SAVARALA SAI SREE
v.
GURRAMKONDA VASUDEVARAO & ORS.
(Criminal Appeal No. 5 of 2014)

JANUARY 2, 2014

[DR. B.S. CHAUHAN AND S.A. BOBDE, JJ.]

Dowry Prohibition Act, 1961:

s.3 – Conviction – Sentence of imprisonment for 3 months and fine of Rs.3000/- imposed by trial court – Reduced by High Court to period already undergone (4 days) – Held: Imposition of sentence is in the realm of discretion of the court and unless the sentence is found to be grossly inadequate, the appellate court would not be justified in interfering with the discretionary order of sentence – In the instant case, the minimum sentence fixed by legislature is five years, however, the court in an appropriate case after recording the reason may award the sentence lesser than five years, but fine shall not be less than Rs.15,000/- or the amount of the value of such dowry, whichever is more – Without recording any reason whatsoever it was not permissible for trial court to award sentence less than five years – Awarding of punishment of 3 months by trial court was hopelessly disproportionate particularly in view of the fact that no mitigating circumstance has been pointed out by trial court – High Court failed in its duty to take up the matter in its revisional power u/s 401 r/w s.386(e) of the Code of Criminal Procedure, 1973 and enhance the punishment commensurate to the offence committed by the accused – High Court grossly erred in reducing the sentence to four days – Sentence is set aside and the matter remanded back to the High Court to determine the quantum of punishment – Code of Criminal Code, 1973 – s.401 r/w s.386 (e) – Sentence/Sentencing.

State of U.P. v. Shri Kishan **AIR 2005 SC 1250;** *Chinnadurai v. State of Tamil Nadu,* **AIR 1996 SC 546;** *Sadhupati Nageswara Rao v. State of Andhra Pradesh,* **2012 (6) SCR 1143 = AIR 2012 SC 3242;** *Ajahar Ali v. State of West Bengal* **(2013) 10 SCC 31;** *State of Rajasthan v. Vinod Kumar* **2012 (6) SCR 1 = AIR 2012 SC 2301 – relied on.**

Ram Sanjiwan Singh & Ors. v. State of Bihar **AIR 1996 SC 3265 – referred to.**

Case Law Reference:

AIR 2005 SC 1250	**relied on**	**para 10**
AIR 1996 SC 546	**relied on**	**para 10**
2012 (6) SCR 1143	**relied on**	**para 10**
(2013) 10 SCC 31	**relied on**	**para 10**
2012 (6) SCR 1	**relied on**	**para 11**
AIR 1996 SC 3265	**referred to**	**para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 5 of 2014.

From the Judgment & Order dated 21.02.2011 of the High Court of A.P. at Hyderabad in CRLRC No. 386 of 2011.

V. Sridhar Reddy, V.N. Raghupathy for the Appellant.

A.T.M. Rangaramanujam, M.A. Chinnasamy, K. Krishna Kumar, A. Senthil Kumar, D. Mahesh Babu, Mayur Shah, Amjid Maqbool, Amit K. Nain for the Respondents.

The following Order of the Court was delivered

O R D E R

1. Leave granted.

2. The facts and the circumstances involved in the case has shocked the conscience of the Court and we take a serious note that neither the trial court nor the High Court proceeded in accordance with law rather acted on their own whims and fancies as if the courts are not bound to follow the law made by the competent legislature.

The trial Court convicted the respondents under Section 498-A of the Indian Penal Code, 1860 (for short "IPC) and awarded the sentence of three (3) years and imposed a fine of Rs.2000/- (Rupees two thousand only) and in case of non payment of fine, a further sentence to undergo simple imprisonment for a period of three (3) months. They were also convicted under Sections 3 and 4 of the Dowry Prohibition Act, 1961 (for short 'Act, 1961') and imposed a sentence for a period of 3 months each and to pay a fine of Rs.3000/-(Rupees three thousand only) each and in default of payment, they were sentenced to undergo simple imprisonment for a period of one month of each of the offence.

3. Aggrieved, the respondents filed appeal before the Sessions Court. The first appellate court dealt with the case. Relevant part of the order runs as under:

> "20. On recording findings in the aforesaid points this court finds there was no legally acceptable evidence for convicting A1 for the offence U/s 498-A IPC and A3 to A5 for the offence U/s. 4 of Dowry Prohibition Act. So, appellants 3 to 5 are entitled for acquittal. Appellants 1 and 2 are liable for punishment only U/s.3 of Dowry Prohibition Act for having accepted three Demand Drafts and not explaining the same though burden is on them as per Sec.8-A.
>
> 21. In the result, the appeal is partly allowed. 1st Appellant is acquitted of the charge U/s.498-A IPC, but his conviction for the U/s.3 of Dowry Prohibition Act is confirmed including the sentence. The conviction of 2nd appellant U/s.3 of Dowry Prohibition Act is confirmed including the sentence. The appeal is allowed with regard to the appellants 3 to 5 and sentence imposed on them is set aside. The fine amount paid by them shall be refunded after appeal time. The fine amount paid by 1st Appellant for the offence U/s.498-A IPC shall be refunded to him after appeal time."

4. Thus, conviction and sentence of Respondent Nos.1 and 2 under Section 3 of the Act 1961 was maintained, however, they were acquitted for the offence under Section 498A of the IPC and Section 4 of the Act 1961.

5. In the Revision, the High Court has dealt with the case in a very cryptic manner as the learned counsel appearing for the respondents did not argue the case on merit rather pleaded for mercy and requested to reduce the sentence taking a lenient view. The High Court reduced the sentence to 4 days, as the said sentence had already been served/undergone by them.

6. Hence this appeal by the complainant-appellant Sarvarala Sai Sree.

7. We have heard learned counsel for the parties and perused the record. So far as the conviction of the respondent under Section 3 of the Act, 1961 is concerned, there is no reason for us to interfere with the same. Thus, the question remains restricted only to the quantum of punishment. Section 3 of the Act, 1961 reads as under:

> **"3. Penalty for giving or taking dowry – (1)** If any person, after the commencement of this Act, gives or takes or abets the giving or taking of dowry, he shall be punishable with imprisonment for a term which **shall not be less than five years and with the fine** which **shall not be less than fifteen thousand rupees** or the amount of the value of such dowry, whichever is more.
>
> Provided that the Court, **for adequate and special reasons** to be recorded in the judgment, impose a

sentence of imprisonment for a term of less than five years."

(Emphasis added)

8. In the instant case, the minimum sentence fixed by the legislature is five years, however, the court in an appropriate case after recording the reason may award the sentence lesser than five years, but the fine shall not be less than Rs.15,000/- or the amount of the value of such dowry, whichever is more.

9. In view of the above, we are not able to understand as under what circumstances without recording any reason whatsoever it was permissible for the trial Court to award the sentence less than five (5) years. Awarding of punishment of 3 months by the trial Court was hopelessly disproportionate particularly in view of the fact that no mitigating circumstance has been pointed out by the trial court. The High Court failed in its duty to take up the matter in its revisional power under Section 401 r/w Section 386(e) of the Code of Criminal Procedure, 1973 and enhance the punishment commensurate to the offence committed by them. We are appalled that the High Court reduced the sentence to four days.

10. In *State of U.P. v. Shri Kishan,* AIR 2005 SC 1250, this Court has emphasised that just and proper sentence should be imposed. The Court held:

> *"…… Any liberal attitude by imposing meager sentences or* ***taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive*** *in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.*
>
> *The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also*

> *against the society to which the criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should 'respond to the society's cry for justice against the criminal'."*

(Emphasis added)

(See also: *Chinnadurai v. State of Tamil Nadu,* AIR 1996 SC 546; *Sadhupati Nageswara Rao v. State of Andhra Pradesh,* AIR 2012 SC 3242; and *Ajahar Ali v. State of West Bengal,* (2013) 10 SCC 31).

11. In *State of Rajasthan v. Vinod Kumar,* AIR 2012 SC 2301, this Court while dealing with the issue of minimum sentence provided under the statute held:

> *"19. Awarding punishment lesser than the minimum prescribed under Section 376, IPC, is an exception to the general rule. Exception clause is to be invoked only in exceptional circumstances where the conditions incorporated in the exception clause itself exist. It is a settled legal proposition that exception clause is always required to be strictly interpreted even if there is a hardship to any individual. Exception is provided with the object of taking it out of the scope of the basic law and what is included in it and what legislature desired to be excluded. The natural presumption in law is that but for the proviso, the enacting part of the Section would have included the subject-matter of the proviso, the enacting part should be generally given such a construction which would make the exceptions carved out by the proviso necessary and a construction which would make the exceptions unnecessary and redundant should be avoided. Proviso is used to remove special cases from the general enactment and provide for them separately.*

Proviso may change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable.(Vide: S. Sundaram Pillai, etc. v. V.R. Pattabiraman, AIR 1985 SC 582; Union of India and Ors. v. M/s. Wood Papers Ltd. and Anr., AIR 1991 SC 2049; Grasim Industries Ltd. and Anr. v. State of Madhya Pradesh and Anr., AIR 2000 SC 66; Laxminarayan R. Bhattad and Ors. v. State of Maharashtra and Anr., AIR 2003 SC 3502; Project Officer, ITDP and Ors. v. P.D. Chacko, AIR 2010 SC 2626; and Commissioner of Central Excise, New Delhi v. Hari Chand Shri Gopal and Ors., (2011) 1 SCC 236).

20. Thus, the law on the issue can be summarised to the effect that punishment should always be proportionate/ commensurate to the gravity of offence.... The court has to decide the punishment after considering all aggravating and mitigating factors and the circumstances in which the crime has been committed. Conduct and state of mind of the accused ……and the gravity of the criminal act are the factors of paramount importance. The court must exercise its discretion in imposing the punishment objectively considering the facts and circumstances of the case. The power under the proviso is not to be used indiscriminately in a routine, casual and cavalier manner for the reason that an exception clause requires strict interpretation…

The court while exercising the discretion in the exception clause has to record "exceptional reasons" for resorting to the proviso. Recording of such reasons is sine qua non for granting the extraordinary relief. What is adequate and special would depend upon several factors and no straight jacket formula can be laid down."

12. Undoubtedly, imposition of sentence is in the realm of discretion of the court and unless the sentence is found to be

grossly inadequate, the appellate court would not be justified in interfering with the discretionary order of sentence. This view stands fortified by the judgment of this Court in *Ram Sanjiwan Singh & Ors. v. State of Bihar,* AIR 1996 SC 3265.

13. In view of the above, the orders impugned are not sustainable in the eyes of law. Thus, we allow the appeal, set aside the sentence and remand the matter back to the High Court to determine the quantum of punishment. However, to cut short, we issue notice to the respondents for enhancement of punishment to which they can file the reply within a period of 8 weeks from today before the High Court and the High Court is requested to pass an appropriate order of punishment considering the law referred to hereinabove. As the matter is old, we request the High Court to decide the case in regard to quantum of punishment within a period of 3 months after the reply is filed by the respondents.

With these observations, the appeal stands disposed of.

R.P. Appeal disposed of.

HEM RAJ S/O. MOTI RAM
v.
STATE OF HARYANA
(Criminal Appeal No.9 of 2014)

JANUARY 3, 2014.

[RANJANA PRAKASH DESAI AND J. CHELAMESWAR, JJ.]

PENAL CODE, 1860:

s. 376 – Rape – Held: In a case involving charge of rape, evidence of prosecutrix is most vital and is on par with evidence of an injured witness — If it is found credible and inspires total confidence, it can be relied upon even sans corroboration — Court may, however, if it is hesitant to place implicit reliance on it, look into other evidence to lend assurance to it short of corroboration required in the case of an accomplice – Evidence – Evidentiary value of evidence of prosecutrix. .

ss. 376 and 450 – Accused alleged to have jumped into the courtyard of prosecutrix in the night and ravished her – Conviction and sentence of 7 years RI by courts below – Held: – In the instant case, it would be extremely dangerous to rely on evidence of prosecutrix — She was declared hostile — In examination-in-chief she stated that appellant raped her and immediately thereafter retracted the statement and stated that he did not rape her but attempted to rape her — She refused to acknowledge the statement made by her to police — The evidence of her brother is far from satisfactory — The conscience of the Court would not permit it to rely on such evidence — Further, the doctor, who had examined the prosecutrix, was not examined in court — From the MLR produced in the court, it cannot be inferred that prosecutrix was raped by appellant — Taking an overall view of the

matter, prosecution case that prosecutrix was raped by appellant cannot be sustained — This is a case where appellant must be given benefit of doubt— Accordingly, his conviction and sentences u/ss 376 and 450 are set aside.

Investigation:

Rape case — Failure of prosecution to examine the doctor who had examined the prosecutrix – Effect of – Explained.

The appellant was prosecuted on the allegation that in night of occurrence at 12.30 A.M., he jumped into the courtyard of the prosecutrix, a 19 year old girl, and raped her. The trial court convicted him u/ss 376 and 450, IPC and sentenced him to 7 years RI and 2 years RI, respectively, under the two courts. The High Court dismissed the appeal.

Allowing the appeal, the Court

HELD: 1.1. In a case involving charge of rape, the evidence of the prosecutrix is most vital. If it is found credible and inspires total confidence, it can be relied upon even sans corroboration. The court may, however, if it is hesitant to place implicit reliance on it, look into other evidence to lend assurance to it short of corroboration required in the case of an accomplice. Such weight is given to the prosecutrix's evidence because her evidence is on par with the evidence of an injured witness, and, therefore, it is the duty of the court to scrutinize it carefully. The court must, therefore, with its rich experience evaluate such evidence with care and circumspection and only after its conscience is satisfied about its creditworthiness, rely upon it. [para 6] [14-D-F]

State of Maharashtra v. Chandraprakash Kewalchand Jain **1990 (1) SCR 115 = 1990 (1) SCC 550 – relied on.**

1.2. In the instant case, it would be extremely dangerous to rely on evidence of the prosecutrix. She knew the appellant being her neighbour. It is her case that she used to write letters to him. In the examination-in-chief she stated at one stage that the appellant raped her and immediately thereafter retracted the statement and stated that he did not rape her but attempted to rape her. She refused to acknowledge that the statement which was read over to her was made by her to the police. She expressed surprise as to how her signatures appeared on the said statement. The Public Prosecutor had to, therefore, declare her hostile. The conscience of the Court would not permit it to rely on such evidence. It would be hazardous to confirm the conviction on the prosecutrix's sole testimony. [para 8] [15-H; 16-A-C]

1.3.The evidence of PW-1, the brother of the prosecutrix, is far from satisfactory and is incapable of offering any corroboration to the prosecutrix's evidence, assuming her evidence does spell out the case of rape. He stated that the appellant had closed the prosecutrix's mouth and was trying to rape her. He stated that he apprehended the appellant and woke up his father. He further stated that he told the police that the appellant had attempted to rape the prosecutrix. He was confronted with his police statement where he had stated that the appellant had raped the prosecutrix. He went to the extent of saying that he did not make any statement to the police. No reliance can be placed on such evidence. [para 9] [16-D, E-H]

1.4. The prosecution has failed to examine the doctor who had examined the prosecutrix. This is a serious lapse on the part of the prosecution. The MLR was produced in the court by PW-6, the Medical Record Technician. It is true that lapses on the part of the prosecution should not lead to unmerited acquittals. This is, however, subject to the rider that in such a situation the evidence on record

must be clinching so that the lapses of the prosecution could be condoned. Such is not the case here. The MLR does suggest that the hymen of the prosecutrix was torn. It is difficult to infer that the prosecutrix was raped by the appellant. [para 10] [17-A-D]

1.5. Taking an overall view of the matter, the prosecution case that the prosecutrix was raped by the appellant cannot be sustained. This is a case where the appellant must be given benefit of doubt. In the circumstances, the impugned judgment convicting the appellant u/ss 376 and 450 of the IPC and sentencing him for the said offences is quashed and set aside. [para 10-11] [17-E-G]

Case Law Reference:

1990 (1) SCR 115 relied on para 6

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 9 of 2014.

From the Judgment & Order dated 22.11.2011 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 853-SB of 2001.

D.P. Singh, Sonam Gupta, Salil Bhattacharya, Rajkiran Vais, Ravi Prakash Vyas (for Shivaji M. Jadhav) for the Appellant.

Deepkaran Dalal, AAG, Naresh Bakshi for the Respondent.

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. Leave granted.

2. The appellant was tried by the Additional Sessions Judge, Faridabad in Sessions Case No.RBT-8 of 1999 for offences punishable under Sections 376 and 450 of the IPC.

By judgment and order dated 3/8/2001, learned Additional Sessions Judge convicted the appellant for the offence punishable under Section 376 of the IPC and sentenced him to undergo rigorous imprisonment for seven years and to pay a fine of Rs.5,000/-. In default of payment of fine, he was directed to undergo rigorous imprisonment for a period of one year. The appellant was also convicted for offence punishable under Section 450 of the IPC and sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,000/-. In default of payment of fine, he was directed to undergo rigorous imprisonment for a period of two months. The substantive sentences were ordered to run concurrently. Being aggrieved by the said conviction and sentence, the appellant filed criminal appeal in the Punjab and Haryana High Court. By the impugned judgment, the High Court dismissed the said appeal. Hence, this appeal, by special leave.

3. According to the prosecution on 12/3/1999, the prosecutrix who was examined as PW-5 was watching a film on television along with her younger brothers till 12.30 in the night. Both her brothers went to sleep. She went outside the veranda to relieve herself. The appellant, who is her neighbour, was standing on the wall of his house. He jumped from the wall, came to her house and raped her. When the prosecutrix raised alarm, her elder brother PW-1 Fateh Ram came there whereupon the appellant ran away. The prosecutrix lodged her complaint on 14/3/1999 on the basis of which investigation was set into motion. After completion of investigation, the appellant came to be charged as aforesaid.

4. The prosecution case is sought to be established through the evidence of the prosecutrix and her brother PW-1 Fateh Ram. The appellant denied the prosecution case and pleaded innocence. Having gone through the evidence adduced by the prosecution, the trial court convicted the appellant and sentenced him as aforesaid. The High Court confirmed the conviction and sentence of the appellant.

5. Mr. D.P. Singh, learned counsel for the appellant, strenuously urged that the evidence of the prsoecutrix is totally unreliable and deserves to be discarded. She has not supported the prosecution. Evidence of her brother also does not substantiate the prosecution case. The doctor who examined the prosecutrix has not been examined by the prosecution. Counsel submitted that conviction of the appellant must, therefore, be set side. Mr. Deepkaran Dalal, learned AAG for the State, however, submitted that the prosecution case can be sustained on the basis of the evidence of the prosecutrix. The Medico Legal Report (MLR) establishes the case of rape. The appeal, therefore, deserves to be dismissed.

6. In a case involving charge of rape the evidence of the prosecutrix is most vital. If it is found credible; if it inspires total confidence, it can be relied upon even sans corroboration. The court may, however, if it is hesitant to place implicit reliance on it, look into other evidence to lend assurance to it short of corroboration required in the case of an accomplice. [See: *State of Maharashtra v. Chandraprakash Kewalchand Jain*[1]]. Such weight is given to the prosecutrix's evidence because her evidence is on par with the evidence of an injured witness which seldom fails to inspire confidence. Having placed the prosecutrix's evidence on such a high pedestal, it is the duty of the court to scrutinize it carefully, because in a given case on that lone evidence a man can be sentenced to life imprisonment. The court must, therefore, with its rich experience evaluate such evidence with care and circumspection and only after its conscience is satisfied about its creditworthiness rely upon it.

7. We shall now read the prosecutrix's evidence keeping the above caution in mind. There is no dispute about the fact that when the incident-in-question took-place the prosecutrix was 19 years old. In her evidence she stated that on 12/03/1991 she was watching a movie on the television along with

1. (1990) 1 SCC 550.

her brothers. The movie got over at about 12.30 a.m. Thereafter, her brothers went to sleep. After that she went to the compound to ease herself. The appellant, who is her neighbour, was standing on the wall. He jumped over the wall, came to her house and raped her. She immediately retracted her statement and stated that the appellant did not rape her but undressed her and attempted to rape her. Thereafter, she raised a cry. Her brother PW-1 Fateh Ram came there. The appellant ran away. The prosecutrix further went on to say that because the appellant tried to rape her she was depressed and hence she consumed celphos tablets. She, then, categorically stated that she did not make any statement to the police. She admitted that statement Ex-P1 contained her signatures, but, she denied that the said statement, which was read over to her was made by her to the police. She further stated that she did not know how her signatures appeared on the said statement. The prosecutrix having completely given a go-by to the prosecution case learned Public Prosecutor declared her hostile. He cross-examined her. Surprisingly, in the cross-examination the prosecutrix changed her version and stated that the appellant had raped her and her earlier statement that the appellant had not raped her is not correct. In her cross-examination conducted by the defence counsel, the prosecutrix stated that she did not raise any alarm when she saw the appellant standing on the wall of his house. She stated that the appellant removed her salwar, removed all her clothes and raped her for about five minutes. Though, she stated that the accused had closed her mouth and did not allow her to struggle, it does not stand to reason that till the appellant untied the string of her salwar and removed all her clothes she could not raise a cry. Her cries would have brought her brother immediately to the room. Pertinently, the prosecutrix stated that the appellant used to visit her house. She admitted that prior to the occurrence she used to write letters to him.

8. It would be extremely dangerous to rely on such evidence. The prosecutrix obviously knew the appellant being

her neighbour. It is her case that she used to write letters to him. In the examination-in-chief she stated at one stage that the appellant raped her and immediately thereafter retracted the statement and stated that he did not rape her but he attempted to rape her. She refused to acknowledge that the statement which was read over to her was made by her to the police. She expressed surprise as to how her signatures appeared on the said statement. The Public Prosecutor had to, therefore, declare her hostile. Our conscience would not permit us to rely on such evidence. It would be hazardous to confirm the conviction on the prosecutrix's sole testimony. Let us, therefore, see whether there is any other evidence on record which bears out the prosecution case.

9. PW-1 Fateh Ram brother of the porsecutrix stated in his evidence that at the relevant time he was sleeping in his house. The prosecutrix and his two brothers were witnessing film on the television. The film ended at about 12.30 a.m. in the night. Thereafter the prosecutrix went out to ease herself. He also got up after some time to ease himself and went out. According to him, he found the appellant in their house. He stated that the appellant had closed the prosecutrix's mouth and was trying to rape her. He, then, apprehended the appellant and woke up his father. The appellant was beaten-up. After his brother came he was allowed to go. He stated that he did not make any statement to the police. He stated that he did not tell the police that he went to sleep while the prosecutrix was watching television along with her brothers. He stated that he had told the police that the appellant had attempted to rape the prosecutrix. He was confronted with his police statement where he had stated that the appellant had raped the prosecutrix. Thus, on a vital aspect he has contradicted himself. His evidence is, therefore, far from satisfactory and incapable of offering any corroboration to the prosecutrix's evidence, assuming her evidence does spell out the case of rape. He went to the extent of saying that he did not make any statement to the police. No reliance can be placed on such evidence.

10. Faced with such a situation, we were anxious to find out whether there can be any clinching medical evidence suggesting rape, but, unfortunately, the prosecution has failed to examine Dr. Anjali Shah, who had examined the prosecutrix. The MLR was produced in the court by PW-6 J.B. Bhardwaj, Medical Record Technician. This is a serious lapse on the part of the prosecution. We are aware that lapses on the part of the prosecution should not lead to unmerited acquittals. This is, however, subject to the rider that in such a situation the evidence on record must be clinching so that the lapses of the prosecution could be condoned. Such is not the case here. The MLR does suggest that the hymen of the prosecutrix was torn. It is also true that the prosecution has brought on record FSL Report which shows that human semen was detected on the salwar of the prosecutrix and on the underwear of the accused. However, it is difficult to infer from this that the prosecutrix was raped by the appellant. The prosecutrix herself has vacillated on this aspect. It was pointed out that no injuries were found on the prosecutrix. We do not attach much importance to this aspect because presence of injuries is not a must to prove commission of rape. But the prosecutrix's evidence is so infirm that it deserves to be rejected. Her brother has come out with a case that the appellant tried to rape the prosecutrix. He did not say that the appellant raped the prosecutrix. Taking an overall view of the matter, we find it difficult to sustain the prosecution case that the prosecutrix was raped by the appellant. This is a case where the appellant must be given benefit of doubt

11. In the circumstances, the impugned judgment convicting the appellant under Sections 376 and 450 of the IPC and sentencing him for the said offences is quashed and set aside. The appellant is directed to be released forthwith, unless he is required in any other case.

12. The appeal is disposed of in the afore-stated terms.

R.P. Appeal allowed.

SHIVSHANKAR GURGAR
v.
DILIP
(Civil Appeal No. 52 of 2014)

JANUARY 3, 2014

[RANJANA PRAKASH DESAI AND J. CHELAMESWAR, JJ.]

MADHYA PRADESH ACCOMMODATION CONTROL ACT, 1961:

ss.12(1)(a) and 13 – Suit for eviction and arrears of rent – Compromise decree — Tenant to deposit arrears of rent within stipulated period failing which landlord would be entitled to possession – Not complied with by tenant – Execution – Executing court granting time to tenant to deposit rent and on his doing so, dismissing execution application — Held: s. 13 indicates that payment or deposit of rent into court by judgment debtor (tenant) is contemplated only during the pendency of suit for eviction or an appeal (by the tenant) against a decree or order of eviction — It has no application to the execution – Further, power of court to enlarge time u/s. 148 CPC can be exercised only in a case where period is granted by court for doing any act prescribed by Code – It has no application where period is stipulated by agreement between parties — Order of executing court granting time to tenant to deposit rent being a nullity, failure of landlord to challenge it would not deny him the right to recover possession – Execution petition allowed — Code of Civil Procedure, 1908 — s. 148 – Practice and procedure.

DECREE:

Compromise decree – Tenant to deposit arrears of rent

within stipulated time and on his failure to do so, landlord entitled to recover possession — Execution of decree – Executing court holding the decree as contrary to provisions of the Act and granting the tenant time to deposit arrears of rent and on his doing so, dismissing the execution application – Held: Such an order amounts to modification of decree and is without jurisdiction on the part of executing court, therefore, a nullity — Executing court cannot go beyond the decree — It has no jurisdiction to modify a decree — It must execute the decree as it is —Such a void order can create neither legal rights nor obligations — Madhya Pradesh Accommodation Control Act, 1961 – ss. 12(1) (a) and 13 .

In a suit u/s 12(1)(a) of the Madhya Pradesh Accommodation Control Act, 1961 for eviction and arrears of rent, a compromise decree was passed to the effect that the respondent-tenant would pay the arrears within 6 months failing which the appellant-landlord would be entitled to possession. In execution proceedings, the executing court allowed the tenant 15 days time to deposit the amount and on such deposit dismissed the execution application. The executing court further held that in view of s. 13(1)(a) of the Act the compromise decree insofar as it provided for eviction of the respondent in the event of his failure to make the deposit of arrears within the stipulated time was void. The High Court dismissed the revision petition filed by the landlord-appellant on three grounds: (i) that the appellant need not have entered into a compromise which led to the decree; (ii) When the execution petition was filed by the appellant and the executing court granted 15 days time to the respondent to pay the balance of the arrears of rent and since the appellant did not choose to challenge the said order, it implied that the appellant acquiesced in the said order, therefore, the appellant-landlord was not entitled for the recovery of the possession of his property; and (iii) in view of the fact that the respondent eventually

deposited the arrears of rent his possession was required to be protected in view of ss.12(3) and 13(5) of the Act.

Allowing the appeal, the Court

HELD: 1.1. All the reasons given by the High Court are unsustainable in law. The High Court did not examine the correctness of the conclusion of the executing court that the compromise decree insofar as it pertained to the eviction of the respondent in the event of his failure to deposit the arrears of rent within time stipulated in the compromise decree is inconsistent with the provisions of the Act and, therefore, void. [para 12 and 14] [27-D; 28-A]

1.2. The reasons which compelled the appellant to enter the compromise are irrelevant for the issue at hand. The respondent-judgment debtor cannot flout the compromise decree with impunity on the ground that his opponent entered the compromise in view of some serious dispute about the maintainability of his claim. The conduct of the appellant in entering the compromise only debars the appellant to recover possession within the period of six months from the date of the compromise decree whether the respondent paid the arrears of rent or not till the last date. [para 14] [28-B-D]

1.3. Failure of the appellant to challenge the order of executing court dated 23.11.2005 (by which it granted time to tenant to deposit the rent) would not debar him from recovery of possession, for the reasons: (i) The only source which confers powers on the civil court to enlarge time is found u/s 148 of the Code of Civil Procedure, 1908. It is obvious from the language of the Section, such a power can be exercised only in a case where a period is fixed or granted by the court for doing of any act prescribed by the Code. In a compromise decree such as the one on hand, the stipulation that the

judgment debtor is required to make the payment of the money within a specified period is a stipulation by agreement between the parties and it is not a period fixed by the court. Therefore, s.148 CPC has no application to such a situation. [para 15] [28-F-G; 29-A-C]

Hukumchand v. Bansilal and Others **1967 SCR 695 = AIR 1968 SC 86 – relied on.**

(ii) The order dated 23.11.2005 virtually amounts to the modification of the decree and is without jurisdiction on the part of the executing court, therefore, a nullity. It is a settled principle of law that the executing court cannot go beyond the decree. It has no jurisdiction to modify a decree. It must execute the decree as it is. It is well settled that such a void order can create neither legal rights nor obligations. Therefore, the appellant cannot be denied his right to recover possession of the property in dispute on the ground that he did not choose to challenge such a void order. [para 15-16] [29-C-D, F-G]

Deepa Bhargava and Another v. Mahesh Bhargava and Others **2008 (17) SCR 636 = (2009) 2 SCC 294 - relied on.**

1.4. Section 12(1)(a) of the Act enables the landlord to evict the tenant if he could successfully establish that the tenant did in fact fall in arrears of rent and had neither tendered nor paid the amount within the period specified despite a demand. [para 19] [30-D-E]

1.5. Section 13 clearly indicates that the payment or the deposit of rent into the court by the judgment debtor (tenant) is contemplated only during the pendency of the suit for eviction or an appeal (by the tenant) against a decree or order of eviction. Section 13 has no application to the execution proceedings of a decree for eviction when the tenant had already been adjudged to be in default of payment of the rent to the landlord. Therefore,

the executing court's interpretation of s. 13(1) is unsustainable. [para 24-25] [33-B-C, D, E-F]

Smt. Nai Bahu v. Lala Ramnarayan and Others **1978 (1) SCR 723 = (1978) 1 SCC 58 – held inapplicable.**

1.6. In the result, neither the judgment under appeal, nor the executing court's order dismissing the landlord's execution petition can be sustained. The execution petition filed by the appellant is allowed. The executing court will take necessary steps for evicting the respondent from the disputed premises and handing over the possession of the same to the appellant. [para 27] [34-B-C]

Case Law Reference:

1967 SCR 695	**relied on**	**para 15**
2008 (17) SCR 636	**relied on**	**para 15**
1978 (1) SCR 723	**held inapplicable**	**Para 26**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 52 of 2014.

From the Judgment & Order dated 28.10.2010 of the High Court of Madhya Pradesh, Bench at Indore in C.R. No. 173 of 2007.

Raj Kishor Choudhary, T. Mahipal, Neeru Sharma for the Appellant.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted.

2. The appellant filed civil suit under section 12(1)(a) of the Madhya Pradesh Accommodation Control Act, 1961 (hereinafter referred to as the "Act") for eviction of the respondent and recovery of arrears of rent. On 16.4.2002 the

suit came to be decreed *ex parte*. The said decree came to be set-aside on an application filed by the respondent with a direction to file the written statement and also deposit the entire arrears within 30 days in the court.

3. On 25.7.2004 a compromise memo signed by both the parties came to be filed under which the respondent acknowledged his liability to pay arrears of rent to the appellant to the tune of Rs.11710/- and also costs quantified to Rs.4000/-. The respondent also agreed to pay the amount within a period of six months. It was also specifically agreed as follows:

> "H. If the defendant violates any of the aforesaid conditions, the plaintiff shall be entitled to get the vacant possession of suit accommodation from the defendant wherein defendant shall have no objection."

4. In view of the said compromise, the matter was referred to the lok adalat and the civil suit was decreed in terms of the compromise.

5. On 21.7.2005 the appellant filed an application for the execution of the compromise decree alleging that the respondent failed to fulfil his obligations arising out of the compromise decree and, therefore, the appellant is entitled to recover possession of the premises. The events that followed are narrated by the High Court in the judgment under appeal as follows–

> "On 04/10/2005 after appearance respondent filed objections wherein it was alleged that signatures were obtained by the petitioner on the said compromise under undue influence and no receipt was issued by the petitioner for a sum of Rs.10,000/-, which was paid by the respondent. The said application was dismissed by the learned Executing Court vide order dated 24/10/2005 and it was directed that since the Executing Court cannot go behind the decree, therefore, warrant of possession be

> issued. Again on 09/11/2005 objections were filed in which adjustment of Rs.25,000/- was claimed. Vide order dated 22/11/2005 objections filed by the respondent was dismissed, however 15 days time was granted to deposit the amount. Since the amount was deposited by the respondent, therefore, vide order dated 23/12/2005 Executing Court dismissed the execution holding that since the relief of possession of suit accommodation was in alternate and the respondent has deposited the amount though belatedly, therefore, petitioner is not entitled for alternative relief and the execution petitioner was dismissed, against which an appeal was filed on 07/01/2006 and vide order dated 16/03/2006 learned Appellate Court held that the Executing Court has no jurisdiction to go behind the decree but no relief was granted to the petitioner against which Writ Petition was filed by the petitioner on 05/02/2006, which was numbered as **WP No.6163/06** and **vide order dated 08.02.2007** Writ Petition **was allowed and the matter was remanded** to the Executing Court with direction to decide the points framed by the Writ Court for determination."
>
> (emphasis supplied)

6. The operative part of the order reads as follows:

> "10. It is for this reason, I am constrained to remand the case to executing court for deciding the issue again arising out of the execution application filed by the petitioner. The executing court will decide the application keeping in view the law laid down in Nai Bahu[1] case and any other case which governs the field and will record categorical finding on following issues:
>
> 1. Whether compromise decree dated 25.7.2005 is nullity in so far as it relates to a relief of eviction of respondent from the suit house?

1. Smt. Nai Bahu v. Lala Ramnarayan and others (1978) 1 SCC 58

2. If not then whether default alleged is made out by the petitioner so as to entitle him to execute the decree for eviction?

7. On remand, by the order dated 17.4.2007, the executing court recorded a finding that the respondent had paid the entire amount due under the compromise decree in the executing court although such a payment was made beyond the period of six months stipulated in the compromise decree. Further, the executing court examined the submission made by the respondent that in view of section 13(1)(a) of the Act the compromise decree insofar as it provided for eviction of the respondent in the event of his failure to make the deposit of arrears within the stipulated time is void. The operative portion of the order of the executing court reads as follows:

> "20. …. Hence, in respect of issue No.A it is decided that the compromise decree is void in respect of eviction relief and no such eviction can be ordered contrary to the provisions of M.P. Accommodation Control Act for default in payment of rent. Since executable part of compromise decree has been held to be void, in such circumstances the executing court cannot pass an order for eviction for default in payment of arrears of rent or remaining part of arrears of rent. Accordingly issue No.B is decided."

8. Aggrieved by the said order, the appellant herein again approached the High Court by way of a Civil Revision Petition No.173 of 2007. The High Court by its judgment under appeal dated 28.10.2010 dismissed the revision. Hence this appeal.

