.2 The concept of a dealership in respect of a retail outlet is completely alien to the concept of a COCO unit. While the former deals with the right of the dealer to independently operate the retail outlet, in the case of a COCO unit, the entire set up of the retail outlet is owned by the Oil Companies and only the day-to-day operation thereof is outsourced to an M&H Contractor. With the discontinuance of the earlier policy of granting dealerships in respect of retail outlets and the introduction of a new policy awarding M&H Contracts in respect of the COCO outlets, the land owners who had entered into fresh lease agreements after the policy to grant dealerships had been suspended, cannot now claim any right on the basis of the earlier policy in the absence of any Letter of Intent having been issued thereunder. [para 58] [502-G-H; 503-A-B]

1.3 The doctrine of promissory estoppel and legitimate expectation cannot be made applicable to these cases where the leases have been granted by the land owners on definite terms and conditions, without any indication that the same were being entered into on a mutual understanding between the parties that these would be temporary arrangements, till the earlier policy was restored and the claim of the land owners for grant of dealership could be considered afresh. On the other hand, although, the nominees of the lessors were almost in all cases appointed as the M&H Contractors, that in itself cannot convert any claim of the land owner for grant of a permanent dealership. Even the M&H Contractor had to submit an affidavit to the effect that he did not have and would not have any claim to the dealership of the retail outlet and that he would not also obstruct the making over possession of the retail outlet to the Oil

Company, as and when called upon to do so. [para 59] [503-E-H; 504-A]

A.P. Transco Vs. Sai Renewable Power (P) Ltd. **2010 (8) SCR 636 = (2011) 11 SCC 34;** *Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer* **2004 (6) Suppl. SCR 264 = (2005) 1 SCC 625;** *State of Himachal Pradesh Vs. Ganesh Wood Products* **1995 (3) Suppl. SCR 477 = (1995) 6 SCC 363;** *Kasinka Trading Vs. Union of India* **1994 (4) Suppl. SCR 448 = (1995) 1 SCC 274; and** *Sethi Auto Service Station Vs. D.D.A.* **(2009) 1 SCC 180 - referred to.**

Union of India Vs. M/s. Indo-Afghan Agencies Limited **(1968) 2 SCR 366;** *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others* **1979 (2) SCR 641 = (1979) 2 SCC 409;** *Jit Ram Shiv Kumar Vs. State of Haryana* **1980 (3) SCR 689 = (1981) 1 SCC 11;** *Union of India and Others Vs. Godfrey Philips India Limited* **1985 (3) Suppl. SCR 123 = (1985) 4 SCC 369;** *State of Bihar Vs. Kalyanpur Cement Limited* **2010 (1) SCR 928 = (2010) 3 SCC 274;** *Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat* **2011 (6) SCR 958 = (2011) 6 SCC 312;** *Kumari Shrilekha Vidyarthi Vs. State of U.P.* **1990 (1) Suppl. SCR 625 = (1991) 1 SCC 212;** *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay* **1989 (2) SCR 751 = (1989) 3 SCC 293; and** *Mahabir Auto Stores Vs. Indian Oil Corporation* **1990 (1) SCR 818 = (1990) 3 SCC 752;** *Ramana Dayaram Shetty Vs. International Airport Authority of India & Ors.* **1979 (3) SCR 1014 = (1979) 3 SCC 489;** *E.P. Royappa Vs. State of Tamil Nadu* **1974 (2) SCR 348 = (1974) 4 SCC 3; and** *Maneka Gandhi Vs. Union of India* **1978 (2) SCR 621 = (1978) 1 SCC 248 - held inapplicable.**

1.4 Although, the appeals have been filed on account of the denial to the land owners of the grant of dealership in respect of the lands demised by them to the Oil Companies, the entire focus has shifted to COCO outlets on account of the fresh lease agreements entered into by

the appellants with the Oil Companies which has had the effect of obliterating the claim of the land owners made separately under earlier lease agreements. The claims of the appellants/ petitioners in the instant batch of matters have to be treated on the basis of the agreements subsequently entered into by the Oil Companies. [para 59] [504-A-C]

1.5 The land owners cannot claim any relief in these proceedings and, if any loss or damages have been suffered by them on account of the assurance earlier given regarding grant of dealership, particularly, in making the sites ready therefor, the remedy of such applicants would lie elsewhere. It will be open to the appellants and the petitioners to approach the proper forum in the event they have suffered any damages and loss, which they are entitled to recover in accordance with law. [para 58 and 60] [503-C-D; 504-F]

Case Law Reference:

(1968) 2 SCR 366	held inapplicable	para 19
1979 (2) SCR 641	held inapplicable	para 21
1980 (3) SCR 689	held inapplicable	para 22
1985 (3) Suppl. SCR 123	held inapplicable	para 22
2010 (1) SCR 928	held inapplicable	para 23
2011 (6) SCR 958	held inapplicable	para 27
1990 (1) Suppl. SCR 625	held inapplicable	para 30
1989 (2) SCR 751	held inapplicable	para 31
1990 (1) SCR 818	held inapplicable	para 31
1979 (3) SCR 1014	held inapplicable	para 36
1974 (2) SCR 348	held inapplicable	para 36

1978 (2) SCR 621	**held inapplicable**	**para 36**
2010 (8) SCR 636	**referred to**	**para 46**
2004 (6) Suppl. SCR 264	**referred to**	**para 46**
1995 (3) Suppl. SCR 477	**referred to**	**para 46**
1994 (4) Suppl. SCR 448	**referred to**	**para 46**
(2009) 1 SCC 180	**referred to**	**para 46**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5228 of 2013.

From the Judgment and Order dated 08.02.2008 of the High Court of Delhi at New Delhi in WP (C) No. 2392 of 2007.

WITH

C.A. Nos. 5229, 5230 of 2013, W.P. (C) Nos. 459 of 2009, 528 of 2008, C.A Nos. 5231, 5232, 5233, 5234, 5235, 5236, 5237, 5238, 5239, 5240, 5241, 5242, 5243, 5244, 5245, 5246, 5247, 5248, 5249, 5250, 5251, 5252, 5253, 5254, 5255, 5256, 5257, 5258, 5259 of 2013, T.C. (C) No. 88, 89, 90 of 2013, C.A. Nos. 5260, 5261, 5262, 5263, 5264, 5265, 5266, 5267, 5268, 5269, 5270, 5271, 5272, 5273, 5274, 5275, 5276, 5277, 5278, 5279, 5279, 5280, 5281, 5282, 5283, 5284, 5285, 5286, 5287-88, 5289-90, 5291, 5292-93, 5294-95, 5296, 5297, 5298, 5299, 5300 of 2013, T.C. (C) No. 91 of 2013 & C.A. Nos. 5301-02 of 2013.

P.P. Malhotra, ASG Pradip K. Ghosh, Sunil Gupta, Jaideep Gupta, P.K. Ghosh, Harish Chandra, Rana Mukherjee, Jitendra Kumar Sharma, Abhijit Sengupta, Ajit Singh, Sandeep Singh, Meenakshi Arora, Goodwill Indeevar, Sandhya Goswami, Jatin Zaveri, Rohit Sthalekar, Neel Kamal Mishra, Ajay Majithia, Dr. Kailash Chand, Sanat Kumar, Sanjay Sharawat, Anjan Chakraborty, Shekhar Kumar, Praween Gupta, P.K. Sahoo, Md. Farman, Uttara Babbar, Neha S. Verma, Deeptakirti Verma, Shomila Bakshi, Abhijeet Sinha, Rajendra Singhvi,

KKL Gautam, Jitendra Mohan Sharma, Meenakshi Arora, Mala Narayan, Rahul Narayan, Shalini Kumar, Rachna Joshi Issar, Raj Kumar Tanwar, Chetan Chawla, B. Krishna Prasad, Priya Puri, Amit Pathak, Sagar Singhal, H.K. Puri, E.C. Vidya Sagar, Arvind Kumar Sharma, Garima Prashad, Chandan Ramamurthi, Parijat Sinha, Reshmi Rea Sinha, Vikram Ganguly for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, CJI. 1. Special Leave Petition (Civil) No. 5849 of 2008 filed by one Mohd. Jamal, has been heard along with several other matters where the same issue has been raised and the reliefs prayed for are similar.

2. Leave granted in all the matters. During the hearing of these matters, Mohd. Jamal's case was taken up as the lead matter.

3. From the facts as disclosed in the several Special Leave Petitions (now Appeals), there are three groups of matters included in these Appeals. The first group relates to the State of Karnataka, where the Union of India is the Petitioner/Appellant. The second group involves matters filed by the private parties where the jurisdiction is that of Delhi. The third group deals with the similar question in regard to the States of Gujarat and Madhya Pradesh.

4. All the private Appellants were and are aspirants for dealership in respect of retail outlets of the Indian Oil Corporation and the IBP, which merged with the Indian Oil Corporation on 2nd May, 2007. The genesis of the claim for dealership arises out of policy guidelines, being Policy/MDPM No.319/02 dated 8th October, 2002, for selection of retail outlet dealers, published by the Indian Oil Corporation after the distribution of petroleum product had been deregulated. The said guidelines dealt with the procedure for locations outside

Marketing Plans and also stipulated that for the purpose of selection, the dealership would be categorised as indicated in the guidelines and all retail outlets would be developed only on A/C Sites basis which finds place in clause 2 of the guidelines dealing with the common guidelines for all categories.

5. Appearing for the Appellant in SLP(C)No.5842/2008 (now appeal), Mr. Pradip Ghosh, learned Senior Advocate, submitted that after nationalisation of Oil Companies in 1976, the sale and distribution of petroleum and petroleum products were under the control of the Central Government and regulated by the provisions of the Essential Commodities Act, 1955. On and from 1978 the Central Government allowed the Public Sector Oil Companies to set up retail outlets through an Oil Selection Board, which was subsequently renamed as Dealer Selection Board. Mr. Ghosh submitted that the Central Government devised a methodology of setting up of retail outlets, by constituting the Industrial Meeting Committee which would decide distribution of outlets region-wise in respect of each petroleum company. Till 1998, the production and marketing of petroleum and petroleum products were under the control of the Ministry of Petroleum and Natural Gas and were executed through Public Sector Oil Companies. In 1998, the Central Government decided to partly deregulate the production, supply and distribution of petroleum and its products and indicated 2002 as a cut-off year to completely deregulate the production and supply of petroleum and petroleum products. The Central Government, therefore, again took steps to meet such objectives and in that connection decided to make certain changes with regard to the functioning of natural oil and gas companies under the Market Driven Pricing Regime and to workout the modalities of setting up petrol pumps on National and State Highways.

6. This led to the creation of the concept of Company Owned Company Operated outlets (COCO) as a means to enable National Oil Companies to run and operate their own

outlets which were to be run as model retail outlets. Mr. Ghosh submitted that the scheme thus devised was to extend and cater to all National and State Highways and has certain salient features which need to be spelt out in order to appreciate future developments, which form the subject matter of the various appeals being heard by us.

7. One of the more important objectives which the scheme hoped to achieve was to develop the retail outlets on relatively large plots of land measuring 5 acres or so on the Highways. Such land would be under the control of the marketing company either by way of purchase or on long-term lease basis. Such retail outlets would also have facilities and amenities to be developed by the Dealer in line with the norms laid down by the Oil Companies on a standardised purchase. Such retail outlets were to be developed outside the Marketing Plan in a transparent manner, subject to observance of ban on multiple dealership. Mr. Ghosh submitted that the said scheme was to be executed in two phases. Phase I would enable the Oil Companies to launch the scheme on pilot project basis for setting up COCO outlets which might serve as models for future outlets. The second phase would be based on the experience of the first phase and the rest of the scheme would be taken up and completed within a period of three years.

8. Mr. Ghosh submitted that apparently a decision had been taken by the oil companies to convert the COCO outlets into regular dealerships. A uniform policy was formulated for manning and controlling of Jubilee Retail Outlets and, pursuant to such policy, the Government approved the Indian Oil Corporation's (IOC) decision to run 83 outlets for which sites had been taken over and facilities installed on COCO basis under certain guidelines. Mr. Ghosh urged that it has subsequently come to light that in respect of the said 82 outlets, 77 dealers or those holding Letters of Intent, had been allotted dealership.

9. However, on 1st April, 2000, the Government of India notified its policy for operation of COCO outlets through contractors. In February, 2002, the Indian Oil Corporation purchased 33.58% of Equity Shares of IBP Ltd. Till 31st March, 2002, no oil company could by itself select its dealers or award its dealership to them. The Government appointed Dealer Selection Boards, who were entrusted with the task of selection of dealers for all oil companies. It was only from 1st April, 2002, that the Administered Price Mechanism was dismantled and the Dealer Selection Boards were dissolved. The Oil Companies were, thereafter, given a certain amount of freedom to frame their own policies, relating to the setting up of the retail outlets by selection of dealers.

10. On 8.10.2002, IBP Ltd. devised and/or formulated its policy and framed guidelines, inter alia, for selection of retail outlets in the deregulated scenario. In line with the change in policy formulated by the Government of India, guidelines were framed which recognised the rights of the land owners as a category of persons entitled to dealership, subject to conditions. Clause 3 of the scheme provided that the dealership of such COCO outlets would first be offered to the landlord, provided he was found suitable. In case the landlord declined to accept the dealership, it would be offered to Maintenance and Handling Contractors (M&H). In the event, the Maintenance and Handling Contractor also declined to accept the dealership, the same would be offered to the best candidate available.

11. Mr. Ghosh submitted that on 14th January, 2003, in line with the Respondent's policy guidelines for selection of retail outlet dealers in the aftermath of deregulation vide Memo Reference Policy/MDPM No.319/02 dated 8.10.2002, and a subsequent clarification of the General Manager (M), MHO dated 14.12.2002, the Appellant, Mohd. Jamal, applied for a retail outlet dealership for his land in the land owner's category. Such application was made pursuant to an advertisement issued by the oil company and the Appellant was also called

upon by the oil company to obtain Dealership Agreement Form from the Divisional Office by depositing Rs.1000/-. After obtaining such Form, the Appellant submitted the same to the company. Mr. Ghosh submitted that on 15th January, 2003, the Committee on Dealer Selection found the Appellant's land suitable for developing a retail outlet, on National Highway No.28, Sadatpur PS, Muzaffarpur Road, Bihar. The company even sought prior approval for the said site from the Joint Chief Controller of Explosives, East Circle, Calcutta. Based on the recommendation made by the Dealer Selection Committee dated 15.1.2003, on 25th January, 2003, the General Manager (ER) of the Respondent No.2 Company recommended that the dealership be given to the Appellant and directed that a Letter of Intent be issued in his favour on receipt of the explosive licence. Mr. Ghosh submitted that while the Appellant's matter for grant of dealership was at the final stage, on 5th February, 2003, the Policy adopted on 8.10.2002 was suspended. It has, of course, been claimed on behalf of the Appellant that the suspension of the policy was never communicated to the land owners, including the Appellant, Mohd. Jamal.

12. It is also the Appellant's case that it was mutually agreed that till the issuance of the Letter of Intent, as an interim arrangement, a nominee of the Appellant would be appointed as the Maintenance and Handling Contractor to run the petrol pump, provided that an affidavit in the prescribed form would be furnished by the Contractor. According to Mr. Ghosh, relying on such assurance, the Appellant offered his land on lease to the Oil Company on 14.3.2003, subject to the condition that the monthly rental of the land would be Rs.27,000/- and would commence from the date of registration of the documents. Further to the said understanding on 29th March, 2003, a contract for Maintenance and Handling was executed between the Oil Company and Mohd. Ishtiaq Alam, the brother and nominee of the Appellant, for running the said petrol pump. Before Mohd. Ishtiaq Alam was appointed as M&H Contractor, on anticipation of the Oil Company that he would be granted

dealership, invested a sum of about Rs.25 lakhs to set up infrastructure. Ultimately, on 31st March, 2003, the petrol pump was commissioned and started operating.

13. Mr. Ghosh submitted that in the above circumstances, the Appellant executed a lease deed in favour of the Oil Company for a period of 15 years, with a clause for further periods of renewal.

14. Mr. Ghosh submitted that the aforesaid arrangement was understood by all the parties to be of temporary duration, as would be evident from the fact that the rent initially settled at Rs. 27,000/- per month in respect of the Appellant's land at Sadatpur was reduced to Rs. 21,000/- per month after negotiation, which upon calculation comes to approximately 50 paise per square feet, which in terms of the valuation made, was abysmally low.

15. Mr. Ghosh submitted that various other decisions were taken both by the Oil Company as well as the Ministry concerned by which fresh guidelines were also framed for selection of retail outlets and SKO-LDO (Super Kerosene Oil - Light Diesel Oil) dealers. Learned counsel submitted that by a policy circular No. 05/0405 dated 30.3.2005, introduced by the Oil Company, existing land owners of the concerned Jubilee Retail Outlets and the Company Owned and Company Operated Outlets were disqualified from being appointed as dealers, although, the same was never communicated to the Appellant. Mr. Ghosh submitted that, in the meantime, the temporary arrangement which had been arrived at in the case of the Appellant, Mohd. Jamal, has been continuing on the strength of orders passed by this Court. Mr. Ghosh also urged that on 6th September, 2006, the Oil Company formulated a new policy whereby the concept of offering dealership to land owners was abandoned to the prejudice of the land owners whose Letters of Intent for dealership were pending and where lands had also been taken on long term lease by the Oil Company at low rates of rent, on the assurance that dealership

under the land owners category would be given to them. By virtue of the new policy, the Oil Company proposed to run outlets on their own and/or through Labour Contractors, in supersession of all earlier policy guidelines.

16. Mr. Ghosh submitted that one of such land owners filed Writ Petition No. 358 of 2006 - *N.K. Bajpai Vs. Union of India and Others,* challenging the changed policy. While disposing of the Writ Petition, the learned Single Judge of the Delhi High Court, inter alia, held that Oil Companies cannot assign the running of petrol pumps on the land of the writ petitioners without their consent. Mr. Ghosh submitted that aggrieved by the said Notification dated 6.9.2006, the Appellant also filed Writ Petition No. 2392 of 2007, before the Delhi High Court for quashing of the said Notification and to restrain the respondents from terminating/cancelling the arrangement arrived at regarding the running of the retail outlet on the Appellant's land through his nominee, or in the alternative, to return the land to the Appellant if the dealership was not granted to the Appellant. Mr. Ghosh submitted that the learned Single Judge of the Delhi High Court referred the matter to a Division Bench for hearing and on 8.2.2008, the Delhi High Court disposed of a bunch of Writ Petitions, while retaining 11 such Writ Petitions, which, it felt needed further consideration since the said Writ Petitions projected an implied promise and/or understanding having been reached between the land owners and the Oil Companies concerned having regard to the low lease rentals for the lands offered by the land owners to the companies for establishing their retail outlets. Learned counsel submitted that the Appellant's Writ Petition was among those bunch of petitions, which were dismissed by the High Court, although, the Appellant's case was the same as that of the 11 Petitioners, whose matters had been retained by the High Court for further consideration. Mr. Ghosh submitted that it is at that stage that this Court admitted the Appellant's Special Leave Petition (Civil) No. 5849 of 2008, on 31st July, 2008, and passed an order whereby the parties were directed to maintain status-quo as

on that day, with liberty to the respondents to apply for variation and/or modification of the order, if so advised.

17. The main ground of challenge canvassed by Mr. Ghosh on behalf of the Appellant, Mr. Jamal, and other similarly placed Appellants, was that having acted on the basis of a policy by which the Respondent Oil Companies had offered full dealership to land owners and having caused such land owners to alter their position to their disadvantage, the Oil Companies were now estopped from going back on their promise. Mr. Ghosh urged that the decision to discontinue the grant of dealership and to introduce the new concept of COCO outlets, to be run by the Maintenance and Handling contractors, could not be used to the disadvantage of those land owners in whose favour a decision had already been taken to issue Letters of Intent for grant of dealership. Mr. Ghosh submitted that these cases were clearly covered by the doctrine of promissory estoppel, inasmuch as, in these cases the land owners had altered their positions to their detriment in several ways. Mr. Ghosh submitted that in most cases the rates of rents at which the lands were offered to the Oil Companies were extremely low and did not reflect the market rental of such lands, which is one of the indications that a promise had been made to the land owners that they would be granted dealerships in respect of the said lands, which was in tune with the policy, which had been declared by the Oil Companies earlier.