9. The reasons recorded by the High Court are as follows-

> "8. Undoubtedly entire rent was deposited by the respondent. It is also not in dispute that the amount was not deposited within a period of six months as per terms and condition of the compromise decree. However, later on the rent was deposited. Since the ground was available to the petitioner under Section 12(1)(a) of M.P. Accommodation Control Act as the respondent did not tender the rent within a period of two months from the date of notice and also did not deposit the rent within one month from the date of receipt of summons under Section 13(1) of the Act, therefore, there was no reason for the petitioner to enter into compromise and condone the delay in depositing the rent and give further time to the respondent of another six months to deposit the rent. It appears that since there was serious dispute between the parties relating to the title of the petitioner, therefore, the concession was given by the petitioner. Vide order dated 23.11.2005 learned Executing Court has further extended the time by another 15 days for depositing the arrears of rent keeping in view the good conduct of the respondent.
>
> 9. From perusal of the order dated 23.11.2005 it appears that the amount of Rs.10,000/- was deposited by the respondent on that day only. Thus, vide judgment and decree dated 25.07.2004 respondent was required to deposit the arrears within six months which expired on 24.01.2005. In execution petition, time was further extended by 15 days vide order dated 23.11.2005. The order dated 23.11.2005 was not challenged by the petitioner, meaning thereby the petitioner agreed with the order whereby time was further extended.
>
> 10. Apart from this if the rent is deposited by the tenant as per Section 13(1) of the Act, then respondent is entitled for protection against eviction under Section 12(3) and 13(5) of the Act and in case of default for three consecutive months another suit for eviction can be filed against respondent. In the facts and circumstances of the case, this Court is of the view that no illegality has been committed by the learned Executing Court in dismissing the execution petition in full satisfaction. Hence, petition filed by the petitioner has no merits and the same is dismissed."

10. It is **argued** by the learned counsel for the appellant that the **executing court erred** in coming to the conclusion that the compromise decree is inconsistent with the section 13 of the Act and the **High Court simply failed** to record its finding on the correctness of the order of the executing court but went astray.

11. On the other hand, the learned counsel for the respondent submitted that the executing court's conclusion that the compromise decree insofar as it provided for the eviction of the respondent is void and calls for no interference in view of section 13 of the Act even though the High Court failed to examine the said question.

12. The High Court did not examine the correctness of the conclusion of the executing court that the compromise decree insofar as it pertained to the eviction of the respondent in the event of his failure to deposit the arrears of rent within time stipulated in the compromise decree is inconsistent with the provisions of the Act and therefore void.

13. From the judgment under appeal, the relevant portion of which is extracted earlier at para 9, it appears that the High Court dismissed the case of the appellant on three grounds (i) that the appellant need not have entered into a compromise which led to the decree. According to the High Court, such a compromise was entered into by the appellant as in the view of the High Court - there was a serious dispute about the title of the appellant (ii) When the execution petition was filed by the appellant, the executing court by its order dated 23.11.2005 granted 15 days time to the respondent to pay the balance of the arrears of rent. The appellant did not choose to challenge the said order. According to the High Court, such failure of the appellant implies that the appellant acquiesced in the said order, hence, the appellant/landlord was not entitled for the recovery of the possession of his property; (iii) in view of the fact that the respondent eventually deposited the arrears of rent his possession is required to be protected in view of section

12(3) and 13(5) of the Act.

14. We are of the opinion that all the reasons given by the High Court are unsustainable in law.

The reasons which compelled the appellant to enter the compromise are irrelevant for the issue at hand. The respondent/judgment debtor cannot flout the compromise decree with impunity on the ground that his opponent entered the compromise in view of some serious dispute about the maintainability of his claim. The conduct of the appellant in entering the compromise only debars the appellant to recover possession within the period of six months from the date of the compromise decree whether the respondent paid the arrears of rent or not till the last date. If the respondent paid the said amount any time within the period of six months, the appellant would be debarred from seeking the eviction of the respondent on the cause of action which led to the filing of the eviction suit.

15. Coming to the second reason i.e., the failure of the appellant to challenge the order of the executing court dated 23.11.2005 (by which the executing court granted 15 days time to the respondent to deposit the balance of the arrears of rent) debar the appellant to recover possession of the property in dispute is equally untenable, because:

(i) in our opinion, the order of the executing court dated 23.11.2005 is beyond his jurisdiction and a nullity. The only source which confers powers on the civil court to enlarge time is found under Section 148 of the Code of Civil Procedure which reads as follows:-

> **148. Enlargement of time** – Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time, enlarge such period not exceeding thirty days in total, even though the period originally fixed or granted may have expired.

It is obvious from the language of the Section, such a power can be exercised only in a case where a period is fixed or granted by the court for doing of any act prescribed by this Court. In a compromise decree such as the one on hand, the stipulation that the judgment debtor is required to make the payment of the money within a specified period is a stipulation by agreement between the parties and it is not a period fixed by the court. Therefore, Section 148 CPC has no application to such a situation. We are fortified by the decision of this court in *Hukumchand v. Bansilal and others* AIR 1968 SC 86

(ii) In our opinion, the order dated 23.11.2005 virtually amounts to the modification of the decree and is without jurisdiction on the part of the executing court, therefore, a nullity.

It is a settled principle of law that the executing court cannot go beyond the decree. It has no jurisdiction to modify a decree. It must execute the decree as it is. This Court in *Deepa Bhargava and Another v. Mahesh Bhargava and Others* [(2009) 2 SCC 294] held thus:-

> "9. There is no doubt or dispute as regards interpretation or application of the said consent terms. It is also not in dispute that the respondent judgment-debtors did not act in terms thereof. An executing court, it is well known, cannot go behind the decree. It has no jurisdiction to modify a decree. It must execute the decree as it is…."

16. It is well settled that such a void order can create neither legal rights nor obligations. Therefore, the appellant cannot be denied his right to recover possession of the property in dispute on the ground that he did not choose to challenge such a void order.

17. The third reason of the High Court and the conclusion of the executing court that the compromise decree insofar as it provided for eviction of the tenant in the event of his failure to pay the arrears of rent within a period of six months from the

decree is contrary to the provisions of the Act are interlinked. Therefore, we are required to examine the scope of sections 12 and 13 of the Act insofar as they are relevant for the present purpose.

18. Section 12(1) of the Act restricts the right of landlord to evict his tenant only on the grounds enumerated in the said section:

> 12. Restriction on eviction of tenants.— (1) Notwithstanding anything the contrary contained in any other law or contract, no suit be filed in any civil court against a tenant for his eviction from any accommodation except one of more of the following grounds only, namely–

19. The only ground urged by the appellant in his suit is that the tenant fell in arrears of rent. Such a ground is one of the grounds in section 12(1)(a) of the Act which enables the landlord to evict the tenant if he could successfully establish that the tenant did infact fall in arrears of rent and had neither tendered nor paid the amount within the period specified under Section 12(1)(a) despite a demand. Section 12(1)(a) reads as follows:-

> 12(1)(a) that the tenant has neither paid nor tendered the whole of the arrears of the rent legally recoverable from him within two months of the date on which a notice of demand for the arrears of rent has been served on him by the landlord in the prescribed manner."

20. Section 13(1)[2] of the Act stipulates that the tenant shall

2. 13. When tenant can get benefit of protection against eviction.—(1) On a suit or any other proceeding being instituted by a landlord in any of the grounds referred to in section 12 or in any appeal or any of other proceeding by a tenant against any decree or other for his eviction, the tenant shall, within one month of the service of writ of summons or notice of any other proceeding within one month of institution of appeal or any other proceeding by the tenant as the case may be, or within such further time as the court may on an application made to it allow in this behalf, deposit in the court

either deposit in the court or pay to the landlord an amount calculated at the rate of rent at which it was prayed for by the landlord for various periods specified therein (the details of which are not necessary for the present). Such a deposit or payment is required to be made in two contingencies. They are:-

(i) upon institution of the suit for eviction of the tenant irrespective of the ground on which eviction is sought; or

(ii) in an appeal or in a proceeding by the tenant against the decree or order of eviction.

It is further stipulated that such a deposit or payment is required to be made within a period of one month of the service of the summons, if the deposit is being made during the pendency of the suit or within a period of one month from the date of institution of appeal or other proceeding as the case may be. Further, the said sub-section also recognizes the authority of the court to extend in its discretion the said period of one month on an application made to it. Sub-section (2)[3] provides for the procedure in case of any dispute regarding the rate of rent payable whereas sub-section (3) provides for the procedure to be followed in case of any dispute regarding the person to whom the rent is payable.

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or pay to the landlord, an amount calculated at the rate of rent at which it was prayed, for the period for which the tenant may have made default including the period subsequent thereto up to the end of the month previous to that in which the deposit or payment is made and shall thereafter continue to deposit or pay, month by the 15th of each succeeding month a sum equivalent to the rent at that rate till the decision of suit, appeal or proceeding as the case may be.

3. (2) If in any suit or proceeding referred to in sub-section (1) there is any dispute as to amount of rent payable by the tenant, the court shall, on a plea made either by landlord or tenant in that behalf which shall be taken at the earliest opportunity during such suit or proceeding, fix a reasonable provisional rent, in relation to the accommodation to be deposited or paid in accordance with the provisions of sub-section (1) and no court shall, save for reasons to be recorded in writing, entertain any plea on this account at subsequent stage.

21. The submission that found favour with the executing court is that in view of section 13.

> "… the decree of the aforesaid Lok Adalat that in default of payment of arrears of rent the judgment debtor shall be liable to be evicted, cannot be enforced because according to Section 13 of M.P. Accommodation Control Act, if the judgment debtor pays the rent to the landlord within one month from the date of issuance of summon or within the stipulated time given by the court on an application so made by the judgment debtor, then he will be entitled for protection from eviction under Section 12 M.P. Accommodation Control Act, thus clearly entire decreetal amount has been paid in the execution proceeding, therefore, the judgment debtor shall be entitled for protection from eviction."

22. Sub-section (5)[4] declares that if a tenant makes deposit or payment as required under sub-section (1) or (2), no decree or order for recovery of possession of the accommodation can be passed. Sub-section (5) only protects the defaulting tenant in possession in the event of his complying with the requirement of Section 13(1) or (2) only in those cases where the eviction is sought on the ground of arrears of rent falling under section 12(1)(a).

23. The case of the appellant is one falling under section 12(1)(a) and, therefore, the learned counsel for the respondent placed reliance on Section 13 (5) to sustain the conclusion of the executing court. Section 13(5) reads as follows:-

> "(5) If a tenant makes deposit or payment as required by sub-section (1) or sub-section (2), no decree or order shall

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4. (5) If a tenant makes deposit or payment as required by sub-section (1) or sub-section (2), on decree or order shall be made by the court for the recovery of possession of the accommodation on the payment of rent by the tenant, but the court may allow such cost as it may deem fit to the landlord.

be made by the court for the recovery of possession of the accommodation on the ground of default in the payment of rent by the tenant, but the court may allow such cost as it may deem fit to the landlord."

24. A reading of Section 13, in our view clearly indicates that the payment or the deposit of rent into the court by the judgment debtor (tenant) is contemplated only during the pendency of the suit for eviction or an appeal (by the tenant) against a decree or order of eviction. Section 13 has no application to the execution proceedings of a decree for eviction.

25. The language of Section 13(1) is very clear and explicit in this regard. We fail to understand as to how the Court could read into Section 13, a possibility of enabling the judgment debtor (tenant) to protect his possession by making the payment during the execution proceedings in spite of the fact that he had already been adjudged to be in default of payment of the rent to the landlord. Such an interpretation of Section 13 would be wholly destructive of Section 12(1)(a). Therefore, not only the language of Section 13(1), but also an irreconcilable inconsistency that would arise between Section 12(1)(a) and Section 13(1) if the interpretation placed by the executing court is accepted - in our view is sufficient to hold that the executing court's interpretation of Section 13(1) is unsustainable.

26. Coming to the decision of this Court in *Smt. Nai Bahu v. Lala Ramnarayan and Others* (1978) 1 SCC 58, all that this Court held is that a landlord whose right to seek the eviction of his tenant is restricted by a statute (to the grounds specified in the statute) cannot successfully evict the tenant only on the basis of a compromise decree passed in a suit for eviction of the tenant. Apart from the consent of the tenant, one of the statutorily stipulated grounds rendering the tenant liable for eviction must necessarily exist for the validity of such a decree. In other words, this court held that a tenant who suffered a consent decree can still raise a question that none of the

statutory conditions existed which render him liable for eviction when the consent decree came to be passed.

27. In the case on hand the tenant was clearly in arrears of the rent which fact is acknowledged by the compromise memo signed by the tenant which was incorporated in the decree. Looked at any angle, we are not able to agree with the judgment under appeal, nor able to sustain the executing court's order dismissing the landlord's execution petition. The appeal is accordingly allowed. The execution petition filed by the appellant is also allowed. The executing court will now take necessary steps for evicting the respondent from the disputed premises and handing over the possession of the same to the appellant.

28. In the facts and circumstances of the case, there will be no order as to costs.

R.P. Appeal allowed.

SMT. T.S. SHYLAJA
v.
ORIENTAL INSURANCE CO. & ANR.
(Civil Appeal No. 51 of 2014)

JANUARY 3, 2014

[T.S. THAKUR AND VIKRAMAJIT SEN, JJ.]

Workmen's Compensation Act, 1923:

s.30, first proviso – Substantial question of law – Appeal before High Court against order of Commissioner awarding compensation – Held: In terms of the 1st proviso, no appeal is maintainable against any order passed by Commissioner unless a substantial question of law is involved – In the instant case, High Court has neither referred to nor determined any question of law much less a substantial question of law existence whereof was a condition precedent for maintainability of an appeal u/s 30 — Inasmuch as the High court remained oblivious of the basic requirement of law for maintainability of an appeal before it and inasmuch as it treated the appeal to be one on facts, it committed an error which needs to be corrected.

Claim petition – Death of a driver – Commissioner awarding compensation – High Court setting aside the award holding that relationship of employer and employee was not proved – Held: Commissioner had recorded a finding of fact that deceased was employed as a driver by owner of vehicle no matter the owner happened to be his brother — That finding could not be lightly interfered with or reversed by High Court — The order of High Court is set aside and that passed by Commissioner restored.

A vehicle being driven by the appellant's son collided with another vehicle, resulting in his death. The

Commission for Workmen's Compensation allowed a compensation of Rs.4,48,000/-. However, the High Court in the appeal filed by the insurer held that the relationship between the deceased and his brother the owner of the vehicle he was driving was not satisfactorily proved to be that of an employee and an employer and that the only remedy was by way of a claim for payment of compensation under the Motor Vehicles Act. In the instant appeal filed by the mother of the deceased, it was contended that since no substantial question of law was involved in the case, High Court should not have entertained the appeal in view of the provisions of s. 30 of the Workmen's Compensation Act, 1923(rechristened as Employee's Compensation Act, 1923).

Allowing the appeal, the Court

HELD: 1.1. In terms of the 1st proviso to s.30 of the Workmen's Compensation Act, 1923, no appeal is maintainable against any order passed by the Commissioner unless a substantial question of law is involved. This necessarily implies that the High Court would in the ordinary course formulate such a question or at least address the same in the judgment especially when it takes a view contrary to the view taken by the Commissioner. [para 8] [41-D-F]

1.2. In the case at hand, the Commissioner for Workmen's Compensation had appraised the evidence adduced before him and recorded a finding of fact that the deceased was indeed employed as a driver by the owner of the vehicle no matter the owner happened to be his brother. That finding could not be lightly interfered with or reversed by the High Court. The High Court overlooked the fact that the respondent-owner of the vehicle had appeared as a witness and clearly stated that the deceased was his younger brother, but was working as a paid driver under him. [para 9] [41-F-H]

1.3. The High Court has neither referred to nor determined any question of law much less a substantial question of law existence whereof was a condition precedent for the maintainability of any appeal u/s 30. Inasmuch as the High court remained oblivious of the basic requirement of law for the maintainability of an appeal before it and inasmuch as it treated the appeal to be one on facts, it committed an error which needs to be corrected. [para 10] [43-A-C]

1.4. Besides, the only reason which the High Court has given to upset the finding of the Commissioner is that the Commissioner could not blindly accept the oral evidence without analysing the documentary evidence on record. But it has not indicated as to what was the documentary evidence which the Commissioner had failed to appreciate and what was the contradiction, if any, between such documents and the version given by the witnesses examined before the Commissioner. The High Court could not have, without adverting to the documents vaguely referred to by it have upset the finding of fact which the Commissioner was entitled to record. [para 10] [42-F-H; 43-A]

1.5. The order of the High Court is set aside and that passed by the Commissioner restored. [para 11]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 51 of 2014.

From the Judgment & Order dated 25.03.2011 of the High Court of Karnataka at Bangalore in MFA No. 738 of 2009 (WC).

G.V. Chandrashekher, N.K. Verma, Anjana Chandrashekar for the Appellant.

Manish Pratap Singh, Ajay Singh, Dr. Nafis A. Siddiqui, Debashhish M., for the Respondents.

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 is whether the High Court was justified in setting aside the order passed by the Commissioner for Workmen's Compensation holding the appellant entitled to an amount of Rs.4,48,000/- towards compensation with interest @ 12% per annum.

3. The claim before the Commissioner arose out of a motor accident in which the deceased-Prahlad lost his life while driving a Toyota Qualis vehicle bearing registration No.KA-02/C-423. The incident in question, it appears, occurred on 3rd September 2000 near Bidadi Police Station, on the Bangalore-Mysore highway involving a head on collision with a Tipper Lorry bearing No.KA-02-B-9135. The deceased was removed to the hospital where he died two days after the accident. A claim petition was then filed before the Commissioner for Workmen's Compensation, Bangalore Sub-Division-IV, Bangalore by the appellant, mother of the deceased for payment of compensation. The claim petition alleged that the deceased was employed as a driver on a monthly salary of Rs.6,000/- by the owner of the vehicle. The vehicle being insured with the respondent-company, the claimant sought recovery of the amount from the company in terms of provisions of the Workmen's Compensation Act, 1923, now re-christened as the Employee's Compensation Act, 1923. The insurance company contested the claim primarily on the ground that the jural relationship of employer and employee did not exist between the owner and the deceased. It was also contended that it was the negligence of the deceased that had caused the accident thereby disentitling the claimant to any compensation.

4. On the pleadings of the parties, the Commissioner framed six issues for determination and eventually came to the conclusion that the deceased was indeed working as a paid

driver of the owner of the vehicle, Toyota Qualis and that the claimant, the appellant herein was entitled to receive an amount of Rs.4,48,000/- towards compensation having regard to the fact that the deceased was just about 20 years of age at the time of accident and was receiving Rs.4,000/- per month towards salary. An award for the said amount was accordingly made by the Commissioner with interest @12% per annum against the respondent-company who had admittedly underwritten the risk in terms of a policy issued by it.

5. Aggrieved by the award made by the Commissioner, the respondent-company preferred an appeal, M.F.A. No. 738 of 2009 before the High Court of Karnataka at Bangalore which has been allowed by a Single Judge of that Court in terms of the order impugned order before us. The High Court was of the view that the relationship between the deceased and his brother the owner of the vehicle he was driving was not satisfactorily proved to be that of an employee and an employer and that the only remedy which the appellant, mother of the deceased had, was by way of a claim for payment of compensation under the Motor Vehicles Act.

6. Appearing for the appellant Mr. G.V. Chandrashekhar, learned counsel, strenuously argued that the High Court was in error in entertaining the appeal and in reversing the view taken by the Commissioner by re-appraising the evidence on record. He urged that the High Court remained oblivious of the provisions of Section 30(1) of the Act which clearly stipulate that no appeal shall lie against any order of the Commissioner unless a substantial question of law fell for consideration. No such question of law arose for consideration nor was the same framed or addressed by the High Court in the course of the judgment. The reasoning given by the High Court was, according to the learned counsel, vague and based entirely on surmises and conjectures hence unsustainable in law.

7. Section 30 of the Employees Compensation Act, 1923

no doubt provides for an appeal to the High Court from the orders passed by the Commissioner and enumerated in clauses (a) to (e) sub-Section (1) of Section 30. Proviso to Section 30(1), however, makes it abundantly clear that no such appeal shall lie unless a substantial question of law is involved in the appeal and in the case of an order other than an order such as is referred to in clause (b) unless the amount in dispute in the appeal is not less than three hundred rupees. Section 30(1) reads as under:

"30. Appeals.—

(1) An appeal shall lie to the High Court from the following orders of a Commissioner, namely:—

(a) an order as awarding as compensation a lump sum whether by way of redemption of a half-monthly payment or otherwise or disallowing a claim in full or in part for a lump sum;

1[(aa) an order awarding interest or penalty under section 4A;]

(b) an order refusing to allow redemption of a half-monthly payment;

(c) an order providing for the distribution of compensation among the dependants of a deceased workman, or disallowing any claim of a person alleging himself to be such dependant;

(d) an order allowing or disallowing any claim for the amount of an indemnity under the provisions of sub-section (2) of section 12; or

(e) an order refusing to register a memorandum of agreement or registering the same or providing for the registration of the same subject to conditions:

Provided that no appeal shall lie against any order unless a substantial question of law is involved in the appeal, and in the case of an order other than an order such as is referred to in clause (b), unless the amount in dispute in the appeal is not less than three hundred rupees:

Provided further that no appeal shall lie in any case in which the parties have agreed to abide by the decision of the Commissioner, or in which the order of the Commissioner gives effect to an agreement come to by the parties:

Provided further that no appeal by an employer under clause (a) shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against."

8. What is important is that in terms of the 1st proviso, no appeal is maintainable against any order passed by the Commissioner unless a substantial question of law is involved. This necessarily implies that the High Court would in the ordinary course formulate such a question or at least address the same in the judgment especially when the High Court takes a view contrary to the view taken by the Commissioner.

9. The Commissioner for Workmen's Compensation had, in the case at hand, appraised the evidence adduced before him and recorded a finding of fact that the deceased was indeed employed as a driver by the owner of the vehicle no matter the owner happened to be his brother. That finding could not be lightly interfered with or reversed by the High Court. The High Court overlooked the fact that the respondent-owner of the vehicle had appeared as a witness and clearly stated that the deceased was his younger brother, but was working as a paid driver under him. The Commissioner had, in this regard, observed:

"After examining the judgment of the Andhra Pradesh High Court relied upon by 2nd opponent it is seen that the owner of the vehicle being the sole witness has been unsuccessful in establishing his case but in this proceeding the owner of the vehicle has appeared before this Court even though he is a relative of the deceased, and has submitted in his objections, even evidence that even though the deceased was his younger brother he was working as a driver under him, and has admitted that he was paying salary to him. The applicant in support of his case has submitted Hon'ble High Court judgment reported in ILR 2006 KAR 518. The Divisional Manager, United India Insurance Company Ltd. Vs. Yellappa Bheemappa Alagudi & Ors. which I have examined in depth which holds that there is no law that relatives cannot be in employer employee relationship. Therefore it is no possible to ignore the oral and documentary evidence in favour of the applicant and such evidence has to be weighed in favour of the applicant. For these reasons I hold that the deceased was working as driver under first opponent and driving Toyota Quails No.KA-02-C-423, that he died in accident on 03.09.2005, that he is a 'workman' as defined in the Workmen's Compensation Act and it is held that he has caused accident in the course of employment in a negligent fashion which has resulted in his death".

10. The only reason which the High Court has given to upset the above finding of the Commissioner is that the Commissioner could not blindly accept the oral evidence without analysing the documentary evidence on record. We fail to appreciate as to what was the documentary evidence which the High Court had failed to appreciate and what was the contradiction, if any, between such documents and the version given by the witnesses examined before the Commissioner. The High Court could not have, without adverting to the documents vaguely referred to by it have upset the finding of

fact which the Commissioner was entitled to record. Suffice it to say that apart from appreciation of evidence adduced before the Commissioner the High Court has neither referred to nor determined any question of law much less a substantial question of law existence whereof was a condition precedent for the maintainability of any appeal under Section 30. Inasmuch as the High court remained oblivious of the basic requirement of law for the maintainability of an appeal before it and inasmuch as it treated the appeal to be one on facts it committed an error which needs to be corrected.

11. We accordingly allow this appeal, set aside the order of the High Court and restore that passed by the Commissioner. We grant three months' time to the respondent to deposit the amount of compensation together with interest, if not already paid or deposited failing which the appellant shall be free to seek redress before the Commissioner for recovery of the amount awarded in her favour. No costs.

R.P. Appeal allowed.

PRAFUL MANOHAR RELE
v.
SMT. KRISHNABAI NARAYAN GHOSALKAR & ORS.
(Civil Appeal No. 50 of 2014)

JANUARY 3, 2014

[T.S. THAKUR AND VIKRAMAJIT SEN JJ.]

Leave and licence:

Licence – Suit for possession stating that defendants-respondents were gratuitous licensees – Alternative plea of eviction on ground of bona fide need – Held: Alternative plea would be redundant if plaintiff's case of defendants being gratuitous licensees was accepted by court — First appellate court accepted plaintiff's case that defendants were in occupation as licensees and not as tenants — High Court has not set aside that finding of fact on its merits and dismissed the suit simply because the plea of tenancy was, in its opinion, contradictory to the plea of licence set up in earlier part of plaint — That was not a proper approach or course to follow — Judgment of High Court set aside and that of first appellate court restored.

***PRACTICE AND PROCEDURE**:*

Plea of termination of licence and alternatively eviction on ground of bona fide need – Held: Plaintiff-appellant had set up a specific case that defendants were occupying the suit premises as licensees and licence had been validly terminated — In reply to the notice, case of defendants was that they were in occupation of suit premises not as licensees but as tenants — Plaintiff was, therefore, entitled on that basis alone to ask for an alternative relief of a decree for eviction on grounds permissible under Rent Act.

The plaintiff filed a suit for possession against the defendants-respondents on the ground that they were licensees occupying the premises gratuitously. It was the case of the plaintiff that the predecessor-in-interest of the defendants was allowed to occupy the suit premises as a gratuitous licensee on humanitarian considerations. After his demise, the defendants were served with a notice terminating the licence and asking them to hand over the possession of the suit premises, but they refused to vacate and falsely claimed to be tenants. It was alternatively urged that the plaintiff was entitled to vacation of the premises, *inter alia*, on the ground of bona fide personal need. In the written statement filed by the defendants they stuck to their version that the suit property was occupied by their predecessor-in-interest as a tenant and upon his demise they too were in occupation of the same as tenants. The trial court dismissed the suit. But, the first appellate court decreed the suit. However, the High Court allowed the second appeal of the defendants-respondents holding that the plaintiff's case that the predecessor-in-interest of the defendants was a gratuitous licensee was incompatible with the plea that he was a tenant and, therefore, could be evicted under the Rent Act.

Allowing the appeal, the Court

HELD: 1.1. Whether or not the defendants were licensees as alleged by the plaintiff was essentially a question of fact and had to be answered on the basis of the evidence on record which the first appellate court had reappraised to hold that the defendants were let into the suit property by the plaintiff on humanitarian grounds and as gratuitous licensees, and licence stood validly terminated. The defence of the defendants-respondents that they were occupying the premises as tenants was held by the first appellate court not proved. The High

Court could not have interfered with that finding of fact. [Para 10] [52-A-D, G]

1.2. The alternative plea would be redundant if the plaintiff's case of the defendants being gratuitous licensees was accepted by the court. That is precisely what had happened in the instant case. The first appellate court accepted the plaintiff's case that defendants were in occupation as licensees and not as tenants. The High Court has not set aside that finding of fact on its merits. Without finding fault with the findings recorded by the first appellate court on the question of license and its termination, the High Court has dismissed the suit simply because the plea of tenancy was, in its opinion, contradictory to the plea of license set up in the earlier part of the plaint. That was not a proper approach or course to follow. Therefore, the order passed by the High Court cannot be sustained. [Para 11-12] [53-B-C, E-G]

2.1. As regards the inconsistent pleas, the plaintiff-appellant in the case at hand had set up a specific case that the defendant as also his legal representatives after his demise were occupying the suit premises as licensees which licence had been validly terminated. In reply to the notice the case of the defendants was that they were in occupation of the suit premises not as licensees but as tenants. The plaintiff was, therefore, entitled on that basis alone to ask for an alternative relief of a decree for eviction on the grounds permissible under the Rent Control Act. The written statement filed by the defendant contained an express admission of the fact that the property belonged to the plaintiff and that the defendants were in occupation thereof as tenants. In the trial court also the question whether the defendants were in occupation as licensee or as tenants had been specifically put in issue thereby giving the fullest opportunity to the parties to prove their respective cases.

There was no question of the defendants being taken by surprise by the alternative case pleaded by the plaintiff nor could any injustice result from the alternative plea being allowed and tried by the court. [Para 18] [57-A-E]

Srinivas Ram Kumar v. Mahabir Prasad and Ors. **1951 SCR 277 = AIR 1951 SC 177;** *Bhagwati Prasad v. Chandramaul* **1966 SCR 286=AIR 1966 SC 735;** *G. Nagamma and Anr. v. Siromenamma and Anr.* **1995 (5) Suppl. SCR 701 = (1996) 2 SCC 25;** *B.K. Narayana Pillai v. Parameswaran Pillai* **1999 (5) Suppl. SCR 271 = 2000(1) SCC 712;** *J.J. Lal Pvt. Ltd. and Ors. v. M.R. Murali and Anr.* **2002 (1) SCR 919 = (2002) 3 SCC 98; relied on**

2.2. Further, no error of jurisdiction was committed in the instant case, as the finding recorded by the civil court was that the defendants were licensees and not tenants and the first appellate court granted relief to the plaintiff-appellant not in relation to the alternative plea but on the principal case set up by him. [Para 18] [57-G-H; 58-A]

3. In the result, the impugned judgment passed by the High Court is set aside and that passed by the first appellate court restored. [Para 19] [58-B-C]

Case Law Reference:

1951 SCR 277	**relied on**	**para 13**
1966 SCR 286	**relied on**	**para 14**
1995 (5) Suppl. SCR 701	**relied on**	**para 15**
1999 (5) Suppl. SCR 271	**relied on**	**para 16**
2002 (1) SCR 919	**relied on**	**para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 50 of 2014.

From the Judgment & Order dated 16.10.2009 of the High Court of Judicature at Bombay in Special Civil Application No. Second Appeal No. 90 of 1992.

K.K. Sharma, Aman Vachhu, Arvind Nayar, Ashuthosh Dubey, Veera Shinde, Harsh Sharma, P.K. Manohar for the Appellant.

Vinay Navare, Keshav Ranjan, Satyajeet Kumar, Abha R. Sharma for the Respondents.

The Judgment of the Court was delivered by

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

2. This appeal arises out of a judgment and order dated 16th October, 2009 passed by the High Court of Judicature at Bombay whereby the High Court has allowed Civil Second Appeal No.90 of 1992 set aside the judgment and decree passed by the Additional District Judge in Civil Appeal No.33 of 1987 and restored that passed by the Trial Court dismissing Regular Civil Suit No.87 of 1984. The factual backdrop in which the dispute arose may be summarized as under:

3. Manohar Narayan Rele owned a house bearing Panchayat No.105 situate in village Ravdanda, Taluka Alibag, District Raigad, in the State of Maharashtra. In RCS No.87 of 1984 filed by the said Shri Rele before the Civil Judge (Junior Division), Alibag, the plaintiff prayed for a decree for possession of the suit premises comprising a part of the house mentioned above on the ground that the defendants who happened to be the legal heirs of one Shri Narayan Keshav Ghosalkar, a Goldsmith by profession, residing in Bombay was allowed to occupy the suit premises as a gratuitous licensee on humanitarian considerations without any return, compensation, fee or charges for such occupation. Upon the demise of Shri Narayan Keshav Ghosalkar in February 1978, the defendants who stepped into his shoes as legal heirs started abusing the confidence reposed by the plaintiff in the said Ghosalkar and creating nuisance and annoyance to the

plaintiff with the result that the plaintiff was forced to terminate the licence granted by him in terms of a notice assuring for delivery of vacant possession of the premises w.e.f. 1st February, 1984. Upon receipt of the notice, the defendants instead of complying with the same sent a reply refusing to vacate the premises on the false plea that they were occupying the same as tenants since the time of Shri Narayan Keshav Ghosalkar and were paying rent although the plaintiff had never issued any receipt acknowledging such payment. In a rejoinder sent to the defendants, the plaintiff denied the allegations made by the defendants and by way of abundant caution claimed possession of the suit premises even on the grounds permitted under the Rent Control Act of course without prejudice to his contention that the defendants could not seek protection under the Rent Act. Time for vacation of the premises was also extended by the said rejoinder upto the end of April, 1984.

4. The defendants did not vacate the premises thereby forcing the plaintiff to file a suit for possession against them on the ground that they were licensees occupying the premises gratuitously and out of humanitarian considerations. It was alternatively urged that the plaintiff was entitled to vacation of the premises on the ground of bona fide personal need, nuisance, annoyance and damage allegedly caused to the premise and to the adjoining garden land belonging to him.

5. In the written statement filed by the defendants they stuck to their version that the suit property was occupied by Shri Narayan Keshav Ghosalkar as a tenant and upon his demise the defendants too were in occupation of the same as tenants.

6. On the pleadings of the parties the Trial Court framed as many as eight issues and eventually dismissed the suit holding that the plaintiff had failed to prove that the defendants were gratuitous licensees. The Trial Court also held that the defendants had proved that they were occupying the premises

as tenants on a monthly rent of Rs.13/- and that the plaintiff had failed to prove that he required the premises for his *bona fide* personal use and occupation. Issues regarding the defendants causing nuisance and annoyance to the plaintiff and damage to the property were also held against the plaintiff by the Trial Court while declining relief to the plaintiff.

7. Aggrieved by the judgment and decree passed by the Trial Court, the plaintiff preferred Civil Appeal No.33 of 1987 before the Additional District Judge, Alibag who formulated six points for determination and while allowing the appeal filed by the plaintiff decreed the suit in favour of his legal representatives as the original plaintiff had passed away in the meantime. The First Appellate Court held that the plaintiff had successfully established that the suit premises was occupied by Shri Narayan Keshav Ghosalkar on gratuitous and humanitarian grounds. It also held that the defendants-respondents had failed to prove the existence of any tenancy in their favour and that since the license granted to the defendants had been validly terminated, the legal heirs substituted in place of the original plaintiff were entitled to a decree.

8. Second appeal No.90 of 1992 was then filed by the respondent against the judgment of the First Appellate Court before the High Court of Judicature at Bombay which was allowed by a Single Judge of that Court in terms of its judgment impugned in the present appeal. Apart from three substantial questions of law which the High Court had formulated for consideration, it framed a fourth question for consideration which was to the following effect:

> *"Whether the plaintiff could raise two contradictory pleas in the plaint, namely, that (i) the defendants were permitted to occupy the suit premises gratis; and (ii) that the defendants should be evicted from the suit premises under the provisions of the Bombay Rent Act?"*

9. Significantly, the decision rendered by the High Court

rests entirely on the fourth question extracted above. The High Court has taken the view that while the plaintiff could indeed seek relief in the alternative, the contentions raised by him were not in the alternative but contradictory, hence, could not be allowed to be urged. The High Court found that the plaintiff's case that the defendant was a gratuitous licensee was incompatible with the plea that he was a tenant and, therefore, could be evicted under the Rent Act. The High Court observed:

> *"It is now well settled that a plaintiff may seek reliefs in the alternative but in fact the pleadings are mutually opposite, such pleas cannot be raised by the plaintiff. There is an essential difference between contradictory pleas and alternative pleas. When the plaintiff claims relief in the alternative, the cause of action for the reliefs claimed is the same. However, when contradictory pleas are raised, such as in the present case, the foundation for these contradictory pleas is not the same. When the plaintiff proceeds on the footing that the defendant is a gratuitous licensee, he would have to establish that no rent or consideration was paid for the premises. Whereas, if he seeks to evict the defendant under the Rent Act, the plaintiff accepts that the defendant is in possession of the premises as a tenant and liable to pay rent. Thus, the issue whether rent is being paid becomes fundamental to the decision. Therefore, in my opinion, the pleas that the defendant is occupying the suit premises gratuitously is not compatible with the plea that the defendant is a tenant and therefore can be evicted under the Rent Act."*

10. We have heard learned counsel for the parties at length. The case of the plaintiff appellant herein primarily was that the original defendant and even his legal representatives were occupying the suit premises as gratuitous licensees upon termination whereof the plaintiff was entitled to a decree for possession. While the Trial Court found that the defendants

were tenants and not licensees as alleged by the plaintiff the First Appellate Court had recorded a clear finding to the contrary holding that the defendants were indeed occupying the premises as licensees whose license was validly terminated by the plaintiff. Whether or not the defendants were licensees as alleged by the plaintiff was essentially a question of fact and had to be answered on the basis of the evidence on record which the First Appellate Court had reappraised to hold that the defendants were let into the suit property by the plaintiff on humanitarian grounds and as gratuitous licensees. Absence of any rent note evidencing payment of rent or any other material or circumstance to suggest that the relationship between the parties was that of landlord and tenant, abundantly supported the conclusion of the First Appellate Court. That finding also negatived the defence of the defendants-respondents that they were occupying the premises as tenants which assertion of the defendant-respondent was held not proved by the First Appellate Court. There is no gainsaid that while considering the question whether the relationship between the parties was that of licensor and licensee as alleged by the plaintiff or landlord and tenant as asserted by the defendants, the First Appellate Court took into consideration the totality of the evidence on record with a view to finding out as to which of the two versions was factually correct. That doubtless was the correct approach to adopt in a suit based on an alleged license where the defendant's logical defence was bound to be that he is in occupation not as a licensee but as a tenant. There was, in that view, nothing special or novel about the plea raised in defence by the defendants-respondents. What is important is that the First Appellate Court on facts found that the defendants and even their predecessor were licensees in the premises which stood validly terminated. The High Court could not have interfered with that finding of fact leave alone on the ground that since the alternative case set up by the plaintiff in the plaint was contradictory to the primary case pleaded by him, he was entitled to relief even on proof of the primary case.