18. Mr. Ghosh submitted that in other cases the landlords had invested large sums of money, as in the case of Mohd. Jamal, in preparing the land offered for operating the retail outlets of petroleum and petroleum products, ostensibly on the promise that they would be granted dealership for running the said outlets. Mr. Ghosh submitted that acting on such promise the Appellant, Mohd. Jamal, spent more than Rs.27 lakhs to prepare the site for running the retail outlet and it would not be unreasonable to accept the case made out on his behalf that such expenditure was incurred in lieu of such promise. In

certain other cases, the land owners had been persuaded to enter into long term lease agreements, again at nominal rents, on the assurance that their nominees would be appointed as Maintenance and Handling Contractors of the different COCO units, pending the decision to grant full dealership in respect of such retail outlets, in keeping with the earlier policy of reducing the number of COCO units and retaining a few to be run by the Oil Companies as model outlets.

19. Mr. Ghosh submitted that in these circumstances, the Oil Companies and the Union of India are estopped by the promises made by them to grant dealerships to the land-owners on the basis of the policy existing prior to 5th February, 2003 and 6th September, 2006.

20. Mr. Ghosh submitted that one of the earliest decisions of this Court regarding the doctrine of promissory estoppel was in *Union of India Vs. M/s. Indo-Afghan Agencies Limited* [(1968) 2 SCR 366], wherein it was held that even though the case did not fall within the scope of Section 115 of the Evidence Act, it was still open to a party who had acted on a representation made by the Government to claim that the Government should be bound to carry out the promise made by it, though not recorded in the form of a formal contract.

21. Reference was then made to the celebrated decision in *Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others* [(1979) 2 SCC 409], commonly known as the "M.P. Sugar Mills case", wherein a Bench of Two Judges went into a detailed enquiry regarding the doctrine of promissory estoppel and equitable estoppel and observed that the doctrine of promissory estoppel is not really based on the principle of estoppel, but is a doctrine evolved by equity in order to prevent injustice. It has also been observed that there is no reason as to why it should be given a limited application by way of defence and that it could also be the basis of a cause of action and all that was necessary for attracting the said doctrine was that the promisee should have altered his position in relying

on the promise. It was emphasized that it was not necessary that the promise should suffer any detriment as well.

22. Mr. Ghosh submitted that a somewhat different view had been taken also by a Bench of Two Judges in *Jit Ram Shiv Kumar Vs. State of Haryana* [(1981) 1 SCC 11], but the differing view expressed in the said case was overruled by a Bench of Three Judges in *Union of India and Others Vs. Godfrey Philips India Limited* [(1985) 4 SCC 369], wherein the decision in the *M.P. Sugar Mills* case (supra) was pronounced as being the correct law.

23. Various other decisions have also been cited in support of the aforesaid doctrine of promissory estoppel or equitable estoppel, but it will suffice to refer to one of the latest decisions in this regard in *State of Bihar Vs. Kalyanpur Cement Limited* [(2010) 3 SCC 274], wherein it was emphasized that in order to invoke the aforesaid doctrine, it has to be established that a party had made an unequivocal promise or representation by word or conduct, to the other party, which was intended to create legal relations or affect the legal relationship to arise in the future, and that the party invoking the doctrine has altered its position relying on the promise.

24. Mr. Ghosh submitted that having held out a promise to grant a dealership to the Appellant and the other Appellants in the connected matters, in respect of the lands offered by them for setting up retail outlets for the sale of petroleum and petroleum products and having acted thereupon just prior to the stage of grant of Letters of Intent, it was no longer available to the Oil Companies to renege on their promise, particularly when the aspirants for dealership had altered their position and had spent enormous sums of money to make the sites ready for setting up the retail outlets. As was observed in the *M.P. Sugar Mills* case (supra), it was not even necessary for the land owners to have suffered any prejudice on account of such alteration. It was sufficient that, pursuant to the promise made of grant of dealership, they had altered their position and had

spent large sums of money to make the sites ready for occupation.

25. To bolster his submissions, Mr. Ghosh referred to the Single Bench decision of the Karnataka High Court dated 28th July, 2009, in Writ Petition No. 1016 of 2007, filed by one Shri Y.T. Narendra Babu and other connected Writ Petitions, wherein the facts identical to the facts in these cases were in issue. In fact, SLP(C) No. 9655 of 2010 (now Appeal) has been filed by the Indian Oil Corporation Limited against Y.T. Narendra Babu, against the appellate order of the Karnataka High Court dated 19.11.2009, in Writ Appeal No. 3248 of 2009, endorsing the judgment of the learned Single Judge in the Writ Petition. In the same set of facts, where lands had been taken on lease on the assurance that the land owners would be appointed as dealers in due course and that till then the retail outlet would be treated as a COCO unit to be run by a nominee of the land owner, the learned Single Judge was of the view that in view of the assurance given to the land owners and notwithstanding the change in policy guidelines regarding the allotment of dealership in favour of the land owners, the doctrine of promissory estoppel and of legitimate expectation would apply to the case. The learned Single Judge, therefore, allowed the Writ Petition and directed the Respondents to process the applications filed by the Petitioners or their nominees for grant of dealership on a co-terminus basis with the period of the lease of the land on which the retail outlets are established. As indicated hereinbefore, the said views were approved by the Division Bench, which did not interfere with the decision or the directions given consequent thereto by the learned Single Judge.

26. Mr. Ghosh then turned to another aspect, which had been considered in the cases heard and determined by the Gujarat High Court, namely, the issuance of Comfort Letters in several cases where the lease deed had been executed prior to 8th October, 2012, assuring the land owners of the demised

plots that they would enjoy the right of first refusal if COCO outlets set up on their lands were to be converted into dealerships. Mr. Ghosh pointed out that some of the Comfort Letters addressed to the land owners issued on behalf of the IBP Company Limited, by its Divisional Manager, have been annexed to the Special Leave Petitions (now Appeals), filed by those aggrieved by the judgment of the Division Bench of the Gujarat High Court, setting aside the orders of the learned Single Judge. Upon holding that the Comfort Letters issued to individual land owners could not be relied upon, as being a policy decision of the Company, the Division Bench came to the conclusion that the learned Single Judge was in error in giving a finding of fact in a Writ Petition under Article 226 of the Constitution, particularly when the facts were disputed and the entire evidence was yet to be disclosed. Mr. Ghosh submitted that, while allowing the Writ Appeals filed by the Oil Companies, the Division Bench of the Gujarat High Court had misconstrued the submissions made with regard to the doctrine of promissory estoppel, which would be available from the surrounding facts and circumstances, even if the same had not been explicitly spelt out.

27. In support of his submissions, Mr. Ghosh referred to the decision of this Court in *Yomeshbhai Pranshankar Bhatt Vs. State of Gujarat* [(2011) 6 SCC 312], wherein the learned Judges, while considering the scope of the Supreme Court's jurisdiction under Article 142 of the Constitution, held that even during a final hearing the Supreme Court was not precluded from considering the controversy in its entire perspective and that the power under Article 142 was to do complete justice, unless there was an express provision of law to the contrary. Mr. Ghosh urged that this Court had always held that technical objections should not come in the way of the Supreme Court doing complete justice to the parties.

28. Mr. Ghosh submitted that in the light of the above, the Oil Companies should either be directed to act in terms of the

promise made to grant dealerships or in the event of their unwillingness to do so, they may be directed to restore possession of the lands leased out to them in accordance with the doctrine of restitution.

29. Mr. Rana Mukherjee, who appeared for some of the Petitioners (now Appellants) in this batch of cases and had also assisted Mr. Pradip Ghosh, while reiterating the submissions made by Mr. Ghosh, referred to some of the factual differences in the individual Writ Petitions and urged that, being in a dominant position, the Government cannot act arbitrarily. Having made a promise to grant dealership licences to some of the land owners, who had on the basis of such assurances demised their lands to the Oil Companies for rents which were markedly lower than the existing rents in the area and had also spent large amounts in making such sites ready, the Oil Companies could not go back on such assurances on the plea that there had been a change in the policy for grant of dealership. Mr. Rana Mukherjee submitted that the window period, which had been identified by this Court, between 8th October, 2002 and 5th February, 2013, was a period when the policy to grant dealerships was in full force and the applications received and processed during the said period would have to be treated differently from the applications made thereafter, after the change in the policy. Mr. Mukherjee, in fact, contended that in some of the cases, where applications had been made for grant of dealership pursuant to advertisements published in the Press, but in whose cases the decision to issue Letters of Intent had been kept in abeyance prior to 8th October, 2002, were also entitled to the same benefits in keeping with the doctrine of promissory equity.

30. Mr. Mukherjee, who also appeared in SLP(C) No. 5756 of 2008 (now Appeal), filed by one Khurshid Ahmed Chippa, submitted that this Court in *Kumari Shrilekha Vidyarthi Vs. State of U.P.* [(1991) 1 SCC 212], wherein the doctrine of natural justice fell for consideration, and it was held

that every State action, in order to survive, must not be susceptible to the vice of arbitrariness, which forms the essence of Article 14 of the Constitution. While interpreting Article 14 of the Constitution, this Court has consistently held that non-arbitrariness is a necessary concomitant of the rule of law and is, in substance, fair play in action. In the said decision, it was further observed that whether an impugned act is arbitrary or not, is ultimately to be decided on the facts and circumstances of each case, but an obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and, if so, does it satisfy the test of reasonableness. It was further observed that every State action must be informed by reason and it follows that an act, uninformed by reasons, is arbitrary.

31. Mr. Mukherjee also referred to the decision of this Court in *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay* [(1989) 3 SCC 293] and *Mahabir Auto Stores Vs. Indian Oil Corporation* [(1990) 3 SCC 752], wherein similar views have consistently been expressed. Mr. Mukherjee also prayed for the same reliefs as prayed for by Mr. Pradip Ghosh, learned Senior Advocate, on behalf of some of the Appellants.

32. Mr. Jitender Mohan Sharma, learned Advocate who appeared with Mr. Pradip Ghosh, learned Senior Advocate, in some of the Appeals, also appeared individually for some of the other Appellants, such as Tirath Ram Chauhan, Sohan Singh, etc. In facts which were similar to that of the facts in Mohd. Jamal's case and in almost all the other cases, Mr. Sharma repeated and reiterated the submissions made by Mr. Ghosh in general and reiterated Mr. Ghosh's submissions with regard to the doctrine of promissory estoppel, since the Appellants in all the cases in which Mr. Sharma appeared, had altered their position after being given an assurance that they would be given dealership in respect of the retail outlets to be established on the demised lands. In their cases interim

arrangements were required to be made as the grant of dealerships were likely to take some time. Mr. Sharma also urged that the decision of the Respondents to alter their policy regarding grant of dealership, when matters had almost reached the final stage of allotment of dealership, was against all norms of fair play and was liable to be quashed.

33. Mr. Sanjay Sharawat, learned Advocate appearing for some of the Respondents, also adopted the submissions made by Mr. Ghosh and pointed out that the lease deeds executed by the land owners and the Maintenance and Handling Contracts were kept separate, since it was the intention of the Oil Companies that in terms of the policy of the Indian Oil Corporation dated 23.7.2003, despite the two contracts being separate, as and when the Policy permitted, dealership would be awarded to the land owners or their nominees. It was, however, pointed out that in all the cases it had been decided to grant Maintenance and Handling Contracts to nominees of the land owners to enable them to run the retail outlets till a final decision was taken in the matter. Mr. Sharawat submitted that the very fact that in the Policy of the Indian Oil Corporation dated 23.7.2003, the Company had specifically permitted the land owners to nominate anyone from the family or from outside the family for being appointed as the Maintenance and Handling Contractor, was sufficient indication that it was the intention of the Respondents to grant permanent dealership to the land owners once a clarification had been received in the matter.

Mr. Sharawat submitted that the problem had been created only on account of the decision of the Oil Companies to go back on their promise which brought all these cases squarely within the doctrine of promissory estoppel.

34. Much the same arguments were advanced by Mr. Rajiv Dutt, learned Senior Advocate appearing for the Writ Petitioner, Tirath Ram Chauhan, in Writ Petition (Civil) No.528 of 2008. Mr. Dutt urged that pursuant to the advertisement issued by IBP Oil Company on 12th April, 2001, the Petitioner (now Appellant)

had offered his land on NH-1A Jalandhar-Pathankot, but no decision had been taken by the Respondents on such offer. On the other hand, on 8th October, 2002, the Company introduced a Policy regarding allotment of retail outlets under the land owners category. Thereafter, as in the other cases, on the Appellant's land being found suitable a lease deed was executed and the Appellant's nominee was appointed as the Maintenance and Handling Contractor to run the outlet on 16.12.2002. On 30.11.2002, the pump began operational. Operations were continued in the retail outlet by virtue of the said contract, which was extended annually.

35. While the aforesaid arrangement was continuing, on 6.9.2006, the Ministry of Petroleum and Natural Gas issued a Notification directing all the marketing companies to phase out the existing COCO retail units within a year.

36. Mr. Dutt submitted that the Writ Petitions which had been filed before the Delhi High Court for quashing the said Policy dated 6.9.2006 were dismissed by the High Court on 8.2.2008 against which the several Special Leave Petitions were filed. As far as the Writ Petitions are concerned, the present Writ Petition was filed under Article 32 of the Constitution and was entertained by this Court on 28.11.2008, when this Court issued Notice and directed the parties to maintain status-quo, which order is still subsisting. Mr. Dutt also relied on the decisions which had been cited by Mr. Pradip Ghosh and in addition he also relied on the often cited decision of this Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India & Ors.* [(1979) 3 SCC 489], wherein a question had arisen regarding the right of the Petitioner to challenge the actions of the International Airports Authority of India, which was an instrumentality or agency of the Government. It was held that where the Corporation is an instrumentality or the agency of the Government, it would be subject to the same constitutional or public law limitations as the Government, which cannot act arbitrarily and enter into a

relationship with any person it likes at its sweet will, but its action must be in conformity with some principle which meets the test of reason and relevance. Reference was also made to the decisions of this Court in the cases of *E.P. Royappa Vs. State of Tamil Nadu* [(1974) 4 SCC 3] and *Maneka Gandhi Vs. Union of India* [(1978) 1 SCC 248], wherein it was held that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary, but must be based on some rational and relevant principle which is non-discriminatory.

37. In some of the other cases, learned counsel appeared and pointed out that the applications for dealership had been made during the window period between 8.10.2002 and 5.2.2003, making them eligible for being considered for grant of dealership on the strength of the Policy, which was then prevalent and was subsequently stayed on 5.2.2003 and was replaced by the decision taken on 6.9.2006 to phase out the existing COCO Units.

38. Special Leave Petition (C) No.9010 of 2008 (now Appeal) arising out of Writ Appeal No.2445 of 2007, from the Delhi High Court is a case similar to that of Mohd. Jamal. Appearing on behalf of the Appellant, Satyanarayan Kumar Singh, Mr. Ravi Shankar Prasad, learned Senior Advocate, repeated the submissions made by Mr. Pradip Ghosh. Mr. Prasad submitted that although the Appellant had applied for full dealership, the COCO unit was thrust upon him and the same had to be reconverted into the Appellant's claim for full dealership.

39. Appearing for two of the Appellants in respect of Civil Appeal @ SLP(C)No.20908 of 2011 (*Kamar Ahmed Yusuf Lulat & Ors. Vs. IBP Co. Ltd. & Ors.*) and Civil Appeal @ SLP(C)No.22831 of 2011 (*Jaswantsinh A Rana (D) by LRs. & Ors. Vs. IBP Co. Ltd. & Ors.*), Mr. Sunil Gupta, learned Senior Advocate, also based the claim of the Appellants on the doctrine of promissory estoppel. In fact, the case of the two

Appellants is the same as the case of most of the Appellants and Writ Petitioners, where the learned Single Judge had allowed the Writ Petitions while the Division Bench reversed the same on the ground that all the writ petitions had been disposed of by a common reasoning. Mr. Gupta contended that the new policy formulated on and from 10th August, 2002, was really a culmination of the earlier policy of the Oil Companies dated 31.5.2001, which provided for grant of full dealership in respect of the lands offered by new applicants. As in the case of the other claimants, the claim of the Appellant did not fructify on account of the change in policy and was kept in abeyance also, as there was a further change in the policy by which the Oil Companies decided to phase out the COCO units which were being run by Maintenance and Handling Contractors. Mr. Gupta referred to the "comfort letters", which had been provided by the Government, assuring the land owners that the decision to run the COCO units with the help of the Maintenance and Handling Contractors, was only a temporary arrangement and as soon as it would be possible, the land owners would be given the first option for dealership in respect of the retail outlet. Mr. Gupta also relied on the decisions of this Court on the doctrine of promissory estoppel and legitimate expectation cited by Mr. Pradip Ghosh, Mr. Rana Mukherjee and the other learned counsel and urged that the directives issued by the Oil Company on 6.9.2006 were liable to be quashed.

40. Appearing for several of the claimants for dealership, Mr. Jaideep Gupta, learned Senior Advocate, submitted that the facts in all these cases were similar to the matters in which submissions had earlier been made. However, in some of the matters, Mr. Gupta urged that the decision to grant dealership had been taken before 8.10.2002 and nowhere in the Letters of Intent, is there any indication that the retail outlets were COCO Units. However, after the change in policy, the concept of COCO Units was introduced and the nominees of the land owners were appointed as Maintenance and Handling Contractors to run the said outlets. Thus, there was a tenuous

connection between the execution of the lease documents and the grant of Maintenance and Handling Contracts. Mr. Gupta submitted that apparently, the separation of the lease from the Maintenance and Handling Contracts, was done with the deliberate intention that the land owners would not have any role to play with the running of the outlet till the matter relating to dealership of the retail outlet was settled.

41. Mr. Gupta also adopted the submissions made by Mr. Pradip Ghosh, learned Senior Advocate for the Appellants and urged that the decision taken by the Oil Companies not to grant dealerships in respect of the COCO Units ran counter to the fact situation which would indicate that the Oil Companies had intended to grant dealership to the land owners, which would be evident from the following summary of facts :-

(a) While in most cases, the issuance of the Letters of Intent were pending, Maintenance and Handling Contracts were given to run the retail outlets to the nominee and/or near relation of the land owners.

(b) The rents initially asked for by the land owners for grant of lease for the lands offered for setting up the retail outlets were substantially reduced when the lease deeds were executed.

(c) The investments made by the landlords in making the plots ready for setting up thepetrol pumps.

(d) Correspondence exchanged between the parties.

(e) Existence of the policy to offer the land owners the right of first refusal for the Maintenance and Handling Contractsprior to grant of dealership.

(f) Annual grant of dealership.

42. Mr. Gupta urged that the lease deeds executed between the parties do not represent the totality of the matter,

but is only a part of the transaction. Mr. Gupta submitted that the cases of the claimants were clearly covered by the doctrine of promissory estoppel and as had been urged by Mr. Ghosh and the other learned counsel, the decision of the Oil Companies arrived at on 6.9.2006 not to grant any further dealership but to operate through COCO Units, was bad and was liable to be quashed.

43. In all the other cases, the fact situations were almost identical as were the submissions advanced on their behalf. The Gujarat matters which were taken up in the said bunch were not very different from the other matters wherein also applications for grant of dealership had been made within the window period when the Policy relating to grant of dealership was subsisting and steps similar to those taken in the other matters were also taken with regard to the Special Leave Petitions filed against the change in Policy contained in the Notification dated 6.9.2006.

44. Appearing for the Indian Oil Corporation, the learned Attorney General confined his submissions to the legal issues raised during the hearing of this batch of Appeals and left it to Ms. Meenakshi Arora, learned Advocate, to deal with the factual aspect.