11. That apart the alternative plea of the plaintiff and the defence set up by the defendants was no different from each other. The only question that would fall for determination based on such a plea was whether the plaintiff had made out a case on the grounds permissible under the Rent Control Act. An adjudication on that aspect would become necessary only if the plaintiff did not succeed on the primary case set up by him. The alternative plea would be redundant if the plaintiff's case of the defendants being gratuitous licenses was accepted by the Court. That is precisely what had happened in the instant case. The First Appellate Court accepted the plaintiff's case that defendants were in occupation as licensees and not as tenants. The High Court has not set aside that finding of fact on its merits. It may have been a different matter if the High Court had done so for valid reasons and then declined to entertain the alternative case set up by the plaintiff based on tenancy. One could in that case perhaps argue that the Court had declined to go beyond the principal contention to examine the alternative plea which was contradictory to the principal plea. That, however, is not what the High Court has done. Without finding fault with the findings recorded by the First Appellate Court on the question of a license and its termination the High Court has dismissed the suit simply because the plea of tenancy was, in its opinion, contradictory to the plea of license set up in the earlier part of the plaint. That was not, in our opinion, a proper approach or course to follow.

12. The upshot of the above discussion is that the order passed by the High Court cannot be sustained. Having said that we may deal with the question whether the plea of license and tenancy could be together urged by the plaintiff for grant of relief in a suit for possession.

13. The general rule regarding inconsistent pleas raised in the alternative is settled by a long line of decisions rendered by this Court. One of the earliest decisions on the subject was rendered by this Court in *Srinivas Ram Kumar v. Mahabir*

Prasad and Ors. AIR 1951 SC 177, where this Court observed:

> *"It is true that it was no part of the plaintiff's case as made in the plaint that the sum of Rs. 30,000 was advanced by way of loan to the defendant second party. But it was certainly open to the plaintiff to make an alternative case to that effect and make a prayer in the alternative for a decree for money even if the allegations of the money being paid in pursuance of a contract of sale could not be established by evidence. The fact that such a prayer would have been inconsistent with the other prayer is not really material…An Appellant may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative."*

14. In *Bhagwati Prasad v. Chandramaul* AIR 1966 SC 735 the plea of licence was accepted against the plea of tenancy although the plea of licence was not set up by the appellant. The appellant in that case contended that the land and the construction over the land belonged to him and that he had let the constructed portion to the respondent on a monthly rental basis. The respondent, however, alleged that although the land belonged to the appellant the building standing over the same was constructed by the respondent out of his own money and, therefore, he was entitled to occupy the same till his money was recovered from the appellant. Since the plea of tenancy set up by the appellant could not be proved, the Court held that the respondent was staying in the house with the leave and licence of the appellant. What is important is that the Court clearly recognised the principle that if the plea raised by the tenant in his written statement was clear and unambiguous in a suit where one party alleged the relationship between the two to be that of licensor and licensee, while the other alleged the existence of a tenancy, only two issues arose for determination,

namely, whether the defendant is tenant of the plaintiff or is holding the property as a licensee. If the Court comes to the conclusion after the parties lead their evidence that the tenancy had not been proved then the only logical inference was that the defendant was in possession of the property as a licensee. This Court said:

> *"In such a case the relationship between the parties would be either that of a landlord and tenant, or that of an owner of property and a person put into possession if it by the owner's license. No other alternative is logically or legitimately possible. When parties led evidence in this case, clearly they were conscious of this position, and so, when the High Court came to the conclusion that the tenancy had not been proved, but the defendant's argument also had not been established, it clearly followed that the defendant was in possession of the suit premises by the leave and license of the plaintiff……..*
>
> *In our opinion, having regard to the pleas taken by the defendant in his written statement in clear and unambiguous language, only two issues could arise between the parties: is the defendant the tenant of the plaintiff, or is he holding the property as the license ,subject to the terms specified by the written statement?.... we are unable to see any error of law in the approach by the High Court in dealing with it."*
>
> (emphasis supplied)

15. In *G. Nagamma and Anr. v. Siromenamma and Anr.* (1996) 2 SCC 25, this Court held that the plaintiff was entitled to plead even inconsistent pleas especially when, they are seeking alternative reliefs.

16. To the same effect is the decision of this Court in *B.K. Narayana Pillai v. Parameswaran Pillai* 2000(1) SCC 712. In

that case the appellant-defendant wanted to amend the written statement by taking a plea that in case he is not held to be a lessee, he was entitled to the benefit of Section 60(b) of the Indian Easements Act, 1882. Allowing the amendment this Court held that the plea sought to be raised was neither inconsistent nor repugnant to the pleas raised in defence. The Court further declared that there was no absolute bar against taking of inconsistent pleas by a party. What is impermissible is taking of an inconsistent plea by way of an amendment thereby denying the other side the benefit of an admission contained in the earlier pleadings. In cases where there was no inconsistency in the facts alleged a party is not prohibited from taking alternative pleas available in law.

17. Reference may also be made to the decision of this Court in *J.J. Lal Pvt. Ltd. and Ors. v. M.R. Murali and Anr.* (2002) 3 SCC 98 where this Court formulated the following tests for determining whether the alternative plea raised by the plaintiff was permissible:

> *"To sum up the gist of holding in **Firm Sriniwas Ram Kumar's case**: If the facts stated and pleading raised in the written statement, though by **way of defence to the case of the plaintiff, are such which could have** entitled the plaintiff to a relief in the alternative, the plaintiff may rely on such pleading of the defendant and claim an alternate decree based thereon subject to four conditions being satisfied, viz., (i) the statement of case by defendant in his written statement amounts to an express admission of the facts entitling the plaintiff to an alternative relief, (ii) in granting such relief the defendant is not taken by surprise, (iii) no injustice can possibly result to the defendant, and (iv) though the plaintiff would have been entitled to the same relief in a separate suit the interest of justice demand the plaintiff not being driven to the need of filing another suit."*

18. The plaintiff-appellant in the case at hand had set up a specific case that the defendant as also his legal representative after his demise were occupying the suit premises as licensees which licence had been validly terminated. In the reply to the notice the case of the defendants was that were in occupation of the suit premises not as licensees but as tenants. The plaintiff was, therefore, entitled on that basis alone to ask for an alternative relief of a decree for eviction on the grounds permissible under the Rent Control Act. Such an alternative plea did not fall foul if any of the requirements/tests set out in the decision of this Court in *J.J. Lal's* case (supra). We say so because the written statement filed by the defendant contained an express admission of the fact that the property belonged to the plaintiff and that the defendants were in occupation thereof as tenants. At the trial Court also the question whether the defendants were in occupation as licencee or as tenants had been specifically put in issue thereby giving the fullest opportunity to the parties to prove their respective cases. There was no question of the defendants being taken by surprise by the alternative case pleaded by the plaintiff nor could any injustice result from the alternative plea being allowed and tried by the Court. As a matter of fact the trial Court had without any demurrer gone into the merits of the alternative plea and dismissed the suit on the ground that the plaintiff had not been able to prove a case for eviction of the defendants. There was thus not only a proper trial on all those grounds urged by the plaintiff but also a judgment in favour of the defendant respondents. Last but not the least even if the alternative plea had not been allowed to be raised in the suit filed by the appellant he would have been certainly entitled to raise that plea and seek eviction in a separate suit filed on the very same grounds. The only difference may have been that the suit may have then been filed before the Court of Small Causes but no error of jurisdiction was committed in the instant case as the finding recorded by the Civil Court was that the defendants were licensees and not tenants. Superadded to all these factors is the fact that the

appellate Court had granted relief to the appellant not in relation to the alternative plea raised by him but on the principal case set up by the plaintiff. If the plaintiff succeeded on the principal case set up by him whether or not the alternative plea was contradictory or inconsistent or even destructive of the original plea paled into insignificance.

19. In the result, this appeal succeeds and is, hereby allowed, the impugned judgment passed by the High Court is set aside and that passed by the first appellate Court is restored. The respondents are granted time till 30th April 2014 to vacate the premises subject to their filing undertakings on usual terms before this Court within six weeks from today. In case the undertakings are not filed, as directed, the decree passed in favour of the appellant shall become executable forthwith. No costs.

R.P. Appeal allowed.

ISHWAR CHANDRA JAYASWAL
v.
UNION OF INDIA & ORS.
(Civil Appeal Nos. 48-49 of 2014)

JANUARY 3, 2014.

[T. S. THAKUR AND VIKRAMAJIT SEN, JJ.]

SERVICE LAW:

Departmental inquiry – Charges proved – Punishment – Doctrine of proportionality — Railway employee – Removal from service on charges of demanding and accepting meager amounts – Held: Removal of employee from service for the charges levelled against him shocks the judicial conscience of the Court — Deprivation of retiral benefits in addition to loss of service is entirely incommensurate with the charge of appellant having taken very small sums of money for issuance of Fit Certificate to other Railway employees — Appellant shall be deemed to have been compulsorily retired under Part-III Penalty 6(vii) of 1968 Rules and shall be entitled to retiral or other benefits — Railway Servants (Discipline and Appeal) Rules: 1968 — Part-III – Penalty 6(vii).

The appellant, an employee of Railways was removed from service as the charges of demanding and accepting Rs. 26/-, Rs. 34/- and Rs. 18/- from three employees, respectively, were found proved in the departmental inquiry. His writ petition and review petition were dismissed.

In the instant appeals, the only question for consideration before the Court was: "whether the punishment of removal of service of the petitioner on the alleged demand of meagre amounts of Rs.18-45 is contrary to the doctrine of proportionality".

Allowing the appeals, the Court

HELD: The appellant is 75 years of age. He has served the respondents for a period of twenty three years and removal from service for the two charges levelled against him shocks the judicial conscience of this Court. It has not been established that the appellant had, as a matter of habit or on a wide scale, made illegal demands from Railway servants desirous of obtaining a Fit Certificate. However, since two of the three charges have been proved, this Court is of the considered opinion that the imposition of compulsory retirement i.e. Penalty 6(vii) of Part III of The Railway Servants (Discipline and Appeal) Rules, 1968 would have better and more appropriately met the ends of justice. Deprivation of retiral benefits in addition to loss of service is entirely incommensurate with the charge of the appellant having taken very small sums of money for the issuance of Fit Certificate to other Railway employees. The impugned order dated 11.10.2010 is set aside. The appellant shall be deemed to have compulsorily retired under Part-III Penalty 6(vii) of the 1968 Rules with effect from 22.1.1991 and shall be entitled to retiral or other benefits as on the said date. [Para 6-7] [62-F, G-H; 63-A-E]

Union of India v. S.S. Ahluwalia **2007 (9) SCR 377 = (2007) 7 SCC 257 – relied on.**

Case Law Reference:

2007 (9) SCR 377	**relied on**	**para 5**

CIVIL APPELLATE JURISDICTION : Civi Appeal No. 48-49 of 2014.

From the Judgment & Order dated 28.03.2012 of the High Court of Judicature at Allahabad in Civil Misc. Review Application No. 325013 of 2010 in Civil Misc. Writ Petition No.

38190 of 2004 and order 11.10.2010 in Civil Misc. Writ Petition No. 38190 of 2004.

Shashank Shekhar, Devashish Bharuka, Jasneet for the Appellant.

S.P. Singh, Sukhbir Kaur Bajwa, Kiran Kapoor Shreekant N. Terdal for the Respondents.

The Judgment of the Court was delivered by

VIKRAMAJIT SEN, J. 1. Leave granted. These Appeals assail the Judgment dated 11.10.2010 of the Division Bench of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No.38190 of 2004 as well as the subsequent Order dated 28.3.2012 by which a Review Application in respect of the former was dismissed.

2. The Division Bench was confronted with the dismissal from service of the Appellant Dr. Ishwar Chandra Jayaswal against whom three Articles of Charge had been framed. Article-I was that he demanded and accepted a sum of Rs.26/- from Shri Pyare Ram, Khalasi for issuing in his favour a Fit Certificate. Article-II, in similar vein was that the Appellant demanded and accepted a sum of Rs.34/- from Shri Nandlal, Semi-skilled Revetter for issuing him a Fit Certificate. Article-III was that the Appellant had demanded and accepted Rs.18/- from Shri Balroop, Semi-skilled Revetter for issuing of Fit Certificate. The Inquiry Officer, after duly perusing the entire evidence, returned a finding that Charges 1 and 3 had been proved. The Disciplinary Authority, after considering the response of the Appellant, by its Order dated 22.1.1991 imposed the penalty of removal of the Appellant from service.

3. A Revision came to be filed which appears to have attracted the gravamen of challenge before the Division Bench. After considering the manner in which the Revision was heard and decided, the Division Bench in the impugned Order, has

come to the conclusion that the President had decided the Revision in accordance with law.

4. In these proceedings, learned counsel for the Appellant has confined his arguments to the ground – "whether the punishment of removal of service of the petitioner on the alleged demand of meagre amount of Rs.18-45 is contrary to the doctrine of proportionality".

5. It is now well settled that it is open to the Court, in all circumstances, to consider whether the punishment imposed on the delinquent workman or officer, as the case may be, is commensurate with the Articles of Charge levelled against him. There is a deluge of decisions on this question and we do not propose to travel beyond Union of India v. S.S. Ahluwalia (2007) 7 SCC 257 in which this Court had held that if the conscience of the Court is shocked as to the severity or inappropriateness of the punishment imposed, it can remand the matter back for fresh consideration to the Disciplinary Authority concerned. In that case, the punishment that had been imposed was the deduction of 10% from the pension for a period of one year. The High Court had set aside that order. In those premises, this Court did not think it expedient to remand the matter back to the Disciplinary Authority and instead approved the decision of the High Court.

6. The Appellant before us is presently 75 years of age. At the time when the Articles of Charge had been served upon him, he had already given the best part of his life to the service of the Respondent-Indian Railways. It has been contended before us that the three charges that have been sustained against the Appellant reflected only the tip of the iceberg; however, there is no material on record to substantiate this argument of Respondents. In the present case, the Appellant has served the Respondents for a period of twenty three years and removal from service for the two charges levelled against him shocks our judicial conscience. Part III of The Railway Servants (Discipline & Appeal) Rules, 1968 contains the

penalties that can be imposed against a Railway servant, both Minor Penalties as well as Major Penalties. We have already noted that it has not been established that the Appellant had, as a matter of habit or on a wide scale, made illegal demands from Railway servants desirous of obtaining a Fit Certificate. However, since two of the three charges have been proved, we are of the considered opinion that the imposition of compulsory retirement i.e. Penalty 6(vii) would have better and more appropriately met the ends of justice. While this would have instilled sufficient degree of fear in the mind of the employees, it would also not have set at naught several years of service which the Appellant had already given to the Respondent-Indian Railways. We think that deprivation of retiral benefits in addition to loss of service is entirely incommensurate with the charge of the Appellant having taken very small sums of money for the issuance of Fit Certificate to other Railway employees.

7. It is in these premises that the Appeals are accepted and the impugned Order dated 11.10.2010 is set aside. The Appellant shall be deemed to have compulsorily retired under Part-III Penalty 6(vii) of the aforementioned Railway Rules with effect from 22.1.1991. If he is entitled to retiral or other benefits on the said date, the Respondents shall make necessary payment within three months from today. This decision is restricted to the facts of the present case.

R.P. Appeals allowed.

KANPUR JAL SANSTHAN & ANOTHER
v.
M/S. BAPU CONSTRUCTION
(Civil Appeal No. 26 of 2014)

JANUARY 03, 2014.

[ANIL R. DAVE AND DIPAK MISRA, JJ.]

ARBITRATION AND CONCILIATION ACT, 1996:

s. 37 – Appeal against order rejecting objection u/s 34 – Applicability of Code of Civil Procedure – Held: Award has the potentiality of enforcement — Therefore, when an appeal is filed against rejection of objection preferred u/s 34, enforceability of award gains absolute ground — When it is challenged in an appeal u/s 37, the underlying principle of Code of Civil Procedure is applicable — Code of Civil Procedure, 1908 – O. 41, r. 5.

CODE OF CIVIL PROCEDURE, 1908:

O. 27, r. 8B and r 8A r/w O. 41, r. 5 — 'Government' – Connotation of — Appeal by Jal Sansthan against order rejecting objection u/s 34 of Arbitration and Conciliation Act – High Court, on an application for stay, directing appellant to deposit entire award amount – Plea that such a condition could not have been imposed on government organization like appellant – Held: Legislature has defined the term "Government" so as not to allow any room for interpretation and speculation — It means either a Central Government or a State Government and in certain cases public officer in the service of a State — Legislature has deliberately used a restrictive definition and its scope cannot be expanded to cover an agency or instrumentality of State by interpretative process –It cannot be accepted that appellant Jal Sansthan would come within the extended wing of the Government —

However, order of High Court modified and appellant directed to furnish security for entire award amount — Interpretation of statutes – Restrictive construction – Constitution of India, 1950 – Art. 12.

The appellant-Jal Sansthan filed an appeal before the High Court challenging the order of the District Judge whereby he rejected its objection u/s 34 of the Arbitration and Conciliation Act, 1996. The appellant filed an appeal before the High Court. In the application for stay, the High Court directed the Jal Sansthan to deposit the entire amount awarded by the arbitrator permitting the claimant-respondent to withdraw half of the said amount without furnishing security and remaining half on furnishing security.

In the instant appeal filed by the Jal Sansthan, it was contended for the appellant that the High Court fell into error by directing deposit of entire award amount and release of the same in favour of the claimant-respondent applying the principle of O. 41, r. 5 of the Code of Civil Procedure, 1908, though the said principle was not applicable to the appellant which was an extended wing of the State. It was submitted that the principle of O. 41, r. 5, CPC were to be read in harmony with O. 27, r. 8A, CPC and on such harmonious reading it would be clear that such a condition could not have been imposed on a governmental organization.

Disposing the appeal, the Court

HELD: 1.1. Sections 35 and 36 of the Arbitration and Conciliation Act, 1996, make it clear that the award becomes enforceable when the time for making the application to set aside the arbitral award has expired or having been filed it has been refused and further that it is enforceable in the same manner as if it were a decree of the court. Thus, the award has the potentiality of

enforcement. Therefore, when an appeal is filed against the rejection of the objection preferred u/s 34 of the Act, the enforceability of the award gains absolute ground. If an application for stay has to be filed, it has to be filed relating to stay of the operation of the award passed by the arbitrator. The court rejecting the objection only refuses to entertain the objection and thereafter, the award becomes enforceable as if it were a decree. Whatever may be the status of the award under the Act, in respect of any other statute, but when it is challenged in an appeal u/s 37 of the Act, the underlying principle of the Code of Civil Procedure is applicable. [Para 9 and 14] [72-D-G; 75-E]

Paramjeet Singh Patheja v. ICDS Ltd. **2006 (8) Suppl. SCR 178 = (2006) 13 SCC 322 – referred to.**

1.2. O.41, r. 5, CPC is applicable to an appeal preferred before the High Court, for there is no provision in the Act prohibiting the appellate court not to take recourse to the underlying principles of the Code of Civil Procedure as long as they are in consonance with the spirit and principles engrafted under the Act. [Para 15] [76-A-B]

M/s. Pandey & Co. Builders Pvt. Ltd. v. State of Bihar and Another **2006 (8) Suppl. SCR 997 = AIR 2007 SC 465 – relied on.**

Kayamuddin Shamsuddin Khan v. State Bank of India **(1998) 8 SCC 676; and** *Sihor Nagar Palika Bureau v. Bhabhlubhai Virabhai & Co.* **(2005) 4 SCC 1 – referred to.**

2.1. The legislature has used the word "Government" in O.27, r. 8A and defined the same in O.27, r. 8B. The intention is absolutely clear and unambiguous. It means the "Government" in exclusivity. From the language employed in O. 27, rr 8A and 8B, it only means the "Government". In fact, r. 8B clearly states "in relation to

any suit by or against the Central Government or against a public officer in the service of the Government" and similar language is used for the State Government. Therefore, the legislature has deliberately used a restrictive definition and its scope cannot be expanded to cover an agency or instrumentality of the State by interpretative process. The legislature has defined the term "Government" so as not to allow any room for interpretation and speculation. It means either a Central Government or a State Government and in certain cases public officer in the service of a State. O. 27, rr. 8A and 8B are applicable only to the Government and not to instrumentality or agency of the State. Thus, it cannot be accepted that the appellant being a Jal Sansthan it would come within the extended wing of the Government. [Para 21, 23, 29 and 30] [79-F-G; 80-F-G; 86-C-E, G-H; 87-A]

State of Punjab and Others v. Raja Ram and Others **1981 (2) SCR 712 = (1981) 2 SCC 66;** *Ramana Dayaram Shetty v. International Airport Authority of India and Others* **1979 (3) SCR 1014 = (1979) 3 SCC 489;** *Pashupati Nath Sukul v. Nem Chandra Jain and Others* **1984 (1) SCR 939 = (1984) 2 SCC 404;** *Pradyat Kumar Bose v. Hon'ble Chief Justice of Calcutta High Court* **(1955) 2 SCR 1331;** *R.S. Nayak v. A.R. Antulay* **1984 (2) SCR 495 = (1984) 2 SCC 183 – relied on.**

State of Kerala v. Kuruvilla AIR 2004 Ker 233; and *Collector, Cuttack v. Padma Charan Mohanty* **50 (1980) CLT 191 – held inapplicable.**

Utkal Contractors & Joinery Pvt. Ltd. and Others v. State of Orissa and Others **1987 (3) SCR 317 = AIR 1987 SC 1454;** *Dy. Chief Controller of Imports & Exports, New Delhi v. K.T. Kosalram and Others* **1971 (2) SCR 507 = (1970) 3 SCC 82 – referred to.**

2.2. In certain contexts the term "Government" may be required to be liberally construed and under certain

circumstances it has to be understood in a narrow spectrum. The concept of "State" as used under Art. 12 of the Constitution is quite different than what is meant by an "Executive Government". An authority or instrumentality of the State or agency of the State has to act in a fair, non-arbitrary and reasonable manner and, in fact, is controlled by Chapter III of the Constitution but it does not assume the character of "Government" for all purposes. [Para 27 and 29] [84-F-G; 86-B-C]

Chander Mohan Khanna v. *National Council of Educational Research and Training and others* **1991 (1) Suppl. SCR 165 = (1991) 4 SCC 578 – referred to.**

3. The High Court has directed for deposit of the money and withdrawal of the 50% of the same without furnishing security and remaining half after furnishing security. The High Court has not given any justifiable reason for permitting such withdrawal. The order is modified and the appellant shall furnish the security for the entire amount to the satisfaction of the District Judge. [Para 31] [87-B-D]

Case Law Reference:

AIR 2004 Ker 233	held inapplicable	para 6
2006 (8) Suppl. SCR 178	referred to	Para 13
2006 (8) Suppl. SCR 997	relied on	para 15
(1998) 8 SCC 676	referred to	para 17
(2005) 4 SCC 1	referred to	para 18
1987 (3) SCR 317	referred to	Para 22
1971 (2) SCR 507	referred to	Para 22
1981 (2) SCR 712	relied on	para 23

1979 (3) SCR 1014	**relied on**	**para 24**
1984 (1) SCR 939	**relied on**	**para 25**
(1955) 2 SCR 1331	**relied on**	**para 25**
1984 (2) SCR 495	**relied on**	**para 26**
1991 (1) Suppl. SCR 165	**referred to**	**Para 27**
50 (1980) CLT 191	**held inapplicable**	**para 30**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 26 of 2014.

From the Judgment & Order dated 17.07.2013 of the High Court of Judicature at Allahabad in FAFO No. 875 of 2013.

Shail Kumar Dwivedi, Gunnam Venkateswara Rao, Siddharth Krishna Dwivedi for the Appellants.

Pradeep Kumar Yadav, P.J. Malkan, Amit Kumar Yadav and Purvish, Jitendra Malkan for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. Calling in question the defensibility of the order dated 17.7.2013 passed by the High Court of Judicature at Allahabad in FAFO No. 875 of 2013 whereby the Division Bench, after admitting the appeal, while dealing with the application for stay, directed the appellants to deposit the entire amount awarded by the arbitrator in the court below with a further direction permitting the claimant-respondent to withdraw half of the said amount without furnishing security and remaining half after furnishing security to the satisfaction of the District Judge, Kanpur with a further stipulation that in case of default in making the deposit, the order of stay shall automatically stand vacated.

3. The essential facts which are to be stated for adjudication of this appeal are that an agreement was executed

between Kanpur Jal Sansthan, the appellant herein, with the respondent, M/s. Bapu Construction, on 10.06.1987 for "supply of sand for slow sand filter" for a value of Rs.21,43,200/-. As per the conditions contained in the agreement the work was to commence 23.5.1987 and was to be completed within one year. During the subsistence of the contract disputes arose between the parties as a consequence of which the respondent moved an application under Section 11(5) and (6) of the Arbitration and Conciliation Act, 1996 (for brevity "the Act") for appointment of an arbitrator. After the learned Arbitrator was appointed, he proceeded with the arbitration and, eventually, passed an award on 20.1.2009 allowing the claim of the respondent by awarding a total sum of Rs.32,62,415.30 with a further stipulation that the said sum shall carry interest at the rate of 18% per annum from the year 1988. The appellant herein filed an objection under Section 34 of the Act to set aside the award dated 20.1.2009 in Arbitration Petition No. 32 of 2003 on many a ground. The learned District Judge, Kanpur, vide order dated 30.3.2013, rejected the application which was the subject-matter of Misc. Case No. 40/70 of 2009.

4. The failure in sustaining the objection before the learned District Judge compelled the appellant to file FAFO No. 875 of 2013 before the High Court of Judicature at Allahabad. Along with the appeal an application for stay was filed. The Division Bench passed an interim order, as has been mentioned hereinbefore.

5. We have heard Mr. Shail Kumar Dwivedi, learned counsel appearing for the appellants and Mr. Pradeep Kumar Yadav, learned counsel appearing for the respondent.

6. Criticizing the justifiability of the order, Mr. Dwivedi, learned counsel for the appellant, has submitted that the Division Bench has fallen into error by directing deposit of entire award amount and release of the same in favour of the claimant-respondent applying the principle of Order XLI Rule 5 of the Code of Civil Procedure though the said principle is not

applicable to the appellant which is an extended wing of the State. It is urged by him that the Division Bench has failed to analyse the merits of the case, namely, the enormous delay in filing the application for appointment of an arbitrator, nature of claims which are absolutely stale and that apart, how the award is flagrantly violative of public policy. It is further urged by him that the principle of Order XLI Rule 5 of the Code has to be read in harmony with Order XXVII Rule 8A of the Code and on such harmonious reading it is clear as sunshine that such a condition is not likely to be imposed on a governmental organization. To buttress his submission he has commended us to the decision in *State of Kerala v. Kuruvilla.*[1]

7. Mr. Yadav, learned counsel appearing for the respondent, resisting the aforesaid submissions, contended that after the objection preferred under Section 34 of the Act has been rejected, the award passed by the learned Arbitrator becomes executable by itself and, therefore, it has the status of a money decree and hence, the Division Bench has correctly imposed the conditions and, therefore, no fault can be found with the said order. It is contended by him that Order XLI Rule 5 and Order XXVII Rule 8A should be kept in different compartments failing which the decree holder would not be able to realize the fruits the decree for a considerable length of time and eventually it may become a paper tiger. He has drawn inspiration from the decision in *Sihor Nagar Palika Bureau v. Bhabhlubhai Virabhai & Co.*[2] to highlight that this Court had applied the principle behind Order XLI Rule 5 to a municipality and a "Jal Sansthan" does not enjoy a better status than a municipality.

8. To appreciate the rivalised submissions raised at the Bar we think it apt to refer to the Scheme of the Act. Under the Act, after the award is passed by the arbitrator, an application for setting aside the arbitral award is permissible under

1. AIR 2004 Ker 233.
2. (2005) 4 SCC 1.

Chapter VII relating to arbitration under Part I. Chapter VIII occurring in Part I provides about the finality and enforcement of arbitral awards. Sections 35 and 36 which occur in this Chapter are reproduced below: -

"**35. Finality of arbitral awards**. – Subject to this Part an arbitral award shall be final and binding on the parties and persons claiming under them respectively.

36. Enforcement. – Where the time for making an application to set aside the arbitral award under Section 34 has expired, or such application having been made, it has been refused, the award shall be enforced under the Code of Civil Procedure, 1908 (5 of 1908) in the same manner as if it were a decree of the Court."

9. On a reading of both the provisions it is clear as day that the award becomes enforceable when the time for making the application to set aside the arbitral award has expired or having been filed it has been refused and further it is enforceable in the same manner as if it were a decree of the Court. Thus, the award has the potentiality of enforcement. Hence, when an appeal is filed against the rejection of the objection preferred under Section 34 of the Act, the enforceability of the award gains absolute ground. If an application for stay has to be filed, it has to be filed relating to stay of the operation of the award passed by the arbitrator. We are disposed to think so as the court rejecting the objection only refuses to entertain the objection and thereafter the award becomes enforceable as if it were a decree. In the present case, it is not clear whether there was prayer for stay of the award. However, we treat it as if there was a prayer for stay of the award and proceed accordingly.

10. At this juncture, we may refer with profit to Section 19 of the Act which occurs in Chapter V of the Act that deals with conduct of arbitral proceedings. It provides for determination of rules of procedure. It reads as follows: -

"**19. Determination of rules of procedure**. – (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence."

11. Section 2(e) of the Act defines "Court" to mean the principal Civil Court of original jurisdiction in a district and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of arbitration if the same has been the subject-matter of a suit but does not include any Civil Court of a grade inferior to such principal Civil Court or any Court of Small Causes.

12. Section 37 of the Act deals with appealable orders. For the sake of completeness it is reproduced below: -

"**37. Appealable orders**. – (1) An appeal shall lie from the following orders (and from no others) to the Court authorized by law to hear appeals from original decrees of the Court passing the order, namely: -

(a) Granting or refusing to grant any measure under section 9;

(b) Setting aside or refusing to set aside an arbitral

award under section 34.

(2) An appeal shall also lie to a Court from an order granting of the arbitral tribunal. –

(a) accepting the plea referred in sub-section (2) or sub-section (3) of section 16; or

(b) granting or refusing to grant an interim measure under Section 17.

(3) No second appeal shall lie from an order passed in appeal under this section, but nothing in this section shall affect or take away any right to appeal to the Supreme Court."

13. At this stage, we are obliged to refer to the decision in *Paramjeet Singh Patheja v. ICDS Ltd.*[3] In the said case question arose whether an award passed by an arbitral tribunal under the Act is a decree for the purposes of the provision of the Presidency Towns Insolvency Act, 1909. The two Judge Bench referred to various provisions of the Arbitration Act 1899, The Presidency Towns Insolvency Act, 1909 and the Civil Procedure Code, 1908, the concept of decree under the Code, the provisions contained as regards award in Arbitration Act, 1940 and Section 36 of the Arbitration and Conciliation Act, 1996 and opined as follows:-

"In fact, Section 36 goes further than Section 15 of the 1899 Act and makes it clear beyond doubt that enforceability is only to be under CPC. It rules out any argument that enforceability as a decree can be sought under any other law or that initiating insolvency proceeding is a manner of enforcing a decree under CPC."

The learned Judges further discussing the principles proceeded to state as follows.

3. (2006) 13 SCC 322.

"Issuance of a notice under the Insolvency Act is fraught with serious consequences: it is intended to bring about a drastic change in the status of the person against whom a notice is issued viz. to declare him an insolvent with all the attendant disabilities. Therefore, firstly, such a notice was intended to be issued only after a regularly constituted court, a component of the judicial organ established for the dispensation of justice, has passed a decree or order for the payment of money. Secondly, a notice under the Insolvency Act is not a mode of enforcing a debt; enforcement is done by taking steps for execution available under CPC for realising monies.

42. The words "as if" demonstrate that award and decree or order are two different things. The legal fiction created is for the limited purpose of enforcement as a decree. The fiction is not intended to make it a decree for all purposes under all statutes, whether State or Central."

14. We have referred to aforesaid authority solely for the purpose that whatever may be the status of the award under the Act in respect of any other Statute, but when it is challenged in an appeal under Section 37 of the Act the underlying principle of the Code of Civil Procedure is applicable. We have thought we should clarify the position as it may not be understood that the decision in *Pramjeet Singh Patheja* (supra) conveys that it is not a decree for all purposes and the principles under the Code while an appeal is preferred is not applicable.

15. In *M/s. Pandey & Co. Builders Pvt. Ltd. v. State of Bihar and Another,*[4] it has been held that a forum of an appellate court must be determined with reference to the definition thereof contained in the 1996 Act. The aforesaid decision further reinforces the conclusion that Order XLI Rule 5 in principle is applicable to an appeal preferred before the

4. AIR 2007 SC 465.

High Court, for there is no provision in the Act prohibiting the appellate court not to take recourse to the underlying principles of the Code of Civil Procedure as long as they are in consonance with the spirit and principles engrafted under the Act.

16. Presently to the anatomy of Order XLI. It deals with appeals from original decrees. Order XLI Rule 5 provides for stay by Appellate Court. To have a complete picture, it is necessary to reproduce the Rule in entirety: -

"**5. Stay by Appellate Court**. – (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

(2) **Stay by Court which passed the decree**. – Where an application is made for stay of execution of an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed.

(3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied –

(a) that substantial loss may result to the party applying for stay of execution unless the order is made;

(b) that the application has been made without unreasonable delay; and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him.

(4) Subject to the provisions of sub-rule (3), the Court may make an *ex parte* order for stay of execution pending the hearing of the application.

(5) Notwithstanding anything contained in the foregoing sub-rules, where the appellant fails to make the deposit or furnish the security specified in sub-rule (3) of rule 1, the Court shall not make an order staying the execution of the decree."

17. At this stage, regard being had to the schematic content of order XLI Rule 5, we think it appropriate to refer to certain authorities how the language employed in the said Rule has been appreciated and understood by this Court. In *Kayamuddin Shamsuddin Khan v. State Bank of India*[5] while dealing the command of the provision relating to deposit the Court had to say:

"...that when non-compliance with the direction given regarding deposit under sub-rule (3) of Rule 1 of Order XLI would result in the Court refusing to stay the execution of the decree. In other words, the application for stay of the execution of the decree could be dismissed for such non-compliance but the Court could not give a direction for the dismissal of the appeal itself for such non-compliance."

18. In *Sihor Nagar Palika Bureau v. Bhabhlubhai Virabhai & Co.,*[6] this Court was dealing with the situation where the appellant municipality constituted and governed by the provision of Gujrat Municipalities Act, 1963 had assailed a money decree in appeal and the High Court in appeal had directed stay of the execution of operation of the money decree subject to the condition that the appellant shall deposit a certain sum with interest by a particular date. In that context the Court adverted to Order XLI Rule 1(3) and 5 (5) and opined thus:-

5. (1998) 8 SCC 676.

6. (2005) 4 SCC 1.