45. On the question of the common grounds taken on behalf of the Appellants and the Writ Petitioners that their respective cases were covered by the doctrine of promissory estoppel, the learned Attorney General submitted that such a stand was entirely misconceived. Once an Agreement is entered into, the parties are bound by the terms of the said Agreement which extinguishes any claim of promissory estoppel, which may have arisen prior to the signing of the Agreement. Referring to the application made by the Appellant, Mohd. Jamal, on 14th March, 2003, providing the specifications of the land and indicating that the same, including the building thereupon, had been made ready and that there was no problem in giving the same to the Company for running the

petrol pump in any manner it liked, the learned Attorney General submitted that the same destroyed any promise that may have been made before the aforesaid offer was made by the Appellant. The learned Attorney General pointed out that in the said letter, while offering the land and structures thereon in question to the Oil Company to establish a petrol pump and to run it in any manner it liked, certain terms and conditions had been indicated by the Appellant, including the monthly rental and the increments thereof after every 5 years, together with the period of the lease with an option of renewal. The learned Attorney General submitted that once such an offer had been made, which was supported by an affidavit affirmed and filed by the land owner's nominee for being awarded the Maintenance and Handling Contract, wherein it was undertaken that the said nominee would have no claim on the retail outlet dealership at any time and would not seek any legal help at a future date to stall smooth handing over of the site as and when desired, nothing remained of the promise, if such an offer had at all been made and the same could be construed to be an offer which attracted the doctrine of promissory estoppel or equitable estoppel.

46. The learned Attorney General submitted that the aforesaid letter was written by the Appellant at a point of time when the Policy dated 8.10.2002 had already been suspended. Further, the said letter had not only been suppressed but had even been disowned by the Appellant. Even after disowning the said letter, the Appellant has again relied on the same in order to make out a case that he had agreed to make the said offer on the assurance given by the Oil Company that he would be granted full dealership once the proceedings before the Court were cleared. The learned Attorney General pointed out that in none of the documents executed between the Appellants had any foundation been laid in support of the assertion that a compromise had been made that a dealership would be given to land owners and that the awarding of Maintenance and Handling contracts was only an interim measure. The learned

Attorney General submitted that given the disputed nature of the claim, the matter cannot be gone into in a Writ Petition which was, therefore, misconceived. In this regard, the learned Attorney General referred to the decision of this Court in *A.P. Transco Vs. Sai Renewable Power (P) Ltd.* [(2011) 11 SCC 34], in which while considering the doctrine of promissory estoppel and legitimate expectation in regard to various communications extending certain incentives to producers of electricity from non-conventional energy resources, it was held that the parties had voluntarily signed the Power Purchase Agreements by which they were governed and neither the doctrine of promissory estoppel nor legitimate expectation could, therefore, have any application in regard to the correspondence exchanged between the parties, whereby the Government had extended certain incentives to the producers of electricity from non-conventional energy resources. The learned Attorney General also referred to the decision in *Bannari Amman Sugars Ltd. Vs. Commercial Tax Officer* [(2005) 1 SCC 625]; *State of Himachal Pradesh Vs. Ganesh Wood Products* [(1995) 6 SCC 363]; *Kasinka Trading Vs. Union of India* [(1995) 1 SCC 274] and *Sethi Auto Service Station Vs. D.D.A.* [(2009) 1 SCC 180],wherein the same doctrine had been considered.

47. Supplementing the submissions made by the learned Attorney General, Ms. Meenakshi Arora, learned Advocate, submitted that the cases being heard in this batch of matters can be divided into four categories, namely:

(i) Agreements entered into between the Oil Companies and the land owners prior to 8.10.2002;

(ii) Maintenance and Handling contracts signed between 8.10.2002 and 5.2.2003;

(iii) Offers made by land owners and lease Agreements executed within the aforesaid period;

(iv) Petrol pumps commissioned upon lease being executed after the new Policy came into existence on 5.2.2003.

48. Ms. Arora submitted that prior to the Policy No. 319 dated 8.10.2002, the Oil Companies granted dealership in respect of retail outlets on the basis of applications invited for the said purpose. Several land owners had responded to the said applications and had offered their lands to the Oil Companies for setting up retail outlets on main Highways. However, the Oil Companies were also considering a scheme whereby they would be able to retain control over the various retail outlets by operating them as Company Owned and Company Operated (COCO) units, which provided for retail outlets to be owned fully by the Oil Companies, but the operation thereof was outsourced to M&H contractors, who would not have any right to dealership of the outlet.

49. Ms. Arora submitted that the cases of the applicants in the third category would have to be treated differently from applicants whose claims were based on decisions to grant dealership which had been arrived at prior to 8.10.2002. In certain cases, on the basis of the leases granted, petrol pumps had already been commissioned and were functioning, but with the help of M&H contractors. Ms. Arora submitted that once the policy to grant full dealerships was suspended and the new policy was adopted in September, 2003, barring a few cases no further dealerships were given in respect of the retail outlets and all the units were, thereafter, run as Company Owned and Company Operated units where the Company retained control of the outlets, but left the day to day management thereof to the contractors.

50. Taking the case of Mohd. Jamal, Ms. Arora submitted that, as was submitted by the learned Attorney General, the Appellant, whose application for grant of Letters of Intent was pending, entered into a separate Agreement with the Oil Company on 14.3.2003, when the earlier policy had already

been discontinued and after execution of the lease, named his brother, Mohd. Ishtiaq Alam, as his nominee, to function as the M&H contractor in respect of the outlet established on his land. Ms. Arora submitted that Mohd. Ishtiaq Alam was found suitable to act as M&H contractor and a Agreement was, therefore, executed on 29.3.2003, which also included an affidavit affirmed by Mohd. Ishtiaq Alam. Pointing to the contents of the said letters, which had been referred to by the learned Attorney General, Ms. Arora submitted that the Appellant executed the lease Agreement, being fully aware of the consequences thereof, and so was the nominee who affirmed an affidavit clearly indicating that he was only managing the unit and had no claim to the dealership of the said outlet in lieu of being awarded the contract.

51. Ms. Arora urged that once Policy No.MDPM-319/02 dated 8.10.2002, was replaced by the new Policy dated 19.9.2003, all future transactions between the Appellants/ Petitioners and the Oil Companies would have to be considered in the light of the new policy, which dealt with COCO outlets only. Ms. Arora submitted that as the lease agreement between Md. Jamal and the Oil Company was executed after the policy dated 8.10.2002 was suspended, it was a clear indication that the land owner was aware of his actions in offering his land to the companies for establishing a petrol pump thereupon, without any conditions attached except for the rental and period of the lease. Even, if Ms. Arora's submission that the appointment of M&H Contractors was connected with the signing of the lease agreement is to be accepted, even then the land owner could have no claim to the dealership in respect of the said retail outlet being operated as a COCO unit. Ms. Arora submitted that as has already been indicated hereinbefore, the concept of COCO units was that the land and the infrastructure would either be owned or taken on long-term lease by the oil company but the operation of the petrol pump would be outsourced to a M&H Contractor, who submitted an affidavit affirmed by him while applying for the M&H Contract that he neither had nor would in

future have any claim to the dealership of the said retail outlet.

52. Ms. Arora submitted that the case made out by the land owners after the grant of M&H Contracts, was not bona fide, and, in any event, could not be related to the transactions under the earlier policies which had been replaced by fresh agreements entered into by the parties on the basis of the new policy. Ms. Arora urged that neither was the doctrine of promissory estoppel nor legitimate expectation applicable in the instant case where there was no foundation for such a claim. Ms. Arora reiterated her submissions that Policy No. MDPM-319/02 dated 8.10.2002, was related to selection of dealers and not to COCO outlets and it was denied that the Appellant had leased out the property upon any understanding that he or his nominee would be allowed to run the retail outlet. On the other hand, the land owner was not even eligible to be appointed as the M&H Contractor.

53. Ms. Arora lastly submitted that since the present batch of matters related to COCO outlets, the question of returning the demised land to the land owner did not also arise. Ms. Arora submitted that the entire exercise was nothing but an attempt on the part of the land owners, who had consciously entered into lease agreements, to try and resile from the contract once it became evident that there was no likelihood of a further change in the policy for grant of dealership in respect of the COCO units.

54. Referring to the decision of this Court in *Sethi Auto Service Station* (supra), Ms. Arora urged that the doctrine of legitimate expectation, had been considered in the said case where the Appellant's claim was based on an old policy and it was held that the Appellant merely had an expectation for being considered for resitement. It was also held that a person basing his claim on the doctrine of legitimate expectation has to establish that he had relied on the said representation and had altered his position and that denial of such expectation worked to his detriment. The Courts can interfere only if the decision

taken by the authority is found to be arbitrary, unreasonable or in gross abuse of power or in violation of principles of natural justice and contrary to public interest. It was also reiterated that the concept of legitimate expectation has no role to play where said action is a matter of public policy or in the public interest, unless, of course, the action taken amounted to an abuse of power. It was further emphasized that in order to establish a claim of promissory estoppel, it must be proved that there was such a definite promise and not any vague offer which could not be enforced. In this regard, Ms. Arora also submitted that the "comfort letters" referred to by learned counsel for the Appellants, purported to have been issued by the State of Gujarat, would have no avail as a promise made in such a letter does not constitute a promise which could be enforced. Ms. Arora submitted that the Appeals and Petitions were liable to be dismissed with costs.

55. Learned Additional Solicitor General, Mr. P.P. Malhotra, appearing for the Union of India, submitted that the dispute involved in this batch of matters was between the Oil Companies and the land owners with whom agreements had been entered into by the Oil Companies. The learned ASG submitted that the Union of India has little to do with the dispute between the parties, except to the extent that it has been given a supervisory function to ensure proper distribution of petrol and petroleum products. Mr. Malhotra urged that anything which was not in public interest, but was likely to affect the public interest, cannot be retained and has to be quashed. As will be evident from the submissions made on behalf of the respective parties, the case of the Appellants and the Writ Petitioners, in most of the cases, is based on the doctrine of promissory estoppel on the basis of a promise apparently made by the Respondents to the land owners that they would be granted dealerships in lieu of the lands offered by them for setting up of the retail outlets. From the facts as disclosed, there is sufficient evidence to indicate that initially negotiations had been conducted by the Oil Companies with aspiring land

owners that in lieu of the lease to be granted they would be provided with dealerships. The applications made pursuant to the advertisement published by the Oil Companies were also duly processed and were acted upon. However, it is only the suspension of the Policy dated 8.10.2002, which prevented such dealerships for being given to the various applicants.

56. Upon deregularisation of the distribution of petroleum products, the Oil Companies issued guidelines dealing with the procedure for locations outside the marketing plans. It was also stipulated that for the purpose of selection, the dealerships would be categorised as indicated in the guidelines and all retail outlets would be developed only on A/C sites basis, which finds place in Clause (2) of the guidelines.

57. The said guidelines referred to grant of dealership which is completely different from the grant of long-term leases by the land owners to the Oil Companies upon the condition that the same could be used by the lessees in any way they liked, which included the right to sublet the demised plot. The concept of Company Owned and Company Operated outlets was sought to be introduced on 6.9.2003, in supersession of Policy No.MDPM-319/02 dated 8.10.2002 and the two cannot be co-related unless a link can be established by the Appellants that they had entered into the lease agreements with the Oil Companies upon the understanding that once the earlier policy was restored, the land owners would be given the option of having the COCO units converted into regular retail outlets.

58. In order to appreciate the difference between the two concepts, it has to be understood that the concept of a dealership in respect of a retail outlet is completely alien to the concept of a COCO unit. While the former deals with the right of the dealer to independently operate the retail outlet, in the case of a COCO unit, the entire set up of the retail outlet is owned by the Oil Companies and only the day-to-day operation thereof is outsourced to a M&H Contractor. With the discontinuance of the earlier policy of granting dealerships in

respect of retail outlets and the introduction of a new policy awarding M&H Contracts in respect of the COCO outlets, in our view, the land owners who had entered into fresh lease agreements after the policy to grant dealerships had been suspended, cannot now claim any right on the basis of the earlier policy in the absence of any Letter of Intent having been issued thereunder. Had any Letter of Intent, which tantamounts to grant of dealership, been issued and then in respect of the same lands COCO units were established, the situation would have been different. Placed in such a position, the land owners cannot claim any relief in these proceedings and, if any loss or damages have been suffered by them on account of the assurance earlier given regarding grant of dealership, particularly in making the sites ready therefor, the remedy of such applicants would lie elsewhere. The policy guidelines and, in particular, Clauses 1.2 and 1.2.2 thereof are not available to the Appellants and the Petitioners in these proceedings, which are concerned mainly with COCO units which have no connection with the concept of dealership.

59. We are inclined to hold that the doctrine of promissory estoppel and legitimate expectation, as canvassed on behalf of the Appellants and the Petitioners, cannot be made applicable to these cases where the leases have been granted by the land owners on definite terms and conditions, without any indication that the same were being entered into on a mutual understanding between the parties that these would be temporary arrangements, till the earlier policy was restored and the claim of the land owners for grant of dealership could be considered afresh. On the other hand, although, the nominees of the lessors were almost in all cases appointed as the M&H Contractors, that in itself cannot, in our view, convert any claim of the land owner for grant of a permanent dealership. As has been indicated hereinbefore, even the M&H Contractor had to submit an affidavit to the effect that he did not have and would not have any claim to the dealership of the retail outlet and that he would not also obstruct the making over possession of the

retail outlet to the Oil Company, as and when called upon to do so. The decisions cited on behalf of the Appellants/ Petitioners, are not, therefore, relevant for a decision in these cases. Although, the Appeals have been filed on account of the denial to the land owners of the grant of dealership in respect of the lands demised by them to the Oil Companies, the entire focus has shifted to COCO outlets on account of the fresh lease agreements entered into by the Appellants with the Oil Companies which has had the effect of obliterating the claim of the land owners made separately under earlier lease agreements. The claims of the Appellants/Petitioners in the present batch of matters have to be treated on the basis of the agreements subsequently entered into by the Oil Companies, as submitted by the learned Attorney General.

60. These Appeals and Petitions must, therefore, fail and are dismissed. C.A. No. 5259 of 2013 filed by the Indian Oil Corporation, stands allowed. The four Transfer Petitions, being T.P.(C) Nos. 971-973 of 2010 and T.P.(C) No. 1260 of 2011, which were heard along with these Appeals and Petitions, are allowed. The Writ Petitions, which are transferred as a consequence thereof, are also dismissed along with other matters. Accordingly, the Transferred Cases, arising out of T.P.(C) Nos. 971-973 of 2010 and T.P.(C) No. 1260 of 2011, are disposed of. However, it will be open to the Appellants and the Petitioners to approach the proper forum in the event they have suffered any damages and loss, which they are entitled to recover in accordance with law.

61. Having regard to the peculiar facts of these cases, the parties are left to bear their individual costs.

R.P. Matters disposed of.

MANOJ & ORS.
v.
STATE OF HARYANA
(Criminal Appeal No.1853 of 2012)

JULY 9, 2013.

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

PENAL CODE, 1860:

ss. 304-B and 498-A - Conviction and sentence awarded by courts below - Held: Death by burn injuries was caused otherwise than in normal circumstances - Deceased was, soon before her death, subjected to cruelty and harassment by appellants for dowry - Prosecution has proved beyond reasonable doubt that appellants are guilty of offences punishable u/ss 304-B and 498-A - As regards plea for reduction of sentence, High Court has already reduced the life sentence awarded by trial court u/s 304-B to 10 years RI, which calls for no interference.

EVIDENCE ACT, 1872:

s.32 - Dying declaration - Statement recorded by doctor, who conducted medico legal examination - Held: The dying declaration recorded by doctor was also signed by husband of deceased - There is nothing to suggest that any relation of deceased was present to influence the doctor.

The marriage of appellant no. 1 was solemnized with the daughter of the complainant (PW-9) on 6.5.2000. On 14.4.2005, she was taken to the hospital with burn injuries. She died in the hospital the same day. On the complaint of PW-9, an FIR was registered against the husband of the deceased, his parents and his brother's wife. The complainant stated that in spite of having given

sufficient dowry, the accused harassed and tortured his daughter by raising a further demand of a motor-cycle; that his daughter told him in the hospital that on the date of incident her mother-in-law (appellant no. 2) called her in her room, where her husband (appellant no. 1) poured kerosene on her and latter's brother's wife (appellant no. 3) lit a match stick and set her on fire. The trial court convicted appellants nos. 1 to 3 u/ss 304-B and 498-A IPC and sentenced each of them to life sentence and three years RI under the two counts, respectively. The father-in-law of the deceased was acquitted. The trial court further held that the charges u/ss 302 and 406 read with s.34 IPC were not proved. On appeal, the High Court upheld the conviction but reduced the sentence of life imprisonment u/s 304-B to 10 years RI.

Dismissing the appeal, the Court

HELD: 1.1 If the declaration is made voluntarily and truthfully by a person who is physically in a condition to make such statement, then there is no impediment in relying on such a declaration. In Ashok Kumar's case, this Court noticed that if it was a case of death by burning, entries of injury report in the bed head ticket could be construed as dying declaration. [para 13-14] [514-C-D; 515-D]

Ashok Kumar v. State of Rajasthan **1990 (1) Suppl. SCR 401 = (1991) 1 SCC 166;** *Kanaksingh Raisingh Rav v. State of Gujarat* **(2003) 1 SCC 73 - relied on.**

1.2 In the instant case, the doctor (PW-4) who conducted medico-legal examination and recorded the statement of the deceased, specifically deposed that the deceased told him that she was called inside and the door was latched from inside. Kerosene oil was sprinkled upon her and her Jethani had ignited the fire by the match stick. Her husband and mother-in-law were also involved

in it. This dying declaration (Ext.PF) was also signed by appellant no.1 which indicates that he was present when statement was recorded. There is nothing on the record to suggest that any of the relation of the deceased was present to influence PW-4. [para 11 and 15] [513-A-C; 516-D-E]

1.3 Admittedly, the death of the deceased is caused by burns i.e. otherwise than under normal circumstances, within seven years of her marriage. In view of the evidence on record both the courts below have come to the definite conclusion that the deceased was soon before her death, subjected to cruelty and harassment by her husband and his relatives in connection with demand for dowry. Therefore, all the ingredients are present to convict the appellants u/s 304-B, IPC. The prosecution also proved beyond reasonable doubts that the appellants are guilty of the offence punishable u/s 498-A, IPC. The Sessions Judge has recorded cogent and convincing reasons for convicting the appellants for the offences u/ss 304-B and 498-A IPC. [para 17-19] [516-F; 517-D-F]

1.4 The Sessions Judge specifically held that the prosecution miserably failed to prove its case against all the four accused for the offence punishable u/ss 302 and 406 r/w s. 34 IPC and, therefore, all the four accused were acquitted of the said offence. No appeal has been preferred by the complainant or the State against the acquittal of the accused for the offences punishable u/ss 302 and 406 r/w s.34 IPC. The finding of Sessions Judge having reached finality, the question of altering the sentence u/s 304-B to s.302 does not arise. [para 22] [518-B-D]

Muthu Kutty and Another v. State by Inspector of Police, Tamil Nadu **2004 (6) Suppl. SCR 222 = (2005) 9 SCC 113 - referred to.**

1.5 As regards the plea of the appellants to reduce the sentence u/s 304-B IPC, it is significant to note that the appellants were sentenced for life for the offence punishable u/s 304-B IPC, by the trial court. The High Court has already considered the facts and circumstances of the case and reduced the sentence from life imprisonment to 10 years, which calls for no interference. [para 23] [518-E-F]

Case Law Reference:

(2003) 1 SCC 73	**relied on**	**para 13**
1990 (1) Suppl. SCR 401	**relied on**	**para 14**
2004 (6) Suppl. SCR 222	**referred to**	**para 21**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1853 of 2012.

From the Judgment and Order dated 15.02.2012 of the High Court of Punjab and Haryana at Chandigarh in Crl. Appeal No. 897-DB/06.

Rishi Malhotra for the Appellants.

Roopansh Purohit, AAG, Dr. Monika Gusain for the Respondent.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. The appellants in this case were found guilty of offence punishable under Sections 498-A and 304-B Indian Penal Code (for short, "IPC") by the Sessions Judge, Bhiwani. They were sentenced to undergo imprisonment for life for the offence under Section 304-B IPC and also to undergo rigorous imprisonment for three years, besides, payment of fine of Rs.5,000/- each and in default of which to undergo further imprisonment for a period of six months for the offence under Section 498-A IPC. Their appeal against the said judgment and conviction to the High Court of Punjab & Haryana at Chandigarh got dismissed except with a modification in the sentence of imprisonment from

imprisonment for life to imprisonment for 10 years for the offence under Section 304-B IPC.

2. The prosecution case, in brief, is that on 14.4.2005 on receipt of a telephonic message from the Incharge, Police Post, General Hospital, Bhiwani regarding admission of Meena Devi wife of Manoj Kumar (appellant no.1) resident of Village Hetampura in burnt condition, ASI Chattarmal (PW-11) of P.S. Sadar,Bhiwani along with other police officials reached the said hospital and collected medical ruqa (memo) alongwith medico-legal report of injured Meena. After obtaining the opinion of the Doctor regarding fitness of the injured to make statement when he brought the Duty Magistrate to record her statement in the hospital, the Doctor had already referred her to PGIMS Rohtak. Thereafter, he alongwith Magistrate reached PGIMS, Rohtak and collected two medical ruqas from Incharge, Police Post, PGIMS Rohtak out of which one was regarding death of Meena. Then he reached in the gallery of emergency ward where complainant Vedpal (PW-9) met him and got recorded his statement (Ex.PA). It is alleged by the complainant-Vedpal (PW-9) that he had one daughter and two sons. His daughter was married with Manoj (appellant no.1) son of Mahabir about five years earlier (the actual date of marriage found to be 6.05.2000) to the incident that had occurred on 14.04.2005. He further stated that in the marriage of his daughter, he had given dowry beyond his financial capacity. However, his daughter on her return from her matrimonial home for the first time told him that her in-laws were not satisfied with the dowry articles that were given in marriage. The complainant had given double bed, T.V., fridge, cooler, sofa set, almirah, 21 utensils and clothes etc., besides, Rs.2100/- in cash. When the daughter of the complainant (PW-9) went to her matrimonial home for the second time, his son-in-law Manoj (appellant no.1), the mother-in-law of his daughter namely Chameli Devi (appellant no.2), the father-in-law namely Mahabir (since acquitted) and Jethani (husband's elder brother's wife) of his daughter namely Suman (appellant no.3) raised a demand for a motor cycle and started

torturing her (beating) for this. Therefore, Meena Devi (deceased) started living with him (complainant). She stayed with her father (complainant) for fourteen months. About ten months earlier from the date of incident that occurred on 14.04.2005, the complainant (PW-9) made his daughter understand and sent her back in the presence of panchayat of Hetampura and Sant Mann Singh s/o Chandu Ram r/o Hissar. However, even then the accused were demanding a motor cycle and kept troubling his daughter for dowry. On 14.04.2005, at about 8.00 a.m, Mahabir informed him on telephone from the Hospital at Bhiwani that Meena Devi (deceased) had been admitted in the Government Hospital, Bhiwani with burn injuries. On receiving this information, the complainant (PW-9) and Dayanand s/o Jogi Ram and his brother Shamsher reached the Hospital at Bhiwani. There they came to know that Meena Devi (deceased) had been referred to PGIMS, Rohtak. Then they all reached PGIMS, Rohtak where he met his daughter in the emergency ward of PGIMS, Rohtak. His daughter told him that in the morning on that day, her mother-in-law namely Chameli Devi (appellant no.2) had called her in the room and her husband Manoj (appellant no.1) poured kerosene oil on her and her husband's elder brother's wife (Jethani) namely Suman (appellant no.3) lit a matchstick and set her on fire on account of which she got burnt. After sometime Meena Devi (deceased) while she was under treatment breathed her last. It it alleged by the complainant (PW-9) that on account of greed of dowry, his daughter Meena Devi (deceased) had been set on fire by pouring kerosene oil on her by her husband Manoj (appellant no.1), mother-in-law Chameli Devi (appellant no.2) and husband's elder brother's wife (Jethani) Suman (appellant no.3) after colluding with each other. He further requested for action being taken against the accused.

3. On the basis of such complaint FIR No.103 dated 14.4.2005 under Sections 304-B/498-A/406/34 IPC was registered. Subsequently, on the basis of above allegations, all the four accused were charged under Section 304-B in

alternative under Sections 302, 498-A and 406 r/w Section 34 of the IPC to which they pleaded not guilty and claimed trial.

4. All together eleven witnesses were produced by the prosecution in support of their case. Exhibits were proved through the prosecution witnesses. Defence also produced two witnesses in its favour.

5. The Sessions Judge, Bhiwani by judgment dated 4.09.2006 acquitted Mahabir father-in-law of the deceased and held the appellants guilty for the offence under Sections 498-A and 304-B of the IPC. The Sessions Judge further held that the prosecution has miserably failed to prove its case against all the four accused for the offence under Sections 302 and 406 r/w Section 34 IPC and, hence, all the four accused were acquitted for the said offence.

6. An appeal was preferred by the appellants against the judgment passed by the Sessions Judge, Bhiwani and another appeal was preferred by the complainant-Ved Pal (PW-9) against acquittal of Mahabir. By impugned judgment dated 15.02.2012 the Division Bench of the High Court of Punjab and Haryana at Chandigarh dismissed the appeal preferred by Ved Pal-complainant(PW-9). The judgment passed by the Sessions Judge was affirmed with the modification in the sentence of imprisonment, the appeal preferred by the appellants was also dismissed.

7. In this appeal, learned counsel appearing for the appellants contended that in view of severity of burn injuries of the deceased she could not have been in a fit state of mind or condition to make a dying declaration. The said dying declaration is purported to be made in presence of Dr. Rajender Rai (PW-4). In absence of any other material to corroborate the same, the dying declaration should not be relied upon.

8. It was submitted that PW-7, the Police Inspector who had prepared a report under Section 173 Cr.PC, in his statement admits that there was no mention of the statement

of the deceased allegedly recorded by the Doctor at the time of her MLR. Even under Section 313 Cr.PC, no question was ever put to the accused with regard to his signing of the said MLR in question. The said dying declaration raises suspicion and doubt. It may not be an absolute proposition of law that a dying declaration should be recorded by a Magistrate but if in a given case, there is ample time and opportunity,the services of a Magistrate should be called upon in order to lend credence to the said dying declaration. The I.O (PW-11) has stated that after reading of the statement Ex.PF, he did not approach the deceased to verify from her if she had made such statement or not.

9. Per contra, according to counsel for the prosecution, the dying declaration recorded by Dr. Rajinder Rai (PW-4), Medical Officer is reliable. There is nothing on record to suggest that Dr. Rajinder Rai (PW-4) is an unreliable witness. To the contrary, he is a natural witness and his testimony has not been shaken during a long cross examination. The theory of tutoring is also ruled out in the present case as the accused persons only were present with the deceased during that time and none of the family members of the deceased were present when the dying declaration was recorded by the Doctor. The husband (appellant no.1) Manoj has also affixed his signature on the MLR on which the dying declaration was recorded by the Doctor. The evidence of PW-4 is trustworthy, cogent and reliable.

10. Further according to the learned counsel for the prosecution an alternate charge under Section 302 shall be framed in addition to Section 304-B and in view of dying declaration of the deceased, which has been believed by both the courts below. A grave error of law has been committed by the trial Court as well as the High Court by not convicting the accused persons under Section 302. It was submitted that this is a fit case wherein this Court may exercise its extraordinary powers under Article 142 of the Constitution of India and shall consider altering the conviction from Section 304-B to Section 302 IPC.

11. Coming to the evidence of Dr. Rajinder Rai (PW-4) who conducted medico-legal examination and recorded the statement of the deceased, we find that he specifically deposed that the deceased Meena was brought to the Hospital with the history of burns. Kerosene like smell was present. Smell was also present in the clothes. On examination she was conscious. There were superficial to deep burns about 100% with in a duration of 12 hours. Dr. Rajender Rai (PW-4) stated that the deceased told him that she was called inside and the door was latched from inside. Kerosene oil was sprinkled upon her and her Jethani Suman had ignited the fire by the match stick. Her husband and mother-in-law were also involved in it. After recording the statement of the deceased, he signed it. The statement was again read over to the patient by him in Hindi. She stated Yes. He again asked the patient whether the above statement was correct and she again stated Yes. He again signed the endorsement and put the time of 7.55 a.m. He prepared MLR including statement of the patient recorded by him in his handwriting and his endorsement. He further stated that he had sent ruqa (Ex.PG) to the Incharge, Police Post, General Hospital, Bhiwani at 8.00 a.m. Therefore, Chhattarmal ASI of P.S. Sadar, Bhiwani moved application Ex.PH before him asking his opinion regarding fitness of Meena Devi to make statement, on which, he opined vide endorsement Ex.PH/1 at 8.45 a.m that she was fit to make statement and thereafter he referred the patient to PGIMS, Rohtak vide endorsement Ex.PH/2. He had recorded the statement of deceased Meena Ex.PF correctly without any addition thereto and on the basis of whatever had been stated before him.

12. The Defence had tried to make a futile effort to prove that Dr. Rajinder Rai (PW-4) was an interested witness because cousin of the deceased and his wife were posted in the same Hospital and, thus, undue influence was exercised upon him by them but it was not believed by both the courts in absence of any evidence on the file that alleged cousin of the deceased and his wife were posted in Government Hospital,

Bhiwani at the time the deceased was medico-legally examined at 7.30 a.m on 14.4.2005. Contrary to it, evidence was brought on record that aforesaid cousin of the deceased and his wife were posted in some private nursing home in Siwani, which was about 70 kilometers away from Bhiwani.

13. There is another glaring factor in the present case which proves that Dr. Rajinder Rai (PW-4) was not under influence of anyone because had it been, he or investigating officer Chhattarmal (PW-11) might not have made any effort to call the Magistrate for recording the statement of the deceased. The law is well settled that if the declaration is made voluntarily and truthfully by a person who is physically in a condition to make such statement, then there is no impediment in relying on such a declaration. Such view was taken by this Court in *Kanaksingh Raisingh Rav v. State of Gujarat,* (2003) 1 SCC 73 wherein this Court held:

> "5. ……. The question then is, can a conviction be based primarily on the dying declaration of the deceased in this case? In this regard we do not think it is necessary for us to discuss the cases cited by the learned counsel which are noted hereinabove because, in our opinion, the law is well settled i.e. if the declaration is made voluntarily and truthfully by a person who is physically in a condition to make such statement, then there is no impediment in relying on such a declaration. In the instant case, the evidence of PW 5, the doctor very clearly shows that the deceased was conscious and was medically in a fit state to make a statement. It is because of the fact that a Judicial Magistrate was not available at that point of time, he was requested to record the statement, which he did. His evidence in regard to the state of mind or the physical condition of the deceased to make such a declaration has not been challenged in the cross-examination. That being so, it should be held that the deceased was in a fit state of mind to make a declaration as held by the courts below. The next question for our consideration is whether this

statement is voluntary and truthful. It is not the case of the defence that when she made the statement either she was surrounded by any of her close relatives who could have prompted her to make an incorrect or false statement. In the absence of the same so far as the voluntariness of the statement is concerned, there can be no doubt because the deceased was free from external influence or pressure. So far as the truthfulness of the statement is concerned, the doctor (PW 5) has stated that she has made the said statement which, as noted above, is not challenged in the cross-examination. The deceased in her brief statement has, in clear terms, stated that because of the quarrel between her and the accused, the accused had poured kerosene and set her on fire which, in our opinion, cannot be doubted....."

14. In *Ashok Kumar v. State of Rajasthan,* (1991) 1 SCC 166 this Court noticed that if it was a case of death by burning, entries of injury report in the bed head ticket can be construed as dying declaration. In the said case this Court held:

"11. Entries in the injury report which have been construed as dying declaration by the two courts below were severely criticised and it was submitted that although dying declaration was admissible in evidence and conviction could be recorded on it without corroboration yet the circumstances in which it was recorded created doubt if it was genuine. The High Court for very good reasons rejected similar arguments advanced before it. We also do not find any substance in it. When the deceased was examined by Dr Temani he having found her condition to be serious immediately sent message to the police station and also requested for arranging for recording of the dying declaration. This is corroborated by the entry in the record of the police station. But the Inspector of Police came after 11.00 when the injection of morphine had already been administered to lessen the agony of the patient who thereafter became unconscious. She was, however, as

indicated earlier conscious between 10.00 to 11.00 during which period the bed head ticket was written by Dr Saxena and the entries were made on the injury report. The judge did not doubt the recording on the bed head ticket that the deceased complained of misbehaviour by her brother-in-law. Even the learned counsel could not point out any infirmity or reason to discard it except that by mere word, brother-in-law it was not established that it was appellant, i.e. the effort was to make out a case of doubt. That could have been possible if that entry could have stood alone. But it stands not only corroborated but clarified by identifying the appellant by entry in injury report as the brother-in-law who was responsible for this crime. We perused the injury report and we could not find any reason to doubt its authenticity."

15. What we find in the present case is that the dying declaration (Ext.PF) which was recorded by Dr.Rajinder Rai (PW-4) was also signed by Manoj (appellant no.1) which indicates that appellant No.1 was present when statement was recorded. Nothing on the record to suggest that any of the relation of the deceased was present to influence Dr. Rajinder Rai (PW-4).

16. Thus, we find that there is no infirmity in the finding of the Sessions Judge as affirmed by the High Court.

17. Admittedly, the death of Meena Devi (deceased) is caused by burns i.e. otherwise than under normal circumstances within seven years of her marriage. The complainant (PW-9) father of the deceased has stated that at the time of marriage he had given double bed, sofa set, T.V., cooler and other domestic articles, besides, gold ornaments of 4 tolas, 21 utensils and Rs.2100/- in cash. However, his daughter told him that her in-laws were not satisfied with those articles. When his daughter visited her matrimonial home for the second time, all the accused started taunting her and harassing her raising demand for a motor cycle. She was turned out of her

matrimonial home after giving beatings. Thereafter, she started living with him (PW-9) and stayed with him for 14 months. Then he convened a panchayat consisting of Sant Man Singh, Krishan of Hetampura and others i.e. his brother Satyawan and his brotherhood from village Khera. In that panchayat, the accused assured not to harass Meena in future and then accused Mahabir and Chameli came to take her away and she was accordingly sent to her matrimonial house about 10 months prior to her death. After four days, they again started harassing her by demanding motor cycle and continued beating her. His brother Satpal (PW-10) has also corroborated his deposition. No mitigating circumstances are found on record to disbelieve their statements.

18. In view of such evidence on record both the courts have come to definite conclusion that soon before her death she was subjected to cruelty and harassment by her husband and his relatives in connection with demand for dowry. Therefore all the ingredients are present to convict the appellants under Section 304-B of the IPC. The prosecution proved beyond reasonable doubts that the appellants are guilty for the offence under Section 498-A of the IPC.

19. In these circumstances, we find that the Sessions Judge has recorded cogent and convincing reasons for convicting the appellants for the offences under Sections 304-B and 498-A IPC.

20. So far as conviction of the appellants under Section 302 IPC, as suggested by counsel for the State, we find no wrong to alter the conviction to Section 302 IPC.

21. In *Muthu Kutty and Another v. State by Inspector of Police, Tamil Nadu* (2005) 9 SCC 113 this Court held that when it was found that the accused were responsible for setting the deceased on fire and causing her death, Section 302 instead of Section 304-B was attracted. On facts, no prejudice would be caused to accused-appellants of the said case if the

conviction is altered to Section 304 Pt. II on the basis of conclusions arrived at by the trial court as they were originally charged for offence punishable under Section 302 alongwith Section 304-B IPC.

22. In the present case, we have noticed that after appreciation of evidence, learned Sessions Judge by judgment dated 4.9.2006 specifically held that the prosecution has miserably failed to prove its case against all the four accused for the offence under Sections 302 and 406 r/w Section 34 IPC and, hence, all the four accused were acquitted under the said offence. Against the acquittal of Mahabir Singh the complainant (PW-9) filed an appeal which has been dismissed by the impugned judgment. No appeal has been preferred by the complainant or the State against the acquittal of all the accused for the offences under Section 302 and 406 r/w Section 34 IPC. The finding of Sessions Judge having reached finality, the question of altering the present sentence under Section 304-B to Section 302 does not arise.

23. Lastly, it was submitted on behalf of the appellants to consider reducing the sentence awarded to the appellants from 10 years to 7 years which is the minimum sentence prescribed under Section 304-B IPC considering the facts and circumstances of the case. In the present case we find that the appellants were sentenced for life for the offence under Section 304-B IPC by the trial Court and the High Court already considered the facts and circumstances of the case and reduced the sentence from life imprisonment to 10 years.

24. We find no other circumstances to reduce it to minimum sentence of seven years. In absence of merit, the appeal is dismissed.

25. Bail bonds of the appellant nos. 2 and 3 are cancelled. Appellant nos. 2 and 3 are directed to be taken into custody to serve out remainder of the sentence.

R.P. Appeal dismissed.

LOKESH KUMAR JAIN
v.
STATE OF RAJASTHAN
(Criminal Appeal No. 888 of 2013)

JULY 09, 2013

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

CODE OF CRIMINAL PROCEDURE, 1973:

s. 482 - Quashing of FIR - Investigation pending for more than nine years - In departmental inquiry on identical charges, appellant exonerated in inquiry report - Held: The instant case is a fit one, where High Court should have exercised its power u/s 482 - Records have not been made available to investigating agency - Keeping the investigation pending will be futile as the department is not sure whether original records can be procured for investigation to bring home the charges -- Considering the fact that delay is caused by respondent, the constitutional guarantee of a speedy investigation and trial under Art. 21 of the Constitution has been violated and as appellant has already been exonerated in departmental proceedings for identical charges, FIR is quashed - Constitution of India, 1950 - Art. 21 - Speedy investigation/trial.

On the basis of the report of the Auditor General, noticing an embezzlement of Rs. 4,39,617, the District Literacy Education Officer, got registered on, 4-1-2000, an FIR against the appellant, who was posted as an LDC-cum-Cashier during the relevant period in the said office. The police submitted a final report on 2-6-2000, before the Chief Judicial Magistrate, who, on the application of the complainant, sent back the matter to the police u/s. 156(3) Cr.P.C. on 18-11-2000. Since there was no progress in the

investigation, the appellant, having waited for more than 6 years, filed a petition u/s. 482 Cr.P.C. before the High Court seeking to quash the FIR. However, the High Court declined to interfere. Meanwhile, in the inquiry report submitted on 15.12.2008, the appellant was exonerated in the departmental enquiry.

In the instant appeal, it was contended for the appellant that after filing of the closure report in the year 2000, no effective investigation could take place and the appellant was suffering the harassment for more than 13 years; and that no purpose in continuing the investigation would be served as the appellant was exonerated in departmental enquiry report on the same charges.

Allowing the appeal, the Court

HELD: 1.1 This Court has held that extraordinary power u/s. 482 Cr.PC could be exercised by the High Court to prevent abuse of process of the Court. Need for speedy investigation and trial, as both are mandated by the letter and spirit of the provisions of Cr.PC, have been emphasized by this Court in numerous cases. [Para 13 and 15] [526-C-D; 528-B]

State of Haryana v. Bhajan Lal, **1990 (3) Suppl. SCR 259 = 1992 (Suppl.) 1 SCC 335;** *Vakil Prasad Singh v. State of Bihar,* **2009 (1) SCR 517 = (2009) 3 SCC 355;** *Hussainara Khatoon v. Home Secretary, State of Bihar,* **1979 (3) SCR 169 = (1980) 1 SCC 81;** *Abdul Rehman Antulay v. R.S. Nayak,* **1991 (3) Suppl. SCR 325 (1992) 1 SCC 225;** *P. Ramachandra Rao v. State of Karnataka,* **(2002) 4 SCC 578 - referred to.**

1.2 The instant case is a fit one where the High Court should have exercised its power u/s. 482 Cr.PC. It is not disputed that in the Inquiry Report dated 15.12.2008

submitted by the Inquiry Officer in the departmental proceeding, the appellant was exonerated over the identical charges for which criminal case was lodged. Further, during the investigation inspite of several requests made by the police, the records in respect of allegation were not produced. No evidence came against the appellant, from the file of the education department. The CJM, by his order dated 18-11-2000 on perusal of Final Report, in exercise of power conferred u/s. 156(3) Cr.PC directed the SHO to re-investigate the case with the assistance of complainant and to procure the original records. However, for nine years, records were not made available. [Para 27 and 32] [540-D-E; 545-E-H; 546-A]

P.S. Rajya v. State of Bihar, **1996 (2) Suppl. SCR 631= (1996) 9 SCC 1 - referred to.**

1.3 There is nothing on the record, even by way of counter affidavit filed before this Court to show that the record has now been traced to make it available to the investigating agency. There is no probability of finding out original documents or evidence mentioned in the counter affidavit. Though, delay has been alleged on the part of the appellant, there is nothing on the record to suggest that he caused delay in the matter of investigation. On the other hand, the silence on the part of the respondent regarding availability of the original record or other evidence before the investigating agency shows that the delay was caused due to inaction on the part of the department. [Para 33] [446-B-D]

1.4 Therefore, keeping the investigation pending will be futile as the respondent including Directorate for the State Literacy Programme is not sure whether original records can be procured for investigation to bring home the charges. Considering the fact that delay is caused by the respondent, the constitutional guarantee of a speedy investigation and trial under Art. 21 of the Constitution

has been violated and as the appellant has already been exonerated in the departmental proceedings for identical charges, keeping the case pending against the appellant for investigation, is unwarranted. The FIR, is therefore, quashed. [Para 33] [446-D-F]

Case Law Reference:

1990 (3) Suppl. SCR 259	**referred to**	**para 14**
1979 (3) SCR 169	**referred to**	**para 16**
1991 (3) Suppl. SCR 325	**referred to**	**para 17**
(2002) 4 SCC 578	**referred to**	**para 18**
2009 (1) SCR 517	**referred to**	**para 19**
1996 (2) Suppl. SCR 631	**referred to**	**para 28**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 888 of 2013.