"Order 41 Rule 1(3) CPC provides that in an appeal against a decree for payment of amount the appellant shall, within the time permitted by the appellate court, deposit the amount disputed in the appeal or furnish such security in respect thereof as the court may think fit. Under Order 41 Rule 5(5), a deposit or security, as abovesaid, is a condition precedent for an order by the appellate court staying the execution of the decree. A bare reading of the two provisions referred to hereinabove, shows a discretion having been conferred on the appellate court to direct either deposit of the amount disputed in the appeal or to permit such security in respect thereof being furnished as the appellate court may think fit. Needless to say that the discretion is to be exercised judicially and not arbitrarily depending on the facts and circumstances of a given case. Ordinarily, execution of a money decree is not stayed inasmuch as satisfaction of money decree does not amount to irreparable injury and in the event of the appeal being allowed, the remedy of restitution is always available to the successful party. Still the power is there, of course a discretionary power, and is meant to be exercised in appropriate cases."

[Emphasis supplied]

19. The submission advanced by the learned counsel for the appellants that the provisions contained in Order XLI Rule 5 and XXVII Rule 8A of the Code should be read harmoniously to avoid any conflict. Rule 8A of Order XXVII reads as follows:-

"**8A. No security to be required from Government or a public officer in certain cases**. – No such security as is mentioned in rules 5 and 6 of Order XLI shall be required from the Government or, where the Government has undertaken the defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity."

20. As far as the Government is concerned, it has been defined in Order XXVII Rule 8B. It reads as follows: -

> "**8B. Definitions of "Government" and "Government pleader"**. – In this order unless otherwise expressly, provided "Government and "Government pleader" mean respectively –
>
> (a) In relation to any suit by or against the Central Government or against a public officer in the service of the Government, the Central Government and such pleader as that Government may appoint whether generally or specially for the purpose of this Order;
>
> (b) (omitted by the A.O. 1948)
>
> (c) In relation to any suit by or against a State Government or against a public officer in the service of a State, the State Government and the Government pleader as defined in clause (7) of section 2, or such other pleader as the State Government may appoint, whether generally or specially, for the purpose of this order."

21. The legislature has defined the term "Government" not to allow any room for interpretation and speculation. It means either a Central Government or a State Government and in certain cases public officer in the service of a State. Learned counsel for the appellant has contended that the appellant "Kanpur Jal Sansthan" is an extended wing of the State and, therefore, is a part of the Government. On a bare glance at the aforesaid provisions it is perspicuous that it categorically lays a postulate that as far as the Government or a public officer is concerned in certain cases the stipulations incorporated in Order XLI Rule 5 would not be applicable.

22. Having regard to the aforesaid provisions it is

necessary to appreciate the definitive character of the Government in the context it has been used. In *Utkal Contractors & Joinery Pvt. Ltd. and Others v. State of Orissa and Others,*[7] it has been laid down that while the words of an enactment are important the context is not less important. It has also been stated that no provision in the statute and no word of the statute may be construed in isolation. The importance of setting and the pattern are to be kept in mind. In *Dy. Chief Controller of Imports & Exports, New Delhi v. K.T. Kosalram and Others*[8] this Court has observed as under:

> "What particular meaning should be attached to words and phrases in a given instrument is usually to be gathered from the context, the nature of the subject-matter, the purpose or the intention of the author and the effect of giving to them one or the other permissible meaning on the object to be achieved. Words are after all used merely as a vehicle to convey the idea of the speaker or the writer and the words have naturally, therefore, to be so construed as to fit in with the idea which emerges on a consideration of the entire context. Each word is but a symbol which may stand for one or a number of objects. The context, in which a word conveying different shades of meanings is used, is of importance in determining the precise sense which fits in with the context as intended to be conveyed by the author...."

23. As we perceive, the legislature has used the word "Government" in Order XXVII Rule 8A and defined the same in Order XXVII Rule 8B. The intention is absolutely clear and unambiguous. It means the "Government" in exclusivity. The submission of the learned counsel for the appellants that the appellant being a Jal Sansthan it would come within the extended wing of the Government does not commend acceptation.

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7. AIR 1987 SC 1454.
8. (1970) 3 SCC 82.

24. We have reasons to so conclude. In *State of Punjab and others v. Raja Ram and Others,*[9] a two-Judge Bench, after referring to a passage from *Ramana Dayaram Shetty v. International Airport Authority of India and Others*[10] and stating what makes a corporation an agency or instrumentality of the Central Government, opined thus: -

> "Even the conclusion, however, that the Corporation is an agency or instrumentality of the Central Government does not lead to the further inference that the Corporation is a Government department."

25. In *Pashupati Nath Sukul v. Nem Chandra Jain and Others,*[11] a question arose whether the Secretary of a State Legislative Assembly is qualified or not to be appointed as the Returning Officer at an election held to fill a seat in the Rajya Sabha. The High Court of Allahabad had returned a finding that the Secretary of the Legislative Assembly was neither an officer of the Government nor of a local authority and hence, could not have been appointed as the Returning Officer under Section 21 of the Representation of the People Act, 1951. Dealing with the said issue, the three-Judge Bench proceeded to analyse whether the expression "Government" used in Section 21 would mean the "Executive Government" in the narrow sense or a liberal construction should be placed. The Court referred to Section 3(23) of the General Clauses Act, 1897 which defines "Government" to mean "Government" or "the Government" to include both the Central Government and any State Government. Thereafter, the Court referred to certain constitutional provisions, namely, Articles 12, 102(1)(a), 191(1)(a), 98, 187, 146, 229, 148(5), 311 and 318 and the decision in *Pradyat Kumar Bose v. Hon'ble Chief Justice of Calcutta High Court*[12] and adverted to the concept of local

9. (1981) 2 SCC 66.
10. (1979) 3 SCC 489.
11. (1984) 2 SCC 404.
12. (1955) 2 SCR 1331.

Government, as understood in the context of Entry 5 of List II of the Seventh Schedule to the Constitution, the concept of State in International Law and thereafter to the conception of the federal construction of the Constitution and the conception of governance under the Constitution and, eventually, opined that: -

> "From the legal point of view, government may be described as the exercise of certain powers and the performance of certain duties by public authorities or officers, together with certain private persons or corporations exercising public functions. The structure of the machinery of Government and the regulation of the powers and duties which belong to the different parts of this structure are defined by the law which also prescribes to some extent the mode in which these powers are to be exercised or these duties are to be performed (see *Halsbury's Laws of England, Fourth Edition, Vol. 8, para 804*). Government generally connotes three estates, namely, the Legislature, the Executive and the Judiciary while it is true that in a narrow sense it is used to connote the Executive only. The meaning to be assigned to that expression, therefore, depends on the context in which it is used."

Thereafter the Court proceeded to further rule thus: -

> "We are of the view that the word 'Government' in Article 102(1)(a) and in Article 191(1)(a) of the Constitution and the word 'Government' in the expression "an officer of Government" in Section 21 of the Act should be interpreted liberally so as to include within its scope the Legislature, the Executive and the Judiciary. The High Court erred in equating the word 'Government' occurring in Section 21 of the Act to the Executive Government only and in further holding that the officers of the State Legislature could not be treated as officers of Government for purposes of that section."

[Emphasis supplied]

26. In *R.S. Nayak v. A.R. Antulay,*[13] the Court was dealing with as to what the expression "Government" exactly connotes in the context of Indian Penal Code. Answering the issue the Constitution Bench stated thus: -

> "There is a short and a long answer to the problem. Section 17 IPC provides that "the word 'Government' denotes the Central Government or the Government of a State". Section 7 IPC provides that "every expression which is explained in any part of the Code, is used in every part of the Code in conformity with the explanation". Let it be noted that unlike the modern statute Section 7 does not provide "unless the context otherwise indicate" a phrase that prefaces the dictionary clauses of a modern statute. Therefore, the expression "Government" in Section 21(12)(*a*) must either mean the Central Government or the Government of a State."

After so stating the Larger Bench referred to many an authority and proceeded to rule thus: -

> "**56.** There thus is a broad division of functions such as executive, legislative and judicial in our Constitution. The Legislature lays down the broad policy and has the power of purse. The Executive executes the policy and spends from the Consolidated Fund of the State what Legislature has sanctioned. The Legislative Assembly enacted the Act enabling to pay to its members salary and allowances. And the members vote the grant and pay themselves. In this background even if there is an officer to disburse this payment or that a pay bill has to be drawn-up are not such factors being decisive of the matter. That is merely a mode of payment, but the MLAs by a vote retained the fund earmarked for purposes of disbursal for pay and

13. (1984) 2 SCC 183.

> allowances payable to them under the relevant statute. Therefore, even though MLA receives pay and allowances, he is not in the pay of the State Government because Legislature of a State cannot be comprehended in the expression "state Government".
>
> **57.** This becomes further clear from the provision contained in Article 12 of the Constitution which provides that "for purposes of Part III, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India". The expression "Government and Legislature", two separate entities, are sought to be included in the expression "state" which would mean that otherwise they are distinct and separate entities. This conclusion is further reinforced by the fact that the Executive sets up its own secretariat, while Article 187 provides for a secretarial staff of the Legislature under the control of the Speaker, whose terms and conditions of the service will be determined by the Legislature and not by the Executive. When all these aspects are pieced together, the expression "Government" in Section 21(12)(*a*) clearly denotes the Executive and not the Legislature."

[Underlining is ours]

27. We have referred to the aforesaid authorities to highlight that in certain contexts the term "Government" may be required to be liberally construed and under certain circumstances it has to be understood in a narrow spectrum. The concept of "State" as used under Article 12 is quite different than what is meant by an "Executive Government". In fact to determine whether a body is an instrumentality or agency of the Government this Court has laid down general principles but no exhaustive tests have been specified. As has been held in *Chander Mohan Khanna v. National Council of*

Educational Research and Training and others,[14] even in general principles there is no cut and dried formula which would provide correct division of bodies into those which are instrumentalities or agencies of the Government and those which are not. In that case the Court opined that where the financial assistance from the State is so much as to meet almost entire expenditure of the institution, or the share capital of the corporation is completely held by the Government, it would afford some indication of the bodies being impregnated with governmental character. It may be a relevant factor if the institution or the corporation enjoys monopoly status which is State conferred or State protected. Existence of deep and pervasive State control may afford an indication. It has been laid down therein that if the functions of the institution are of public importance and related to governmental functions, it would also be a relevant factor and these are merely indicative indicia and are by no means conclusive or clinching in any case. It has been further opined therein, after referring to host of decisions, that a wide enlargement of the meaning must be tempered by a wise limitation, for the State control does not render such bodies as "State" under Article 12 of the Constitution. The State control, however, vast and pervasive is not determinative; the financial contribution by the State is also not conclusive. If the Government operates behind a corporate veil, carrying out governmental functions of vital public importance, there may be little difficulty in identifying the body as "State".

28. At this stage, we may usefully refer to a three-Judge Bench decision in *Ramana Dayaram Shetty* (supra) wherein Bhagwati, J. (as his Lordship then was) opined that where a corporation is an instrumentality or agency of Government, it would, in the exercise of its power or discretion, be subject to the same constitutional or public law limitations as Government. The rule inhibiting arbitrary action by Government must apply equally where such corporation is dealing with the public,

14. (1991) 4 SCC 578.

whether by way of giving jobs or entering into contracts or otherwise, and it cannot act arbitrarily and enter into 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. This rule also flows directly from the doctrine of equality embodied in Article 14.

29. The reference to the aforesaid authorities by us is only for the purpose that an authority or instrumentality of the State or agency of the State has to act in a fair, non-arbitrary and reasonable manner and, in fact, is controlled by Chapter III of the Constitution but it does not assume the character of "Government" for all purposes. As we find from the language employed in Order XXVII Rules 8A and 8B, it only means the "Government". In fact, Rule 8B clearly states "in relation to any suit by or against the Central Government or against a public officer in the service of the Government" and similar language is used for the State Government. Hence, the legislature has deliberately used a restrictive definition and its scope cannot be expanded to cover an agency or instrumentality of the State by interpretative process.

30. Learned counsel for the appellants, as stated earlier, has commended us to the decision in *Kuruvilla* (supra) of the High Court of Kerala wherein the Division Bench placing reliance on the decision in *Collector, Cuttack v. Padma Charan Mohanty*[15] has basically dealt with the applicability of Order XXVII Rule 8A and grant of stay under Order XLI Rule 5 when the State is the appellant. We do not intend to express any opinion on the correctness of the said decisions as the controversy does not arise in the present case because it is neither the Central Government nor the State Government in that sense in appeal before us. It is the "Jal Sansthan" which claims to be an extended wing or agency of the State has preferred the appeal. We have clearly ruled that Order XXVII Rules 8A and 8B are applicable only to the Government and not to

15. 50 1980 CLT 191

instrumentality or agency of the State. That is the specific and definite language employed by the legislature and for that purpose we have drawn a distinction between the concept of "State" under Article 12 and the "Government" as used in Order XXVII Rules 8A and 8B.

31. Coming to the legal validity of the impugned order we find that the High Court has directed for deposit of the money and withdrawal of the 50% of the same without furnishing security and remaining half after furnishing security. The High Court has not given any justifiable reason for permitting such withdrawal. Without commenting on the merits of the grounds sought to be urged before us (to which we have not referred to in detail not being necessary) we only modify the order that the appellant shall furnish the security for the entire amount to the satisfaction of the concerned District Judge within a period of six weeks. As the scope of appeal is very limited, we would request the High Court to dispose of the appeal by the end of June, 2014.

32. Resultantly, with the aforesaid modifications in the order passed by High Court, the appeal stands disposed without any order as to costs.

R.P. Appeal disposed of.

T.N. GODAVARMAN THIRUMULPAD
v.
UNION OF INDIA & ORS.
I.A. NOs.1868, 2091, 2225-2227, 2380, 2568 AND 2937
IN
WRIT PETITION (CIVIL) No. 202 OF 1995

JANUARY 06, 2014.

[A.K. PATNAIK, SURINDER SINGH NIJJAR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

ENVIRONMENT (PROTECTION) ACT, 1986:

s. 3(3) — National Regulator – Order of Supreme Court dated 6.7.2011 directing for appointment of National Regulator –Held: In Lafarge Umiam Mining's case, on an interpretation of s. 3 (3), the Court took a view that it confers a power coupled with duty to appoint an appropriate authority in the form of a Regulator at the State and at the Central level for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters and accordingly directed the Central Government to appoint a National Regulator under the said provision, as the Court did not find the mechanism of making the EIA appraisals of projects by MoEF to be satisfactory — The mechanism under EIA Notification dated 14.09.2006, issued by Government with regard to processing, appraisals and approval of the projects for environmental clearance is deficient in many respects and what is required is a Regulator at the national level having its offices in all the States which can carry out an independent, objective and transparent appraisal and approval of the projects for environmental clearances and which can also monitor the implementation of the conditions laid down in the Environmental Clearances — The Regulator so appointed u/s 3(3) can exercise only such powers and functions of Central

Government under the Act as are entrusted to it and obviously cannot exercise powers of Central Government u/s 2 of Forest (Conservation) Act, 1980, but while exercising such powers under Environment Protection Act, he will ensure that the National Forest Policy, 1988 is duly implemented as held in the order dated 06.07.2011 in the case of Lafarge Umiam Mining — Union of India is directed to appoint a Regulator with offices in as many States as possible under sub-s. (3) of s. 3 of the Environment (Protection) Act as directed in the order in the case of Lafarge Umiam Mining and file an affidavit along with the notification appointing the Regulator in compliance of this direction — Forest (Conservation) Act, 1980 — National Forest Policy, 1988 — EIA Notification dated 14.09.2006.

Lafarge Umiam Mining Private Limited v. *Union of India & Ors*. **2011 (7) SCR 954 = (2011) 7 SCC 338 – referred to.**

Case Law Reference:

2011 (7) SCR 954 referred to para 1

CIVIL ORIGINAL JURISDICTION I.A. NOs.1868, 2091, 2225-2227, 2380, 2568 AND 2937

IN

Writ Petition (Civil) No. 202 OF 1995.

Harish N. Salve, Uday U. Lalit, Vivek Tankha, R.K. Raizada, Mahaveer Singh, A.D.N. Rao, Siddharth Chowdhury, P.K. Manohar, Group Capt. Karan Singh Bhati, Dr. Prikshayat Singh, Karmendra Singh, Prashant Kumar, Joseph Pookkatt (for APJ Chambers), Rajiv Tyagi (for Rajiv Tyagi Associates), Vivek Gupta, S.S. Shamshery, Bhakti Vardhan Singh, Bharat Sood, Dr. Kailash Chand, Arvind Kumar Shukla, Amit Shukla, Nihal Ahmad, Alok Shukla, R.C. Kohli, Yash Pal Dhingra, Himanshu Shekhar, Sanchit Guru, Gunwant Dara, D.K. Thakur, Sukhbeer Kaur Baiwa, Shreekant N. Terdal, Gopal Prasad, C.D. Singh, Hemantika Wahi, Preeti Bhardwaj, Parul Kumari,

Gopal Prasad, Anitha Shenoy, Mishra Saurabh, Vanshja Shukla and Abhishek Chowdhury for the appearing parties.

The following Order of the Court was delivered

O R D E R

1. In the case of *Lafarge Umiam Mining Private Limited* v. *Union of India & Ors*. [(2011) 7 SCC 338], this Court, while refusing to interfere with the decisions of the Ministry of Environment and Forests (MoEF) granting site clearance, EIA clearance read with revised environmental clearance and Stage I forest clearance to the mining project of Lafarge Umiam Mining Private Limited, laid down some guidelines to be followed in future cases in Part-II of its order dated 06.07.2011. These guidelines have been stated in Para 122 of the said order and sub-para (i.1.) of Para 122, this Court called upon the Central Government to appoint a National Regulator under Section 3(3) of the Environment (Protection) Act, 1986 for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters. Despite the order dated 06.07.2011 of this Court, the Central Government did not appoint a National Regulator under Section 3(3) of the Environment (Protection) Act, 1986. On 09.09.2013, this Court therefore requested Mr. Mohan Parasaran, learned Solicitor General, to obtain instructions and apprise this Court as to when the direction of this Court will be complied with.

2. When the matter was taken up on 18.11.2013 again, Mr. Mohan Parasaran, learned Solicitor General, relying on the affidavit filed on behalf of the MoEF, submitted that in the case of Lafarge Umiam Mining Private Limited, this Court was really concerned with the National Forest Policy, 1988. He submitted that so far as the National Forest Policy, 1988 is concerned, the same relates to forests and under Section 2 of the Forest (Conservation) Act, 1980 the duty of a Regulator has been cast

upon the Central Government. He submitted that the responsibility to appraise proposals seeking prior approval of the Central Government under Section 2 of the Forest (Conservation) Act, 1980 lies with the Forest Advisory Committee constituted by the Central Government under Section 3 of the Forest (Conservation) Act, 1980. He argued that these statutory duties of the Central Government under Section 2 of the Forest (Conservation) Act, 1980 cannot be delegated to any other authority.

3. Mr. Parasaran next submitted that sub-section (1) of Section 3 of the Environment (Protection) Act, 1986 similarly confers powers on the Central Government to take all such measures as it deems necessary or expedient for the purpose of protecting and improving the quality of the environment and preventing, controlling and abating environmental pollution and the Central Government in exercise of its powers under sub-section (1) and clause (v)(b) of sub-section (2) of Section 3 Environment (Protection) Act, 1986 had issued the EIA Notification dated 14.09.2006. He explained that the EIA Notification dated 14.09.2006 provides that the prior environmental clearance from the Central Government, or as the case may be, from the State Level Environment Impact Assessment Authority, shall be taken for construction of new projects or activities or the expansion or modernization of existing projects or activities mentioned in the Schedule to this Notification. He submitted that the Central Government through MoEF is, thus, undertaking appraisals of projects in accordance with the Notification dated 14.09.2006. He submitted that compliance of the conditions stipulated in the environmental clearance granted to the projects are being monitored and enforced six Regional Offices of the MoEF are functioning at Bangalore, Bhopal, Bhubaneswar, Chandigarh, Lucknow and Shillong. He submitted that as an appropriate mechanism for appraising projects as well as monitoring and enforcing compliance of environmental conditions that govern

Environmental Clearances is already in place, it is not necessary for the Central Government to appoint a National Regulator under sub-section (3) of Section 3 of the Environment (Protection) Act, 1986. Mr. Parasaran finally submitted that Part II of the order dated 06.07.2011 of this Court in the case of Lafarge Umiam Mining Private Limited is titled "Guidelines to be followed in future cases" and hence the observations of this Court in Part II were in the nature of suggestions of this Court and the Central Government is considering these suggestions and has not taken a decision to appoint a National Regulator under sub-section (3) of Section 3 of the Environment (Protection) Act, 1986.

4. Mr. Harish N. Salve, learned Amicus Curiae, on the other hand, submitted that it will be clear, on a reading of Para 122 of the order dated 06.07.2011 of this Court in the case of Lafarge Umiam Mining Private Limited, that this Court held that Section 3 of the Envrionment (Proection) Act, 1986 confers a power coupled with duty and it is incumbent on the Central Government, to appoint a Regulator. He submitted that the order of this Court was therefore in the nature of a mandamus to the Central Government to appoint a National Regulator and the plea taken on behalf of the Union of India that the order to appoint a National Regulator was in the nature of a suggestion is misconceived. He argued that the order in the case of *Lafarge Umiam Mining Private Limited* was passed on 06.07.2011, and no review petition was filed in response of the order dated 06.07.2011, and after two years of the passing of the order, the Union of India cannot refuse to comply with the order of this Court. Mr. Salve referred to notifications issued by the Central Government under Section 3(3) of the Environment (Protection) Act, 1986 constituting authorities, such as the Notification dated 17.09.1998 constituting the Arunachal Pradesh Forest Protection Authority.

5. We have considered the submissions of Mr. Parasaran and Mr. Salve and the main question that we have to decide is whether the order of this Court in *Lafarge Umiam Mining Private Limited* for appointing a National Regulator under Section 3(3) of the Environment (Protection) Act, 1986 was merely a suggestion or a mandamus to the Central Government. Sub-paragraphs (i.1), (i.2.), (i.3.), (i.4.) and (i.5.) of paragraph 122 of the order of this Court in the case of *Lafarge Umiam Mining Private Limited* are extracted hereinbelow*:*

"*(i.1.)* The time has come for this Court to declare and we hereby declare that the National Forest Policy, 1988 which lays down far-reaching principles must necessarily govern the grant of permissions under Section 2 of the Forest (Conservation) Act, 1980 as the same provides the road map to ecological protection and improvement under the Environment (Protection) Act, 1986. The principles/ guidelines mentioned in the National Forest Policy, 1988 should be read as part of the provisions of the Environment (Protection) Act, 1986 read together with the Forest (Conservation) Act, 1980. This direction is required to be given because there is no machinery even today established for implementation of the said National Forest Policy, 1988 read with the Forest (Conservation) Act, 1980. Section 3 of the Environment (Protection) Act, 1986 confers a power coupled with duty and, thus, it is incumbent on the Central Government, as hereinafter indicated, to appoint an appropriate authority, preferably in the form of regulator, at the State and at the Central level for ensuring implementation of the National Forest Policy, 1988.

(*i.2*.) The difference between a regulator and a court must be kept in mind. The court/tribunal is basically an authority which reacts to a given situation brought to its notice whereas a regulator is a proactive body with the power conferred upon it to frame statutory rules and

regulations. The regulatory mechanism warrants open discussion, public participation and circulation of the draft paper inviting suggestions.

(*i.3*.) The basic objectives of the National Forest Policy, 1988 include positive and proactive steps to be taken. These include maintenance of environmental stability through preservation, restoration of ecological balance that has been adversely disturbed by serious depletion of forests, conservation of natural heritage of the country by preserving the remaining natural forests with the vast variety of flora and fauna, checking soil erosion and denudation in the catchment areas, checking the extension of sand dunes, increasing the forest/tree cover in the country and encouraging efficient utilisation of forest produce and maximising substitution of wood.

(*i.4*.) Thus, we are of the view that under Section 3(3) of the Environment (Protection) Act, 1986, the Central Government should appoint a National Regulator for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters.

(*i.5*.) There is one more reason for having a regulatory mechanism in place. Identification of an area as forest area is solely based on the declaration to be filed by the user agency (project proponent). The project proponent under the existing dispensation is required to undertake EIA by an expert body/institution. In many cases, the court is not made aware of the terms of reference. In several cases, the court is not made aware of the study area undertaken by the expert body. Consequently, MoEF/ State Government acts on the report (Rapid EIA) undertaken by the institutions who though accredited submit answers according to the terms of reference propounded by the project proponent. We do not wish to

cast any doubt on the credibility of these institutions. However, at times the court is faced with conflicting reports. Similarly, the Government is also faced with a fait accompli kind of situation which in the ultimate analysis leads to grant of ex post facto clearance. To obviate these difficulties, we are of the view that a regulatory mechanism should be put in place and till the time such mechanism is put in place, MoEF should prepare a panel of accredited institutions from which alone the project proponent should obtain the Rapid EIA and that too on the terms of reference to be formulated by MoEF."

It will be clear from the underlined portions of the order of this Court in *Lafarge Umiam Mining Private Limited* extracted above that this Court on an interpretation of Section 3 (3) of the Environment (Protection) Act, 1986 has taken a view that it confers a power coupled with duty to appoint an appropriate authority in the form of a Regulator at the State and at the Central level for appraising projects, enforcing environmental conditions for approvals and to impose penalties on polluters and has accordingly directed the Central Government to appoint a National Regulator under the said provision of the Act. Mr. Parasaran is, therefore, not right in arguing that in the case of *Lafarge Umiam Mining Private Limited,* this Court has merely suggested that a National Regulator should be appointed and has not issued any mandamus to appoint a National Regulator.

6. We further find on reading of sub-paragraphs (i.2), (i.3) and (i.5) of Paragraph 122 of the order in the case of *Lafarge Umiam Mining Private Limited* extracted above that this Court has not found the mechanism of making the EIA appraisals of projects by the MoEF to be satisfactory. As a matter of fact, we also find that the Department of Management Studies, Indian Institute of Technology, Delhi, has prepared report on '*Scope, Structure and Processes of National Environment*

Assessment and Monitoring Authority (NEAMA)' for the Ministry of Environment and Forest, Government of India, and the Executive Summary of the Report points out the problems with regard to the implementation of EIA 2006 Notification. Paragraph 4 from Section I of the Executive Summary under the heading '*Major Findings & Recommendations*', is extracted hereinbelow:

"4. We analysed the implementation of EIA 2006 notification and the proposed CZM notification 2010 in terms of policy, structure and process level issues. Almost all the problems in implementing these notifications relate to structure and processes. Key issues are mentioned below

a. The presence of MoEF in both the appraisal and approval processes leads to a perception of conflict of interest. The Member Secretary (who, according to the 2006 notification, was supposed to be the Secretary) is involved in the processing, appraisal and approval of the EIA applications.

b. Lack of permanence in the Expert Appraisal Committees leads to lack of continuity and institutional memory leading to poor knowledge management.

c. Current EIA and CRZ clearances rely predominantly on the data provided by the project proponent and the absence of authenticated and reliable data and lack of mechanisms to validate the data provided by the project proponent might lead to subjectivity, inconsistency and inferior quality of EIA reports.

d. Though the EIA notification requires several documents like ToRs (for every project), minutes of public hearing meetings (for each project), EIA report (with clearance conditions) and self-monitoring reports to be put in public

domain (predominantly on the website), this has not been done for lack of institutional mechanisms. This leads to a perception of lack of transparency in the processes.

e. Several studies have pointed toward the poor monitoring of the clearance conditions. Huge gaps in monitoring and enforcement of clearance conditions actually defeats the very purpose of grant of conditional environmental clearance." (See moef.nic.in/downloads/public-information/exec-summ-NEMA.pdf)

7. Hence, the present mechanism under the EIA Notification dated 14.09.2006, issued by the Government with regard to processing, appraisals and approval of the projects for environmental clearance is deficient in many respects and what is required is a Regulator at the national level having its offices in all the States which can carry out an independent, objective and transparent appraisal and approval of the projects for environmental clearances and which can also monitor the implementation of the conditions laid down in the Environmental Clearances. The Regulator so appointed under Section 3(3) of the Environment (Protection) Act, 1986 can exercise only such powers and functions of the Central Government under the Environment (Protection) Act as are entrusted to it and obviously cannot exercise the powers of the Central Government under Section 2 of the Forest (Conservation) Act, 1980, but while exercising such powers under the Environment Protection Act will ensure that the National Forest Policy, 1988 is duly implemented as held in the order dated 06.07.2011 of this Court in the case of *Lafarge Umiam Mining Private Limited.* Hence, we also do not find any force in the submission of Mr. Parasaran that as under Section 2 of the Forest (Conservation) Act, 1980 the Central Government alone is the Regulator, no one else can be appointed as a Regulator as directed in the case of *Lafarge Umiam Mining Private Limited.*

8. We, therefore, direct the Union of India to appoint a Regulator with offices in as many States as possible under sub-section (3) of Section 3 of the Environment (Protection) Act, 1986 as directed in the order in the case of *Lafarge Umiam Mining Private Limited* and file an affidavit along with the notification appointing the Regulator in compliance of this direction by 31st March, 2014.

9. The I.As. will stand disposed of accordingly.

R.P. I.As disposed of.

M.B. SURESH
v.
STATE OF KARNATAKA
(Criminal Appeal No. 985 of 2007)

JANUARY 06, 2014

[CHANDRAMAULI KR.PRASAD AND JAGDISH SINGH KHEHAR, JJ.]

PENAL CODE, 1860:

ss. 299, 302 and 307 – Victim shot at from a distant range – Death of victim on the way to village – Acquittal by trial court – Conviction by High Court u/s 302 of accused who fired the shots – Held: The doctor, who conducted post-mortem examination, found no internal injuries and opined that gun was fired from a distant range — He further opined that death was caused because of shock but he has not stated that it was due to the injuries caused by appellant or that deceased profusely bled which could have caused shock — It is not shown that the injuries found on the person of the deceased were of such nature, which in the ordinary course of nature could cause shock — It, therefore, creates a doubt as to whether deceased suffered shock on account of injuries sustained by him – However, it has been proved that appellant shot at deceased with an intention to kill him or at least he had the knowledge that the act would cause death — Allegations proved constitute an offence u/s 307 — Conviction of appellant is altered from s. 302 to s. 307 and he is sentenced to rigorous imprisonment for ten years.

The appellant (in Crl. A. No. 985 of 2007) and his father (appellant in Crl. A. No. 21 of 2014) were prosecuted for commission of offences punishable u/ss 302, 114 and 427, IPC and s. 3 read with ss. 25 and 27 of the Arms Act. The prosecution case was that there was a long standing

enmity between the family of the informant and the accused in respect of certain land over which appellant's father was claiming tenancy rights. On the date of occurrence while the informant (PW-1) and others were going to the coffee estate and their companion 'C' was ahead of them, the appellant fired at 'C'. After the first shot, his father instigated him to fire again. The appellant fired for the second time at 'C' and thereafter they left the place. P.Ws. 1 to 3, took the victim to the village, but he died on the way. The trial court acquitted both the accused of all the charges. However, the High Court, reversed their acquittal and held the appellant guilty of offences punishable u/ss 302 and 427, IPC and s. 27 of the Arms Act and sentenced him to imprisonment for life u/s 302 IPC and imprisonment for one year u/s 27 of the Arm Act. Both of them were also convicted and sentenced to undergo simple imprisonment for one week for offence u/s 427, IPC.

Disposing of the appeals, the Court

HELD: 1.1.For holding an accused guilty of murder, the prosecution has first to prove that it is a culpable homicide, as defined u/s 299, IPC and an accused will come under the mischief of this section only when the act done by him has caused death. [para 6] [106-B-C]

1.2. In the instant case, the doctor, who conducted the post-mortem examination, was categorical in his evidence that no internal injuries were found and the gun was fired from a distant range. As regards the cause of death, he has opined that it was because of shock but he has nowhere stated that it was due to the injuries caused by the appellant or that the deceased profusely bled which could have caused shock. It cannot be ignored that the case of the prosecution itself is that after the deceased sustained injuries while he was being

taken to the hospital for treatment, he died on the way. Any mishandling of the deceased by the person carrying him to the hospital so as to cause shock cannot be ruled out. It, therefore, creates a doubt as to whether the deceased suffered shock on account of the injuries sustained by him. It is not shown that the injuries found on the person of the deceased were of such nature, which in the ordinary course of nature could cause shock. It cannot be assumed that those injuries can cause shock in the absence of any evidence in this regard. There is no evidence to show that it was the injury inflicted by the appellant which was the cause of death. Thus, it cannot be held that it is the act of the appellant which caused the death. Therefore, conviction of the appellant u/s 302, IPC cannot be sustained. [para 6] [106-A-B, C-G]

2.1. However, it has been proved that the appellant shot at the deceased with an intention to kill him or at least he had the knowledge that the act would cause the death. Accordingly, the allegations proved constitute an offence u/s 307, IPC. Therefore, the conviction of the appellant is altered from s. 302 to s. 307, IPC and he is sentenced to rigorous imprisonment for ten years. However, his conviction under other penal provisions and the conviction of the other appellant is maintained. [para 7-8] [107-A-B; 108-C-E]

Bhupendra Singh v. State of U.P. **1991 (1) SCR 856 = (1991) 2 SCC 750 - relied on.**

Case Law Reference:

1991 (1) SCR 856	**relied on**	**para 7**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 985 of 2007.

From the Judgment & Order dated 09.02.2007 of the High

Court of Karnataka at Bangalore in Criminal Appeal No. 991 of 2000.

WITH

Crl. A.No. 21 of 2014.

Basant R., Shekhar G. Devasa, Karthik Ashok (for Adarsh Upadhyay), Vijay Kumar for the Appellant.

Anitha Shenoy, V.N. Raghupathy for the Respondent.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Appellant, besides his father Bhadregowda, was put on trial for offence punishable under Section 302, 114 and 427 of the Indian Penal Code and Section 3 read with Section 25 and 27 of the Arms Act. Additional Sessions Judge, Hasan, vide judgment and order dated 24th of February, 2000 passed in Sessions Case No. 24 of 1992, acquitted both the accused of all the charges. Aggrieved by the same, the State of Karnataka preferred an appeal. The High Court, vide judgment and order dated 9th of February, 2007 passed in Criminal Appeal No. 991 of 2000, reversed their acquittal and held the appellant M.B. Suresh guilty of offence punishable under Section 302 and 427 of the Indian Penal Code and Section 25 and 27 of the Arms Act. However, his father Bhadregowda was found guilty of offence punishable under Section 427 of the Indian Penal Code alone. Appellant M.B. Suresh was sentenced to undergo life imprisonment for offence under Section 302 of the Indian Penal Code and fine of Rs. 5,000/-, and in default to undergo simple imprisonment for six months. He was also sentenced to undergo one year's imprisonment and fine of Rs. 2,000/- for offence under Section 27 of the Arms Act. Both of them were sentenced to undergo simple imprisonment for one week for offence under Section 427 of the Indian Penal Code and fine of Rs. 5,000/- each. Sentences were directed to run concurrently. Aggrieved by the same, M.B. Suresh has preferred

the present appeal whereas his father Bhadregowda, aggrieved by his conviction and sentence, has preferred Special Leave Petition No. 5363 of 2007.

2. Leave granted in Special Leave Petition (Criminal) No. 5363 of 2007.

3. According to the prosecution there was a long standing enmity between the family of the informant and the accused in respect of land of Survey No. 29/2 and 22 of Marur Village over which the accused Bhadregowda was claiming tenancy rights. According to the prosecution, on 19th of November, 1991 the deceased Chandrashekar, along with his elder brother Raghunath, cousin Krishnegowda, a friend Prakash and one Suresh came to the residence of Halegowda in the Village Marur in a tractor-trailer for unloading the gunny bags. After unloading the gunny bags, they sent the tractor-trailer along with the labourers to the coffee plantation of Ramegowda to pluck coffee seeds. However, the aforesaid persons stayed back at Halegowda's house to have a cup of coffee and later, at about 10.30 A.M., while they were going to coffee estate by the side of the wetland of Ramegowda, Chandrashekar was ahead of them. At that time, Chandrashekar was shot at by the appellant M.B. Suresh, who was standing near the gate made of bamboo. After the first shot, his father Bhadregowda instigated him to fire again and at that the appellant M.B. Suresh fired for the second time at the deceased and thereafter they left the place. P.Ws. 1 to 3, namely Krishnegowda, Raghunath and Prakash respectively, rushed to the place where Chandrashekar had fallen on the ground and in order to save him, they carried him to the village, but unfortunately he died because of the gun shot injury on their way to the village. On the basis of the report given by Krishnegowda (PW-1), a case was registered at the Bellur Police Station. Post-mortem on the dead body was conducted by Dr. Gunashekar V.C.(PW-10), who found nine injuries on the person of the deceased caused by the appellant.