From the Judgment and Order dated 02.03.2012 of the High Court of Rajasthan, Jaipur Bench; Jaipur in SB Criminal Misc. Petition No. 605 of 2006.

Dr. Sumant Bhardwaj, Mridula Ray Bharadwaj for the Appellant.

Sonia Mathur, Sushil Kumar Dubey, Pragati Neekhra for the Respondent.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. Leave granted. This appeal has been preferred by the appellant against the order dated 2nd March, 2012 passed by the Rajasthan High Court, Jaipur Bench in S.B. Criminal Miscellaneous Petition No.605 of 2006 titled Lokesh Kumar Jain v. State of Rajasthan. By the impugned order, the High

Court refused to quash the FIR No.10/2000 lodged against the appellant under Section 409 IPC at Police Station, Dausa. The petition under Section 482 Cr.PC was disposed of by the High Court with the following observation:

"This criminal misc. petition has been filed under section 482 Cr.PC for quashing of FIR No.10/2000 registered at Police Station, Dausa.

This Court has asked the learned counsel for the petitioner whether challan has been filed or not. He replied that still challan has not been filed and the matter is under investigation.

If it is to, the petitioner is permitted to file representation/documents on the basis of the judgment of the Hon'ble Supreme Court or any other Court, the I.O. Should investigate the matter on the basis of the judgment/documents/representation so filed by the petitioner and thereafter shall file progress before the court concerned.

Accordingly, the petition is disposed of."

2. In order to appreciate the rival stands of the parties, it would be necessary to notice the background facts in a greater detail.

3. The appellant was posted as Lower Division Clerk (for short, 'LDC') during the period November, 1996 to November,1997 in the Office of District Literacy Education Officer, Dausa. On 4th January, 2000, the District Literacy Education Officer, Dausa registered a First Information Report (for short, 'FIR') in Police Station, Dausa alleging therein that when the appellant was posted as LDC-cum-Cashier, a financial irregularity was committed by him. As per the report of Auditor General, an embezzlement of Rs.4,39,617/- has been discovered. The original copies of the bills and documents were available in the office of the Auditor General and in the

office of Directorate for the State Literacy Programme. Therefore, on the basis of report given by the Auditor General, the FIR was filed.

4. On the basis of report submitted by the complainant, the Police lodged FIR No.10/2000 of the incident alleged to have taken place in the year 1996-1997, implicating appellant as an accused. After making investigation, the Police submitted a final report in the matter on 2nd June,2000 before the Chief Judicial Magistrate, Dausa (hereinafter referred to as the, "CJM, Dausa").

5. During the pendency of the matter before the CJM, Dausa, the complainant filed an application on 18th November, 2000 before the CJM, Dausa requesting therein to send back the matter to the Police for further investigation. The CJM, Dausa vide order dated 18th November, 2000, sent back the matter to the Police under Section 156(3) of Cr.PC. Since then the matter remained pending with the police. According to the appellant, he met as well as represented on a number of times to the Police Authorities and the Departmental Authorities but still no action has been taken by the Authorities. Neither final report is submitted nor the challan is being filed and the matter is pending since then. Earlier in the final report, it was stated that the Police informed that the original copies of the bills and another documents are not available, therefore, no investigation could be made.

6. Having waited for more than six years, the appellant preferred a petition under Section 482 Cr.PC before the Rajasthan High Court being Criminal Miscellaneous Petition No.605/2006 to set aside the FIR No.10/2000 registered at Police Station, Dausa.

7. In the meantime, a Departmental Inquiry was initiated against the appellant for the same charges in which the Inquiry Officer after inquiry submitted his report on 15th December, 2008 exonerating the appellant from the charges.

8. The High Court by impugned order dated 2nd March, 2012 chose not to interfere with the FIR and again left the matter in the hands of the authorities. Hence, the special leave petition was filed by the appellant before this Court.

9. Learned counsel for the appellant challenged the decision of the High Court on the following grounds:

(a) Since the date of order passed by the CJM, Dausa the appellant has been suffering the harassment of investigation for more than 13 years which is not completed till date because of lack of supply of documents.

(b) After filing the closure report way back in the year 2000 no effective investigation has taken place.

(c) If investigation is allowed to continue even in absence of document, it will be futile and can only cause harassment to the appellant, serving no purpose as even in the departmental inquiry for said charges conducted against the appellant in the year 2009, the appellant was exonerated as none of the charges which also form the basis of the present FIR could be proved against the appellant.

10. He also relied on decisions of this Court which will be discussed in the following paragraphs of this judgment.

11. The State of Rajasthan has filed counter affidavit. According to them, the investigation is still continuing and the appellant himself is delaying the same due to non-cooperative attitude adopted by him. In any case, from the investigation carried out till now, offence under Section 409 IPC is clearly made out against the appellant and on this ground alone, the petition seeking quashing of FIR is liable to be dismissed and the legal process deserves to be taken to a logical end.

12. Though the aforesaid stand has been taken by the respondent in their counter affidavit, the respondent is silent

about the documents i.e. whether they have been made available to the Police for further investigation. Further no specific instance was shown to suggest that the appellant failed to cooperate with the Investigating Agency on any particular date.

13. Before deciding the question whether under the given circumstances the High Court should have exercised its inherent powers under Section 482 Cr.PC to prevent abuse of process of any court or otherwise to secure the ends of justice, it will be desirable to notice some of the decisions of this Court relating to categories of cases wherein extraordinary power under Section 482 Cr.PC could be exercised by the High Court to prevent abuse of process of the Court.

14. In *State of Haryana v. Bhajan Lal,* 1992 (Suppl.) 1 SCC 335 this Court while formulating the categories of cases by way of illustration, wherein the extraordinary power under the aforestated provisions could be exercised by the High Court to prevent abuse of process of the Court and observed as follows:-

"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously

instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."

15. Need for speedy investigation and trial as both are mandated by the letter and spirit of the provisions of Cr.PC have been emphasized by this Court in numerous cases.

16. In *Hussainara Khatoon v. Home Secretary, State of Bihar,* (1980) 1 SCC 81 this Court observed that Article 21 confers a fundamental right on every person not to be deprived of his life or liberty except according to procedure established by law; that such procedure is not some semblance of a procedure but the procedure should be "reasonable, fair and just"; and therefrom flows, without doubt, the right to speedy trial. This Court further observed that:

"8. In regard to the exercise of the judicial power to release a prisoner awaiting trial on bail or on the execution of a personal bond without sureties for his appearance, I have to say this briefly. There is an amplitude of power in this regard within the existing provisions of the Code of Criminal Procedure, and it is for the courts to fully acquaint themselves with the nature and extent of their discretion in exercising it. I think it is no longer possible to countenance a mechanical exercise of the power. What should be the amount of security required or the monetary obligation demanded in a bond is a matter calling for the careful consideration of several factors. The entire object being only to ensure that the undertrial does not flee or hide himself from trial, all the relevant considerations which enter into the determination of that question must be taken into account. A synoptic impression of what the considerations could be may be drawn from the following provision in the United States Bail Reform Act of 1966:

> *"In determining which conditions of releases will reasonably assure appearance, the judicial officer*

shall, on the basis of available information, take into account the nature and circumstances of the offence charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, the length of his residence in the community, his record of convictions, and his record of appearance at court proceedings or of flight to avoid prosecution or failure to appear at court proceedings."

These are considerations which should be kept in mind when determining the amount of the security or monetary obligation. Perhaps, if this is done the abuses attendant on the prevailing system of pre-trial release in India could be avoided or, in any event, greatly reduced."

17. In *Abdul Rehman Antulay v. R.S. Nayak,* (1992) 1 SCC 225, the Court formulated as many as 11 propositions with a note of caution that these were not to be treated as exhaustive and were meant only to serve as guidelines.

86. In view of the above discussion, the following propositions emerge, meant to serve as guidelines. We must forewarn that these propositions are not exhaustive. It is difficult to foresee all situations. Nor is it possible to lay down any hard and fast rules. These propositions are:

(1) Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused. The fact that a speedy trial is also in public interest or that it serves the social interest also, does not make it any the less the right of the accused. It is in the interest of all concerned that the guilt or innocence of the accused is determined as quickly as possible in the circumstances.

(2) Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, trial, appeal, revision and re-trial. That is how, this Court has understood this right and there is no reason to take a restricted view.

(3) The concerns underlying the right to speedy trial from the point of view of the accused are:

(a) the period of remand and pre-conviction detention should be as short as possible. In other words, the accused should not be subjected to unnecessary or unduly long incarceration prior to his conviction;

(b) the worry, anxiety, expense and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal; and

(c) undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witnesses or otherwise.

(4) At the same time, one cannot ignore the fact that it is usually the accused who is interested in delaying the proceedings. As is often pointed out, "delay is a known defence tactic". Since the burden of proving the guilt of the accused lies upon the prosecution, delay ordinarily prejudices the prosecution. Non-availability of witnesses, disappearance of evidence by lapse of time really work against the interest of the prosecution. Of course, there may be cases where the prosecution, for whatever reason, also delays the proceedings. Therefore, in every case, where the right to speedy trial is alleged to have been infringed, the first question to be put and answered is - who is responsible for the delay? Proceedings taken by either party in good faith, to vindicate their rights and interest, as perceived by them, cannot be treated as

delaying tactics nor can the time taken in pursuing such proceedings be counted towards delay. It goes without saying that frivolous proceedings or proceedings taken merely for delaying the day of reckoning cannot be treated as proceedings taken in good faith. The mere fact that an application/petition is admitted and an order of stay granted by a superior court is by itself no proof that the proceeding is not frivolous. Very often these stays are obtained on ex parte representation.

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

(6) Each and every delay does not necessarily prejudice the accused. Some delays may indeed work to his advantage. As has been observed by Powell, J. in Barker "it cannot be said how long a delay is too long in a system where justice is supposed to be swift but deliberate". The same idea has been stated by White, J. in U.S. v. Ewell in the following words:

'... the Sixth Amendment right to a speedy trial is necessarily relative, is consistent with delays, and has orderly expedition, rather than mere speed, as its essential ingredients; and whether delay in completing a prosecution amounts to an unconstitutional deprivation of rights depends upon all the circumstances.'

However, inordinately long delay may be taken as presumptive proof of prejudice. In this context, the fact

of incarceration of accused will also be a relevant fact. The prosecution should not be allowed to become a persecution. But when does the prosecution become persecution, again depends upon the facts of a given case.

(7) We cannot recognize or give effect to, what is called the 'demand' rule. An accused cannot try himself; he is tried by the court at the behest of the prosecution. Hence, an accused's plea of denial of speedy trial cannot be defeated by saying that the accused did at no time demand a speedy trial. If in a given case, he did make such a demand and yet he was not tried speedily, it would be a plus point in his favour, but the mere non-asking for a speedy trial cannot be put against the accused. Even in USA, the relevance of demand rule has been substantially watered down in Barker and other succeeding cases.

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

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

(10) It is neither advisable nor practicable to fix any time-

limit for trial of offences. Any such rule is bound to be qualified one. Such rule cannot also be evolved merely to shift the burden of proving justification on to the shoulders of the prosecution. In every case of complaint of denial of right to speedy trial, it is primarily for the prosecution to justify and explain the delay. At the same time, it is the duty of the court to weigh all the circumstances of a given case before pronouncing upon the complaint. The Supreme Court of USA too has repeatedly refused to fix any such outer time-limit in spite of the Sixth Amendment. Nor do we think that not fixing any such outer limit ineffectuates the guarantee of right to speedy trial.

(11) An objection based on denial of right to speedy trial and for relief on that account, should first be addressed to the High Court. Even if the High Court entertains such a plea, ordinarily it should not stay the proceedings, except in a case of grave and exceptional nature. Such proceedings in High Court must, however, be disposed of on a priority basis."

18. Seven learned Judges of this Court in *P. Ramachandra Rao v. State of Karnataka,* (2002) 4 SCC 578, considered the validity of the ratio laid down in Common Cause case (I) as modified in Common Cause case (II) and Raj Deo Sharma (I) and (II) cases wherein this Court prescribed periods of limitation beyond which the trial of a criminal case or a criminal proceeding cannot continue and directed to close the proceeding by an order acquitting or discharging the accused in such cases. In the said case of P. Ramachandra Rao(supra) after exhaustive consideration of the authority on the subject this Court held:

"29. For all the foregoing reasons, we are of the opinion that in Common Cause case (I) [as modified in Common Cause (II)] and Raj Deo Sharma (I) and (II) the Court could not have prescribed periods of limitation beyond

which the trial of a criminal case or a criminal proceeding cannot continue and must mandatorily be closed followed by an order acquitting or discharging the accused. In conclusion we hold:

(1) The dictum in A.R. Antulay case is correct and still holds the field.

(2) The propositions emerging from Article 21 of the Constitution and expounding the right to speedy trial laid down as guidelines in A.R. Antulay case adequately take care of right to speedy trial. We uphold and reaffirm the said propositions.

(3) The guidelines laid down in A.R. Antulay case are not exhaustive but only illustrative. They are not intended to operate as hard-and-fast rules or to be applied like a straitjacket formula. Their applicability would depend on the fact situation of each case. It is difficult to foresee all situations and no generalization can be made.

(4) It is neither advisable, nor feasible, nor judicially permissible to draw or prescribe an outer limit for conclusion of all criminal proceedings. The time-limits or bars of limitation prescribed in the several directions made in Common Cause (I), Raj Deo Sharma (I) and Raj Deo Sharma (II) could not have been so prescribed or drawn and are not good law. The criminal courts are not obliged to terminate trial or criminal proceedings merely on account of lapse of time, as prescribed by the directions made in Common Cause case (I), Raj Deo Sharma case (I) and (II). At the most the periods of time prescribed in those decisions can be taken by the courts seized of the trial or proceedings to act as reminders when they may be persuaded to apply their judicial mind to the facts and circumstances of the case before them and determine by taking into consideration the several relevant factors as pointed out in A.R. Antulay case and decide whether the trial or proceedings have become so

inordinately delayed as to be called oppressive and unwarranted. Such time-limits cannot and will not by themselves be treated by any court as a bar to further continuance of the trial or proceedings and as mandatorily obliging the court to terminate the same and acquit or discharge the accused.

(5) The criminal courts should exercise their available powers, such as those under Sections 309, 311 and 258 of the Code of Criminal Procedure to effectuate the right to speedy trial. A watchful and diligent trial Judge can prove to be a better protector of such right than any guidelines. In appropriate cases, jurisdiction of the High Court under Section 482 CrPC and Articles 226 and 227 of the Constitution can be invoked seeking appropriate relief or suitable directions.

(6) This is an appropriate occasion to remind the Union of India and the State Governments of their constitutional obligation to strengthen the judiciary - quantitatively and qualitatively - by providing requisite funds, manpower and infrastructure. We hope and trust that the Governments shall act."

19. This Court in *Vakil Prasad Singh v. State of Bihar,* (2009) 3 SCC 355 considered the question of quashing of criminal proceedings due to delay, when warranted. Referring to earlier decisions of this Court on the issue, this Court held that speedy investigation and trial, both are enshrined in Cr.PC. The right to speedy trial is guaranteed under Article 21 and the same is applicable not only to actual proceedings in court but also includes within its sweep the preceding police investigations as well.

20. In *Vakil Prasad Singh* (supra) one search operation was conducted by the office of Superintendent of Police, Crime Investigation Department (Vigilance), Muzaffarpur, on the basis of a complaint lodged by a civil contractor against the accused, an Assistant Engineer in the Bihar State Electricity Board (Civil)

Muzaffarpur, for allegedly demanding a sum of Rs.1000 as illegal gratification for release of payment for the civil work executed by him. The case was instituted on 8th April, 1981 and the charge-sheet for aforesaid offences was filed against the accused on 28th February, 1982. The Magistrate took cognizance on 9th December,1982 but nothing substantial happened. The accused filed a petition under Section 482 Cr.PC before the Patna High Court against the order passed by the Special Judge, Muzaffarpur taking cognizance of the said offences, on the ground that the Inspector of Police, who had conducted the investigations, on the basis whereof the charge-sheet was filed, had no jurisdiction to do so. Accepting the plea, the High Court by its order dated 7th December, 1990 quashed the order of the Magistrate taking cognizance and directed the prosecution to complete the investigation within three months. However, no further progress was made and the matter rested there till 1998, when the accused filed another petition under Section 482 Cr.PC, giving rise to the appeal before this Court.

21. Having noticed the ratio laid down by this Court in number of cases including *State of Haryana v. Bhajan Lal* (supra), *Hussainara Khatoon* (supra), *Abdul Rehman Antulay* (supra) etc. and the relevant facts of *Vakil Prasad Singh* (supra) case, this Court was of the view that it was a fit case where the High Court should have exercised its power under Section 482 Cr.PC as the State was not sure as to whether a sanction for prosecuting the accused is required and if so, whether it has been granted or not and that the case was pending for about 17 years and the proceedings against the appellant was quashed.

22. To find out the factual scenario, we have noticed the background in a greater detail as mentioned hereunder:

23. On 4th January, 2000, the following allegation was made by the complainant-District Literacy & Education Mission Officer, Dausa in the FIR, the relevant portion of which is quoted below:

"First Information Report

Office of literacy and continuous education mission, Dausa File No.672 dated 4.1.2000

To,

The SHO

Police Station: Dausa

Subject: Regarding misappropriation of the amount of pending Bill for the period 11.96-11.97 by Sh.Lokesh Jain LDC(Cashier),

In reference to the above subject, it is requested that Sh. Lokesh Jain, Lower Division Clerk (Cashier) presently under suspension while working on the post of cashier has committed financial irregularities for which financial department and office of CAG conducted an enquiry which is annexed herewith.

As per the enquiry report Rs.4,39,617 has been misappropriated, all the copies of the original bill are present in the office of CAG and the original documents are available in the office of Directorate State Literacy and Education Mission.

Hence, it is requested that an FIR may be got registered on the basis of the annexed enquiry report of the office of the CAG.

Enclosures enquiry 8 pages

Sd/-
District Literacy & Education
Mission Officer, Dausa"

24. After conducting investigation, the Investigation Agency submitted Final Report on 2nd June,2000 before the CJM,

Dausa, the relevant portion of which reads as follows:

"Brief Facts of the case:

Respected Sir,

The facts of the present case are that on 4.1.2000 Sh. Murari lal S/o Sh. Harmukh Prasad, caste: Brahmin, aged 56 years, R/o Village: Oonch, P.S: Nandbai, District:Bharatpur presently posted as district literacy and mission education officer, Dausa, presented in the Police Station and filed one report against Sh. Lokesh Kumar Jain (LDC) presently under suspension that Lokesh Jain while working as cashier, committed certain financial irregularities which emerged during an enquiry conducted by the office of the Controller and Auditor General as per which misappropriation of Rs.4,39,619/- has been reflected.

Copy of report is annexed; copies of the original document of CAG and original document of state literacy and mission education office are available. On the basis of the said report FIR No.10/2000 u/s 409 of IPC was registered and investigation witnesses were recorded. Oral requests were made several times to the concerned department for producing the requisite document pertaining to the case but was ineffective subsequently on 13.4.2000. A notice was issued u/s 91 Cr.PC for making available of the requisite document but despite that no record was made available.

Again on 21.4.2000 a notice u/s 91 Cr.PC was issued and directions were given that in case of non-supply of document one sided action will be taken. No document, no record was produced.

During the course of investigation pertaining to Lokesh Jain (LDC) for the period 11.96 -11.97

statements of Sh. Kailash and Ram Kishor Bairwa (Jr. accountant) who stated that during investigation credit-debit record was not made available and they showed their inability to produce the record before the I.O, No. T.P. 31162, a complaint was also given in this regard, C.O. has also written to the department to produce the record but they showed their inability to produce the same.

The present case, several requests were made for production of record but the same was not produced. No evidence came against Sh. Lokesh Jain, from the file of the education department. The case has been pending since long and there is no probability of availability of record in the near future. Further investigation will be taken on the receipt of the records from the concerned departments.

Hence FR No.67/2000 is being filed for kind perusal and acceptance because of insufficient evidence."

25. On perusal of Final Report, the CJM, Dausa passed the following order:

"Before the Chief Judicial Magistrate
District: Dausa, Dausa
Complainant: Murari Lal
FIR No. 10/2000

18.11.2000

Present App.

Present complainant: Sh Murari Lal Sharma

In this case final report has been filed with the avernment that the original record has not been supplied to the SHO and hence investigation cannot be carried out. The

complainant Murari Lal is present and he is ready to cooperate with the police officers for procuring the said records.

Hence u/s 156(3) Cr.PC the SHO Dausa is directed to re-investigate the case with the assistance of Sh. Murari Lal literacy and mission education officer to procure the original records. Final report is not accepted, case diary is being returned.

Sd/- CJM
District: Dausa, Dausa"

26. Thereafter, nothing on the record suggest that after the order dated 18th November, 2000 passed by the CJM, Dausa the respondent produced the original records before the Investigation Agency for further investigation.

27. At least for more than nine years neither original records could be traced by the Authorities nor any relevant document could be found to implicate the appellant, as evident from the Inquiry Report dated 15th December,2008 submitted by the Inquiry Officer whereby the appellant was exonerated over the identical charges for which criminal case was lodged. The respondent inspite of repeated requests by the Inquiry Officer failed to produce any records including originals from the Bank to establish the guilt of the delinquent official, Sh.Lokesh Kumar Jain. The relevant portions of Inquiry Report dated 15th December, 2008 are quoted hereunder:

"The prosecuting officer after the lapse of various dates has presented the following documents:

a) Books of accounts, Encashment Register and Bill register (all photocopies)

b) Letter dated 26-04-2004 issued by S.B.B.J. Bank Branch Dausa which was addressed to the office of Literacy officer, Dausa.

c) Letter dated 21-11-2008 issued by the office of the treasurer of the treasury.

d) Letter bearing CA/II/Dausa/176 dated 04-11-2008 issued by the office of the chief auditor.

According to the aforesaid documents, the photocopies of the original documents was shown to the alleged officer. After the perusal of the photocopies, the alleged officer denying the same has again filed the application on 12-01-2009 and demanded that he might be allowed to peruse the original records. The objections were raised by the alleged officer and the prosecuting officer was given strict direction to present the original record and evidence. On the next several dates also the prosecuting officer failed to produce any other original record.

On 24-07-2009, the alleged officer along with the assistant perused the case and the related document and letters in the presence of the prosecution party and for the purpose of the presenting the written argument the case was fixed for 29-07-2009. The defence appearing along with the assistant has filed his written argument which was taken on record.

The prosecution party and the defence party were given one last and final opportunity to present the witness/ evidence/documents in accordance with the principle of natural justice. On the date fixed neither the prosecution nor the defence has filed their witness/evidence/ documents.

According to the notification, following offence was alleged against Shri Jain on 22-12-2007:

1. That you Shri Lokesh Kumar Jain (Cashier) being in the office of the District Education and Education officer Dausa from 20-11-1995 to 13-11-1997, was given the work of accountant.

According the inquiry report of 11/96 to 11/97, an embezzlement of Rs.4,39,617/- was found to be done by you.

The details of the allegation is depicted as follows:

a) Bills of F.V.C. amounting to Rs.65,330/- is found to be entered in the Bill Register but after the passing of the bill from the treasury, the entry of which was not found in the encashment register and books of account.

There is no entry of any bill of F.V.C. in the aforesaid manner in the photocopy of the records (Cash book, Encashment Register) filed by the prosecution in respect of the offence alleged. From the bare perusal it becomes clear that the bill which is entered, the earlier entry record of which is entered according to the rules. The letter of both the agencies were produced in respect of the withdrawal of various bills of F.V.C. amounting to Rs.65,330/- (P-1) from the banks and in respect of passing from the treasury and the said bills are also found to be mentioned in the bill register (P-2) (P-3). The entries of the bills are not available in the other records apart from the Bill Register. On the basis of the documents produced (P-2) (P-3) by the prosecution, the original bill which was to be obtained from the office of the Chief Auditor, was not received (P-4).

Hence it is not clear that which person has withdrawn the said bills from the bank nor the original bill is there on record, looking into the pages of which conclusion could be drawn that who has withdrawn the amount of the said bills from the bank.

In the light of the said evidence (P-2) (P-3) the first part of the offence (1), the offence of embezzlement of amount by withdrawing the amount of said bills from the banks could not establish the guilt of the Delinquent Officer Shri

Lokesh Kumar Jain. Hence the part of the offence is not established in respect of the accused.

2. The entry of the Bills of F.V.C. amounting to Rs.2,96,100/- is found in the Bill Register, Encashment Register and Books of account:-

In respect of the said offence, the original bill or the carbon copy of the said bills is not filed by the prosecution. On the basis of the documents P-1 and P-2 filed by the State, the delinquent member could not be held guilty for the withdrawal of the amount of the said bills. The said offence merely on the basis of the letters of the bank and Treasury could not be regarded as cogent evidence. The entries of the bills are not available on any record of the related office. In the inquiry, the original bills are not available with the Assistant Agency Treasury nor the carbon copies of the bills are available in the office. In the said facts and circumstances, it could not be established that the said bills are withdrawn by Shri Lokesh Kumar Jain because in ordinary course of business it is not possible for single person to execute the entire work that is to say generation of bills, getting it passed and withdrawing the same.

Hence the second part of offence is not proved against Shri Lokesh Kumar Jain for want of cogent and sufficient proof.

3. Embezzlement of the amount of Rs.78,179/- by withdrawing the bills of the other department in the head of Literacy and Education in the Budget.

The prosecution has filed the evidence of (P-2) (P-3) in respect of the offence. According to the evidence, the payment was made for the purpose of making the payment of the bills of said Sparsh Vidyalaya RAMAVI Dhigariya but in the budget the same is under the head of Literacy and Education department.

The entire part of the offence is completely disputed. There is withdrawal of the bills of the other department in the head of Literacy and Education in the Budget but it is not clear as to who has received the payments. Merely on the basis of the Treasury office regarding the fact of expenditure and receiving the payments does not prove the delinquent officer to be the guilty of the offence. It is possible that error might have happened by the other assisting agency. It is also impossible to pass the bill merely on the budget head. It could not be ascertained, without looking to pages of the original records, whether the guilty officer has obtained the payment of the bills from the bank or not.

CONCLUSION:

On the basis of the records, evidence and documents presented in the proceedings and upon the basis of written and oral arguments of both the parties, the undersigned comes to the conclusion that who was made the payment of amount of various bills alleged in the offence is doubtful. All the said bills were passed by the Treasurer. The original and carbon copies of the said entire bills is not available with the department. Merely on the basis of the letters of the Assisting Agencies the offence against the alleged officer is not found to be established.

Sd/- Chitarmal Meena
Inquiry Officer and Principal Officer,
RAU Department Bhandarej, Dausa."

28. In *P.S. Rajya v. State of Bihar,* (1996) 9 SCC 1, this Court noticed that the appellant was exonerated in the departmental proceeding in the light of report of the Central Vigilance Commission and concurred by the Union Public Service Commission. The criminal case was pending since long, in spite of the fact that the appellant was exonerated in the departmental proceeding for same charge.

29. Having regard to the aforesaid fact, this Court held that if the charges which is identical could not be established in a departmental proceedings, one wonders what is there further to proceed against the accused in criminal proceedings where standard of proof required to establish the guilt is far higher than the standard of proof required to establish the guilt in the departmental proceedings.

30. Having regard to the factual scenario, noted above, and for the reasons stated below, we are of the opinion that the present case of the appellant is one of the fit cases where the High Court should have exercised its power under Section 482 Cr.PC. It is not disputed by the respondent that the departmental proceeding was initiated against the appellant with regard to identical charges made in the FIR. It was alleged that as per CAG Inquiry Report dated 15th December, 2008 Rs.4,39,617/- has been misappropriated by the appellant, all the copies of original bills and documents are available in the office of CAG and the original documents are available in the office of the Directorate, State Literacy Programme.

31. In the departmental proceeding identical allegation was made that as per the Inquiry Officer Report, an embezzlement of Rs.4,39,617/- was found to be done by the appellant.

32. During the investigation inspite of several requests made by the Investigating Agency (Police), the records in respect of allegation were not produced. No evidence came against the appellant-Lokesh Kumar Jain, from the file of the education department. As the case was pending since long and there was no possibility of availability of record in the near future, FR No.67/2000 against the appellant was filed before the CJM, Dausa. The CJM, Dausa by his order dated 18th November, 2000 on perusal of Final Report, in exercise of power conferred under Section 156(3) Cr.PC directed the SHO, Dausa to re-investigate the case with the assistance of complainant and to procure the original records. Inspite of order

dated 18th November, 2000, for nine years, records were not made available, as apparent from the Inquiry Report dated 15th December,2008.

33. There is nothing on the record, even by way of counter affidavit filed before this Court to show that record has now been traced to make it available to the Investigating Agency. There is no probability of finding out original documents or evidence mentioned in the counter affidavit. Though, delay has been alleged on the part of the appellant, there is nothing on the record to suggest that the appellant caused delay in the matter of investigation. On the other hand, the silence on the part of the respondent regarding availability of the original record or other evidence before the Investigating Agency shows that the delay caused due to inaction on the part of the respondent. Therefore, in our view, keeping investigation pending for further period will be futile as the respondent including Directorate for the State Literacy Programme is not sure whether original records can be procured for investigation and to bring home the charges. Considering the fact that delay in the present case is caused by the respondent, the constitutional guarantee of a speedy investigation and trial under Article 21 of the Constitution is thereby violated and as the appellant has already been exonerated in the departmental proceedings for identical charges, keeping the case pending against the appellant for investigation, is unwarranted, the FIR deserves to be quashed.

34. In the result, the appeal is allowed and the FIR No.10/2000 lodged in Police Station, Dausa as against the appellant is hereby quashed.

R.P. Appeal allowed.

BHAGWATI DEVELOPERS PVT. LTD.
v.
PEERLESS GENERAL FINANCE & INVESTMENT COMPANY LTD AND ANR.
(Civil Appeal No. 7445 of 2004)

JULY 15, 2013

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

SECURITIES CONTRACTS (REGISTRATION) ACT, 1956:

s.13 - Contract in notified areas illegal in certain circumstances - Transfer of shares of Peerless General Finance and Investment Company (Peerless) - Held: In the instant case, the place where the contract for sale of shares in question has been entered is a notified area for the purpose of s.13 -- Further, the contract is not between the members of a recognized stock exchange and, therefore, as held by the Company Law Board, is in violation of s.13.

s. 2(h)(i) - 'Securities' - 'Shares of Pearless General Finance and Investment Company - Held: For shares of a public limited company to come within the definition of securities they have to satisfy that they are marketable - 'Marketability' requires free transferability -- Subject to certain limited statutory restrictions, the shareholders possess the right to transfer their shares, when and to whom they desire -- It is this right which satisfies the requirement of free transferability -- Shares of public limited company though not listed in stock exchange, come within the definition of 'securities' and, therefore, provisions of the Act would apply including the indictments contained in s.13 thereof.

ss.2(i) and 16 - 'Spot delivery contract' - Explained -

Shares of Peerless transferred - Part of consideration passed more than 6 years after the transfer - Held: The transaction does not come within the expression 'spot delivery contract' as defined in s.2(i) and, as such is, in violation of s.16 and Notification dated 27.6.1969 - Central Government Notification dated 27.6.1969.

On 30.10.1987, respondent no. 2 agreed to transfer 3530 shares of Peerless General Finance and Investment Company (respondent no. 1) to the appellant by way of repayment of loan. But the transfer deeds were not properly filled in nor were executed. Meanwhile respondent no. 2 received bonus shares and there arose a dispute between the appellant and respondent no. 2 with regard to entitlement to bonus shares. Ultimately, by compromise decree dated 28.11.1994, it was decided that respondent no. 2 would retain as absolute owner the dividend of the entire shares upto the accounting year 1989-90 as part of the consideration for the settlement, besides a sum of Rs.10 lakh paid by the appellant by pay order dated 21.11.1994. Accordingly, the appellant on 12.12.1994 lodged the transfer deed in respect of 14120 shares with Peerless for their transfer. Peerless refused to register the same on the ground that the transaction was in violation of provisions of the Securities Contracts (Registration) Act, 1956. The Company Law Board held that the transfer of shares in favour of the appellant was contrary to ss.13 and 16 of the 1956 Act. The Company Judge of the High Court also held against the appellant.

In the instant appeal, the questions for consideration before the Court were: (i) "whether the provisions of Regulation Act will apply to the shares of a public limited company which are admittedly not listed on any stock exchange?" and (ii) "whether the contract in question is a spot delivery contract".

Dismissing the appeal, the Court

HELD: 1.1 Section 13 of the Securities Contracts (Regulation) Act, 1956 lays down that contract in relation to securities in notified areas is illegal if made otherwise than between the members of recognized stock exchange. It is not in dispute that the place where the contract for sale of shares in question has been entered is a notified area for the purpose of s.13 of the Regulation Act. Further, the contract is not between the members of a recognized stock exchange. [para 10-11] [558-E; 559-C-E]

1.2 Notwithstanding that the shares of Peerless, a public limited company in respect of which the appellant had sought rectification, are not listed in the stock exchange, if shares come within the definition of "securities" as defined u/s 2(h)(i) of the Regulation Act, the indictments contained in s.13 would apply. The Regulation Act was enacted to prevent "undesirable transaction in securities by regulating business of dealing therein" and from that one cannot infer that it was to apply only to the transfer of shares on the stock exchange. [para 15 and 24] [560-E-F; 565-D-E]

1.3 The definition of the term "securities" in s.2(h)(i) of the Regulation Act makes it evident that for shares of a public limited company to come within the definition of securities they have to satisfy that they are marketable. The expression "marketable" has been equated with the word saleable. The number of persons willing to purchase such shares would not be decisive. What is required is free transferability. Subject to certain limited statutory restrictions, the shareholders possess the right to transfer their shares, when and to whom they desire. It is this right which satisfies the requirement of free transferability. However, when the statute prohibits or limits transfer of shares to a specified category of people with onerous conditions or restrictions, the right of shareholders to

transfer or the free transferability is jeopardized and in that case those shares with these limitations cannot be said to be marketable. Therefore, the shares of Public Limited Company though not listed in the stock exchange come within the definition of securities and, as such, the provisions of the Regulation Act would apply. [para 16 and 18] [561-B-C, G-H; 562-A-C]

Naresh K. Aggarwala & Co. vs. Canbank Financial Services Ltd. and Another **2010 (6) SCR 1 = (2010) 6 SCC 178 - relied on.**

B.K.Holdings (P) Ltd. v. Prem Chand Jute Mills & Ors. **(1983) 53 Com.Cases 367 (Cal.);** *East Indian Produce Ltd. v. Naresh Acharya Bhaduri & Ors.* **(1988) 64 Com. Cases 259 (Cal.) - approved.**

Brooke Bond India Ltd. v. U.B.Ltd and Ors. **(1994) 79 Com.Cases 346 (BHC) - disapproved.**

Dahiben Umedbhai Patel and Others v. Norman James Hamilton and Ors. **(1985) 57 Com. Cases 700(BHC) - distinguished.**

Black's Law Dictionary (Sixth Edition); and Oxford English Dictionary, **Vo. 1 p.1728 - referred to.**

2.1 Section 16(1) of the Regulation Act confers power on the Central government to prohibit contracts in certain cases. The provision makes it evident that in order to prevent undesirable stipulation in specified securities in any State or area, the Central Government by notification is competent to declare that no person in any State or area specified in the notification shall, save with the permission of the Central Government, enter into any contract for sale or purchase of any security specified in the notification. The Central Government in exercise of the said power, issued notification dated 27.6.1969 and

declared that in the whole of India "no person" shall "save with the permission of the Central Government enter into any contract for the sale or purchase of securities other than such spot delivery contract" as is permissible under the Act, the Rules, bye-laws and the Regulations of a recognized stock exchange. [para 27-28] [566-E; 567-A-D]

2.2 Section 2(i) of the Regulation Act, defines "spot delivery contract" as a contract providing for actual delivery of securities and the payment of price thereof either on the same day as the date of contract or on the next day. In the instant case, the agreement dated 21.11.1994 between the appellant and respondent no. 2 which formed part of the compromise decree, provides that the sale of shares took place on 30.10.1987 and in consideration thereof the appellant paid a sum of Rs. 10 lakhs on 21.11.1994 and further the dividend on the entire shares up to the accounting year 1989-90 amounting to Rs.8,64,850/- to be retained by respondent no. 2. In the face of it, the plea of the appellant that the payment of Rs. 10 lakh was made to buy peace, is not fit to be accepted and, in fact, that forms part of the consideration for the sale of shares. Therefore, the transaction does not come within the expression "spot delivery contract" as defined u/s 2(i) of the Regulation Act. [para 6,32 and 33] [555-C-D; 568-B-C, H; 569-A-D]

Case Law Reference:

(1985) 57 Com. Cases 700(BHC)	**distinguished**	**Para 12**
(1994) 79 Com.Cases 346	**disapproved**	**para 12**
(1983) 53 Com.Cases 367 (Cal.)	**approved**	**Para 12**
(1988) 64 Com. Cases 259 (Cal.)	**approved**	**Para 12**

2010 (6) SCR 1 relied on para 25

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7445 of 2004.

From the Judgment and Order dated 30.07.2003 of the High Court at Calcutta in ACO No. 76 of 1999.

Sunil Gupta, Manoj, Aparna Singhal, Mahesh Agarwal, Rishi Agrawala, E.C. Agrawala, Aparna Sinha for the Appellant.

Bhaskar P. Gupta, Abhijit Chatterjee, S. Sukumaran, Anand Sukumar, Bhupesh Kumar Pathak (For K. Rajeev) for the Respondents.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Appellant aggrieved by the judgment and order dated 30th July, 2003 passed in ACO No.76 of 1999 by the Company Judge, High Court of Judicature at Calcutta affirming the judgment and order dated 25th November, 1998 passed by the Company Law Board, Eastern Region Bench at Calcutta in Original Petition No.15(111)/ERB/1995 is before us with the leave of the Court.

2. The appellant, Bhagwati Developers Private Limited, hereinafter referred to as 'Bhagwati' was earlier known as Lodha Services Private Limited. Tuhin Kanti Ghose, hereinafter referred to as 'Tuhin', Respondent No.2 herein, approached Bhagwati for a loan of Rs.38,83,000/- for purchasing 3530 equity shares of Respondent No.1, Peerless General Finance & Investment Company Limited, hereinafter referred to as 'Peerless'. As requested, Bhagwati on 25th of July, 1986 advanced a sum of Rs.38,83,000/- as loan to Tuhin. Bhagwati and Tuhin later, on 19th November, 1986 entered into a formal agreement in respect of the aforesaid loan and Tuhin assured to repay the loan on or before 31st December, 1991. On 30th

of October, 1987, Tuhin agreed to transfer 3530 shares of Peerless to Bhagwati by way of repayment of the aforesaid loan. In the light thereof, Tuhin handed over the original share scrips as also the transfer deeds for doing the needful by Bhagwati. Tuhin on 30th October, 1987, wrote that Bhagwati would be entitled to all the benefits i.e. dividend, bonus shares etc. in respect of all these shares. It seems that the transfer deeds were not properly filled in and executed and accordingly, Bhagwati on 28th December, 1987 wrote to Tuhin to put his signature in the fresh transfer deeds and return them to it. Bhagwati further requested Tuhin to send it shares and dividends received by him from Peerless. During these developments, Peerless declared bonus shares in the ratio of 1:1 and Tuhin being the registered shareholder, received further 3530 bonus shares. Tuhin, it appears, did not sign the fresh transfer deeds and retained the bonus shares. Bhagwati by its letter dated 6th of July, 1988 asked Tuhin to furnish fresh transfer deeds in respect of the total shares i.e.7060 shares. Peerless declared further bonus shares in the year 1991 in the ratio of 1:1 and Tuhin being the registered shareholder of 7060 shares was further allotted 7060 bonus shares. In this way Tuhin altogether got 14120 shares.