"1. Three circular pellet wounds present over the left part of the fore head, each measuring 0.5 cm. in diameter bony deep over an area of 4 cm. x 4 cm.

2. Three circular pellet wounds present near the lateral end of the right side of the lip each measuring 0.5 cm. in diameter skin deep over an area of 2 cm. x 2 cm.

3. Two pellet wounds over the left side of the front of the neck 0.5 cm. in diameter the muscle deep, there is an exit lacerated wound over the back of the left side of the neck piercing the skin 2 cm. x 2 cm., with lacerated edges.

4. Three circular pellet wounds present over the anterior aspect of the right arm each 0.5 cm. in diameter muscle deep over an area of 1 ½" x 1 ½".

5. Six circular pellet wounds present over the right anterior aspect of the chest each measuring 0.5 cm. in diameter over an area of 4" x 4" skin deep.

6. A single circular pellet present in the anterior aspect of chest at the level of the 12th rib measuring 0.5 cm. in diameter and skin deep.

7. An incised like wound 1" x ½" in the epigastrium skin deep.

8. A single circular pellet wound measuing 0.5 cm in diameter skin deep in the right iliac fassa.

9. Three pellet wounds circular in shapre each measuring 0.5 cm. in diameter in the anterior aspect of the upper third of the right thigh over an area of 6" x 4" skin deep"

4. As regards the cause of death, the doctor has stated

that it was because of shock. The trial court, on appreciation of evidence, came to the conclusion that the prosecution had not been able to prove its case beyond all reasonable doubt and, accordingly, acquitted them of both the charges. However, the judgment of acquittal has been reversed by the High Court in an appeal preferred by the State.

5. We have heard Mr. Basant R., learned Senior Advocate, on behalf of the appellant whereas the respondent, State of Karnataka is represented by Ms. Anitha Shenoy. Mr. Basant submits that even if the entire case of the prosecution is accepted, the same does not constitute an offence under Section 302 of the Indian Penal Code. He submits that according to the prosecution, the deceased died of shock but there is nothing on record to show that the shock was on account of the injury inflicted by the appellant M.B. Suresh. He further submits that the prosecution has not brought any evidence to show that the deceased suffered any grievous hurt and in that view of the matter, the appellant at most can be held guilty for an offence under Section 324 of the Indian Penal Code. He points out that the appellant M.B. Suresh has already remained in jail for more than 10 years. Ms. Shenoy, however, contends that the very fact that the deceased died within a few hours of the incident, it has to be assumed that the cause of death, i.e. shock had occurred on account of the gun shot injury caused by the appellant M.B. Suresh.

6. We have bestowed our consideration to the rival submissions and we partly find substance in the submission of Mr. Basant R. Dr. Gunashekar V.C.(PW-10) had conducted the post-mortem examination on the dead body of the deceased Chandrashekar and, as stated earlier, had found nine injuries on his person out of which six were skin deep of the size of 0.5 or less than 0.5 cm., three circular wounds each measuring 0.5 cm. bone deep found over an area of 4 cm. x 4 cm. over the left side of the forehead as also a lacerated wound of the same size over the left side of the front of the neck and another

muscle deep wound of the same size on the right arm. The doctor conducting the post-mortem examination was categorical in his evidence that no internal injuries were found and the gun was fired from a distant range. As regards the cause of death, the doctor has opined that it was because of shock but he has nowhere stated that it was due to the injuries caused by the appellant. For holding an accused guilty of murder, the prosecution has first to prove that it is a culpable homicide. Culpable homicide is defined under Section 299 of the Indian Penal Code and an accused will come under the mischief of this section only when the act done by him has caused death. True it is that the deceased died of shock but there is no evidence to show that the shock had occurred on account of the injuries caused by the appellant. We cannot ignore that the case of the prosecution itself is that after the deceased sustained injuries while he was being taken to the hospital for treatment, he died on the way. Any mishandling of the deceased by the person carrying him to the hospital so as to cause shock cannot be ruled out. The doctor had not stated that the deceased profusely bled which could have caused shock. In the absence of any such evidence, we are in doubt as to whether the deceased suffered shock on account of the injuries sustained by him. It is not shown that the injuries found on the person of the deceased were of such nature, which in the ordinary course of nature could cause shock. We cannot assume that those injuries can cause shock in the absence of any evidence in this regard. The doctor has not even remotely suggested that the shock was caused due to the injuries sustained by the deceased. In the face of what we have observed above, we are not in a position of hold that it is the act of the appellant, which caused death. Hence, we are of the opinion that the conviction of the appellant under Section 302 of the Indian Penal Code cannot be sustained.

7. Next question which falls for our consideration is as to the offence for which the appellant M.B. Suresh would be liable. What has been proved against this appellant is that he shot at

the deceased, but there is no evidence to show that it was the injury inflicted by the appellant which was the cause of death. However, from the facts proved, there is no doubt that he shot at the deceased with an intention to kill him or at least he had the knowledge that the act would cause the death. Accordingly, we are of the opinion that the allegations proved constitute an offence under Section 307 of the Indian Penal Code. The view which we have taken finds support from the judgment of this Court in the case of *Bhupendra Singh v. State of U.P., (1991) 2 SCC 750*, in which it has been observed as follows:

> **"9.**…….The evidence only established that the first appellant shot at the deceased but it is not known where the bullet hit and whether that injury caused by the said bullet shot caused the death. Even in the case of shooting by a rifle unless the evidence shows the particular injury caused by the same and that injury is sufficient to cause death, the offence under Section 302 IPC could not be said to have been made out. In the circumstances, therefore, we are unable to agree with the High Court that the first appellant is guilty of offence under Section 302 IPC of causing the death of Gajendra Singh. However, we are of the view that while the first appellant shot at the deceased there could be no doubt that either he had the intention to kill him or at least he had the knowledge that the act could cause the death.
>
> **10.** All the witnesses also say that the shot by A 1 brought down the deceased to the ground. There could, therefore, be no doubt that the shot had caused some hurt or injury though we could not predicate what was the nature of the injury and whether that injury could have caused the death. In the circumstances we consider that the offence would come under the second limb or second part of Section 307, IPC. Though imprisonment for life also could be awarded as sentence for such an offence on the facts and circumstances we impose a sentence of 10 years rigorous imprisonment. Accordingly we alter the conviction under Section 302, IPC as one under Section 307 IPC and sentence him to a term of 10 years rigorous imprisonment."

8. Accordingly, we alter the conviction of the appellant M.B. Suresh from Section 302 to Section 307 of the Indian Penal Code and sentence him to undergo rigorous imprisonment for ten years.

9. Mr. Basant R. has not assailed the conviction of the appellant M.B. Suresh other than Section 302 of the Indian Penal Code. As regards the conviction of the other accused Bhadregowda under Section 427, it is on correct appreciation of evidence, which does not call for interference in the present appeal.

10. In the result, Criminal Appeal No. 985 of 2007 is partly allowed, the conviction of the appellant M.B. Suresh under Section 302 of the Indian Penal Code is set aside and is altered to Section 307 of the Indian Penal Code and he is sentenced to undergo rigorous imprisonment for ten years. However, his conviction under other penal provisions is maintained. Sentences awarded to him shall run concurrently. As the appellant has already remained in custody for more than 10 years, we direct that he be set at liberty forthwith unless required in any other case.

11. The appeal (arising out of Special Leave Petition (Criminal) No. 5363 of 2007) preferred by the appellant Bhadregowda is, however, dismissed.

R.P. Appeals disposed of.

STATE (NCT OF DELHI)
v.
NARENDER
(Criminal Appeal No. 25 of 2014)

JANUARY 06, 2014.

[CHANDRAMAULI KR. PRASAD AND KURIAN JOSEPH, JJ.]

Delhi Excise Act, 2009:

s.61 r/w ss.58,59 and 60 – Vehicle used in commission of offence under the Act – Seized – Released by High Court exercising powers u/s 451 of the Code – Held: The general provisions of s. 451 of the Code have to yield where a statute makes a special provision with regard to confiscation and disposal of the property – s.61 of the Act with its non-obstante clause, puts an embargo on jurisdiction of courts to make any order with regard to the property used in committing any offence and seized under the Act – Therefore, ss.451, 452 and 457 of the Code must yield to the provisions of the Act; and Magistrate or High Court, while dealing with the case of seizure of vehicle under the Act, has no power to pass an order for interim custody of such vehicle on security or for its release – Under the Act, the vehicle seized has to be produced before Deputy Commissioner, who has been conferred with the power of its confiscation or release — High Court exceeded in its jurisdiction in directing release of the vehicle on security – Impugned order of High Court is set aside – Code of Criminal Procedure, 1973 – ss.451, 452 and 457.

INTERPRETATION OF STATUTES:

Non-obstante clause in a statute – General provisions and special provision – Interpretation of.

An FIR for offences u/ss 33(a) and 58 of the Delhi Excise Act, 2009 was registered, as 47 cartons of unauthorized liquor were found inside a vehicle. The respondent's application for release of the vehicle was rejected by the Magistrate. However, the High Court allowed his petition under s.482 of the Code and directed the vehicle to be released on furnishing security.

The State filed the instant appeal contending that in view of the embargo put by s.61 of the Delhi Excise Act, the High Court had no jurisdiction to pass an order for release of the vehicle.

Allowing the appeal, the Court

HELD: 1.1. Section 33(a) of the Delhi Excise Act, 2009 makes it evident that transportation of any intoxicant in contravention of the provisions of the Act or of any rule or order made or notification issued or any licence, permit or pass, is punishable and any vehicle used for carrying the same, is liable for confiscation u/s 58(d) of the Act. Section 59 of the Act deals with the power of confiscation of Deputy Commissioner in certain cases. Under the scheme of the Act any vehicle used for carrying the intoxicant is liable to be confiscated and on seizure of such vehicle, the same is required to be produced before the Deputy Commissioner, who in turn has been conferred with the power of its confiscation. [para 8] [115-E-F, G-H; 116-A]

1.2. Section 61 of the Act puts an embargo on jurisdiction of courts laying down that notwithstanding anything contrary contained in any other law for the time being in force, no court shall have jurisdiction to make any order with regard to the property used in committing any offence and seized under the Act. [para 9-10] [116-A-B, D]

1.3. In the instant case, the High Court, while releasing the vehicle on security has exercised its power u/s 451 of the Code of Criminal Procedure, 1973. The general provision of s.451 of the Code with regard to the custody and disposal of the property or for that matter by destruction, confiscation or delivery to any person entitled to possession thereof u/s 452 of the Code or that of s.457 authorising a Magistrate to make an order for disposal of property, if seized by an officer and not produced before a criminal court during an inquiry or trial, however, has to yield where a statute makes a special provision with regard to its confiscation and disposal. [para 11] [116-E, G-H; 117-A-B]

1.4. From the scheme of the Act it is evident that the vehicle seized has to be produced before the Deputy Commissioner, who in turn has been conferred with the power of its confiscation or release to its rightful owner. The requirement of production of seized property before the Deputy Commissioner u/s 59(1) of the Act is, notwithstanding anything contained in any other law, and, so also is the power of confiscation. In the instant case, the Legislature has used a non-obstante clause not only in s.59 but also in s.61 of the Act. A non-obstante clause is a legislative device to give effect to the enacting part of the section in case of conflict over the provisions mentioned in the non-obstante clause. Therefore, ss.451, 452 and 457 of the Code must yield to the provisions of the Act; and the Magistrate or for that matter the High Court, while dealing with the case of seizure of vehicle under the Act, has no power to pass an order dealing with the interim custody of the vehicle on security or its release. [para 11] [117-B-F]

State of Karnataka v. K.A. Kunchindammed **2002 (3) SCR 162 = (2002) 9 SCC 90 – relied on.**

Oma Ram v. State of Rajasthan, **2008 (6) SCR 747 =**

(2008) 5 SCC 502 – referred to.

1.5. The High Court exceeded in its jurisdiction in directing for release of the vehicle on security. Therefore, the impugned judgment and order of the High Court is set aside. [para 14] [119-B]

Case Law Reference:

2002 (3) SCR 162	**relied on**	**para 11**
2008 (6) SCR 747	**referred to**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 25 of 2014.

From the Judgment & Order dated 28.11.2011 of the High Court of Delhi at New Delhi in Crl. M.C. No. 2540 of 2011.

Mohan Jain, ASG, Deepak Jain, D.K. Thakur, M. Pasha, D.S. Mahra, B.V. Balaram Das for the Appellant.

Harish Pandey for the Respondent.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. The State of Delhi, aggrieved by the order dated 28th of November, 2011 passed by the Delhi High Court in Criminal M.C. No. 2540 of 2011, whereby it had directed for release of the vehicle bearing Registration No. HR-56-7290 to the registered owner on security, has preferred this special leave petition.

2. Leave granted.

3. Shorn of unnecessary details, facts giving rise to the present appeal are that while constables Raghmender Singh and Sunil were on night patrolling duty at Kirari Nithari turn on 17th of April, 2011, they saw a vehicle coming from the side of the Nithari Village. Constable Raghmender Singh signalled the driver to stop the vehicle, but he did not accede to his command

and turned the vehicle into the Prem Nagar Extension Lane. Both the constables chased the vehicle on their motorcycle and the driver of the vehicle, apprehending that he would be caught, left the vehicle and ran away from the place, taking advantage of the darkness. The vehicle abandoned by the driver was "Cruiser Force" and had registration No. HR-56-7290. After opening of the windows of the vehicle, 27 Cartons, each containing 12 bottles of 750 ml. Mashaledar country-made liquor and 20 Cartons, each containing 48 quarters of Besto Whisky were found inside the vehicle. All the 47 Cartons were embossed with 'Sale in Haryana only'. Constable Raghmender Singh gave a report to the police and on that basis FIR No. 112 of 2011 dated 17.04.2011 was registered at Aman Vihar Police Station under Section 33(a) and Section 58 of the Delhi Excise Act, 2009. During the course of investigation, Narender, respondent herein, claiming to be the owner of the vehicle, filed an application for its release on security, before the Metropolitan Magistrate, Rohini, who, by his order dated 24th of May, 2011 rejected the same, inter alia, holding that he has no power to release the vehicle seized in connection with the offence under the Delhi Excise Act. The respondent again filed an application for the same relief i.e. for release of the vehicle on security before the Metropolitan Magistrate but the said application also met with the same fate. By order-dated 14th of July, 2011, the learned Metropolitan Magistrate declined to pass the order for release, inter alia, observing that any order directing for release of the vehicle on security would amount to review of the order dated 24th of May, 2011, which power the court did not possess.

4. Aggrieved by the same, the respondent filed an application before the High Court under Section 482 of the Code of Criminal Procedure (hereinafter referred to as 'the Code'), assailing the order dated 24th May, 2011 passed by the learned Metropolitan Magistrate. The High Court, by its impugned order dated 28th of November, 2011 directed the vehicle to be released in favour of the registered owner on

furnishing security to the satisfaction of the Metropolitan Magistrate. While doing so, the High Court has observed as follows:

> "……The vehicle in question was seized by the Police and not confiscated and if that was so, Section 58, Delhi Excise Act would not apply with regard to the vehicle in question and the procedure that was to be followed regarding the vehicle was to be found in Chapter VI of Delhi Excise Act and also Section 451, Cr.P.C……."

5. Mr. Mohan Jain, Additional Solicitor General appears on behalf of the appellant whereas the respondent is represented by Mr. Harish Pandey. Mr. Jain submits that in view of the embargo put by Section 61 of the Delhi Excise Act, the High Court had no jurisdiction to pass an order for release of the vehicle on security. Mr. Pandey, however, submits that the High Court has the power under Section 451 of the Code to direct for release of the vehicle on security and the same is legal and valid.

6. Rival submissions necessitate examination of the scheme of the Delhi Excise Act, 2009 (hereinafter referred to as 'the Act'). Section 33 of the Act provides for penalty for unlawful import, export, transport, manufacture, possession, sale etc. of intoxicant and Section 33(a), which is relevant for the purpose reads as follows:

> **"33. Penalty for unlawful import, export, transport, manufacture, possession, sale, etc.**- (1) Whoever, in contravention of provision of this Act or of any rule or order made or notification issued or of any licence, permit or pass, granted under this Act-
>
> (a) manufactures, imports, exports, transports or removes any intoxicant;
>
> xxx xxx xxx

shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to three years and with fine which shall not be less than fifty thousand rupees but which may extend to one lakh rupees."

7. Section 58 of the Act provides for confiscation of certain things and Section 58(d) thereof, with which we are concerned in the present appeal, reads as follows:

"58. Certain things liable to confiscation.- Whenever an offence has been committed, which is punishable under this Act, following things shall be liable to confiscation, namely-

xxx xxx xxx

(d) any animal, vehicle, vessel, or other conveyance used for carrying the same."

8. From a plain reading of Section 33(a) of the Act, it is evident that transportation of any intoxicant in contravention of the provisions of the Act or of any rule or order made or notification issued or any licence, permit or pass, is punishable and any vehicle used for carrying the same, is liable for confiscation under Section 58(d) of the Act. Section 59 of the Act deals with the power of confiscation of Deputy Commissioner in certain cases. Section 59(1) thereof provides that notwithstanding anything contained in any other law where anything liable for confiscation under Section 58 is seized or detained, the officer seizing and detaining such thing shall produce the same before the Deputy Commissioner. On production of the seized property, the Deputy Commissioner, if satisfied that the offence under the Act has been committed, may order confiscation of such property. Therefore, under the scheme of the Act any vehicle used for carrying the intoxicant is liable to be confiscated and on seizure of the vehicle transporting the intoxicant, the same is required to be produced before the Deputy Commissioner, who in turn has been

conferred with the power of its confiscation.

9. Section 61 of the Act puts an embargo on jurisdiction of courts, the same reads as follows:

"61. Bar of jurisdiction in confiscation.- Whenever any intoxicant, material, still, utensil, implement, apparatus or any receptacle, package, vessel, animal, cart, or other conveyance used in committing any offence, is seized or detained under this Act, no court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, have jurisdiction to make any order with regard to such property."

10. According to this section, notwithstanding anything contrary contained in any other law for the time being in force, no court shall have jurisdiction to make any order with regard to the property used in committing any offence and seized under the Act.

11. It is relevant here to state that in the present case, the High Court, while releasing the vehicle on security has exercised its power under Section 451 of the Code. True it is that where any property is produced by an officer before a criminal court during an inquiry or trial under this section, the court may make any direction as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, as the case may be. At the conclusion of the inquiry or trial, the court may also, under Section 452 of the Code, make an order for the disposal of the property produced before it and make such other direction as it may think necessary. Further, where the property is not produced before a criminal court in an inquiry or trial, the Magistrate is empowered under Section 457 of the Code to make such order as it thinks fit. In our opinion, the general provision of Section 451 of the Code with regard to the custody and disposal of the property or for that matter by destruction, confiscation or delivery to any person entitled to possession thereof under Section 452 of the Code

or that of Section 457 authorising a Magistrate to make an order for disposal of property, if seized by an officer and not produced before a criminal court during an inquiry or trial, however, has to yield where a statute makes a special provision with regard to its confiscation and disposal. We have referred to the scheme of the Act and from that it is evident that the vehicle seized has to be produced before the Deputy Commissioner, who in turn has been conferred with the power of its confiscation or release to its rightful owner. The requirement of production of seized property before the Deputy Commissioner under Section 59(1) of the Act is, notwithstanding anything contained in any other law, and, so also is the power of confiscation. Not only this, notwithstanding anything to the contrary contained in any other law for the time being in force, no court, in terms of Section 61 of the Act, has jurisdiction to make any order with regard to the property used in commission of any offence under the Act. In the present case, the Legislature has used a non-obstante clause not only in Section 59 but also in Section 61 of the Act. As is well settled, a non-obstante clause is a legislative device to give effect to the enacting part of the section in case of conflict over the provisions mentioned in the non-obstante clause. Hence, Section 451, 452 and 457 of the Code must yield to the provisions of the Act and there is no escape from the conclusion that the Magistrate or for that matter the High Court, while dealing with the case of seizure of vehicle under the Act, has any power to pass an order dealing with the interim custody of the vehicle on security or its release thereof. The view which we have taken finds support from a judgment of this Court in the case of *State of Karnataka v. K.A. Kunchindammed,* (2002) 9 SCC 90, which while dealing with somewhat similar provisions under the Karnataka Forest Act held as follows:-

> "**23**…….The position is made clear by the non obstante clause in the relevant provisions giving overriding effect to the provisions in the Act over other statutes and laws. The necessary corollary of such provisions is that in a case

> where the Authorized Officer is empowered to confiscate the seized forest produce on being satisfied that an offence under the Act has been committed thereof the general power vested in the Magistrate for dealing with interim custody/release of the seized materials under CrPC has to give way. The Magistrate while dealing with a case of any seizure of forest produce under the Act should examine whether the power to confiscate the seized forest produce is vested in the Authorized Officer under the Act and if he finds that such power is vested in the Authorized Officer then he has no power to pass an order dealing with interim custody/release of the seized material. This, in our view, will help in proper implementation of provisions of the special Act and will help in advancing the purpose and object of the statute. If in such cases power to grant interim custody/release of the seized forest produce is vested in the Magistrate then it will be defeating the very scheme of the Act. Such a consequence is to be avoided.
>
> **24.** From the statutory provisions and the analysis made in the foregoing paragraphs the position that emerges is that the learned Magistrate and the learned Sessions Judge were right in holding that on facts and in the circumstances of the case, it is the Authorized Officer who is vested with the power to pass order of interim custody of the vehicle and not the Magistrate. The High Court was in error in taking a view to the contrary and in setting aside the orders passed by the Magistrate and the Sessions Judge on that basis."

12. From a conspectus of what we have observed above, the impugned order of the High Court is found to be vulnerable and, therefore, the same cannot be allowed to stand.

13. To put the record straight it is relevant here to state that the counsel for the respondent had not, and in our opinion rightly, challenged the vires of the provisions of the Act in view of the

decision of this Court in the case of *Oma Ram v. State of Rajasthan,* (2008) 5 SCC 502, which upheld a somewhat similar provision existing in the Rajasthan Excise Act.

14. In the result, we allow this appeal, set aside the impugned judgment and order of the High Court and hold that the High Court exceeded in its jurisdiction in directing for release of the vehicle on security.

R.P. Appeal allowed.

NANDLAL WASUDEO BADWAIK
v.
LATA NANDLAL BADWAIK & ANR.
(Criminal Appeal No. 24 of 2014)

JANUARY 06, 2014

[CHANDRAMAULI KR. PRASAD AND JAGDISH SINGH KHEHAR, JJ.]

Code of Criminal Procedure, 1973:

s.125 – Maintenance to wife and daughter – Appellant-husband denying paternity of the child and challenging the order as regards maintenance to her – Two DNA test reports excluding him to be the biological father of the child – Held: Impugned judgment is set aside so far as it directs payment of maintenance to the child — However, the payments already made shall not be recovered from the respondents.

Evidence Act, 1872:

s.112 – Birth during marriage, conclusive proof of legitimacy – Rebuttal by two DNA tests – Held: DNA test is scientifically accurate —When there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former — Husband's plea that he had no access to the wife when child was begotten, stands proved by DNA test report and in the face of it, he cannot be compelled to bear the fatherhood of the child, when scientific reports prove to the contrary.

s.112 – Birth during marriage – Presumption as regards legitimacy of child – Held: s.112 does not create a legal fiction but provides for presumption — Where there is evidence to the contrary, presumption is rebuttable and must yield to proof.

Medical Jurisprudence:

DNA test – Nature and evidentiary value of – Explained.

The instant appeal was filed by the husband challenging the order of maintenance u/s 125 CrPC as regards the daughter and denying the paternity of the child. His case was that his wife was residing separately and during the relevant period he had no access to her. He applied for referring the child for DNA test and its report excluded him from being the biological father of the child. Respondent no. 1-wife requested for re-test and its report from a different institute also was to the same effect. It was contended for the respondents that the appellant having failed to establish that he had no access to his wife at any time when she could have begotten respondent no. 2, the direction for DNA test ought not to have been given and, as such, the result of such a test was fit to be ignored.

Allowing the appeal, the Court

HELD: 1.1. This Court twice gave directions for DNA test. The respondents did not oppose the prayer of DNA test when such a prayer was being considered. It was only after the reports of the DNA test had been received, which was adverse to the respondents, that they challenged it on the ground that such a test ought not to have been directed. This Court, at this stage, cannot go into the validity of the orders passed by a coordinate Bench. It has attained finality. [para 10] [129-C-E]

Goutam Kundu v. State of W.B., **1993 (3) SCR 917 = (1993) 3 SCC 418; *Banarsi Dass v. Teeku Dutta* 2005 (3) SCR 923 = (2005) 4 SCC 449; and *Bhabani Prasad Jena v. Orissa State Commission for Women,* 2010 (9) SCR 457 = (2010) 8 SCC 633 – held inapplicable.**

1.2. It has been recognized by this Court in the case of *Kamti Devi* that the result of a genuine DNA test is scientifically accurate. It is nobody's case that the result of the DNA test is not genuine and, therefore, it has to be assumed that the result of the DNA test is accurate. The DNA test reports show that the appellant is not the biological father of the girl-child. [para 12] [131-C]

Kamti Devi v. Poshi Ram **2001 (3) SCR 729 = (2001) 5 SCC 311– referred to.**

1.3. From a plain reading of s.112 of the Evidence Act, 1872, it is evident that a child born during the continuance of a valid marriage shall be a conclusive proof that the child is a legitimate child of the man to whom the lady giving birth is married. The provision makes the legitimacy of the child to be a conclusive proof, if the conditions are satisfied. It can be denied only if it is shown that the parties to the marriage had no access to each other at any time when the child could have been begotten. [para 14] [131-G-H; 132-A]

1.4. The DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl-child. However, at the same time, the condition precedent for invocation of s.112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten, has been recorded. [para 15] [132-D]

1.5. Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although s.112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. Interest of justice is best served

by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. When there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former. [para 16] [132-G-H; 133-A-B]

1.6. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption. [para 17] [133-C-D]

1.7. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, he cannot be compelled to bear the fatherhood of the child, when the scientific reports prove to the contrary. The impugned judgment is set aside so far as it directs payment of maintenance to respondent no. 2. However, the payments already made shall not be recovered from the respondents. [para 18 and 20] [133-F; 134-C]

Case Law Reference:

1993 (3) SCR 917	**held inapplicable**	**para 7**
2005 (3) SCR 923	**held inapplicable**	**para 8**
2010 (9) SCR 457	**held inapplicable**	**para 9**
2001 (3) SCR 729	**referred to**	**para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 24 of 2014.

From the Judgment and Order dated 13.06.2008 of the High Court of Judicature at Bombay, Nagpur Bench at Nagpur in Criminal Writ Petition No. 293 of 2008.

Anagha S. Desai for the Appellant.

Manish Pitale, Wasi Haider (for Chander Shekhar Ashri) for the Respondents.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Petitioner happens to be the husband of respondent no. 1, Lata Nandlal Badwaik and alleged to be the father of girl child Netra alias Neha Nandlal Badwaik, respondent no. 2, herein. The marriage between them was solemnized on 30th of June, 1990 at Chandrapur. Wife filed an application for maintenance under Section 125 of the Code of Criminal Procedure, but the same was dismissed by the learned Magistrate by order dated 10th December, 1993. Thereafter, the wife resorted to a fresh proceeding under Section 125 of the Code of Criminal Procedure (hereinafter referred to as the 'Code') claiming maintenance for herself and her daughter, inter alia, alleging that she started living with her husband from 20th of June, 1996 and stayed with him for about two years and during that period got pregnant. She was sent for delivery at her parents' place where she gave birth to a girl child, the respondent no. 2 herein. Petitioner-husband resisted the claim and alleged that the assertion of the wife that she stayed with him since 20th of June, 1996 is false. He denied that respondent no. 2 is his daughter. After 1991, according to the husband, he had no physical relationship with his wife. The learned Magistrate accepted the plea of the wife and granted maintenance at the rate of Rs.900/- per month to the wife and at the rate of Rs.500/- per month to the daughter. The challenge to the said order in revision has failed so also a petition under Section 482 of the Code, challenging those orders.

It is against these orders, the petitioner has preferred this special leave petition.

2. Leave granted.

3. Taking note of the challenge to the paternity of the child, this Court by order dated 10th of January, 2011 passed the following order:

> "……However, the petitioner-husband had challenged the paternity of the child and had claimed that no maintenance ought to have been awarded to the child. The petitioner had also applied for referring the child for DNA test, which was refused. It is against the said order of refusal that the present Special Leave was filed and the same prayer for conducting the DNA test was made before us. On 8th November, 2010 we had accordingly, directed the petitioner-husband to deposit all dues, both arrear and current, in respect of the maintenance awarded to the wife and child to enable us to consider the prayer for holding of such DNA test. Such deposit having been made on 3rd January, 2011, we had agreed to allow the petitioner's prayer for conducting DNA test for ascertaining the paternity of the child.
>
> We have since been informed by counsel for the parties that a Forensic Science Laboratory in Nagpur conducts the very same test, as has been asked for, by the Petitioner. Accordingly, we direct the petitioner-Nandlal Wasudeo Badwaik and the respondent No. 1-Ms. Lata Nandlal Badwaik to make a joint application to the Forensic Science Laboratory, Nagpur, situated at Jail Road, Dhantoli, for conducting such test. The petitioner, as well as the respondent No. 1, shall present themselves at the Laboratory with respondent No. 2 for the said purpose on the date to be fixed by the laboratory, and, thereafter, the laboratory is directed to send the result of such test to this Court within four weeks thereafter. The expenses for the test to be conducted shall be borne by the petitioner-husband."

4. In the light of the aforesaid order, the Regional Forensic Science Laboratory, Nagpur has submitted the result of DNA testing and opined that appellant "Nandlal Vasudev Badwaik is excluded to be the biological father of Netra alias Neha Nandlal Badwaik", respondent no. 2 herein.

5. Respondents, not being satisfied with the aforesaid report, made a request for re-test. The said prayer of the respondents was accepted and this Court by order dated 22nd of July, 2011 gave the following direction:

> "Despite the fact that the report of the DNA Test conducted at the Regional Forensic Science Laboratory, State of Maharashtra, Nagpur-12, indicates that the petitioner is not the biological father of the respondent No. 2, on the prayer made on behalf of the respondents for a re-test, we are of the view that such a prayer may be allowed having regard to the serious consequences of the Report which has been filed.
>
> Accordingly, we direct that a further DNA Test be conducted at the Central Forensic Laboratory, Ministry of Home Affairs, Government of India at Hyderabad and for the said purpose the parties are directed to appear before the Laboratory on 24th August, 2011 at 11.00 a.m."

6. As directed, the Central Forensic Science Laboratory, Hyderabad submitted its report and on that basis opined that the appellant, "Nandlal Wasudeo Badwaik can be excluded from being the biological father of Miss Neha Nandlal Badwaik", respondent no. 2 herein.

7. At the outset, Mr. Manish Pitale appearing for the respondents submits that the appellant having failed to establish that he had no access to his wife at any time when she could have begotten respondent no. 2, the direction for DNA test ought

not to have been given. In view of the aforesaid he submits that the result of such a test is fit to be ignored. In support of the submission he has placed reliance on a judgment of this Court in *Goutam Kundu v. State of W.B.,* (1993) 3 SCC 418, relevant portions whereof read as under:

> **"24.** This section requires the party disputing the paternity to prove non-access in order to dispel the presumption. "Access" and "non-access" mean the existence or non-existence of opportunities for sexual intercourse; it does not mean actual "cohabitation".
>
> **26.** From the above discussion it emerges—
>
> (1) That courts in India cannot order blood test as a matter of course;
>
> (2) wherever applications are made for such prayers in order to have roving inquiry, the prayer for blood test cannot be entertained.
>
> (3) there must be a strong prima facie case in that the husband must establish non-access in order to dispel the presumption arising under Section 112 of the Evidence Act.
>
> (4) the court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman.
>
> (5) no one can be compelled to give sample of blood for analysis.
>
> **27.** Examined in the light of the above, we find no difficulty in upholding the impugned order of the High Court, confirming the order of the Additional Chief Judicial Magistrate, Alipore in rejecting the application for blood test……."

8. Yet another decision on which reliance has been placed is the decision of this Court in the case of *Banarsi Dass v. Teeku Dutta,* (2005) 4 SCC 449, paragraph 13, which is relevant for the purpose is quoted below:

> **"13.** We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Evidence Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception. Hence the question regarding the degree of proof of non-access for rebutting the conclusiveness must be answered in the light of what is meant by access or non-access as delineated above. (See *Kamti Devi* v. *Poshi Ram, 2001 (5) SCC 311*.)"

9. Reliance has also been placed on a decision of this Court in the case of *Bhabani Prasad Jena v. Orissa State Commission for Women*, (2010) 8 SCC 633, in which it has been held as follows:

> **"22.** In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due

consideration whether for a just decision in the matter, DNA test is eminently needed. DNA test in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of "eminent need" whether it is not possible for the court to reach the truth without use of such test."

10. Miss Anagha S. Desai appearing on behalf of the appellant submits that this Court twice ordered for DNA test and, hence, the question as to whether this was a fit case in which DNA profiling should or should not have been ordered is academic. We find substance in the submission of Ms. Desai. Fact of the matter is that this Court not only once, but twice gave directions for DNA test. The respondents, in fact, had not opposed the prayer of DNA test when such a prayer was being considered. It is only after the reports of the DNA test had been received, which was adverse to the respondents, that they are challenging it on the ground that such a test ought not to have been directed. We cannot go into the validity of the orders passed by a coordinate Bench of this Court at this stage. It has attained finality. Hence, we do not find any merit in the submission of the learned counsel for the respondents. As regards the decision of this Court in the cases of *Goutam Kundu (supra), Banarsi Dass (supra)* and *Bhabani Prasad Jena (supra)*, the same have no bearing in the facts and circumstances of the case. In all these cases, the court was considering as to whether facts of those cases justify passing of an order for DNA test. When the order for DNA test has already been passed, at this stage, we are not concerned with this issue and we have to proceed on an assumption that a valid direction for DNA test was given.

11. Ms. Desai submits that in view of the opinions, based on DNA profiling that appellant is not the biological father, he

cannot be fastened with the liability to pay maintenance to the girl-child born to the wife. Mr. Pitale, however, submits that the marriage between the parties has not been dissolved, and the birth of the child having taken place during the subsistence of a valid marriage and the husband having access to the wife, conclusively prove that the girl-child is the legitimate daughter of the appellant. According to him, the DNA test cannot rebut the conclusive presumption envisaged under Section 112 of the Evidence Act. According to him, respondent no. 2, therefore, has to be held to be the appellant's legitimate daughter. In support of the submission, reliance has been placed on a decision of this Court in the case of *Kamti Devi v. Poshi Ram,* (2001) 5 SCC 311, and reference has been made to paragraph 10 of the judgment, which reads as follows:

> **"10. ……**The result of a genuine DNA test is said to be scientifically accurate. But even that is not enough to escape from the conclusiveness of Section 112 of the Act e.g. if a husband and wife were living together during the time of conception but the DNA test revealed that the child was not born to the husband, the conclusiveness in law would remain irrebuttable. This may look hard from the point of view of the husband who would be compelled to bear the fatherhood of a child of which he may be innocent. But even in such a case the law leans in favour of the innocent child from being bastardised if his mother and her spouse were living together during the time of conception……."

12. Before we proceed to consider the rival submissions, we deem it necessary to understand what exactly DNA test is and ultimately its accuracy. All living beings are composed of cells which are the smallest and basic unit of life. An average human body has trillion of cells of different sizes. DNA (Deoxyribonucleic Acid), which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. Human cells contain 46 chromosomes and those 46

chromosomes contain a total of six billion base pair in 46 duplex threads of DNA. DNA consists of four nitrogenous bases – adenine, thymine, cytosine, guanine and phosphoric acid arranged in a regular structure. When two unrelated people possessing the same DNA pattern have been compared, the chances of complete similarity are 1 in 30 billion to 300 billion. Given that the Earth's population is about 5 billion, this test shall have accurate result. It has been recognized by this Court in the case of Kamti Devi (supra) that the result of a genuine DNA test is scientifically accurate. It is nobody's case that the result of the DNA test is not genuine and, therefore, we have to proceed on an assumption that the result of the DNA test is accurate. The DNA test reports show that the appellant is not the biological father of the girl-child.

13. Now we have to consider as to whether the DNA test would be sufficient to hold that the appellant is not the biological father of respondent no. 2, in the face of what has been provided under Section 112 of the Evidence Act, which reads as follows:

> "**112. Birth during marriage, conclusive proof of legitimacy.**- The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

14. From a plain reading of the aforesaid, it is evident that a child born during the continuance of a valid marriage shall be a conclusive proof that the child is a legitimate child of the man to whom the lady giving birth is married. The provision makes the legitimacy of the child to be a conclusive proof, if the conditions aforesaid are satisfied. It can be denied only if it is shown that the parties to the marriage have no access to

each other at any time when the child could have been begotten. Here, in the present case, the wife had pleaded that the husband had access to her and, in fact, the child was born in the said wedlock, but the husband had specifically pleaded that after his wife left the matrimonial home, she did not return and thereafter, he had no access to her. The wife has admitted that she had left the matrimonial home but again joined her husband. Unfortunately, none of the courts below have given any finding with regard to this plea of the husband that he had or had not any access to his wife at the time when the child could have been begotten.

15. As stated earlier, the DNA test is an accurate test and on that basis it is clear that the appellant is not the biological father of the girl-child. However, at the same time, the condition precedent for invocation of Section 112 of the Evidence Act has been established and no finding with regard to the plea of the husband that he had no access to his wife at the time when the child could have been begotten has been recorded. Admittedly, the child has been born during the continuance of a valid marriage. Therefore, the provisions of Section 112 of the Evidence Act conclusively prove that respondent No. 2 is the daughter of the appellant. At the same time, the DNA test reports, based on scientific analysis, in no uncertain terms suggest that the appellant is not the biological father. In such circumstance, which would give way to the other is a complex question posed before us.

16. We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need

or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.

17. We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption.

18. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice.

19. As regards the authority of this Court in the case of *Kamti Devi* (Supra), this Court on appreciation of evidence came to the conclusion that the husband had no opportunity whatsoever to have liaison with the wife. There was no DNA test held in the case. In the said background i.e. non-access of the husband with the wife, this Court held that the result of DNA test "is not enough to escape from the conclusiveness of Section 112 of the Act". The judgment has to be understood in

the factual scenario of the said case. The said judgment has not held that DNA test is to be ignored. In fact, this Court has taken note of the fact that DNA test is scientifically accurate. We hasten to add that in none of the cases referred to above, this Court was confronted with a situation in which DNA test report, in fact, was available and was in conflict with the presumption of conclusive proof of legitimacy of the child under Section 112 of the Evidence Act. In view of what we have observed above, these judgments in no way advance the case of the respondents.

20. In the result, we allow this appeal, set aside the impugned judgment so far as it directs payment of maintenance to respondent no. 2. However, we direct that the payments already made shall not be recovered from the respondents.

R.P. Appeal allowed.

STATE OF TAMILNADU BY INS.OF POLICE VIGILANCE AND ANTI CORRUPTION

v.

N.SURESH RAJAN & ORS.

(Criminal Appeal No. 22-23 of 2014)

JANUARY 06, 2014.

[CHANDRAMAULI KR. PRASAD AND M.Y. EQBAL JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

s. 239 – Discharge of accused – Accused charged with offences punishable u/s 109 IPC and s. 13(2) r/w s. 13 (1) (e) of Prevention of Corruption Act — Acquiring of properties disproportionate to known sources of income – Held: At the stage of consideration of an application for discharge, court has to proceed with an assumption that the materials brought on record by prosecution are true and to evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence — At this stage, probative value of the materials has to be gone into and court is not expected to go deep into the matter and hold that materials would not warrant a conviction – In the instant case, while passing the orders of discharge, court has not sifted the materials for the purpose of finding out whether or not there is sufficient ground for proceeding against accused, but whether that would warrant a conviction — Orders impugned suffer from grave error and, as such, are set aside.

ss. 227, 239 and 245 – Discharge of accused – Explained.

PREVENTION OF CORRUPTION ACT, 1988:

s. 13(2) r/w 13(1) (e) – Allegations that State Ministers purchased properties in the names of their relatives – Income tax paid by persons in whose names properties were acquired – Held: While passing the order of discharge, the fact that accused other than two Ministers have been assessed to and paid income tax cannot be relied upon to discharge the accused persons particularly in view of the allegation made by prosecution that there was no separate income to amass such huge properties — Property in the name of an income tax assessee itself cannot be a ground to hold that it actually belongs to such an assessee – Code of Criminal Procedure, 1973 – s. 239.

The instant appeals arose out of the orders of discharge of the accused of offences punishable u/s 109 IPC and s. 13(2) read with 13 (1)(e) of the Prevention of Corruption Act, 1988 passed u/s 239 of the Code of Criminal Procedure, 1973. In respect of accused-respondent no. 1 in Crl. A. Nos. 22-23 of 2014, the High Court in revision petition set aside the order of the Special Judge and discharged the accused; whereas in respect of accused-respondent no. 1 in Crl. A. Nos. 26-38 of 2014, the revision petition against the order of the Special Judge discharging the accused was dismissed by the High Court. The allegations against respondents no. 1 in both sets of appeals were that while they were Members of the State Legislative Assemblies and Ministers in the State Government, they acquired and possessed in their own names and in the names of other accused, namely, their relatives, pecuniary resources and properties disproportionate to their known sources of income.

Allowing the appeals, the Court

HELD: 1.1. The offences punishable under the scheme of the Prevention of Corruption Act have to be tried by a Special Judge and he may take cognizance of

the offence without committal of the accused and the Judge trying the accused is required to follow the procedure prescribed by the Code of Criminal Procedure, 1973 (the Code) for the trial of warrant cases by the Magistrate. The Special Judge holding the trial is deemed to be a Court of Session. [para 15] [148-C]

1.2. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. What needs to be considered is whether there is a ground for presuming that the offence has been committed, and not whether a ground for convicting the accused has been made out. If the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage. [para 19] [153-B-F]

Sheoraj Singh Ahlawat & Ors. vs. State of Uttar Pradesh & Anr., **2012 SCR 1034 = AIR 2013 SC 52,;** *Onkar Nath Mishra v. State (NCT of Delhi),* **2007 (13) SCR 716 = (2008) 2 SCC 561 – relied on.**

Sajjan Kumar v. CBI **2010 (11) SCR 669 = (2010) 9 SCC 368;** *Dilawar Balu Kurane v. State of Maharashtra,* **2002 (1) SCR 75 = (2002) 2 SCC 135 – held inapplicable.**

1.3. Sections 227 and 239 provide for discharge

before the recording of evidence on the basis of the police report, the documents sent along with it and examination of the accused after giving an opportunity to the parties to be heard. However, the stage of discharge u/s 245, on the other hand, is reached only after the evidence referred in s. 244 has been taken. Under s. 227 of the Code, the trial court is required to discharge the accused if it "considers that there is not sufficient ground for proceeding against the accused". However, discharge u/s 239 can be ordered when "the Magistrate considers the charge against the accused to be groundless". The power to discharge is exercisable u/s 245(1) when, "the Magistrate considers, for reasons to be recorded that no case against the accused has been made out which, if not repudiated, would warrant his conviction". Thus, there is difference in the language employed in these provisions. But, notwithstanding these differences, and whichever provision may be applicable, the court is required at this stage to see that there is a prima facie case for proceeding against the accused. [para 20] [154-E-H; 155-A-B]

R.S. Nayak v. A.R. Antulay **1986 (2) SCR 621 = (1986) 2 SCC 716 – referred to.**

1.4. In the instant case, while passing the order of discharge, the fact that the accused, other than the two Ministers, have been assessed to income tax and paid income tax cannot be relied upon to discharge the accused persons, particularly, in view of the allegation made by the prosecution that the Ministers had acquired properties in the names of their relatives and there was no separate income to amass such huge properties. The property in the name of an income tax assessee itself cannot be a ground to hold that it actually belongs to such an assessee. [para 21] [155-H; 156-A-B]

1.5. While passing the impugned orders, the court

has not sifted the materials for the purpose of finding out whether or not there is sufficient ground for proceeding against the accused, but whether that would warrant a conviction. This was not the stage where the court should have appraised the evidence and discharged the accused as if it was passing an order of acquittal. Further, defect in investigation itself cannot be a ground for discharge. The orders impugned suffer from grave error and call for rectification. The orders of discharge are, therefore, set aside. [para 21-23] [1556-C-D and F-G]

State by Deputy Superintendent of Police, Vigilance and Anti Corruption Cuddalore Detachment v. K. Ponumudi & Ors. **(2007-1MLJ-CRL.-100) – Reversed.**

Postmaster General v. Living Media India Ltd., **2012 (1) SCR 1045= (2012) 3 SCC 563,** *Pundlik Jalam Patil v. Executive Engineer, Jalgaon Medium Project* **2008 (15) SCR 135 = (2008) 17 SCC 448 – cited.**

Case Law Reference:

(2007-1MLJ-CRL.-100)	**reversed**	**para 4**
2012 (1) SCR 1045	**cited**	**para 8**
2008 (15) SCR 135	**cited**	**para 9**
2010 (11) SCR 669	**held inapplicable**	**para 19**
2002 (1) SCR 75	**held inapplicable**	**para 20**
2012 SCR 1034	**relied on**	**para 21**
2007 (13) SCR 716	**relied on**	**para 21**
1986 (2) SCR 621	**referred to**	**para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 22-23 of 2014.

From the Judgment & Order dated 10.12.2010 of the High

Court of Judicature of Madras, Madurai Bench in Crl. R.C. No. 528 of 2009 and MP (MD) No. 1 of 2009.

WITH

Criminal Appeal Nos. 26-38 of 2014.

Ranjit Kumar, M.S. Ganesh, Soli J. Sorabjee, Devvrat, Anup Kumar, M.K. Subramaniam, M. Yogesh Kanna, R. Ayyam Perumal, K. Seshachary, Anushree Kapadia, Sukun K.S. Chandele, R. Nedumaran, Movita, Meherwaz, Shaunak for the appearing parties.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J.

CRIMINAL APPEAL NO.22-23 OF 2014 (@SPECIAL LEAVE PETITION(CRL.)Nos.3810-3811 of 2012)

1. The State of Tamil Nadu aggrieved by the order dated 10th of December, 2010 passed by the Madras High Court in Criminal R.C.No.528 of 2009 and Criminal M.P.(MD) No.1 of 2009, setting aside the order dated 25th of September, 2009 passed by the learned Chief Judicial Magistrate-cum-Special Judge, Nagercoil (hereinafter referred to as 'the Special Judge'), whereby he refused to discharge the respondents, has preferred these special leave petitions.

2. Leave granted.

3. Short facts giving rise to the present appeals are that Respondent No. 1, N. Suresh Rajan, during the period from 13.05.1996 to 14.05.2001, was a Member of the Tamil Nadu Legislative Assembly as also a State Minister of Tourism. Respondent No. 2, K. Neelkanda Pillai is his father and Respondent No. 3, R.Rajam, his mother. On the basis of an information that N. Suresh Rajan, during his tenure as the Minister of Tourism, had acquired and was in possession of

pecuniary resources and properties in his name and in the names of his father and mother, disproportionate to his known sources of income, Crime No. 7 of 2002 was registered at Kanyakumari Vigilance and Anti Corruption Department on 14th of March, 2002 against the Minister N. Suresh Rajan, his father, mother, elder sister and his bother-in-law. During the course of the investigation, the investigating officer collected and gathered informations with regard to the property and pecuniary resources in possession of N. Suresh Rajan during his tenure as the Minister, in his name and in the name of others. On computation of the income of the Minister from his known sources and also expenditure incurred by him, it was found that the properties owned and possessed by him are disproportionate to his known sources of income to the tune of Rs. 23,77,950.94. The investigating officer not only examined the accused Minister but also his father and mother as also his sister and the brother-in-law. Ultimately, the investigating agency came to the conclusion that during the check period, Respondent No.1, N. Suresh Rajan has acquired and was in possession of pecuniary resources and properties in his name and in the names of his father, K. Neelakanda Pillai (Respondent No. 2) and mother R. Rajam (Respondent No. 3) and his wife D.S. Bharathi for total value of Rs. 17,58,412.47. The investigating officer also came to the conclusion that Minister's father and mother never had any independent source of income commensurate with the property and pecuniary resources found acquired in their names. Accordingly, the investigating officer submitted the charge-sheet dated 4th of July, 2003 against Respondent No.1, the Minister and his father (Respondent No.2) and mother (Respondent No.3) respectively, alleging commission of an offence under Section 109 of the Indian Penal Code and Section 13(2) read with Section 13(1)(e) of the Prevention of Corruption Act. Respondents filed application dated 5th of December, 2003 under Section 239 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code'), seeking their discharge. The Special Judge, by its order dated 25th of September, 2009 rejected their

prayer. While doing so, the Special Judge observed as follows:

> "At this stage it will be premature to say that there are no sufficient materials on the side of the state to frame any charge against them and the same would not be according to law in the opinion of this court and at the same time this court has come to know that there are basic materials for the purpose of framing charges against the 3 petitioners, the petition filed by the petitioners is dismissed and orders passed to that effect."

4. Aggrieved by the same, respondents filed criminal revision before the High Court. The High Court by the impugned judgment had set aside the order of the Special Judge and discharged the respondents on its finding that in the absence of any material to show that money passed from respondent No. 1 to his mother and father, latter cannot be said to be holding the property and resources in their names on behalf of their son. The High Court while passing the impugned order heavily relied on its earlier judgment in the case of *State by Deputy Superintendent of Police, Vigilance and Anti Corruption Cuddalore Detachment v. K. Ponumudi & Ors.* (2007-1MLJ-CRL.-100), the validity whereof is also under consideration in the connected appeals. The High Court while allowing the criminal revision observed as follows:

> "**12**.In the instant case, the properties standing in the name of the petitioners 2 and 3 namely, A2 and A3 could not be held to be the properties or resources belonging to the 1st accused in the absence of any investigation into the individual income resources of A2 and A3. Moreover, it is not disputed that A2 was a retired Head Master receiving pension and A3 is running a Financial Institution and an Income Tax assessee. In the absence of any material to show that A1's money flow into the hands of A2 and A3, they cannot be said to be holding the properties and resources in their name on behalf of the first accused. There is also no material to show that A2 and A3 instigated

A1 to acquire properties and resources disproportionate to his known source of income."

It is in these circumstances that the appellant is before us.

CRIMINAL APPEAL NO. 26-38 OF 2014

(@SPECIAL LEAVE PETITION(CRL.)Nos. 134-146 of 2013)

5. These special leave petitions are barred by limitation. There is delay of 1954 days in filing the petitions and 217 days in refiling the same. Applications have been filed for condoning the delay in filing and refiling the special leave petitions.

6. Mr. Ranjit Kumar, learned Senior Counsel for the petitioner submits that the delay in filing the special leave petitions has occurred as the Public Prosecutor earlier gave an opinion that it is not a fit case in which special leave petitions deserve to be filed. The Government accepted the opinion and decided not to file the special leave petitions. It is pointed out that the very Government in which one of the accused was a Minister had taken the aforesaid decision not to file special leave petitions. However, after the change of the Government, opinion was sought from the Advocate General, who opined that it is fit case in which the order impugned deserves to be challenged. Accordingly, it is submitted that the cause shown is sufficient to condone the delay.

7. Mr. Soli J. Sorabjee, learned Senior Counsel appearing for the respondents, however, submits that mere change of Government would not be sufficient to condone the inordinate delay. He submits that with the change of the Government, many issues which have attained finality would be reopened after long delay, which should not be allowed. According to him, condonation of huge delay on the ground that the successor Government, which belongs to a different political party, had taken the decision to file the special leave petitions would be setting a very dangerous precedent and it would lead to

miscarriage of justice. He emphasizes that there is a life span for every legal remedy and condonation of delay is an exception. Reliance has been placed on a decision of this Court in the case of *Postmaster General v. Living Media India Ltd.,* (2012) 3 SCC 563, and our attention has been drawn to Paragraph 29 of the judgment, which reads as follows:

> **"29.** In our view, it is the right time to inform all the government bodies, their agencies and instrumentalities that unless they have reasonable and acceptable explanation for the delay and there was bona fide effort, there is no need to accept the usual explanation that the file was kept pending for several months/years due to considerable degree of procedural red tape in the process. The government departments are under a special obligation to ensure that they perform their duties with diligence and commitment. Condonation of delay is an exception and should not be used as an anticipated benefit for the government departments. The law shelters everyone under the same light and should not be swirled for the benefit of a few."

8. Mr. Sorabjee further submits that the Limitation Act does not provide for different period of limitation for the Government in resorting to the remedy provided under the law and the case in hand being not a case of fraud or collusion by its officers or agents, the huge delay is not fit to be condoned. Reliance has also been placed on a decision of this Court in the case of *Pundlik Jalam Patil v. Executive Engineer, Jalgaon Medium Project,* (2008) 17 SCC 448 and reference has been made to Paragraph 31 of the judgment, which reads as follows:

> **"31.** It is true that when the State and its instrumentalities are the applicants seeking condonation of delay they may be entitled to certain amount of latitude but the law of limitation is same for citizen and for governmental authorities. The Limitation Act does not provide for a different period to the Government in filing appeals or

applications as such. It would be a different matter where the Government makes out a case where public interest was shown to have suffered owing to acts of fraud or collusion on the part of its officers or agents and where the officers were clearly at cross purposes with it. In a given case if any such facts are pleaded or proved they cannot be excluded from consideration and those factors may go into the judicial verdict. In the present case, no such facts are pleaded and proved though a feeble attempt by the learned counsel for the respondent was made to suggest collusion and fraud but without any basis. We cannot entertain the submission made across the Bar without there being any proper foundation in the pleadings."

9. The contentions put forth by Mr. Sorabjee are weighty, deserving thoughtful consideration and at one point of time we were inclined to reject the applications filed for condonation of delay and dismiss the special leave petitions. However, on a second thought we find that the validity of the order impugned in these special leave petitions has to be gone into in criminal appeals arising out of Special Leave Petitions (Criminal) Nos. 3810-3811 of 2012 and in the face of it, it shall be unwise to dismiss these special leave petitions on the ground of limitation. It is worth mentioning here that the order impugned in the criminal appeals arising out of Special Leave Petition (Criminal) Nos. 3810-3811 of 2012, *State of Tamil Nadu by Ins. of Police, Vigilance and Anti Corruption v. N. Suresh Rajan & Ors.,* has been mainly rendered, relying on the decision in State by Deputy Superintendent of Police, Vigilance and Anti Corruption Cuddalore Detachment vs. K. Ponmudi and Ors.(2007-1MLJ-CRL.-100), which is impugned in the present special leave petitions. In fact, by order dated 3rd of January, 2013, these petitions were directed to be heard along with the aforesaid special leave petitions. In such circumstances, we condone the delay in filing and refiling the special leave petitions.

10. In these petitions the State of Tamil Nadu impugns the order dated 11th of August, 2006 passed by the Madras High Court whereby the revision petitions filed against the order of discharge dated 21st of July, 2004 passed by the Special Judge/Chief Judicial Magistrate, Villupuram (hereinafter referred to as 'the Special Judge'), in the Special Case No. 7 of 2003, have been dismissed.

11. Leave granted.

12. Shorn of unnecessary details, facts giving rise to the present appeals are that K. Ponumudi, respondent No. 1 herein, happened to be a Member of the State Legislative Assembly and a State Minister in the Tamil Nadu Government during the check period. P. Visalakshi Ponmudi (Respondent No.2) is his wife, whereas P.Saraswathi (Respondent No.3) (since deceased) was his mother-in-law. A.Manivannan (Respondent No.4) and A.Nandagopal (Respondent No.5) (since deceased) are the friends of the Minister (Respondent No.1). Respondent Nos. 3 to 5 during their lifetime were trustees of one Siga Educational Trust, Villupuram.

13. In the present appeals, we have to examine the validity of the order of discharge passed by the Special Judge as affirmed by the High Court. Hence, we consider it unnecessary to go into the details of the case of the prosecution or the defence of the respondent at this stage. Suffice it to say that, according to the prosecution, K. Ponmudi (Respondent No.1), as a Minister of Transport and a Member of the Tamil Nadu Legislative Assembly during the period from 13.05.1996 to 30.09.2001, had acquired and was in possession of pecuniary resources and properties in his name and in the names of his wife and sons, which were disproportionate to his known sources of income. Accordingly, Crime No. 4 of 2002 was registered at Cuddalore Village, Anti-Corruption Department on 14th of March, 2002 under Section 109 of the Indian Penal Code read with Section 13(2) and Section 13(1)(e) of the Prevention of Corruption Act, hereinafter referred to as 'the Act'.

During the course of investigation it transpired that between the period from 13.05.1996 to 31.03.2002, the Minister had acquired and possessed properties at Mathirimangalam, Kaspakaranai, Kappiampuliyur villages and other places in Villupuram Taluk, at Vittalapuram village and other places in Thindivanam Taluk, at Cuddalore and Pondicherry Towns, at Chennai and Trichy cities and at other places. It is alleged that respondent No.1-Minister being a public servant committed the offence of criminal misconduct by acquiring and being in possession of pecuniary resources and properties in his name and in the names of his wife, mother-in-law and also in the name of Siga Educational Trust, held by the other respondents on behalf of Respondent No. 1, the Minister, which were disproportionate to his known sources of income to the extent of Rs.3,08,35,066.97. According to the prosecution, he could not satisfactorily account for the assets and in this way, the Minister had committed the offence punishable under Section 13(2) read with Section 13(1)(e) of the Act.

14. In the course of investigation, it further transpired that during the check period and in the places stated above, other accused abetted the Minister in the commission of the offence by him. Respondent No. 2, the wife of the Minister, aided in commission of the offence by holding on his behalf a substantial portion of properties and pecuniary resources in her name as well as in the name of M/s. Visal Expo, of which she was the sole Proprietor. Similarly, Respondent No. 3, the mother-in-law, aided the Minister by holding on his behalf a substantial portion of properties and pecuniary resources in her name as well as in the name of Siga Educational Trust by purporting to be one of its Trustees. Similarly, Respondent No. 4 and Respondent No. 5 aided the Minister and held on his behalf a substantial portion of the properties and pecuniary resources in the name of Siga Educational Trust by purporting to be its Trustees. It is relevant here to mention that during the course of investigation, the statement of all other accused were taken and in the opinion of the investigating agency, after due scrutiny of their statements

and further verification, the Minister was not able to satisfactorily account for the quantum of disproportionate assets. Accordingly, the Vigilance and Anti Corruption Department of the State Government submitted charge-sheet against the respondents under Section 109 of the Indian Penal Code and Section 13(2) read with Section 13(1)(e) of the Act.

15. It is relevant here to state that the offences punishable under the scheme of the Act have to be tried by a Special Judge and he may take cognizance of the offence without commitment of the accused and the Judge trying the accused is required to follow the procedure prescribed by the Code for the trial of warrant cases by the Magistrate. The Special Judge holding the trial is deemed to be a Court of Sessions. The respondents filed petition for discharge under Section 239 of the Code inter alia contending that the system which the prosecution had followed to ascertain the income of the accused is wrong. Initially, the check period was from 10.05.1996 to 13.09.2001 which, during the investigation, was enlarged from 13.05.1996 to 31.03.2002. Not only this, according to the accused, the income was undervalued and the expenditures exaggerated. According to Respondent No. 1, the Minister, income of the individual property of his wife and that of his mother-in-law and their expenditure ought not to have been shown as his property. According to him, the allegation that the properties in their names are his benami properties is wrong. It was also contended that the valuation of the properties has been arrived at without taking into consideration the entire income and expenditure of Respondent No. 1. Respondents have also alleged that the investigating officer, who is the informant of the case, had acted autocratically and his action is vitiated by bias. The Special Judge examined all these contentions and by order dated 21st of July, 2004 discharged Respondents on its finding that the investigation was not conducted properly. The Special Judge further held that the value of the property of Respondent Nos. 2 to 5 ought not to have been clubbed with that of the individual properties and

income of Respondent No. 1 and by doing so, the assets of Respondent No. 1 cannot be said to be disproportionate to his known sources of income. On the aforesaid finding the Special Judge discharged all the accused. Aggrieved by the same, the State of Tamil Nadu filed separate revision petitions and the High Court, by the impugned order, has dismissed all the revision petitions. The High Court, while affirming the order of discharge, held that the prosecution committed an error by adding the income of other respondents, who were assessed under the Income Tax Act, in the income of Respondent No.1. In the opinion of the High Court, an independent and unbiased scrutiny of the entire documents furnished along with the final report would not make out any ground of framing of charges against any of the accused persons. While doing so, the High Court has observed as follows:

> "**18**. The assets which admittedly, do not belong to Accused 1 and owned by individuals having independent source of income which are assessed under the Income Tax Act, were added as the assets of Accused -1. Such a procedure adopted by the prosecution is not only unsustainable but also illegal. An independent and unbiased scrutiny of the entire documents furnished along with the final report would not make out any ground for framing of charge as against any of the accused persons. The methodology adopted by the prosecution to establish the disproportionate assets with reference to the known source of income is absolutely erroneous.
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> xxx xxx xxx
>
> The theory of Benami is totally alien to the concept of trust and it is not legally sustainable to array the accused 3 to 5 as holders of the properties or that they are the benamies of the accused. The benami transaction has to be proved by the prosecution by producing legally permissible materials of a bona fide character which would directly prove the fact of benami and there is a total lack of materials on this account and hence the theory of benami has not been established even remotely by any evidence. On a prima-facie evidence it is evident that the other accused are possessed of sufficient funds for acquiring their properties and that A1 has nothing to do with those properties and that he cannot be called upon to explain the source of income of the acquisition made by other persons.
>
> **19**……. Admittedly the accused are not possessed of the properties standing in the name of Trust and controlled by the Accused A3 to A5. The trust is an independent legal entity assessed to income tax and owning the properties. Only to boost the value of the assets the prosecution belatedly arrayed the Trustees of the Trust as accused 3 to 5 in order to foist a false case as against A1.
>
> xxx xxx xxx
>
> **21**…….All the properties acquired by A2 and A3 in their individual capacity acquired out of their own income have been shown in the Income Tax Returns, which fact the prosecution also knows and also available in the records of the prosecution. The prosecution has no justification or reason to disregard those income tax returns to disallow such income while filing the final report. The documents now available on record also would clearly disprove the claim of benami transaction."

The High court ultimately concluded as follows:

> "**24**……..Therefore, the trial court analyzing the materials and documents that were made available at the stage of framing charges and on their face value arrived at the right conclusion that charges could not be framed against the respondents/accused."

16. Now we proceed to consider the legal position concerning the issue of discharge and validity of the orders impugned in these appeals in the background thereof. Mr. Ranjit

Kumar submits that the order impugned suffers from patent illegality. He points out that at the time of framing of the charge the scope is limited and what is to be seen at this stage is as to whether on examination of the materials and the documents collected, the charge can be said to be groundless or not. He submits that at this stage, the court cannot appraise the evidence as is done at the time of trial. He points out that while passing the impugned orders, the evidence has been appraised and the case of the prosecution has been rejected, as is done after the trial while acquitting the accused.

17. Mr. Sorabjee as also Mr. N.V. Ganesh appearing on behalf of the respondents-accused, however, submit that when the court considers the applications for discharge, it has to examine the materials for the purpose of finding out as to whether the allegation made is groundless or not. They submit that at the time of consideration of an application for discharge, nothing prevents the court to sift and weigh the evidence for the purpose of ascertaining as to whether the allegations made on the basis of the materials and the documents collected are groundless or not. They also contend that the court while considering such an application cannot act merely as a post-office or a mouthpiece of the prosecution. In support of the submission, reliance has been placed on a decision of this Court in the case of *Sajjan Kumar v. CBI,* (2010) 9 SCC 368 and our attention has been drawn to Paragraph 17(4) of the judgment, which reads as follows:

> **"17.** In *Union of India v. Prafulla Kumar Samal & Anr.,* 1979 (3) SCC 4, the scope of Section 227 CrPC was considered. After adverting to various decisions, this Court has enumerated the following principles:
>
> xxx xxx xxx
>
> (*4*) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a post

> office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

18. Yet another decision on which reliance has been placed is the decision of this Court in the case of *Dilawar Balu Kurane v. State of Maharashtra, (*2002) 2 SCC 135, reference has been made to the following paragraph of the said judgment:

> **"12.** Now the next question is whether a prima facie case has been made out against the appellant. In exercising powers under Section 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Code of Criminal Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial."

19. We have bestowed our consideration to the rival submissions and the submissions made by Mr. Ranjit Kumar commend us. True it is that at the time of consideration of the applications for discharge, the court cannot act as a mouthpiece of the prosecution or act as a post-office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is trite that at the stage of consideration of an application for discharge, the court has to proceed with an assumption that the materials brought on record by the prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, probative value of the materials has to be gone into and the court is not expected to go deep into the matter and hold that the materials would not warrant a conviction. In our opinion, what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting the accused has been made out. To put it differently, if the court thinks that the accused might have committed the offence on the basis of the materials on record on its probative value, it can frame the charge; though for conviction, the court has to come to the conclusion that the accused has committed the offence. The law does not permit a mini trial at this stage. Reference in this connection can be made to a recent decision of this Court in the case of Sheoraj Singh Ahlawat & Ors. vs. State of Uttar Pradesh & Anr., AIR 2013 SC 52, in which, after analyzing various decisions on the point, this Court endorsed the following view taken in *Onkar Nath Mishra v. State (NCT of Delhi),* (2008) 2 SCC 561:

> "**11**. It is trite that at the stage of framing of charge the court is required to evaluate the material and documents on record with a view to finding out if the facts emerging there from, taken at their face value, disclosed the existence of all the ingredients constituting the alleged offence. At that stage, the court is not expected to go deep into the probative value of the material on record. What needs to be considered is whether there is a ground for presuming that the offence has been committed and not a ground for convicting the accused has been made out. At that stage, even strong suspicion founded on material which leads the court to form a presumptive opinion as to the existence of the factual ingredients constituting the offence alleged would justify the framing of charge against the accused in respect of the commission of that offence."

20. Now reverting to the decisions of this Court in the case *Sajjan Kumar (supra)* and *Dilawar Balu Kurane (supra),* relied on by the respondents, we are of the opinion that they do not advance their case. The aforesaid decisions consider the provision of Section 227 of the Code and make it clear that at the stage of discharge the Court can not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if it was conducting a trial. It is worth mentioning that the Code contemplates discharge of the accused by the Court of Sessions under Section 227 in a case triable by it; cases instituted upon a police report are covered by Section 239 and cases instituted otherwise than on a police report are dealt with in Section 245. From a reading of the aforesaid sections it is evident that they contain somewhat different provisions with regard to discharge of an accused. Under Section 227 of the Code, the trial court is required to discharge the accused if it "considers that there is not sufficient ground for proceeding against the accused". However, discharge under Section 239 can be ordered when "the Magistrate considers the charge against the accused to be groundless". The power to discharge is exercisable under Section 245(1) when, "the Magistrate considers, for reasons to be recorded that no case against the accused has been made out which, if not repudiated, would warrant his conviction". Section 227 and 239 provide for discharge before the recording of evidence on the basis of the police report, the documents sent along with it and examination

of the accused after giving an opportunity to the parties to be heard. However, the stage of discharge under Section 245, on the other hand, is reached only after the evidence referred in Section 244 has been taken. Thus, there is difference in the language employed in these provisions. But, in our opinion, notwithstanding these differences, and whichever provision may be applicable, the court is required at this stage to see that there is a prima facie case for proceeding against the accused. Reference in this connection can be made to a judgment of this Court in the case of *R.S. Nayak v. A.R. Antulay, (1986) 2 SCC 716*. The same reads as follows:

> "43……Notwithstanding this difference in the position there is no scope for doubt that the stage at which the magistrate is required to consider the question of framing of charge under Section 245(1) is a preliminary one and the test of "prima facie" case has to be applied. In spite of the difference in the language of the three sections, the legal position is that if the Trial court is satisfied that a prima facie case is made out, charge has to be framed."

21. Bearing in mind the principles aforesaid, we proceed to consider the facts of the present case. Here the allegation against the accused Minister (Respondent No.1), K. Ponmudi is that while he was a Member of the Tamil Nadu Legislative Assembly and a State Minister, he had acquired and was in possession of the properties in the name of his wife as also his mother-in-law, who along with his other friends, were of Siga Educational Trust, Villupuram. According to the prosecution, the properties of Siga Educational Trust, Villupuram were held by other accused on behalf of the accused Minister. These properties, according to the prosecution, in fact, were the properties of K.Ponumudi. Similarly, accused N. Suresh Rajan has acquired properties disproportionate to his known sources of income in the names of his father and mother. While passing the order of discharge, the fact that the accused other than the two Ministers have been assessed to income tax and paid

income tax cannot be relied upon to discharge the accused persons particularly in view of the allegation made by the prosecution that there was no separate income to amass such huge properties. The property in the name of an income tax assessee itself cannot be a ground to hold that it actually belongs to such an assessee. In case this proposition is accepted, in our opinion, it will lead to disastrous consequences. It will give opportunity to the corrupt public servants to amass property in the name of known persons, pay income tax on their behalf and then be out from the mischief of law. While passing the impugned orders, the court has not sifted the materials for the purpose of finding out whether or not there is sufficient ground for proceeding against the accused but whether that would warrant a conviction. We are of the opinion that this was not the stage where the court should have appraised the evidence and discharged the accused as if it was passing an order of acquittal. Further, defect in investigation itself cannot be a ground for discharge. In our opinion, the order impugned suffers from grave error and calls for rectification.

22. Any observation made by us in this judgment is for the purpose of disposal of these appeals and shall have no bearing on the trial. The surviving respondents are directed to appear before the respective courts on 3rd of February, 2014. The Court shall proceed with the trial from the stage of charge in accordance with law and make endeavour to dispose of the same expeditiously.

23. In the result, we allow these appeals and set aside the order of discharge with the aforesaid observation.

R.P. Appeals allowed.

KICHHA SUGAR COMPANY LIMITED TH. GEN. MANG.
v.
TARAI CHINI MILL MAJDOOR UNION, UTTARKHAND
(Civil Appeal No.77 of 2014)

JANUARY 06, 2014.

[CHANDRAMAULI KR. PRASAD AND JAGDISH SINGH KHEHAR, JJ].

SERVICE LAW:

'Basic wage' – Connotation of – Reckoning of leave encashment and overtime wages in basic wage to grant Hill Development Allowance – Held: Those wages which are universally, necessarily and ordinarily paid to all the employees across the board are basic wage — Where the payment is available to those who avail the opportunity more than others, the amount paid for that cannot be included in the basic wage – Therefore, amount received as leave encashment and overtime wages is not fit to be included for calculating Hill Development Allowance.

INTERPRETATION OF STATUTES:

Construing of an expression which has not been defined – 'Basic wage', not explained in the Order granting Hill Development Allowance – Held: When an expression is not defined, one can take into account the definition given to such expression in a statute as also the dictionary meaning — Employees' Provident Funds and Miscellaneous Provisions Act, 1952 – s. 2 (b)

WORDS AND PHRASES:

Expressions 'basic wages', 'Hill Development Allowance' - 'Compensatory allowance' – Connotation of.

The instant appeal arose out of the order of the High Court, whereby it affirmed the award of the Industrial Tribunal directing payment of Hill Development Allowance after taking into account the amounts received as "leave encashment and overtime wages." The case of the employer was that the workmen would be entitled to 15% of the basic wages only as Hill Development Allowance.