3. When Tuhin did not accede to the request of Bhagwati for transferring the entire shares, Bhagwati on 29th May, 1991 filed a suit in the Court of Civil Judge at Allahabad and obtained an ad interim order of injunction restraining Tuhin from claiming any right, title or interest in respect of the aforesaid 14120 shares of Peerless. During the pendency of the suit, Tuhin and Bhagwati settled their dispute out of Court and executed an agreement dated 21st November, 1994, according to which Tuhin acknowledged to have sold 3530 equity shares to Bhagwati on 30th October, 1987 which entitled it to the bonus shares declared in the years 1987 and 1991 totaling 14120 equity shares. In terms of the agreement, an application for recording the compromise was filed in the civil suit and for passing a decree in terms of the compromise. The trial court

acceded to the prayer of Bhagwati and Tuhin and decreed the suit in terms of the compromise by judgment and decree dated 28th November, 1994. The trial court further directed that the compromise petition and the agreement between the parties shall also form part of the decree. According to the compromise decree, it was agreed that Tuhin shall retain as absolute owner the dividend on the entire shares up to the accounting year 1989-90 amounting to Rs.8,64,850/- as part of consideration for the settlement. In terms of the compromise decree, Bhagwati has also paid a further sum of Rs.10 lakh by way of pay order dated 21st November, 1994.

4. Armed with the decree, Bhagwati on 12th December, 1994 lodged the transfer deeds in respect of 14120 shares with Peerless for their transfer. Peerless, however, did not accede to the prayer of Bhagwati and by its letter dated 8th February, 1995 refused to register the said shares, inter alia, on the ground that the said transfer of shares by Tuhin in favour of Bhagwati was in violation of the provisions of Securities Contracts (Regulation) Act, 1956; hereinafter to be referred to as 'the Regulation Act'. According to Peerless, the contract for sale of shares was not a spot delivery contract, signatures of Tuhin differed from the signatures on the record of Peerless and further the stamps affixed on the instruments of transfer had not been cancelled. Bhagwati re-lodged the shares for transfer on 14th February, 1995 with Peerless but again Peerless did not register those shares in the name of Bhagwati.

5. Bhagwati, aggrieved by that, approached the Company Law Board, Eastern Region by filing an application under Section 111 of the Companies Act, 1956 hereinafter to be referred to as 'the Act' and the Company Law Board by its judgment and order dated 25th November, 1998 dismissed the said application inter alia holding that transfer of shares in favour of Bhagwati was against the provisions of Sections 13 and 16 of the Regulation Act and as such, illegal. In the opinion of the Company Law Board Peerless rightly refused registration

of transfer. While doing so, the Company Law Board further observed that the shares of a public limited company which are not registered in the Stock Exchange also come under the purview of Regulation Act. In this connection, the Company Law Board observed as follows:

> "We, therefore, hold that the provisions of the SCR Act, 1956, including the provisions of Sections 13,16 and 17 of the Act would be applicable to a public limited company even though its shares may not be listed on any recognized stock exchange."

6. As regards the plea of the appellant that the sales of shares in question is a spot delivery contract, the Company Law Board taking into account that consideration for sales of shares having been paid much after the date on which the sales of shares have taken place, observed that the transaction does not come within the expression, "spot delivery contract" as defined under Section 2(i) of the Regulation Act. While doing so, the Company Law Board observed as follows:

> "It is, therefore, obvious that a part of the consideration for the sale of shares passed on much after the date on which the sale of shares is alleged to have taken place on 30.10.87. We are unable to accept the argument of Mr. Bose that the payment of Rs.10.00 lacs was made only to buy peace. We find that the agreement dated 21.11.94 clearly states that the payment of Rs.10.00 lacs was made as a part of consideration for the sale of shares and we fail to see how it can be contended to be otherwise. There is other intrinsic evidence in the agreement dated 21.11.94 which indicate against the contention of Mr. Bose, Learned Advocate for the petitioner that the entire transaction of sale of shares was completed on 30.10.87. Clause 2.1 of the said agreement provides that notwithstanding anything contained anywhere in the agreement dated 21.11.94 which indicate against the

> contention of Mr. Bose Learned Advocate for the petitioner that the entire transaction of sale of shares was completed on 30.10.87. Clause 2.1 of the said agreement provides that notwithstanding anything contained anywhere in the agreement dated 21.11.94. It was agreed that the respondent no.2 would be entitled to retain as absolute owner of the dividend on the entire shares up to the accounting year 1989-90 amounting to Rs.8,64,850/- as part of consideration for the settlement. It is difficult to envisage as to how the respondent no.2 could continue to be absolute owner of the shares up to 1989-90 if the sale was completed on 30.10.87."

7. Accordingly, the Company Law Board reached the following conclusion:

> "We, therefore, hold that the contract of sale of shares in question does not satisfy the definition of a spot delivery contract since part of the consideration passed on much after the alleged sale of shares on 30.10.87."

8. Assailing the aforesaid judgment and order of the Company Law Board, passed in Original Petition No.15(111)/ERB/1995, Bhagwati preferred an appeal before the High Court, inter alia, contending that the shares of Peerless, a public limited Company having not been listed on any recognized stock exchange, it will not come within the definition of 'securities' under Section 2(h)(i) of the Regulation Act. Further the transaction between it and Tuhin was a case of spot delivery contract and therefore, the view taken by the Company Law Board on both the counts are erroneous. The Company Judge, negated both the contentions and observed that the provisions of the Regulation Act would be applicable to a public limited Company even though its share is not listed on any recognized stock exchange. Further, the transaction did not satisfy the definition of a spot delivery contract since part of consideration passed on 21st November, 1994, when Bhagwati made payment of Rs.10 lakh to Tuhin much after the transfer of shares

on 30th October, 1987. To come to the aforesaid conclusion, the High Court also took into account the fact that in terms of the compromise decree as part of consideration Tuhin retained as absolute owner all the dividends on the entire shares including the bonus shares up to the accounting year 1989-90. The observation of the High Court in this connection reads as follows:

> "In the abovementioned background it is necessary, in my view, to note the findings of fact arrived at by the Company Law Board. The Company Law Board found, as findings of fact, that the provisions of the Securities Contract (Regulation) Act, 1956 would be applicable to a public limited company even though it's shares might not be listed on any recognized stock exchange. It was, further, held that it was obvious that the part of consideration for the sale of shares passed on much after the date on which the sale of shares took place on October 30,1987. The payment of Rs.10,00,000/-(Rupees ten lakh) only by Bhagwati to Tuhin on November 21, 1994 was a part of consideration for the sale of the said shares and, further it was agreed between the Bhagwati and Tuhin that Tuhin would be entitled to retain as absolute owner of the dividends on the entire shares including the bonus shares up to the accounting year 1989-1990 as part of consideration. The transaction did not satisfy the definition of a spot delivery contract since part of the consideration passed on much after the transfer of shares on October 30,1987. Moreover, the shares transfer forms were all dated November 21, 1994, that is, on the date on which the consideration of Rs.10,00,000/- (Rupees ten lakh) only passed from the Bhagwati to Tuhin. Therefore, the transfer of shares in question was hit by the provisions of the sections 13 and 16 of the Securities Contract (Regulation) Act, 1956 and, therefore, was illegal, void and a nullity".

9. Ultimately, the High Court held as follows:

> "The Company Law Board has considered all the materials placed before it and, thereafter, arrived at the findings of fact that the impugned transactions is hit by the provisions of the Securities Contracts (Regulation) Act, 1956 and the guidelines issued by the Government of India. The Company Law Board cannot be termed as perverse in the sense that no normal person would have arrived at. The Company Law Board found, as findings of fact, that the consideration for transfer of shares included Rs.10,00,000/- (Rupees ten lakh) only paid by Bhagwati to Tuhin on November 21, 1994. The said findings is sustainable from the reasoning given by the Company Law Board and, therefore, cannot be interfered with in this appeal."

That is how, the appellant is before us with the leave of the Court.

10. It is relevant here to state that the Company Law Board has held that transfer of shares in favour of Bhagwati is in the teeth of Sections 13 and 16 of the Regulation Act and hence, we deem it expedient to refer to the aforesaid provisions one after another. Section 13 of the Regulation Act makes contract in notified areas illegal in certain circumstances, same reads as follows:

> **"13. Contracts in notified areas illegal in certain circumstances.-** If the Central Government is satisfied, having regard to the nature or the volume of transactions in securities in any State or States or area, that it is necessary so to do, it may, by notification in the Official Gazette, declare this section to apply to such State or States or area and thereupon every contract in such State or States or area, which is entered into after the date of the notification otherwise than between members of a recognized stock exchange or recognized stock exchanges in such State or States or area or through or with such member shall be illegal:

Provided that any contract entered into between members of two or more recognized stock exchanges in such State or States or area, shall-

(i) be subject to such terms and conditions as may be stipulated by the respective stock exchanges with prior approval of Securities and Exchange Board of India;

(ii) require prior permission from the respective stock exchanges if so stipulated by the stock exchanges with prior approval of Securities and Exchange Board of India."

11. From a plain reading of the aforesaid provision, it is evident that contract in relation to securities in notified areas is illegal if made otherwise than between the members of recognized stock exchange. It is not in dispute that the place where the contract for sale of shares in question has been entered is a notified area for the purpose of Section 13 of the Regulation Act. Further, the contract is not between the members of a recognized stock exchange.

12. In order to overcome this difficulty, Mr. Sunil Gupta, learned Senior Counsel appearing on behalf of the appellant submits that the security in question is not marketable and therefore, does not come within the definition of "securities" as defined under Section 2(h)(i) of the Regulation Act. According to him, shares of a public limited company to come within the definition of securities under the Regulation Act has to be marketable and for that purpose has necessarily to be listed in the Stock Exchange. Mr. Gupta further points out that the aforesaid submission finds support from the judgment of the Bombay High Court in the case of *Dahiben Umedbhai Patel and Others v. Norman James Hamilton and Ors.* (1985) 57 Com. Cases 700 (BHC) and in the case of *Brooke Bond India Ltd. v. U.B. Ltd and Ors.* (1994) 79 Com. Cases 346 (BHC). In fairness to him, he has drawn our attention to the decision

of Calcutta High Court in the case of *B.K. Holdings (P) Ltd. v. Prem Chand Jute Mills & Ors.* (1983) 53 Com.Cases 367 (Cal.) and in the case of *East Indian Produce Ltd. v. Naresh Acharya Bhaduri & Ors.* (1988) 64 Com. Cases 259 (Cal.) which have taken an altogether contrary view. He contends that the Bombay decisions are based on sound reasoning and therefore, commend our acceptance.

13. Mr. Bhaskar P.Gupta, learned Senior Counsel representing respondent No.1 submits that the provisions of Regulation Act apply to the shares of a public limited company which are not listed on any stock exchange. According to him, for securities of a public limited company to be marketable, it does not necessarily require to be sold in any market of a specified nature i.e. stock exchange. He submits that it may be any area where buyers and sellers are in contact with one another and there securities can be sold.

14. In view of the rival submissions, the first question which falls for our determination is as to whether the provisions of Regulation Act will apply to the shares of a public limited company which are admittedly not listed on any stock exchange?

15. Admittedly, the shares of Peerless, a public limited company in respect of which the appellant had sought rectification are not listed in the stock exchange. In our opinion, notwithstanding that if shares come within the definition of "securities" as defined under Section 2(h)(i) of the Regulation Act, the indictments contained in Section 13 would apply. The word, 'securities' has been defined under Section 2(h)(i) of the Regulation Act which reads as follows:

"2. Definitions - In this Act, unless the context otherwise requires, -

x x x

"(h) "securities" include-

(i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;"

x x x"

16. From a plain reading of the aforesaid provision, it is evident that for shares of a public limited company to come within the definition of securities they have to satisfy that they are marketable. The word, 'marketable' has not been defined in the Regulation Act and hence to understand it, we have to revert to its dictionary meaning. Black's Law Dictionary (Sixth Edition) explains the word, 'marketable' as follows:

"Marketable. Saleable. Such things as may be sold in the market; those for which a buyer may be found; merchantable."

17. The compact edition of the Oxford English Dictionary, Vol.I p.1728 gives the meaning of the expression "marketable" as follows:

"1. Capable of being marketed that may or can be bought or sold; suitable for the market; that finds a ready market; that is in demand, saleable.

2. Of or pertaining to buying or selling; concerned with trade; of price, value, that may be obtained in buying or selling."

18. As is evident from the dictionary meaning set out above, the expression "marketable" has been equated with the word saleable. In other words, whatever is capable of being bought and sold in a market is marketable. The size of the market is of no consequence. In other words, the number of persons willing to purchase such shares would not be decisive.

One cannot lose sight of the fact that there may not be any purchaser even for the listed shares. In such a case can it be said that even listed shares are not marketable? In our opinion what is required is free transferability. Subject to certain limited statutory restrictions, the shareholders possess the right to transfer their shares, when and to whom they desire. It is this right which satisfies the requirement of free transferability. However, when the statute prohibits or limits transfer of shares to a specified category of people with onerous conditions or restrictions, right of shareholders to transfer or the free transferability is jeopardized and in that case those shares with these limitations cannot be said to be marketable. In our opinion, therefore, shares of public limited company though not listed in the stock exchange come within the definition of securities and hence, the provisions of Regulation Act apply. A Division Bench of the Calcutta High Court in the case of *East Indian Produce Ltd.* (supra) relying on its earlier decision in the case of *B.K.Holdings (P) Ltd.* (supra) came to the same conclusion and held as follows:

"In my view to accept the contention of Mr. Dipankar Gupta on this aspect of the case would be to ascribe too narrow a meaning to the expression "marketable securities". As will be evident from the dictionary meaning set out above the expression "marketable" has been equated with "saleable". In other words, whatever is capable of being bought and sold in a market is marketable. I see no warrant whatsoever for limiting the expression "marketable securities" only to those securities which are quoted in the stock exchange. This argument of Mr. Gupta, therefore, fails."

19. True it is that the Bombay High Court in the case of *Dahiben Umedbhai Patel* (supra) has taken a view that the shares of a private company does not possess the character of liquidity and, therefore, cannot be said to be marketable. Relevant portion of the judgment reads as follows:

"It is thus clear that the shares of a private company do not possess the character of liquidity, which means that the purchaser of shares cannot be guaranteed that he will be registered as a member of the company. Such shares cannot be sold in the market or, in other words, they cannot be said to be marketable and cannot, therefore, be said to fall within the definition of "securities" as a "marketable security…."

20. We must at the outset state that this case relates to a private company and having regard to the absence of free transferability, shares were held not to be marketable securities as defined under Section 2(h)(i) of the Regulation Act. This would be evident from the following passage of the said judgment:

"…A market, therefore, contemplates a free transaction where shares can be sold and purchased without any restriction as to title. The shares which are sold in a market must, therefore, have a high degree of liquidity by virtue of their character of free transferability. Such character of free transferability is to be found only in the shares of a public company. The definition of a "private company" in S. 3 of the Companies Act, 1956, speaks of the restrictions for which the articles of the private company must provide.

x x x

The restriction with regard to the transfer of the shares is a characteristic of a private company…."

21. In the present case, we are concerned with a public limited company and the aforesaid judgment clearly indicates that shares of a public limited company will come within the definition of securities. This would be evident from the following passage from the said judgment:

"It is thus clear to us that the definition of "securities" will only take in shares of a public limited company notwithstanding the use of the words "any incorporated company or other body corporate" in the definition."

22. For all these reasons, we are of the opinion that the aforesaid decision of the Bombay High Court is clearly distinguishable.

23. As stated earlier, a learned Single Judge of the Bombay High Court in the case of *Brooke Bond India Ltd.* (supra) had followed its earlier Division Bench judgment in *Dahiben Umedbhai Patel* (supra) and expressed a prima facie view that transaction of shares of a public limited company unlisted on the stock exchange is not intended to be covered under the Regulation Act. While doing so, the learned Single Judge had referred to the decisions of the Calcutta High Court in the case of *B.K. Holdings* (supra) and *East Indian Produce Ltd.* (supra) but disagreed with the ratio of those judgments without assigning any reason. The learned Single Judge found himself bound to follow the earlier Division Bench judgment in the case of *Dahiben Umedbhai Patel* (supra). The observation of the learned Single Judge in this connection reads as follows:

"On the contrary, my prima facie view of these two judgments accords with the submission of Mr. Mehta. I am of the prima facie view that a transaction of shares of a public limited company, unlisted on the stock exchange, is not intended to be governed by this Act.

Mr. Cooper strongly relied on the judgment of the Division Bench of the Calcutta High Court in *East Indian Produce Ltd.* (1988) 64 Comp. Cas 259 on this issue also. The Calcutta High Court relied on an earlier judgment of the same High Court in *B.K. Holdings (P) Ltd. v. Prem Chand Jute Mill*s (1983) 53 Comp Cas 367. At that stage, the judgment of Mrs. Manohar J. was cited before the learned single judge of the Calcutta High Court. He seemed to take

the view that the decision of Mrs. Manohar J. in Norman J. *Hamilton v. Umedbhai S. Patel* (1979) 49 Comp Cas 1, must be confined to a situation of transfer of shares of a private limited company. So far as the decision of the Division Bench of the Calcutta High Court in *East Indian Produce Ltd.* (1988) 64 Comp Cas 259 is concerned, it seems to follow the earlier judgment in B.K. Holdings. With great respect to the learned Judges of the Calcutta High Court, who decided the aforesaid two cases, even if the matter were not res integra, I would be inclined to disagree with their observations made therein. However, in the view I have taken of the judgments of the learned single judge and the appeal judgment of our court, I consider myself bound to take the view that the Securities Contracts (Regulation) Act, 1956, is not intended to regulate private transactions in shares of public limited companies, not listed on the stock exchange. This contention also, therefore, fails."

24. The Regulation Act was enacted to prevent "undesirable transaction in securities by regulating business of dealing therein" and from that one cannot infer that it was to apply only to the transfer of shares on the stock exchange. The Bombay High Court in this case was greatly influenced by the fact that the Act was intended to govern transactions in the stock exchange. As stated earlier, we do not find anything in the object of the Act to warrant that conclusion. We, for the reasons stated above, are not inclined to endorse the view of the Bombay High Court in *Brooke Bond India Ltd.*(supra).

25. We are fortified in our view from a judgment of this Court in the case of *Naresh K. Aggarwala & Co. vs. Canbank Financial Services Ltd. and Another* (2010) 6 SCC 178, wherein this Court considered the term "securities" as defined under Section 2(h)(i) of the Regulation Act, with reference to the notification issued under Section 16(2) and held that the definition does not make any distinction between listed

securities and unlisted securities. Relevant portion of the judgment reads as follows:

"41……..A perusal of the abovequoted definition shows that it does not make any distinction between listed securities and unlisted securities and therefore it is clear that the circular will apply to the securities which are not listed on the stock exchange……."

26. When the word 'Securities' has been defined under the Regulation Act, its meaning would not vary when the same word is used at more than one place in the same Statute, otherwise it will defeat the very object of the definition Section. Accordingly, our answer to the first question set out earlier is that the provisions of the Regulation Act would cover unlisted Securities of Public Limited Company. In other words, shares of Public Limited Company not listed in the stock-exchange is covered within the ambit of Regulation Act.

27. As stated in the preceding paragraph of the judgment, the Company Law Board has held that transfer of shares in favour of Bhagwati was also against the provisions of Section 16 of the Regulation Act. Section 16(1) of the Act confers power on the Central government to prohibit contracts in certain cases. Section 16 reads as follows:

"16. Power to prohibit contracts in certain cases.- (1) If the Central Government is of opinion that it is necessary to prevent undesirable speculation in specified securities in any State or area, it may, by notification in the Official Gazette, declare that no person in the State or area specified in the notification shall, save with the permission of the Central Government, enter into any contract for the sale or purchase of any security specified in the notification except to the extent and in the manner, if any, specified therein.