Allowing the appeal, the Court

HELD: 1.1. Hill Development Allowance is nothing but a compensatory allowance. A compensatory allowance broadly falls into three categories; (i) allowance to meet the high cost of living in certain, specially costly cities and other local areas; (ii) allowance to compensate for the hardship of service in certain areas, e.g. areas which have a bad climate and/or difficult to access; and (iii) allowances granted in areas, e.g. field service areas, where, because of special conditions of living or service, an employee cannot, besides other disadvantages, have his family with him. In the instant case, it seems that taking into account bad climate and remote and difficult access, the decision was taken to grant the Hill Development Allowance at the rate of 15% of the basic wage. [para 5] [161-F-H; 162-A-B]

1.2. When an expression is not defined, one can take into account the definition given to such expression in a statute as also the dictionary meaning. The expression 'basic wage' has not been explained by the Government in the Order granting Hill Development Allowance. It has been defined only u/s 2(b) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. The term 'basic wage' has also been defined in Merriam Webster Dictionary. This Court, therefore, holds that those wages which are universally, necessarily and ordinarily paid to all the employees across the board are basic wage. Where the payment is available to those who avail the

opportunity more than others, the amount paid for that cannot be included in the basic wage. [para 8-10] [163-B-C; 164-A-D]

http://www.merriam-webster.com – referred to.

1.3 Overtime wages or for that matter, leave encashment may be available to each workman but it may vary from one workman to other. The extra bonus depends upon the extra hour of work done by the workman whereas leave encashment shall depend upon the number of days of leave available to workman. Both are variable and, therefore, are not fit to be included for calculating the Hill Development Allowance. [para 10] [164-D-F]

Muir Mills Co. Ltd. v. Workmen, **1960 SCR 488 = AIR 1960 SC 985*; and*** *Manipal Academy of Higher Education v. Provident Fund Commr*. **2008 (4) SCR 772 = (2008) 5 SCC 428 – relied on.**

1.4. This Court, therefore, holds that overtime allowance and leave encashment are not fit to be taken into account for calculating the Hill Development Allowance. The impugned award and the judgment of the High Court are illegal and, as such, are set aside. [para 12-13] [165-E]

Case Law Reference:

1960 SCR 488	**relied on**	**para 6**
2008 (4) SCR 772	**relied on**	**para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No.77 of 2014.

From the Judgment & Order dated 24.06.2008 of the High Court of Uttarakhand in WPMS No. 3717 of 2001.

Tanmaya Agarwal, Vinay Garg for the Appellant.

Jatin Zaveri (A.C.) for the Respondent.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Kichha Sugar Company Limited aggrieved by the order dated 24th of June, 2008 passed by the Uttarakhand High Court in WPMS No. 3717 of 2001, affirming the award dated 12th of November, 1992 directing payment of Hill Development Allowance after taking into account the amount received as "leave encashment and overtime wages", has preferred this special leave petition.

2. Leave granted.

3. Facts lie in a narrow compass;

4. The Government of Uttar Pradesh, by its order dated 5th of January, 1981, had directed for payment of Hill Development Allowance to its employees working at specified hill areas at the rate of 15% of the basic wage. Kichha Sugar Company Limited, the appellant herein (hereinafter referred to as 'the employer'), being a unit of a subsidiary of U.P. Government Corporation, adopted the same and started paying Hill Development Allowance at the rate of 15% of the basic wage. The workmen demanded calculation of 15% of the said allowance by taking into account the amount paid as overtime, leave encashment and all other allowances. When the employer did not agree to the calculation of the Hill Development Allowance as suggested by the workmen, a dispute was raised. It was referred to conciliation and on its failure, the competent Government made the following reference.

Whether the exclusion of payment of overtime, leave encashment, bonus and retaining allowance while calculating the Hill Development Allowance by the Employer is legal and justified? If not, to what relief, the workmen concerned are entitled to get?

It is common ground that while calculating Hill

Development Allowance, the employer has not taken into account any other amount including amount received as bonus, leave encashment, retaining allowance or overtime wages. It is the claim of the workmen that 15% of the Hill Development Allowance is to be calculated and paid after taking into account the payments made under the aforesaid headings. The employer repudiated their claim and according to it, the workmen shall be entitled to 15% of the basic wages as Hill Development Allowance. The Industrial Tribunal gave opportunity to both the employer and the workmen to file their claim and produce material and on consideration of the same, gave award dated 12th of November, 1992 directing the employer to "give Hill Development Allowance to their permanent and regular workers on the amount received regarding leave encashment and overtime wages." However, the Tribunal observed that "Hill Development Allowance shall not be payable on bonus and retaining allowance or on any other allowances". The employer, aggrieved by the award preferred writ petition before the High Court, which affirmed the same without any discussion or assigning any reason in the following words:

> "9. After going through the aforesaid finding recorded by the tribunal concerned, I find no infirmity or illegality in the impugned award passed by the tribunal concerned and the same is hereby confirmed."

5. Before we enter into the merit of the case, it is apt to understand what Hill Development Allowance is. In our opinion, Hill Development Allowances is nothing but a compensatory allowance. A compensatory allowance broadly falls into three categories; (i) allowance to meet the high cost of living in certain, specially costly cities and other local areas; (ii) allowance to compensate for the hardship of service in certain areas, e.g. areas which have a bad climate and/or difficult to access; and (iii) allowances granted in areas, e.g. field service areas, where, because of special conditions of living or service,

an employee cannot, besides other disadvantages, have his family with him. There may be cases in which more than one of these conditions for grant of compensatory allowance is fulfilled. It seems that taking into account bad climate and remote and difficult access, the decision was taken to grant the Hill Development Allowance at the rate of 15% of the basic wage.

6. We have heard Mr. Tanmaya Agarwal for the appellant and Mr. Jatin Zaveri for the respondent. Mr. Agarwal submits that basic wage will not include the amount received as leave encashment and overtime wages. According to him, basic wage would mean the wage which is paid to all the employees. He submits that leave encashment and overtime wages would vary from workman to workman and, therefore, those cannot be included in the basic wage. In support of the submission he placed reliance on a judgment of this Court in the case of *Muir Mills Co. Ltd. v. Workmen,* AIR 1960 SC 985 and our attention has been drawn to the following passage from Paragraph 11 of the judgment, which reads as follows:

> **"11.** Thus understood "basic wage" never includes the additional emoluments which some workmen may earn, on the basis of a system of bonuses related to the production. The quantum of earnings in such bonuses varies from individual to individual according to their efficiency and diligence; it will vary sometimes from season to season with the variations of working conditions in the factory or other place where the work is done; it will vary also with variations in the rate of supplies of raw material or in the assistance obtainable from machinery. This very element of variation, excludes this part of workmen's emoluments from the connotation of "basic wages"."

7. Mr. Garg, however submits that any amount including the amount paid as leave encashment and overtime wages do come within the expression 'basic wage' and, hence, have to

be accounted for the purpose of calculating 15% of the basic pay.

8. In view of the rival submissions, the question which falls for our determination is as to the meaning of the expression 'basic wage'. The expression 'basic wage' has not been explained by the Government in the order granting Hill Development Allowance. It has been defined only under Section 2(b) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. Therefore, we have to see what meaning is to be given to this expression in the present context. Section 2(b) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 defines 'basic wages' as follows:

"**2. Definitions**. - In this Act, unless the context otherwise requires, -

(a) xxx xxx xxx

(b) "basic wages" means all emoluments which are earned by an employee while on duty or on leave or on holidays with wages in either case in accordance with the terms of the contract of employment and which are paid or payable in cash to him, but does not include-

(i) the cash value of any food concession;

(ii) any dearness allowance that is to say, all cash payments by whatever name called paid to an employee on account of a rise in the cost of living, house-rent allowance, overtime allowance, bonus commission or any other similar allowance payable to the employee in respect of his employment or of work done in such employment;

(iii) any presents made by the employer;"

9. According to http://www.merriam-webster.com (Merriam Webster Dictionary) the word 'basic wage' means as follows:

"1. A wage or salary based on the cost of living and used as a standard for calculating rates of pay

2. A rate of pay for a standard work period exclusive of such additional payments as bonuses and overtime."

10. When an expression is not defined, one can take into account the definition given to such expression in a statute as also the dictionary meaning. In our opinion, those wages which are universally, necessarily and ordinarily paid to all the employees across the board are basic wage. Where the payment is available to those who avail the opportunity more than others, the amount paid for that cannot be included in the basic wage. As for example, the overtime allowance, though it is generally enforced across the board but not earned by all employees equally. Overtime wages or for that matter, leave encashment may be available to each workman but it may vary from one workman to other. The extra bonus depends upon the extra hour of work done by the workman whereas leave encashment shall depend upon the number of days of leave available to workman. Both are variable. In view of what we have observed above, we are of the opinion that the amount received as leave encashment and overtime wages is not fit to be included for calculating 15% of the Hill Development Allowance. The view which we have taken finds support from the judgment of this Court in *Muir Mills Co. Ltd.* (supra), relied on by the appellant, in which it has been specifically held that the basic wage shall not include bonus.

11. It also finds support from a judgment of this Court in the case of *Manipal Academy of Higher Education v. Provident Fund Commr.*,(2008) 5 SCC 428 in which it has been held as follows:

"10. The basic principles as laid down in *Bridge & Roofs*

case, AIR 1963 SC 1474, on a combined reading of Sections 2(*b*) and 6 are as follows:

(*a*) Where the wage is universally, necessarily and ordinarily paid to all across the board such emoluments are basic wages.

(*b*) Where the payment is available to be specially paid to those who avail of the opportunity is not basic wages. By way of example it was held that overtime allowance, though it is generally in force in all concerns is not earned by all employees of a concern. It is also earned in accordance with the terms of the contract of employment but because it may not be earned by all employees of a concern, it is excluded from basic wages.

(*c*) Conversely, any payment by way of a special incentive or work is not basic wages."

12. In view of what we have observed above, the impugned award and the judgment of the High Court are illegal and cannot be allowed to stand.

13. In the result, we allow this appeal, set aside the award and the judgment of the High Court and hold that overtime allowance and leave encashment are not fit to be taken into account for calculating the Hill Development Allowance. No costs.

R.P. Appeal allowed.

KESHAR BAI

v.

CHHUNULAL

(Civil Appeal No.106 of 2014)

JANUARY 7, 2014.

[RANJANA PRAKASH DESAI AND J. CHELAMESWAR, JJ.]

MADHYA PRADESH ACCOMMODATION CONTROL ACT, 1961:

s. 12(1)(c) -- Suit for eviction – Tenant denying title of landlord – Held: Under s. 111(g) of Transfer of Property Act, lease is determined by forfeiture, if lessee denies lessor's title -- Denial of landlord's title or disclaimer of tenancy by tenant is an act which is likely to affect adversely and substantially the interest of landlord -- It is, therefore, covered by s. 12(1)(c) – In the instant case, there are several documents on record relating to ownership of appellant, apart from registered sale deed, yet, respondent refused to acknowledge appellant's title -- He denied it in his evidence -- In eviction proceedings the question of title to the properties in question may be incidentally gone into, but cannot be decided finally – s. 116 of Evidence Act is clearly applicable to such a situation -- High Court erred in setting aside the concurrent finding of fact recorded by courts below that respondent had denied title of appellant -- Impugned judgment of High Court is set aside and eviction decree passed by trial court and confirmed by first appellate court u/s 12(1)(c) is restored -- Transfer of Property Act, 1882 – s. 111(g) – Evidence Act, 1972 – s. 116 – Appeal.

CODE OF CIVIL PROCEDURE, 1908:

s.100 – Second appeal – Jurisdiction of High Court –

Held: High Court should not interfere with a concurrent finding of fact unless it is perverse.

The appellant purchased a building, which included a room (suit premises) occupied by the respondent as a tenant. The respondent was informed of the transaction. When in spite of notice, the respondent did not pay the rent, the appellant filed a suit under the M.P. Accommodation Control Act, 1961 on the grounds of non-payment of rent, denial of title, bona fide need etc. The respondent filed a written statement denying the title of the appellant, any attornement between the parties as also any landlord-tenant relationship between him and the appellant. He even denied the genuineness of the sale deed. The trial court recorded a finding that the respondent-tenant denied the title of the appellant-landlady and, accordingly, decreed the suit u/s 12(1)(c) of the Act. The decree was confirmed by the first appellate court. However, the High Court set aside the eviction decree holding that in the facts of the case no decree u/s 12(1)(c) of the Act could be passed.

Disposing of the appeal, the Court

HELD: 1.1. It is well settled that the High Court should not interfere with a concurrent finding of fact unless it is perverse. In the instant case, there is no perversity in the concurrent finding of fact returned by the courts below warranting the High Court's interference. [Para 9] [173-B]

Deep Chandra Juneja v. Lajwanti Kathuria (dead) through LRs. **2008 (10) SCR 684 = (2008) 8 SCC 497;** *Yash Pal v. Ram Lal & Ors.* **(2005) 12 SCC 239; and** *Firojuddin & Anr. v. Babu Singh* **(2012) 3 SCC 319 – relied on.**

State of Andgra Pradesh & Ors. v. D. Raghukul Pershad(dead) by LRs. & Ors. **2012 (6) SCR 1176 = (2012) 8 SCC 584 – cited.**

1.2. Under s. 111(g) of the Transfer of Property Act, 1882, the lease is determined by forfeiture, if the lessee denies the lessor's title. Denial of landlord's title or disclaimer of tenancy by tenant is an act which is likely to affect adversely and substantially the interest of the landlord. It is, therefore, covered by s. 12(1)(c) of the M.P. Act. [Para 11] [174-A and C]

Devasahyam v. P. Savithramma **2005 (3) Suppl. SCR 255 = (2005) 7 SCC 653 – relied on.**

Sheela v. Prahlad Rai Prem Prakash **2002 (2) SCR 177 = (2002) 3 SCC 375** *Raja Mohammad Amir Ahmad Khan v. Municipal Board of Sitapur* **AIR 1965 SC 1923 – cited.**

1.3. In the instant case, there are several documents on record relating to the ownership of the appellant, apart from the registered sale deed. Yet, the respondent refused to acknowledge the appellant's title. He denied it in his written statement and evidence. The High Court has accepted that in his cross-examination the respondent has stated that he was not accepting the appellant as his landlady. Even denial of a landlord's title in the written statement can provide a ground for eviction of a tenant. It is also settled position in law that it is not necessary that the denial of title by the landlord should be anterior to the institution of eviction proceedings. [Para 13] [176-B, D and F]

Majati Subbarao v. P.V.K. Krishnarao(deceased) by LRs. **1989 (1) Suppl. SCR 153 = (1989) 4 SCC 732 – relied on.**

1.4. The High Court has expressed that the respondent was justified in asking the appellant to produce the documents. Implicit in this observation is the High Court's view that the respondent could have in an eviction suit got the title of the appellant finally adjudicated upon. There is a fallacy in this reasoning. In

eviction proceedings the question of title to the properties in question may be incidentally gone into, but cannot be decided finally. Section 116 of the Evidence Act is clearly applicable to such a situation. [Para 14] [176-H; 177-A-B and D]

Bhogadi Kannababu & Ors. v. Vuggina Pydamma & Ors. **2006 (2) Suppl. SCR 352 = (2006) 5 SCC 532; and** *Tej Bhan Madan v. II Additional District Judge and Ors.* **(1988) 3 SCC 137 – relied on.**

Mohd. Nooman & Ors. v. Mohd. Jabed Alam & Ors. **2010 (11) SCR 729 = (2010) 9 SCC 560 – held inapplicable.**

1.5. The High Court erred in setting aside the concurrent finding of fact recorded by the courts below that the respondent had denied the title of the appellant. The case is covered by s. 12(1)(c) of the M.P. Act. In the circumstances, the impugned judgment of the High Court is set aside and eviction decree passed by the trial court and confirmed by the first appellate court u/s 12(1)(c) of the M.P. Act is restored. [Para 16] [179-A-C]

Case Law Reference:

2008 (10) SCR 684	**relied on**	**para 7**
(2005) 12 SCC 239	**relied on**	**para 7**
(2012) 3 SCC 319	**relied on**	**para 7**
2012 (6) SCR 1176	**cited**	**para 7**
2005 (3) Suppl. SCR 255	**relied on**	**para 7**
2002 (2) SCR 177	**cited**	**para 11**
AIR 1965 SC 1923	**cited**	**para 11**
1989 (1) Suppl. SCR 153	**relied on**	**para 13**
2006 (2) Suppl. SCR 352	**relied on**	**para 7**

(1988) 3 SCC 137	**relied on**	**para 14**
2010 (11) SCR 729	**held inapplicable**	**para 8**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 106 of 2014.

From the Judgment & Order dated 03.08.2010 of the High Court of Madhya Pradesh, Bench at Indore in Second Appeal No. 756 of 2004.

Ardhendumauli Kumar Prasad, Aviral Shukla, Nirnimesh Dube for the Appellant.

Amit Pawan, Bharat Singh, Vivek Srivastava for the Respondent.

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. Leave granted.

2. This appeal, by grant of special leave, is directed against the judgment and order dated 03/08/2010 passed by the High Court of Madhya Pradesh, Bench at Indore allowing Second Appeal No. 756 of 2004 filed by the respondent.

3. Briefly put, the facts are that the appellant-landlady purchased House No. 1/2, Street No. 6, Parsi Mohallah, Indore **('the said building')** from M/s. Pyare Mohan Khar, Hari Mohan Khar, Shayam Sunder Khar and Anil Khar predecessors-in-title of the appellant by a registered sale deed dated 26/9/1991 for a consideration of Rs. 1,70,000/-. At the time of purchase of the said building, the respondent-tenant was occupying one room (**'suit premises'**) situated on the rear side of the said building as tenant. The respondent was informed by the predecessors-in-title of the appellant that the appellant is the new landlady of the said building and he should pay the rent to her. The respondent agreed to pay the rent but failed to pay it. Failure of the respondent to pay the rent resulted in a notice

being sent by the appellant to him on 23/11/2002, but despite the notice the respondent did not pay the rent.

4. On 06/1/2003, the appellant filed a suit for eviction of the respondent under the M.P. Accommodation Control Act, 1961 **('the M.P. Act')** on grounds of non-payment of rent, denial of the appellant's title by the respondent, bona fide need for residential purpose and reconstruction of the said building as it had become unsafe for human habitation. It was specifically averred in the plaint that the appellant had purchased the said building vide a registered document on 26/9/1991.

5. The respondent contested the said suit and filed a written statement denying the title of the appellant as well as the grounds on which his eviction from the suit premises was sought. The respondent denied that there was any attornement between the parties and that there was a landlord-tenant relationship between him and the appellant. He claimed to be tenant of the earlier landlord Shri Khar. He contended that he had never paid any rent to the appellant. He denied the genuineness of the registered sale deed dated 26/9/1991.

6. The trial court decreed the suit under Section 12(1)(c) of the M.P. Act. The suit was dismissed so far as the other grounds are concerned. The trial court's judgment was confirmed by the first appellate court. The High Court by the impugned order set aside the eviction decree passed by the courts below holding that in the facts of the case no decree under Section 12 (1) (c) of the M.P. Act could be passed. The controversy, therefore, revolves around Section 12(1)(c) of the M.P. Act in the context of the facts of this case.

7. Shri Ardhendumauli Kumar Prasad, learned counsel for the appellant, submitted that both the courts having concurrently found that the landlord was entitled to a decree of eviction under Section 12(1)(c) of the M.P. Act and since there was no perversity attached to the said finding, the High Court ought not to have interfered with it while dealing with a second appeal,

particularly, when there was no substantial question of law involved in the matter. In this connection, he relied on *Deep Chandra Juneja v. Lajwanti Kathuria (dead) through LRs.,*[1] *Yash Pal v. Ram Lal & Ors*[2]*.* and *Firojuddin & Anr. v. Babu Singh.*[3] Mr. Prasad submitted that it is clearly established from the evidence on record that the respondent had denied the title of the appellant and, therefore, the case clearly falls within the ambit of Section 12(1)(c) of the M.P. Act. The eviction decree was, therefore, correctly passed by the trial court and confirmed by the first appellate court. In this connection he relied on *Devasahyam v. P. Savithramma*[4]*, State of Andgra Pradesh & Ors. v. D. Raghukul Pershad(dead) by LRs.& Ors*[5]. and *Bhogadi Kannababu & Ors. v. Vuggina Pydamma & Ors.*[6]*.* Counsel submitted that in the circumstances the impugned order be set aside.

8. Shri Amit Pawan, learned counsel for the respondent, on the other hand submitted that attornment of tenancy to the appellant is not proved. Counsel submitted that the respondent had no knowledge about the sale transaction that allegedly took place between the appellant and Shri Khar, under which the appellant is said to have purchased the suit premises. This is a case of derivative title which the tenant can deny if he had no knowledge of the sale transaction. Counsel submitted that the trial court and lower appellate court ignored this vital legal position and, therefore, the High Court rightly set aside the eviction decree. Counsel relied on *Mohd. Nooman & Ors. v. Mohd. Jabed Alam & Ors.*[7] in support of his submission that

1. (2008) 8 SCC 497.
2. (2005) 12 SCC 239.
3. (2012) 3 SCC 319.
4. (2005) 7 SCC 653.
5. (2012) 8 SCC 584.
6. (2006) 5 SCC 532.
7. (2010) 9 SCC 560.

the issue regarding title can be decided in an eviction suit and, therefore, it was correctly raised by the respondent.

9. It is well settled by a long line of judgments of this Court that the High Court should not interfere with a concurrent finding of fact unless it is perverse. (See: *Deep Chandra Juneja*, *Yash Pal* & *Firojuddin*). In this case, for the reasons which we shall soon record, we are unable to find any such perversity in the concurrent finding of fact returned by the courts below warranting the High Court's interference.

10. The trial court passed the decree under Section 12 (1)(c) of the M.P. Act on the ground that the respondent-tenant denied the title of the appellant-landlady. It was confirmed by the first appellate court. It is, therefore, necessary to reproduce Section 12(1) (c) of the M.P. Act. It reads as under:

> "12. Restriction on eviction of tenants.—(1) Notwithstanding anything to the contrary contained in any other law or contract, no suit shall be filed in any civil court against a tenant for his eviction from any accommodation except on one or more of the following grounds only, namely—
>
> (a) xxx
>
> (b) xxx
>
> (c) that the tenant or any person residing with him has created nuisance or has done any act which is inconsistent with the purpose for which he was admitted to the tenancy of the accommodation, or which is likely to affect adversely and substantially the interest of the landlord therein:
>
> Provided that the use by a tenant of a portion of the accommodation as his office shall not be deemed to be an act inconsistent with the purpose for which he was admitted to the tenancy;"

11. The first question that arises is how denial of title falls

within the ambit of Section 12(1)(c) of the M.P. Act. Under Section 111(g) of the Transfer of Property Act, 1882, the lease is determined by forfeiture, if the lessee denies the lessor's title. While dealing with eviction suit, arising out of the M.P. Act, in *Devasahayam,* this Court has held that so just is the above rule that in various rent control legislations such a ground is recognized and incorporated as a ground for eviction of a tenant either expressly or impliedly within the net of an act injurious to the interest of the landlord. It is further held that denial of landlord's title or disclaimer of tenancy by tenant is an act which is likely to affect adversely and substantially the interest of the landlord. It is, therefore, covered by Section 12(1)(c) of the M.P. Act. The following observations of this Court in *Devasahayam* are relevant:

> **"**27**.** In *Sheela v. Prahlad Rai Prem Prakash*[8] whereupon Mr. Nageswara Rao placed strong reliance, Lahoti, J., as the learned Chief Justice then was, while construing the provisions of clause (*c*) of sub-section (1) of Section 12 of the M.P. Accommodation Control Act, 1961 observed:
>
> 13. The law as to tenancy being determined by forfeiture by denial of the lessor's title or disclaimer of the tenancy has been adopted in India from the law of England where it originated as a principle in consonance with justice, equity and good conscience. On enactment of the Transfer of Property Act, 1882, the same was incorporated into clause (*g*) of Section 111. So just is the rule that it has been held applicable even in the areas where the Transfer of Property Act does not apply. (See: *Raja Mohammad Amir Ahmad Khan v. Municipal Board of Sitapur*[9].) The principle of determination of tenancy by forfeiture consequent upon denial of the lessor's title may not be applicable where rent control legislation intervenes and such legislation while extending protection to tenants from

8. (2002) 3 SCC 375.
9. AIR 1965 SC 1923.

eviction does not recognise such denial or disclaimer as a ground for termination of tenancy and eviction of tenant. However, in various rent control legislations such a ground is recognised and incorporated as a ground for eviction of tenant either expressly or impliedly by bringing it within the net of an act injurious to the interest of the landlord on account of its mischievous content to prejudice adversely and substantially the interest of the landlord.

… … … …

… … … …

17. In our opinion, denial of landlord's title or disclaimer of tenancy by tenant is an act which is likely to affect adversely and substantially the interest of the landlord and hence is a ground for eviction of tenant within the meaning of clause (*c*) of sub-section (1) of Section 12 of the M.P. Accommodation Control Act, 1961. To amount to such denial or disclaimer, as would entail forfeiture of tenancy rights and incur the liability to be evicted, the tenant should have renounced his character as tenant and in clear and unequivocal terms set up title of the landlord in himself or in a third party. A tenant bona fide calling upon the landlord to prove his ownership or putting the landlord to proof of his title so as to protect himself (i.e. the tenant) or to earn a protection made available to him by the rent control law but without disowning his character of possession over the tenancy premises as tenant cannot be said to have denied the title of landlord or disclaimed the tenancy. Such an act of the tenant does not attract applicability of Section 12(1)(*c*) abovesaid. It is the intention of the tenant, as culled out from the nature of the plea raised by him, which is determinative of its vulnerability."

12. Having ascertained the legal position we will now state why we feel that the High Court is not right in disturbing the

concurrent finding of fact that the respondent-tenant denied the title of the appellant-landlady.

13. There is a specific reference to the registered document under which the appellant purchased the suit building from the earlier landlord in the plaint. Yet, in the written statement the respondent denied the title of the appellant. We notice that there are several documents on record relating to the ownership of the appellant, apart from the registered sale deed, such as municipal tax receipts, ration card etc. Yet, the respondent refused to acknowledge the appellant's title. He denied it in his evidence. This is not a simple case of denial of derivative title by a person who did not know about the purchase of the building by the landlord. Even after going through the relevant documents relating to the appellant's title the respondent feigned ignorance about it. The High Court has accepted that in his cross-examination the respondent has stated that he was not accepting the appellant as his landlady. The High Court has, however, gone on to say that by this piece of evidence no decree of eviction can be passed against the respondent under Section 12(1)(c) of the M.P. Act because the respondent will have no occasion to establish in what circumstances he denied the title of the appellant. The High Court has further held that the respondent was within permissible limit in asking the appellant to produce documentary evidence about his title as a landlord. The High Court, in our opinion, fell into a grave error in drawing such a conclusion. Even denial of a landlord's title in the written statement can provide a ground for eviction of a tenant. It is also settled position in law that it is not necessary that the denial of title by the landlord should be anterior to the institution of eviction proceedings. This is so stated by this Court in *Majati Subbarao v. P.V.K. Krishnarao(deceased) by LRs.*[10].

14. The High Court has expressed that the respondent was justified in asking the appellant to produce the documents.

10. (1989) 4 SCC 732.

Implicit in this observation is the High Court's view that the respondent could have in an eviction suit got the title of the appellant finally adjudicated upon. There is a fallacy in this reasoning. In eviction proceedings the question of title to the properties in question may be incidentally gone into, but cannot be decided finally. Similar question fell for consideration of this Court in *Bhagadi Kannabalu.* In that case it was argued that the landlady was not entitled to inherit the properties in question and hence could not maintain the application for eviction on the ground of default and sub-letting under the A.P. Tenancy Act. This Court referred to its decision in *Tej Bhan Madan v. II Additional District Judge and Ors.*[11] in which it was held that a tenant was precluded from denying the title of the landlady on the general principle of estoppel between landlord and tenant and that this principle, in its basic foundations, means no more than that under certain circumstances law considers it unjust to allow a person to approbate and reprobate. Section 116 of the Evidence Act is clearly applicable to such a situation. This Court held that even if the landlady was not entitled to inherit the properties in question, she could still maintain the application for eviction and the finding of fact recorded by the courts below in favour of the landlady was not liable to be disturbed. The position on law was stated by this Court as under:

> "In this connection, we may also point out that in an eviction petition filed on the ground of sub-letting and default, the court needs to decide whether relationship of landlord and tenant exists and not the question of title to the properties in question, which may be incidentally gone into, but cannot be decided finally in the eviction proceeding."

15. Reliance placed by learned counsel for the respondent on *Mohd. Nooman* is misplaced. In that case, the landlord had filed an eviction suit described as Title Suit No.36 of 1973 to

11. (1988) 3 SCC 137.

evict the tenant. The trial court held that the relationship of landlord and tenant had not been proved and since the tenant had raised the question of title the proper course would be to dismiss the suit and not to convert it into a declaratory suit because the suit was neither for declaration of title nor had the plaintiff paid *ad valorem* court fee. The trial court dismissed the suit as there was no landlord and tenant relationship, but, upheld the plaintiff's claim of title. In the appeal, the first appellate court observed that by filing a suit for eviction and paying court fee on twelve months alleged rent, the plaintiff had adopted a tricky way of getting the title decided. The plaintiff, then, filed a suit on title. The trial court decreed the suit. The first appellate court allowed the appeal and dismissed the suit. In the second appeal before the High Court the question was whether the judgment and decree regarding title passed in the earlier suit shall operate as *res judicata* between the parties on the question of title. The High Court observed that pleas taken by both parties regarding title in both the title suits are the same and answered the question in affirmative. This Court endorsed the High Court's view and held that the issue of title was directly and substantially an issue between the parties in the earlier eviction suit, hence, the High Court was right in holding that the finding of title recorded in the earlier suit would operate as *res judicata* in the subsequent suit. This view was expressly restricted by this Court to the facts before it. This Court clarified that ordinarily it is true that in a suit for eviction even if the court goes into the question of title it examines the issue in an ancillary manner and in such cases (which constitute a very large majority) any observation or finding on the question of title would certainly not be binding in any subsequent suit on the dispute of title. This Court further clarified that the case with which it was dealing fell in an exceptional category of very limited number of cases. Thus, in our opinion, no parallel can be drawn from *Mohd. Nooman*. In that case issue of title was framed. In the instant case issue of title was not even framed. *Mohd. Nooman* arose out of exceptional facts and must be restricted to those facts.

16. In view of the above, we are of the opinion that the High Court was wrong in setting aside the concurrent finding of fact recorded by the courts below that the respondent had denied the title of the appellant. We are of the view that the present case is covered by Section 12(1)(c) of the M.P. Act. It is, therefore, necessary to restore the decree of eviction. In the circumstances, we allow the appeal. The impugned judgment of the High Court is set aside and eviction decree passed by the trial court and confirmed by the first appellate court under Section 12(1)(c) of the M.P. Act is restored.

17. The appeal is disposed of in the afore-stated terms.

R.P. Appeal disposed of.

UNION OF INDIA AND OTHERS
v.
VASAVI CO-OP. HOUSING SOCIETY LTD. AND OTHERS
(Civil Appeal No. 4702 of 2004)

JANUARY 07, 2014

[K.S. RADHAKRISHNAN A.K. SIKRI JJ.]

Suit:

Suit for title and possession – Onus – Held: In a suit for declaration of title and for possession, burden always lies on the plaintiff to make out and establish his case by adducing sufficient evidence and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to plaintiff – In the instant case, trial court as well as High Court rather than examining in depth, the question, as to whether the plaintiffs have succeeded in establishing their title to the suit land, went on to examine in depth the weakness of defendants' title – Plaintiffs have not succeeded in establishing their title and possession over the suit land — Judgment of trial court, affirmed by High Court, is set aside.

Evidence:

Evidence as to title – Held: Revenue records do not confer title — In a given case, the conferment of Patta as such does not confer title.

Respondent no. 1 Co-op. Housing Society filed a suit against defendants-appellantsfor declaration of title over the suit land comprising 6 acres 30 guntas in Survey No.60/1 and 61 and for possession thereof from the appellants-defendant Nos.1 to 3 and 7. The respondent-plaintiff's case was that it had purchased the suit land from the Pattedar during the year 1981-82. The plaintiff

relied on sale deeds, Setwar of 1353 Fasli (Ext. A-3) and the family partition and settlement deed dated 11.12.1939 (Ext. A-2) pertaining to the family of the Pattedar. Defendant No. 3 filed a written statement stating that the suit land belonged to defendant no. 1 and it was locally managed and possessed by defendant No.3. The trial court decreed the suit. The High Court, in appeal, affirmed the judgment and decree, but noticing that the defendants had made large scale construction of quarters for the Defence Accounts Department, afforded an opportunity to them to provide alternative suitable extent of land in lieu of the suit scheduled land.

Allowing the appeal, the Court

HELD: 1.1. It is trite law that in a suit for declaration of title, burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff. The plaintiff in a suit for declaration of title and possession can succeed only on the strength of his own title and that can be done only by adducing sufficient evidence to discharge the onus on him, irrespective of the question whether the defendant has proved his case or not. Even if the title set up by the defendants is found against, in the absence of establishment of plaintiff's own title, plaintiff must be non-suited.[para 12 and 15] [191-G; 192-G]

Maran Mar Basselios Catholicos v. *Thukalan Paulo Avira* **AIR1959 SC 31** *Nagar Palika, Jind* v. *Jagat Singh, Advocate* **1995 (3) SCR 9 = (1995) 3 SCC 426 – relied on.**

1.2. In the instant case, the trial court as well as the High Court rather than examining in depth, the question, as to whether the plaintiffs have succeeded in establishing their title on the scheduled suit land, went on to examine in depth the weakness of the defendants;

title. The defendants relied on the entries in the GLR and their possession or re-possession over the suit land to non-suit the plaintiffs. The court went on to examine the correctness and evidentiary value of the entries in the GLR in the context of the history and scope of Cantonment Act, 1924 and the Cantonment Land Administration Rules, 1925 and tried to establish that no reliance could be placed on the GLR. The question is not whether the GLR could be accepted or not, the question is, whether the plaintiff could prove its title over the suit property. The entries in the GLR by themselves may not constitute title, but the question is whether entries made in Ext.A-3 (Setwar of 1353 Fasli) relied upon by the plaintiff would confer title on the plaintiff. [para 16] [192-H; 193-A-C]

1.3. This Court in several Judgments has held that the revenue records do not confer title. Even if the entries in the Record of Rights carry evidentiary value, that itself would not confer any title on the plaintiff over the suit land. Ext.X-1 is Classer Register of 1347 Fasli which according to the trial court, speaks of the ownership of the plaintiff's vendor's property. These entries, as such, would not confer any title. Plaintiffs have to show, independent of those entries that the plaintiff's predecessors-in-interest had title over the property in question and it is that property which they have purchased. The only document that has been produced before the court was the registered family settlement and partition deed dated 11.12.1939 wherein, admittedly, the suit land in question has not been mentioned. [para 17 and 20] [193-D; 194-D-F]

Corporation of the City of Bangalore v. M. Papaiah and *Another* **(1989) 3 SCC 612;** *Guru Amarjit Singh v. Rattan Chand and Others* **1993 (1) Suppl. SCR 523 = (1993) 4 SCC 349** *State of Himachal Pradesh v. Keshav Ram and*

Others **1996 (7) Suppl. SCR 263 = (1996) 11 SCC 257 – relied on.**

1.4. The plaintiff has also maintained the stand that their predecessor-in-interest was the Pattedar of the suit land. In a given case, the conferment of Patta as such does not confer title. [para 18] [193-G]

Syndicate Bank v. Estate Officer & Manager, APIIC Ltd. & Ors. **2007 (9) SCR 619 = (2007) 8 SCC 361 and** *Vatticherukuru Village Panchayat v. Nori Venkatarama Deekshithulu & Ors.* **1991 (2) SCR 531 = (1991) Supp. (2) SCC 228 – relied on.**

1.5. As regards the plea of the respondents-plaintiffs that the land in question is pot kharab, the A.P. Survey and Settlement Mannual, Chapter XIII deals with pot kharab land, which is generally a non-cultivable land and if the plaintiff's predecessor in interest had ownership over this pot kharab land, it should have reference in the family settlement and partition deed dated 11.12.1939. Admittedly, the predecessor in interest of the plaintiff got the property through the family settlement and partition deed. Conspicuous absence of the suit land in the deed would cast doubt about the ownership and title of the plaintiffs over it. [para 21] [194-G-H; 195-A]

1.6. A family settlement is based generally on the assumption that there was an antecedent title of some kind in the purchase and the arrangement acknowledges and defines what that title was. In a family settlement-cum-partition, the parties may define the shares in the joint property and may either choose to divide the property by metes and bounds or may continue to live together and enjoy the property as common. Ext.A-2 is totally silent as to whose share the suit land will fall and who will enjoy it. The burden is on the plaintiff to explain

away those factors, but it has not succeeded. [para 22] [195-E-F]

Union of India v. Ibrahim Uddin & Anr. **(2012) 8 SCC 148,** *Union of India & Ors. v. Kamla Verma* **(2010) 13 SCC 511,** *Chief Executive Officer v. Surendra Kumar Vakil & Ors.* **2003 (6) Suppl. SCR 395 = (1999) 3 SCC 555 and** *Secunderabad Cantonment Board, Andhra Circle, Secundrabad v. Mohd. Mohiuddin & Ors.* **(2003) 12 SCC 315 - cited.**

1.7. The plaintiff has not succeeded in establishing its title and possession over the suit land. The judgment of the trial court, affirmed by the High Court, is set aside. [para 23] [196-F]

Case Law Reference:

AIR1959 SC 31	**relied on**	**Para 14**
1995 (3) SCR 9	**relied on**	**Para 18**
(1989) 3 SCC 612	**relied on**	**Para 17**
1993 (1) Suppl. SCR 523	**relied on**	**Para 17**
1996 (7) Suppl. SCR 263	**relied on**	**para 17**
2007 (9) SCR 619	**relied on**	**Para 18**
1991 (2) SCR 531	**relied on**	**Para 18**
(2012) 8 SCC 148	**cited**	**Para 22**
(2010) 13 SCC 511	**cited**	**Para 22**
2003 (6) Suppl. SCR 395	**cited**	**Para 22**
(2003) 12 SCC 315	**cited**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4702 of 2004.