(2) All contracts in contravention of the provisions of sub-

section (1) entered into after the date of the notification issued thereunder shall be illegal."

28. From a plain reading of the aforesaid provision it is evident that in order to prevent undesirable stipulation in specified securities in any State or area the Central Government by notification is competent to declare that no person in any State or area specified in the notification shall, save with the permission of the Central Government, enter into any contract for the sale or purchase of any security specified in the notification. The Central Government in exercise of the aforesaid power issued notification dated 27th of June, 1969 and declared that in the whole of India "no person" shall "save with the permission of the Central Government enter into any contract for the sale or purchase of securities other than such spot delivery contract" as is permissible under the Act, the Rules, bye-laws and the Regulations of a recognized stock exchange. The appellant, therefore, can come out of the rigors of Section 16 of the Act only when it satisfies that the transaction comes within the definition of "spot delivery contract".

29. Mr. Sunil Gupta, further submits that the contract in question is a spot delivery contract and, therefore, does not come within the mischief of Section 16 of the Regulation Act. Mr. Bhaskar P. Gupta, joins issue and submits that in view of the limited rule the appellant cannot be allowed to raise the point of spot delivery contract. In this connection, he has drawn our attention to the order dated 19th of December, 2003. We are not inclined to sustain this objection of Counsel for the respondent.

30. By the aforesaid order while issuing rule this Court noted the submission advanced on behalf of the appellant in regard to the conflicting decisions of the Bombay and Calcutta High Courts in regard to the question of applicability of Regulation Act. From the aforesaid it cannot be said that the limited rule was issued. Further, by order dated 5.11.2004 leave

has been granted by this Court and it has not been confined to any specific question. From the aforesaid it cannot be said that the appellant has got a limited rule.

31. On merit, the respondents submit that the contract in question cannot be said to be a spot delivery contract and, in this connection, the learned Senior Counsel draws our attention to the terms of agreement which formed part of the decree.

32. The second question, therefore, which falls for our determination is as to whether the contract in question is a spot delivery contract. This expression is defined under Section 2(i) of the Regulation Act. It reads as follows:

"2. Definitions - In this Act, unless the context otherwise requires, -

x x x

(i) "spot delivery contract" means a contract which provides for -

(a) actual delivery of securities and the payment of a price therefor either on the same day as the date of the contract or on the next day, the actual periods taken for the despatch of the securities or the remittance of money therefor through the post being excluded from the computation of the period aforesaid if the parties to the contract do not reside in the same town or locality;

(b) transfer of the securities by the depository from the account of a beneficial owner to the account of another beneficial owner when such securities are dealt with by a depository;

x x x"

33. According to the definition, a contract providing for actual delivery of securities and the payment of price thereof

either on the same day as the date of contract or on the next day means a spot delivery contract. When we consider the facts of the present case bearing in mind the definition aforesaid, we find that the contract in question is not a spot delivery contract. True it is that by letter dated 30th of October, 1987 written by Tuhin to Bhagwati, he had stated that the formal agreement had been executed between them on 10th November, 1986 and as per the agreement he is transferring the entire 3530 shares of Peerless purchased from the loan amount and the transfer is in its repayment. However, the agreement dated 21st November, 1994 between Bhagwati and Tuhin which formed part of the compromise decree provides that the sale of shares took place on 30th October, 1987 and in consideration thereof Bhagwati paid a sum of Rs. 10 lakhs on 21st November, 1994 and further the dividend on the entire shares up to the accounting year 1989-90 amounting to Rs.8,64,850 to be retained by Tuhin. In the face of it, the plea of Bhagwati that the payment of Rs. 10 lakh was made to buy peace, is not fit to be accepted and, in fact, that forms part of the consideration for the sale of shares. Once we take this view, the plea of the appellant that it is a spot delivery contract is fit to be rejected. We agree with the reasoning and conclusion of the Company Law Board and the High Court on this issue.

34. Both the contentions of the appellant having no substance, we do not find any merit in this appeal and it is dismissed accordingly but without any order as to costs.

R.P. Appeal dismissed.

RAJENDRA SHARMA

v.

STATE OF WEST BENGAL

(Criminal Appeal No. 1109 of 2009)

JULY 17, 2013

[P. SATHASIVAM AND J. CHELAMESWAR, JJ.]

PENAL CODE, 1860:

ss. 395/397 - Dacoity in gold jewellery workshop - Conviction of appellant-taxi driver along with another and sentence of 10 years RI - Held: The evidence on record has clearly established the involvement of appellant in commission of the offence - Courts below rightly convicted the appellant - However, as regards sentence, on going through all the aspects, particularly, the evidence of taxi-owner, who nowhere in his deposition stated about any illegal activity on the part of the appellant, ends of justice would be met by altering his sentence to the period already undergone, i.e. 7 ½ years.

The appellant alongwith two others was prosecuted for committing offences punishable u/ss 395/397 IPC. The prosecution case was that on the date of incident the three accused along with 2-3 others, armed with revolvers, khojali, bombs etc. looted gold ornaments from a gold jewellery workshop and fled away in two taxis. The trial court convicted the three accused u/ss 395/397 and sentenced them to 10 years RI each. The High Court acquitted one of the accused and maintained the conviction and sentence of the appellant and the other accused.

In the instant appeal, it was contended for the appellant that he being a taxi driver, was sitting inside his

taxi and in the absence of any individual overt act, the sentence of 10 years RI was not warranted.

Disposing of the appeal, the Court

HELD: 1.1 A conjoint reading of the evidence of PWs 3, 4 and 5 and the owner of the taxi (PW-12) clearly establish the involvement of the appellant in the commission of the offence. There is no reason to disbelieve their versions, and both the courts below rightly accepted their statements. [para 9] [575-C-D]

1.2 As regards the sentence, on going through all the aspects, particularly, the entire evidence of the owner of the taxi (PW-12), it is relevant to point out that he nowhere in his statemen t has described about any illegal activity on the part of the appellant who was his taxi driver, and also the fact that till date, the appellant has already undergone seven years and six months in jail, while confirming his conviction, ends of justice would be met by altering his sentence to the period already undergone. Ordered accordingly. [para 10] [575-D-G]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1109 of 2009.

From the Judgment and Order dated 09.04.2008 of the High Court at Calcutta in C.R.A. No. 81 of 2006.

Pradip Ghosh, Kunal Chatterji, Ghanshyam Joshi for the Appellant.

Chanchal Kr. Ganguli, Avijit Bhattacharjee, Soumi Kundu for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal is filed against the final judgment and order dated 09.04.2008 passed by the

Division Bench of the High Court at Calcutta in C.R.A. No. 81 of 2006 whereby the High Court dismissed the appeal preferred by the appellant herein by confirming his conviction and sentence passed by the Court of 1st Additional Sessions Judge, Alipore dated 19/20.12.2005 in Sessions Trial No. 1(2) of 2000 for the offence punishable under Sections 395/397 of the Indian Penal Code, 1860 (in short 'IPC'), Section 25 (1a) (b) of the Arms Act, 1959 and Sections 3 and 5 of the Explosive Substances Act, 1908.

2. **Brief facts:**

(a) As per the prosecution case, on 07.12.1998, at about 13:15 hours, the accused persons, viz., Rajendra Sharma, Sk. Muktar @ Dabbu, Sarban Singh and 2/3 others, armed with revolvers, khojali, bombs etc., committed dacoity in gold jewellery workshops at Gopal Bose Lane and looted gold ornaments weighing about 1820 grams approx. and fled away in two taxis.

(b) With regard to the above incident, a written FIR being No. 234 dated 07.12.1998 was registered by Arun Hazra (PW-3) at P.S. Cossipore under Sections 395/397 IPC and Sections 25/27 of the Arms Act, 1959 read with Sections 3 and 5 of the Explosive Substances Act, 1908.

(c) After investigation, the case was committed to the Court of 1st Additional Sessions Judge, Alipore and was numbered as Sessions Trial No. 1(2) of 2000.

(d) The trial Court, by order dated 19/20.12.2005 convicted the appellant along with other co-accused under Sections 395/397 IPC and directed him to suffer rigorous imprisonment (RI) for 10 years along with a fine of Rs.5,000/-, in default, to further undergo RI for a period of 2 years.

(e) Being aggrieved of the above said order, the appellants therein preferred separate appeals before the High Court at Calcutta.

(f) The High Court, by impugned judgment dated 09.04.2008, dismissed the appeal of the appellant (A-1) and one Sarban Singh affirming their conviction and sentence and set aside the order of conviction and sentence of other co-accused - Ranjit Kumar.

(g) Being aggrieved, the appellant (A-1) alone has preferred the above appeal by way of special leave before this Court.

3. Heard Mr. Pradip Ghosh, learned senior counsel for the appellant-accused and Mr. Chanchal Kumar Ganguli, learned counsel for the respondent-State.

4. Mr. Pradip Ghosh, learned senior counsel for the appellant, after taking us through the entire materials submitted that in the absence of any individual overt act committed by him, particularly, even when the prosecution witnesses identified the appellant as the person who was sitting inside the taxi in which the other dacoits got up after committing dacoity, awarding maximum punishment of 10 years is not warranted. He also submitted that even if the conviction is sustainable, taking note of his limited role, namely, keeping taxi near the spot and of the fact that out of 10 years of sentence, so far he had served seven years and six months in jail, the same may be considered sufficient and he may be released forthwith. On the other hand, Mr. Ganguli, learned counsel for the respondent-State submitted that the prosecution witnesses, particularly, PWs 3, 4 and 5 and the owner of the taxi, viz., Kartik Santra (PW-12) amply prove the involvement of the appellant. He also pointed out that considering the seriousness of the offence, the sentence awarded, namely, 10 years cannot be construed as excessive or unreasonable.

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

Discussion:

6. Among the witnesses, the evidence of Arun Hazra (PW-3) is heavily relied on by the prosecution and accepted by both the courts who was a goldsmith in the shop of Uttam Majhi at 2F Gopal Bose Lane. It was he who made a complaint under Exh. 3-3/3. In his evidence, he asserted that on 07.12.1998, at about 1.30 p.m., while he was working in the shop of Uttam Majhi along with others, suddenly a man of 25-30 years entered into their shop through their collapsible gate with a pistol. 4-5 persons also entered into their shop following him. They all were armed with pistols, knives and curbed knives. They were running here and there and they picked up the manufactured gold ornaments from their workers and kept the same in a jute bag. Some persons also entered into the gold shops of Prosanta and Nasiruddin. When people assembled in front of their shops and shouted 'dacoits dacoits', the said persons, on hearing the same, fled away. He also stated that when he came out while following them, he noticed that the engines of two taxis, viz., yellow and black yellow were on with the drivers standing outside the taxis. He noted down the registration numbers of the taxis. He identified the appellant as one of the person standing with the taxi on.

7. The next witness examined on the side of the prosecution was Asim Das (PW-4). He also worked as a goldsmith in a jewellery factory of Uttam Majhi at 2F Gopal Base Lane, Kolkata. He narrated the incident similar to one as mentioned by PW-3. PW-4 also came to the road and shouted 'dacoit dacoit' and noted that two hired taxis were standing on the road with start condition and drivers were standing besides them. He also identified the appellant who, according to him, standing near the taxi in start condition. In the same effect, PW-5 also deposed before the Court.

8. Apart from the evidence of PWs 3, 4 and 5, the prosecution has also examined one Kartik Santra as PW-12 who is the owner of a yellow taxi No. WB/237672. He admitted

that the appellant Rajendra Sharma (A-1) was the driver of the said taxi. He identified him in the dock. He also stated that Rajendra Sharma took the vehicle on 07.12.1998 at about 7.00 a.m. and returned the same at 3.00 p.m. on that day. On 08.12.1998, the police informed him that there was a dacoity in which his taxi was involved. On inquiry by the police, he took them to his driver's residence and, thereafter, the police arrested him from his house and the taxi was seized on the very same day. He also produced the Garage Register maintained by him which has been marked as Exh.-10.

9. A conjoint reading of the evidence of PWs 3, 4 and 5 and the owner of the taxi, namely, PW-12 clearly establish the involvement of the appellant in the commission of the offence. There is no reason to disbelieve their versions and we are satisfied that both the courts below rightly accepted their statements.

10. Relating to sentence, Mr. Ghosh pointed out that even if the prosecution case is accepted that the appellant had facilitated in the commission of crime, considering the fact that he did not enter the jewellery shop and was not armed with any weapon, the maximum sentence of 10 years is excessive. On going through all the aspects, particularly, the entire evidence of the owner of the taxi PW-12, we inclined to accept the claim of Mr. Ghosh. It is relevant to point out that PW-12, nowhere in his statement has described about any illegal activity on the part of the appellant who was his taxi driver. Inasmuch as no adverse statement has been made by him and also of the fact that till date, he had already undergone seven years and six months in jail, while confirming his conviction, we feel that ends of justice would be met by altering his sentence to the period already undergone.

11. In view of our conclusion on the sentence, we direct that the appellant be released forthwith, if he is not required in any other case. The appeal is disposed of on the above terms.

R.P. Appeal disposed of.

KETANKUMAR GOPALBHAI TANDEL
v.
STATE OF GUJARAT
(Criminal Appeal No. 556 of 2004)

JULY 18, 2013

[K.S. RADHAKRISHNAN AND PINAKI CHANDRA GHOSE, JJ.]

JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000:

ss. 2(k), 2(l), 7-A, 20 and 49 - Accused convicted u/ss 302 and 324 IPC aged less than 18 years on date of commission of offence (i.e. 6.5.1995) - Held: Is entitled to benefit of the Act - Conviction affirmed - However, the sentence awarded by trial court as affirmed by High Court set aside and matter sent to Juvenile Justice Board for imposing adequate sentence - Juvenile Justice Act, 1986 - Juvenile Justice (Care and Protection of Children) Rules, 2007 - rr.12 and 98.

In the instant appeal arising out of the conviction and sentence of the appellant for commission of offences punishable u/ss 302 and 324 IPC, the question for consideration before the Court was: "whether or not the appellant, who was admittedly not a juvenile within the meaning of the Juvenile Justice Act, 1986 when offences were committed but had not completed 18 years of age, on that date, will be governed by the Juvenile Justice (Care and Protection of Children) Act, 2000 and be declared as a juvenile in relation to the offences alleged to have been committed by him."

Allowing the appeal in part, the Court

HELD:

In view of ss. 2(k), 2(l), 7-A, 20 and 49 of the Juvenile Justice (Care and Protection of Children) Act, 2000 read with rr.12 and 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, all persons who were below the age of 18 years on the date of commission of the offence even prior to 1-4-2001, would be treated as juveniles even if the claim of juvenility is raised after they have attained the age of 18 years on or before the date of the commencement of the 2000 Act and were undergoing sentences upon being convicted. In the instant case, on the date of the commission of the offence i.e. 06.05.1995, the appellant was 17 years, 11 months and 5 days, thus, less than 18 years, and, therefore, he has to be treated as a juvenile on the date of the crime and, as such, entitled to get the benefit of the provisions of the 2000 Act read with the Rules.The order of conviction is affirmed. However, the sentence awarded by the trial court and confirmed by the High Court is set aside and the matter is sent to the Juvenile Justice Court for imposing adequate sentence. [para 6-8] [580-C-H]

Dharambir v. State (NCT of Delhi) and Another **2010 (5) SCR 137 = (2010) 5 SCC 344 - relied on.**

Case Law Reference:

2010 (5) SCR 137 relied on para 5

CRIMINAL APPEALLATE JURISDICTION : Criminal Appeal No. 556 of 2004.

From the Judgment and Order dated 24.07.2003 of the High Court of Gujarat at Ahmedabad in Crl. Appeal No. 366 of 1997.

S.C. Patel for the Appellant.

Hemantika Wahi, Sumita Hazarika Shubhada Deshpande for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. The question that falls for consideration in this appeal is whether or not the appellant, who was admittedly not a juvenile within the meaning of the Juvenile Justice Act, 1986 (for short 'the 1986 Act') when offences were committed but had not completed 18 years of age, on that date, will be governed by the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short 'the 2000 Act') and be declared as a juvenile in relation to the offences alleged to have been committed by him.

2. The appellant herein was convicted by the Additional Sessions Judge, Valsad (trial court) in Sessions Case No. 133 of 1995 for offences punishable under Sections 302 and 324 of the Indian Penal Code, 1860 (for short 'IPC') and was sentenced to undergo imprisonment for life and to pay a fine of Rs1000/- and in default to undergo Simple Imprisonment for 15 days for an offence punishable under Section 302, IPC and to undergo Rigorous Imprisonment for 2 months and to pay a fine of Rs.1000/- and in default to undergo Simple Imprisonment for 7 days for an offence punishable under Section 324, IPC. Both the sentences were ordered to run concurrently. The accused preferred Criminal Appeal No. 366 of 1997 before the High Court of Gujarat, the same was dismissed vide judgment dated 24.07.2003 against which this appeal has been preferred.

3. Shri S.C. Patel, learned counsel appearing for the appellant raised a preliminary contention that the appellant has to be treated as a juvenile on 06.05.1995 i.e. the date of occurrence, in view of the provision of the 2000 Act, since his date of birth being 01.06.1977. On 06.05.1995, it was pointed out that the appellant was 17 years, 11 months and 5 days,

hence less than 18 years and is, therefore, entitled to get the benefit of the 2000 Act.

4. Ms. Hemantika Wahi, learned counsel appearing for the respondent submitted that the appellant is governed by the 1986 Act and under the 1986 Act all persons who were above the age of 16 years on the date of the commission of the offence would not be treated as juveniles and since the appellant was aged more than 16 years on the date of occurrence hence would not get the benefit of juvenility. Learned counsel submitted that the trial court as well as the High Court has rightly convicted and sentenced the appellant and thus calls for no interference by this Court.

5. We have gone through the judgment of the trial court as well as that of the High Court and also the oral and documentary evidences adduced in this case and we find no reason to interfere with the order of conviction passed by the trial court, confirmed by the High Court. Learned counsel for the appellant has also not canvassed the correctness or otherwise of the order of conviction but confined his arguments, as already indicated, on the plea of juvenility. The question posed in this case is no longer res integra. On exhaustive survey of the previous judgments on the point this Court in *Dharambir v. State (NCT of Delhi) and Another* (2010) 5 SCC 344 held as follows:

> "It is, thus, manifest from a conjoint reading of Sections 2(k), 2(l), 7-A, 20 and 49 of the Act of 2000 read with Rules 12 and 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 that all persons who were below the age of eighteen years on the date of commission of the offence even prior to 1-4-2001 would be treated as juveniles even if the claim of juvenility is raised after they have attained the age of eighteen years on or before the date of the commencement of the Act of 2000 and were undergoing sentences upon being convicted. In the view we have taken, we are fortified by the dictum of this Court in a recent decision in *Hari Ram v. State of Rajasthan*."

6. This Court, when the matter came up for hearing, directed the Sessions Judge, Valsad (Gujarat) to find out the age of the appellant on the date of occurrence of the crime. The Sessions Judge vide his report dated 11.04.2011 stated that the appellant was not juvenile on the date of occurrence i.e. 06.05.1995. Such a view was taken by the Sessions Judge on the basis of the 1986 Act. If we apply the provisions of the 1986 Act then the appellant was not a juvenile on the date of the crime but if we apply Sections 2(k), 2(l), 7-A, 20 and 49 of the 2000 Act read with Rules 12 and 98 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (for short 'the Rules') all persons who were below the age of 18 years on the date of commission of the offence even prior to 1-4-2001, would be treated as juveniles even if the claim of juvenility is raised after they have attained the age of 18 years on or before the date of the commencement of the 2000 Act and were undergoing sentences upon being convicted.

7. So far as the present case is concerned, as already indicated, the age of the appellant as on the date of the commission of the offence i.e. 06.05.1995 was 17 years, 11 months and 5 days and hence less than 18 years, and hence when we apply provisions of the 2000 Act, the appellant has to be treated as a juvenile, being less than 18 years of age on the date of the crime and hence entitled to get the benefit of the provisions of the 2000 Act read with Rules.

8. We are therefore inclined to affirm the order of conviction, however, the sentence awarded by the trial court and confirmed by the High Court is set aside and the matter is sent to the concerned Juvenile Justice Court for imposing adequate sentence. Appeal is allowed as above.

R.P. Appeal partly allowed.