From the Judgment & Order dated 06.09.2002 of the High

Court of Judicature, Andhra Pradesh at Hyderabad in C.C.C.A. No. 123 of 1996.

Vikas Singh, P.S. Narasimha, Basava Prabhu Patil, B. Sunita Rao, Deepika Kalia, Sanket, Kapish Seth, B.V. Balaram Das, P. Badri Prem Nath, M. Narender Reddy, Shakil Ahmed Syed, Amitesh Kumar (for Gopal Singh) Promila, Prabhakar Reddy, Sridhar Potaraju, P. Prabhakar, Gaichangpou Gangmei, A.T.M. Sampath, T.S. Shanthi, C.K. Sucharita, Sushma Suri, Anil Katiyar, Md. Shahid Anwar, Madhusmita Bora, G.N. Reddy, Lawyer's Knit & Co., M.K. Garg, Promila for the appearing parties.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. The Vasavi Co-op. Housing Society Ltd., the first respondent herein instituted a suit No.794 of 1988 before the City Civil Court, Hyderabad, seeking a declaration of title over land comprising 6 acres 30 guntas in Survey No.60/1 and 61 of Kakaguda village and recovery of the vacant possession from Defendant Nos.1 to 3 and 7, the appellants herein, after removal of the structure made therein by them. The plaintiff has also sought for an injunction restraining the defendants from interfering with the above-mentioned land and also for other consequential refliefs. The City Civil Court vide its judgment dated 31.07.1996 decreed the suit, as prayed for, against which the appellants preferred C.C.C.A. No.123 of 1996 before the High Court of Andhra Pradesh at Hyderabad. The High Court also affirmed the judgment of the trial Court on 6.9.2002, but noticed that the appellant had made large scale construction of quarters for the Defence Accounts Department, therefore, it would be in the interest of justice that an opportunity be given to the appellants to provide alternative suitable extent of land in lieu of the scheduled suit land, for which eight months' time was granted from the date of the judgment. Aggrieved by the same, the Union of India and others have filed the present appeal.

FACTS

2. The plaintiff's case is that it had purchased the land situated in Survey Nos.60, 61 and 62 of Kakaguda Village from Pattedar B.M. Rama Reddy and his sons and others during the year 1981-82. The suit land in question forms part of Survey Nos.60 and 61. The suit land in question belonged to the family of B. Venkata Narasimha Reddy consisting of himself and his sons Anna Reddy, B.V. Pulla Reddy and B.M. Rama Reddy and Anna Reddy's son Prakash Reddy. Land in old Survey No.53 was allotted to Rama Reddy vide registered family settlement and partition deed dated 11.12.1939 (Ex.A2). In the subsequent re-settlement of village (Setwar of 1353 FASLI), the land in Survey No.53 was re-numbered as Survey No.60, 61 and 62. Ever since the allotment in the family partition of the above-mentioned land, vide the family partition deed dated 19.03.1939, Rama Reddy had been in exclusive possession and enjoyment and was paying land revenue. Rama Reddy's name was also mutated in the Pahanies.

3. Plaintiffs further stated that the first defendant had it's A.O.C. Centre building complex in Tirumalagiri village adjoining the suit land Survey No.60 of Kakaguda village. The first defendant had also requisitioned 4 acres and 28 guntas in Survey No.60 of Kakaguda Village in the year 1971 along with the adjoining land in Tirumalagiri for extension of A.O.C. Centre. Further, it was stated that 6th Defendant took possession of the above-mentioned land and delivered possession of the same to other defendants. The 3rd Defendant later vide his letter dated 18.12.1979 sent a requisition for acquisition of 4.38 guntas in Surevy No.60 for the extension of A.O.C. Centre. Notification was published in the official Gazette dated 18.09.1980 and a declaration was made on 30.06.1981 and compensation was awarded to Rama Reddy vide Award dated 26.07.1982.

4. The Plaintiffs, as already stated, had entered into various sale deeds with Rama Reddy during the year 1981-82

by which land measuring 13 acres and 08 guntas in Survey No.60, 11 acres and 04 guntas in Survey No.61 and 17 acres and 20 guntas in Survey No.62 were purchased, that is in all 41 acres and 32 guntas. Plaintiffs further stated that the land, which was purchased by it was vacant, but persons of the Defence Department started making some marking on the portions of the land purchased by the plaintiff, stating that a substantial portion of the land purchased by the plaintiff in Survey No.60/1 and 61 belonged to the Defence Department and treated as B-4 in their records. Plaintiff then preferred an application dated 12.09.1983 to the District Collector under the A.P. Survey and Boundaries Act for demarcation of boundaries. Following that, Deputy Director of Survey issued a notice dated 21.01.1984 calling upon the plaintiff and 3rd Defendant to attend to the demarcation on 25.01.1984. Later, a joint survey was conducted. The 3rd Defendant stated that land to the extent of 4 acres and 35 guntas in Survey No.60 and 61 corresponds to their G.L.R. (General Land Register) No.445 and it is their land as per the record. The Deputy Director of Survey, however, stated that lands in Survey Nos.60 and 61 of Kakaguda village are patta lands as per the settlement records and vacant, abutting Tirumalagiri village boundaries to Military Pillers and not partly covered in Survey No.60. Plaintiff later filed an application for issuing of a certificate as per the plan prepared by the Revenue Records under Section 19(v) of the Urban Land Ceiling Act. Plaintiff further stated that pending that application, officers of Garrison Engineers, on the direction of the 3rd Defendant, illegally occupied land measuring 2 acres and 29 guntas in Survey No.60 and 4 acres and 01 guntas in Survey No.61. Thus, a total extent of land 6 acres and 30 guntas was encroached upon and construction was effected despite the protest by the plaintiff. Under such circumstances, the plaintiff preferred the present suit, the details of which have already been stated earlier.

5. The 3rd Defendant filed a written statement stating that an area of land measuring 7 acres and 51 guntas, out of Survey

No.1, 60 and 61 of Kakaguda village comprising G.L.R. Survey No.445 of Cantonment belongs to the first Defendant, which is locally managed and possessed by Defendant No.3 being local representative of Defendant No.1 and D-3 and is also the custodian of all defence records. Further, it was also stated that, as per the G.L.R., the said land was classified as B-4 and placed under the management of Defence Estates Officer. It was also stated that the suit land is part of review Survey Nos.60 and 61 and the plaintiff is wrongly claiming that the said land was purchased by it. Further, it was also stated that the plaintiff is threatening to encroach upon another 6 guntas of land alleged to be situated in Survey Nos.60/1 and 61. It has been categorically stated that, as per the records maintained by the 3rd Defendant, land measuring 7 acres and 51 guntas, forming part of G.L.R. Survey No.445 of the Cantonment is part of Survey Nos.1, 60 and 61 of Kakaguda village. It is owned, possessed and enjoyed by Defendant Nos.1 to 4 and 7.

6. The plaintiff, in order to establish its claim, examined PWs 1 to 4 and produced Exs. A-1 to A-85 and Exs. X-1 to X-10 besides Exs. A-86 to A-89 on behalf of DW1. On behalf of the defendants DW1 was examined and Exs D-1 to D-7 are produced.

7. The primary issue which came up for consideration before the trial court was whether the plaintiff has got ownership and possession over 6 acres and 30 guntas covered by Survey No.60/1 and 61 of Kakaguda village for which considerable reliance was placed on the settlement record (Setwar Ex.A-3 of 1353 Fasli). On the other hand, the defendants placed considerable reliance on G.L.R. Survey No.445 of the Cantonment which is part of Survey No.1, 60 and 61 of Kakaguda village, wherein, according to the defendants, the suit land falls. PW2, the Deputy Inspector of Survey stated, according to Setwar, land in Survey Nos.60, 61 and 62 is patta land of Prakash Reddy and others and such Survey numbers corresponds to Old Survey No.53. The evidence of PW-3 and

4 also states that the land is covered by old Survey No.53 which figures in Survey Nos.60, 61 and 62. Ext. A-3 Setwar, is a settlement register prepared by the Survey Officer at the time of revised survey and settlement in the year 1358 Fasli in which the names of the predecessors in title of the plaintiff are shown as pattedars. In other words, Ex-A-3 is the exhibit of rights and title of plaintiff's predecessors in title.

8. Defedants, as already indicated, on the other hand, pleaded that the total extent of Survey No.53 was only 33 acres and 12 guntas and if that be so, after sub-division the extent of sub-divided survey numbers would also remain the same, but the extent of sub-divided Survey Nos.60, 61 and 62 were increased to 41 acres and 32 guntas in the revenue records without any notice to the defendants which according to the defendants, was fraudulently done by one Venkata Narasimha Reddy, the original land owner of Survey No.53 of Kakaguda village, who himself was the Patwari of Kakaguda village. Further, it was the stand of the Defendants that in exercise of powers under The Secunderabad and Aurangabad Cantonment Land Administration Rules, 1930, the G.LR. of 1933 was prepared by Captain O.M. James after making detailed enquiries from the holder of occupancy rights as well as general public. Further, it is also stated that certain land within the villages were handed over by the then Nizam to British Government for military use. Land in question measuring 7 acres and 51 guntas in G.L.R. 1933 at Survey No.581 was used by the British Government as murram pits and it was classified as Class-C land vested in the Cantonment Authority. G.L.R. 1933 was re-written in the year 1956 in view of the provisions of Rule 3 of Cantonment Land Administration Rules, 1937 and said Survey No.581 was re-written as G.L.R. Survey No.445. Further, in view of the classification of the land, as stipulated in Cantonment Land Administration rules, 1937, land pertaining to G.L.R. Survey No.445 was re-classified as B-4 (vacant land) reserved for future military purposes and

management was transferred from cantonment authority to Defence Estate.

9. The above-mentioned facts would indicate that the plaintiff traces their title to the various sale deeds, Ext.A-3 Setwar of 1353 Fasli and the oral evidence of the survey officials and the defendants claim title and possession of the land on the basis of the G.L.R. The question that falls for consideration is whether the evidence adduced by the plaintiff is sufficient to establish the title to the land in question and to give a declaration of title and possession by the civil court.

10. Shri Vikas Singh, learned senior counsel appearing for the appellants submitted that G.L.R. 445 measuring an area of 7 acres and 51 guntas is classified as B-4 and placed under the management of the Defence Estate Officer. Column 7 of the G.L.R. would indicate that the landlord is the Central Government. Out of 7 acres and 51 guntas, land admeasuring 6 acres has been handed over to Defence Accounts Department for construction of Defence Staff Quarters as per survey No.445/A, as per the records as early as in 1984. Further, it was pointed out that the appellant had already constructed approximately 300 quarters in 6 acres of land. Learned senior counsel submitted that since the extent of land mentioned in old Survey No.53 as well as in the settlement and partition deed, do not tally to the extent of land mentioned in Ext.A-3 and burden is heavy on the side of the plaintiff to show and explain as to how the registered family settlement and partition deed did not take place in the disputed land. Learned senior counsel also submitted that the High Court has committed an error in ignoring the G.L.R. produced by the defendants, even though there is no burden on the defendants to establish its title in a suit filed by the plaintiff for declaration of title and possession.

11. Shri P.S. Narasimha, learned senior counsel and Shri Basava Prabhu Patil, learned senior counsel appearing for the

respondents submitted that the city civil court as well as the High Court have correctly appreciated and understood the legal position and correctly discarded the entries made in the G.L.R. Learned senior counsel submitted that the correctness and evidentiary value of G.L.R. entries have to be appreciated in the context of the history of the Secunderabad Cantonment. Reference was made to the provisions of Cantonment Act, 1924 and it was pointed out that the Secunderabad and Aurangabad Cantonment Land Administration Rules, 1930 do not apply to the Kakaguda village. Learned senior counsel have also referred to Ex.A6, the Sesala Pahani for the year 1955-58, of Kakaguda village, Ex.A7, the Pahani Patrika for the year 1971-72, Ex.A8, the Pahani Patrika for the year 1972-73 and submitted that they would indicate that Methurama Reddy, the predecessor in title, was the Pattedar of Survey Nos.60 and 61 of Kakaguda village. It was pointed out that the entries made therein have evidentiary value. Learned counsel pointed out that the Settlement Register prepared under the Statutes and Pahanies maintained under the Hyderabad Record of Rights in Land Regulations of 1358, Fasli have considerable evidentiary value. Further, it was also pointed out that the land in question is pot kharab land, which is not normally treated as land in Section 3(j) of Ceiling Act and hance may not figure in a Settlement or Partition Deed, hence not subjected to any revenue assessment. Learned senior counsel submitted that the plaintiff has succeeded in establishing its title to the property in question, as was found by the city civil court as well as the High Court which calls for no interference by this Court under Article 136 of the Constitution.

12. It is trite law that, in a suit for declaration of title, burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff.

13. The High Court, we notice, has taken the view that

once the evidence is let in by both the parties, the question of burden of proof pales into insignificance and the evidence let in by both the parties is required to be appreciated by the court in order to record its findings in respect of each of the issues that may ultimately determine the fate of the suit. The High Court has also proceeded on the basis that initial burden would always be upon the plaintiff to establish its case but if the evidence let in by defendants in support of their case probabalises the case set up by the plaintiff, such evidence cannot be ignored and kept out of consideration.

14. At the outset, let us examine the legal position with regard to whom the burden of proof lies in a suit for declaration of title and possession. This Court in *Maran Mar Basselios Catholicos v. Thukalan Paulo Avira* reported in AIR 1959 SC 31 observed that "in a suit for declaration if the plaintiffs are to succeed, they must do so on the strength of their own title." In *Nagar Palika, Jind v. Jagat Singh, Advocate* (1995) 3 SCC 426, this Court held as under:

> "the onus to prove title to the property in question was on the plaintiff. In a suit for ejectment based on title it was incumbent on the part of the court of appeal first to record a finding on the claim of title to the suit land made on behalf of the plaintiff. The court is bound to enquire or investigate that question first before going into any other question that may arise in a suit."

15. The legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. We are of the view that even if the title set up by the defendants is found against, in the absence of establishment of plaintiff's own title, plaintiff must be non-suited.

16. We notice that the trial court as well as the High Court

rather than examining that question in depth, as to whether the plaintiffs have succeeded in establishing their title on the scheduled suit land, went on to examine in depth the weakness of the defendants title. Defendants relied on the entries in the GLR and their possession or re-possession over the suit land to non-suit the Plaintiffs. The court went on to examine the correctness and evidentiary value of the entries in the GLR in the context of the history and scope of Cantonment Act, 1924, the Cantonment Land Administration Rules, 1925 and tried to establish that no reliance could be placed on the GLR. The question is not whether the GLR could be accepted or not, the question is, whether the plaintiff could prove its title over the suit property in question. The entries in the GLR by themselves may not constitute title, but the question is whether entries made in Ext.A-3 would confer title or not on the Plaintiff.

17. This Court in several Judgments has held that the revenue records does not confer title. In *Corporation of the City of Bangalore v. M. Papaiah and Another* (1989) 3 SCC 612 held that "it is firmly established that revenue records are not documents of title, and the question of interpretation of document not being a document of title is not a question of law." In *Guru Amarjit Singh v. Rattan Chand and Others* (1993) 4 SCC 349 this Court has held that "that the entries in jamabandi are not proof of title". In *State of Himachal Pradesh v. Keshav Ram and Others* (1996) 11 SCC 257 this Court held that "the entries in the revenue papers, by no stretch of imagination can form the basis for declaration of title in favour of the plaintiff."

18. The Plaintiff has also maintained the stand that their predecessor-in-interest was the Pattadar of the suit land. In a given case, the conferment of Patta as such does not confer title. Reference may be made to the judgment of this Court in *Syndicate Bank v. Estate Officer & Manager, APIIC Ltd. & Ors.* (2007) 8 SCC 361 and *Vatticherukuru Village Panchayat v. Nori Venkatarama Deekshithulu & Ors.* (1991) Supp. (2) SCC 228.

19. We notice that the above principle laid down by this Court sought to be distinguished by the High Court on the ground that none of the above-mentioned judgments, there is any reference to any statutory provisions under which revenue records referred therein, namely, revenue register, settlement register, jamabandi registers are maintained. The High Court took the view that Ext.A-3 has evidentiary value since the same has been prepared on the basis of Hyderabad record of Rights in Land Regulation, 1358 Fasli. It was also noticed that column 1 to 19 of Pahani Patrika is nothing but record of rights and the entries in column 1 to 19 in Pahani Patrika shall be deemed to be entries made and maintained under Regulations.

20. We are of the view that even if the entries in the Record of Rights carry evidentiary value, that itself would not confer any title on the plaintiff on the suit land in question. Ext.X-1 is Classer Register of 1347 which according to the trial court, speaks of the ownership of the plaintiff's vendor's property. We are of the view that these entries, as such, would not confer any title. Plaintiffs have to show, independent of those entries, that the plaintiff's predecessors had title over the property in question and it is that property which they have purchased. The only document that has been produced before the court was the registered family settlement and partition deed dated 11.12.1939 of their predecessor in interest, wherein, admittedly, the suit land in question has not been mentioned.

21. Learned senior counsel appearing for the respondents submitted that the land in question is pot kharab and since no tax is being paid, the same would not normally be mentioned in the partition deed or settlement deed. The A.P. Survey and Settlement Mannual, Chapter XIII deals with pot kharab land, which is generally a non-cultivable land and if the predecessors in interest had ownership over this pot kharab land, the suit land, we fail to see, why there is no reference at all to the family settlement and partition deed dated 11.12.1939. Admittedly, the predecessor in interest of the plaintiff got this property in

question through the above-mentioned family settlement and partition deed. Conspicuous absence of the suit land in question in the above-mentioned deed would cast doubt about the ownership and title of the plaintiffs over the suit land in question. No acceptable explanation has been given by the plaintiff to explain away the conspicuous omission of the suit land in the registered family settlement and partition deed. Facts would also clearly indicate that in Ext-A1, the suit land has been described in old Survey No.53 which was allotted to the plaintiff's predecessors in title. It is the common case of the parties that Survey No.53 was sub-divided into Survey Nos.60, 61 and 63. Admittedly, the old Survey No.53 takes in only 33 acres and 12 guntas, then naturally, Survey Nos.60, 61 and 63 cannot be more than that extent. Further, if pot kharab land is not recorded in the revenue record, it would be so even in case of sub-division of Old Survey No. 53. The only explanation was that, since the suit land being pot kharab land, it might not have been mentioned in Ex.A.

22. A family settlement is based generally on the assumption that there was an antecedent title of some kind in the purchase and the arrangement acknowledges and defines what that title was. In a family settlement-cum-partition, the parties may define the shares in the joint property and may either choose to divide the property by metes and bounds or may continue to live together and enjoy the property as common. So far as this case is concerned, Ex.A1 is totally silent as to whose share the suit land will fall and who will enjoy it. Needless to say that the burden is on the plaintiff to explain away those factors, but the plaintiff has not succeeded. On other hand, much emphasis has been placed on the failure on the part of the defendants to show that the applicability of the GLR. The defendant maintained the stand that the entries made in GLR, maintained under the Cantonment Land Administration Rules, 1937, in the regular course of administration of the cantonment lands, are admissible in evidence and the entries made therein will prevail over the records maintained under the

various enactment, like the Andhra Pradesh (Telangana Area) Land Revenue Act, 1317 Falsi, the Hyderabad Record of Rights in Land Regulation, 1358 Falsi, the Hyderabad Record of Rights Rules, 1956 etc. In order to establish that position, reliance was placed on the judgments of this Court in *Union of India v. Ibrahim Uddin & Anr.* (2012) 8 SCC 148, *Union of India & Ors. v. Kamla Verma* (2010) 13 SCC 511, *Chief Executive Officer v. Surendra Kumar Vakil & Ors.* (1999) 3 SCC 555 and *Secunderabad Cantonment Board, Andhra Circle, Secundrabad v. Mohd. Mohiuddin & Ors.* (2003) 12 SCC 315. Both, the trial Court and the High Court made a detailed exercise to find out whether the GLR Register maintained under the Cantonment Land Administration Rules, 1937 and the entries made there under will have more evidentiary value than the Revenue records made by the Survey Department of the State Government. In our view, such an exercise was totally unnecessary. Rather than finding out the weakness of GLR, the Courts ought to have examined the soundness of the plaintiff case. We reiterate that the plaintiff has to succeed only on the strength of his case and not on the weakness of the case set up by the defendants in a suit for declaration of title and possession.

23. In such circumstances, we are of the view that the plaintiff has not succeeded in establishing his title and possession of the suit land in question. The appeal is, therefore, allowed and the judgment of the trial court, affirmed by the High Court, is set aside. However, there will be no order as to costs.

R.P. Appeal allowed.

STATE OF GUJARAT
v.
KISHANBHAI ETC.
(Criminal Appeal No. 1485 of 2008)

JANUARY 7, 2014

[C.K. PRASAD AND JAGDISH SINGH KHEHAR, JJ.]

PENAL CODE, 1860:

ss.376, 302, 201, 363, 369 and 394 – Rape and murder of a six year old girl – Her legs amputed above ankles and anklets stolen – Circumstantial evidence – Conviction by trial court and sentence of death – Acquittal by High Court giving the accused benefit of doubt – Held: Since the guilt of accused in the instant case is to be based on circumstantial evidence, establishing of a complete chain from the evidence produced by prosecution becomes essential -- High Court has rightly pointed out several missing links in the chain of circumstances leading to failure of prosecution to establish guilt of accused – Further there are several lapses committed by investigating/prosecuting agency – There are several discrepancies and inconsistencies in the evidence produced by prosecution before trial court – Judgment of High Court needs no interference -- Directions given to identify erring officers in the instant case and take appropriate departmental action against them in accordance with law – Investigation – Bombay Police Act 1951 -- s. 135(1) -- Circumstantial evidence.

INVESTIGATION:

Serious lapses in investigation and prosecution of a rape and murder case – In the instant case, there have been serious lapses committed by the investigating and prosecuting agencies and there are deficiencies in the

process of establishing the guilt of the accused before the trial court -- The investigating officials and the prosecutors involved in presenting the case, have miserably failed in discharging their duties -- They have been instrumental in denying to serve the cause of justice –

Arrest of accused – Held -- Though accused was acknowledged to be in police station since 9 p.m., he was formally arrested at 6.40 a.m. on the following day – There are inconsistent statements on record in this regard.

Entries in Station Diary – Though IO had been apprised about the commission of crime, he left Police Station without making any entry in Station Diary or in any other register, depicting the purpose of his departure.

Panchnama – Held: In the instant case, inquest panchnama was drawn before registration of FIR.

Identification -- Held: Though the witness had seen the accused for the first time on the date of occurrence, no test identification parade to get the accused identified was conducted.

EVIDENCE:

Circumstantial evidence -- DNA test – Rape and murder – Held: Advancement in scientific investigation should be taken recourse to – In the instant case, investigating agency ought to have sought DNA profiling of the blood samples, which would have given a clear picture.

F.I.R.:

Delay in registering the FIR – Held: In the instant case, not only is the delay of seven hours in registration of complaint unexplained, but the same is also rendered extremely suspicious.

ADMINISTRATION OF CRIMINAL JUSTICE:

Faulty investigation and deficient prosecution -- Directions given to State Governments to examine all orders of acquittal and record reasons for the failure of each prosecution case -- A standing committee of senior officers of the police and prosecution departments should be vested with this responsibility -- Home Department of every State Government will incorporate in its existing training programmes for investigation/prosecution officials course-content drawn in light of instant judgment.

Respondent no.1 was prosecuted for committing offences punishable u/ss 363, 369, 376, 394, 302 and 201, IPC and s. 135(1) of Bombay Police Act, on the allegations that he abducted a six year old girl, raped and killed her. It was also alleged that the accused chopped off her feet just above ankles and took away her anklets. The trial court convicted and sentenced the accused to death. However, the High Court noticing several missing links in the chain of circumstances, allowed his appeal and acquitted him giving him benefit of doubt.

Dismissing the appeal, the Court

HELD: 1.1. Since the guilt of the accused in the instant case is to be based on circumstantial evidence, establishing of a complete chain from the evidence produced by the prosecution becomes essential. The serious lapses committed by the investigating and prosecuting agencies and the deficiencies during the course of investigation and prosecution, in the instant case, are as follows:

(a) According to the prosecution story after having removed the anklets from victim's feet, the accused had taken them to a Jeweller's shop and pledged them for a sum of Rs. 1,000/-. The jeweller had gone

to the police station with the anklets on his own, after having read the news. The lapse of the prosecution on account of not producing the jeweller as prosecution witness, resulted in a missing link in the chain of events. [para 11(a)] [221-B-D, E-F, G-H]

(b) The prosecution story discloses that the jeweller had executed a receipt with the accused, who put his thumb mark thereon, depicting the pledging of the anklets for a sum of Rs.1,000/-. The prosecution took no steps to compare the thumb impression on the receipt, with that of the accused-respondent. [para 11(b)] [222-B-C, C-D, E-F]

(c) It is also the case of the prosecution, that when the accused was apprehended, a sum of Rs.940/- was recovered from his possession. However, he ought to have been in possession of at least Rs.1,000/- i.e., the amount given to him by the jeweller when he pledged the anklets at his shop, even if it is assumed that he had no money with him when he had pawned the anklets. [para 11(c)] [223-C-D]

(d) In order to prove the prosecution case that the victim was raped, the doctor, who had medically examined the accused and had been cited as a witness before the trial court, was not examined as a prosecution witness. [para 11(d)] [223-G-H]

(e) Even the report/certificate given by the medical officer relating to the medical examination of the accused was not produced by the prosecution before the trial court. His evidence could have established, whether or not accused had committed rape on victim. [para 11(e)] [224-A-C]

(f) The accused could have been medically examined within a period of 24 hours of the occurrence. The

prosecution case does not show whether or not such action was taken. [para 11(f)] [224-E-F]

(g) When the accused was arrested, there were several injuries on his person. He was sent to Civil Hospital for his medical examination. Neither the doctor who had examined him was produced as a prosecution witness, nor was the report/certificate given by the medical officer disclosing the details of his observations/findings was placed on record. The importance of nature of the injuries suffered by the accused emerges from the fact, that both the accused and the victim had the same blood group "B +ve". The investigating agency ought to have sought DNA profiling of the blood samples, which would have given a clear picture whether or not the blood of the victim was, in fact on the clothes of the accused-respondent. Additionally, DNA profiling of the blood found on the knife used in the commission of the crime, would have uncontrovertibly determined whether or not the said knife had been used for severing the legs of the victim, to remove her anklets. [11(g)] [225-B, D-E, G; 226-F-H]

(h) It is also apparent from the complaint submitted by PW 2, that he had been informed by one 'KG', that he had seen the accused taking away the victim. In such an event, the proof of the fact of the accused having abducted the victim and her last seen with accused could have only been substantiated through the statement of 'KG'. [para 11(h)] [227-B-C]

(i) A green blood stained "dupatta" was recovered from the person of the victim, which neither belonged to the victim nor to the accused. The presence of the green "dupatta", has also not been explained. [para 11(i)] [227-F-H]

(j) PW6 is said to have seen the accused-respondent for the first time when the latter approached his "lari" to purchase a "dabeli" on 27.2.2003. Therefore, it was imperative for the investigating agency to hold a test identification parade in order to determine whether PW6, had correctly identified the accused-respondent, as the person who had come to his "lari" to purchase a "dabeli" on 27.2.2003 and also whether he was the same person, who had stolen a knife from his "lari" on 27.2.2003. [para 11(j)] [228-C-D]

(k) All the prosecution witnesses have been equivocal about the fact that the deceased went missing at about 6:00 p.m., i.e., the time when she was last seen in the company of the accused, and thereafter the search party met the accused at 8:00 pm. Within the period of these two hours the accused is alleged to have visited different places and committed several acts. However, no sketch map indicating the distance between different places was prepared, which would have helped the court to determine all that was alleged in the prosecution version of the incident. [para 11(k)] [229-C-D; 230-F-G, H; 231-A]

1.2. Discrepancies found in the evidence produced by the prosecution before the trial court are as follows:

(a) The post mortem report states that injuries on the genitals of deceased were post mortem in nature. It is not possible to contemplate that the legs of the deceased were cut whilst she was in her senses. It does not appear humanly possible for even the most perverted person, to have committed rape on a child, who had been killed by causing injuries on head and other parts of body, and after her feet had been severed from her legs. The prosecution in the instant case apparently projected a version including an act of rape, which is impossible to accept on the

touchstone of logic and common sense. [para 12(a)] [231-B, F-H; 232-A]

(b) The evidence produced by the prosecution also reveals that pubic hair of the accused had been examined in the Forensic Science Laboratory. The FSL report does not support the prosecution case of rape by the accused. This would prima facie exculpate him from the offence of rape. [para 12(b)] [232-B and D]

(c) According to the testimony of the complainant PW2, the accused was wearing a white shirt at the time of occurrence. It is, therefore, when a white shirt was found covering the dead body of the victim, he had identified the same as the shirt which the accused was wearing, before the offence was committed. From the prosecution story, as it emerged from the statements of different witnesses, it is apparent that PW2 had had no occasion to have seen the accused, wearing the said white shirt. [para 12(c)] [232-E-G]

(d) The T-shirt worn by accused at the time of his arrest was a white one, but PW-2 in his complaint has mentioned that the accused was wearing a black T-shirt at the time of his detention. Thus, narration in this regard made by the complainant PW2 was absolutely incorrect and contrary to the factual position and, as such, his deposition does not appear to be fair and honest. [para 12(d)] [233-B-D]

(e) From the statements of PW2 and PW5, it is apparent that the accused was detained by the police informally around 9:00 p.m. on 27.2.2003. However, his arrest was shown at 6.40 a.m. on 28.3.2003. The detention of the accused from 9:00 pm on 27.2.2003 to 6.40 a.m. on 28.2.2003, shows that the prosecution

has not presented the case in the manner the events unfolded to the investigating agencies. [para 12(e)] [233-G-H; 234-B-C]

(f) The inquest panchnama besides mentioning the amputation of the legs of the victim above her ankles, also records that the silver anklets worn by the victim were missing. In this behalf, it would also be relevant to mention, that even though the inquest panchnama was drawn at 00.30 a.m. on 28.2.2003, the complaint resulting in the registration of the first information report was lodged by PW2 at 3:05 a.m. on 28.02.2003. It is strange, that the inquest panchnama should be drawn before the registration of the first information report. It is also strange as to how, while drawing the inquest panchnama, the panchas of the same could have recorded that after amputation of the victim's legs, her silver anklets had been taken away by the offender, as there was no occasion for the panchas to have known, that the deceased used to wear silver anklets. [para 12(f)] [234-C-F]

(g) From the prosecution version (emerging from the evidence recorded before the trial court), it is apparent, that the search party as also the relatives of the victim were aware at about 8:00 p.m. on 27.2.2003 that she had been murdered, with a possibility of her having been raped also, and her silver anklets had been stolen. Still no complaint whatsoever came to be filed on 27.2.2003, despite the close coordination between the search party and the police from 8:00 pm onwards on 27.2.2003 itself. The complaint leading to the filing of the first information was made at about 3:05 a.m. on 28.2.2003. Not only is the delay of seven hours in the registration of the complaint un-explained, but the same is also rendered extremely suspicious, on account of the fact

that the accused is acknowledged to be in police detention since 9:00 p.m. on 27.2.2003 itself. This may be the result of fudging the time and date on which the victim went missing, as also, the time and date on which the body of the victim was discovered resulting in the discovery of the occurrence itself. [para 12(g)] [234-G-H; 235-B-D]

(h) PW13, the Sub Inspector, who had commenced investigation of the crime, acknowledged about informal detention of accused at about 9 P.M. on 27.2.2003. But, in his statement as a witness, he had expressed that for the first time he had seen the accused only on 28.2.2003 at around 5:30 a.m. Whereafter, the accused-respondent was formally arrested at 6.40 a.m. The inconsistency between the statements made by the complainant (PW2) and his father (PW5) on the one hand, and by Sub-Inspector (PW13) on the other, discloses a serious contradiction with respect to the time of detention of the accused. The truth of the matter is that PW 13 did not make any note either in the station diary or in any other register; he did not take any informal complaint from the complainant, even though he had been apprised about the commission of the offence. It is therefore, clear that PW13, had left the police station without making an entry depicting the purpose of his departure. A police officer, investigating a crime of such a heinous nature should not commit such a lapse. All this further adds to the suspicion of the manner in which investigation of the matter was conducted. [para 12(h)] [235-E-H; 236-B-F]

(i) PW6 could identify the shirt worn by the accused-respondent, when he visited his "lari" for a very short period during rush hours for the purchase of a "dabeli", but he could not depose about the sort of shirt which the accused was wearing at the Police

Station where he remained with the accused for approximately four hours. It is, therefore, apparent that PW6 was deposing far in excess of what he remembered, and/or in excess of what was actually to his knowledge. He appears to be a tutored witness. This aspect of the matter also renders the testimony of PW6, suspicious. [para 12(i)] [236-G-H; 237-B and E-F]

(j) The investigating agency became aware from the disclosure statement of the accused tendered on 1.3.2003, that he had procured the weapon of offence by way of theft from the "lari" of PW6. In the ordinary course of investigation, it would have been imperative for the investigating agency to have immediately approached PW6, to record his statement, but his statement was recorded for the first time on 4.3.2003. No reason is forthcoming why his statement was not recorded either on 1.3.2003, or on the intervening dates before 4.3.2003. The inordinate delay by the investigating agency, in confirming the version of the accused, in respect of the weapon of the crime, renders the prosecution version suspicious. Such delay would not have taken place in the ordinary course of investigation. This fact too raises a doubt about the correctness of the prosecution version of the incident. [para 12(j)] [237-G-H; 238-B-D]

1.3. The prosecution case which mainly rests on the testimony of PW2, PW5 and PW6, is unreliable because of the glairing inconsistencies in their statements. The testimony of the investigating officer PW13 shows fudging and padding, making his deposition untrustworthy. In the absence of direct oral evidence, the prosecution case almost wholly rested on these witnesses. The evidence produced to prove the charges has been systematically shattered, thereby demolishing

the prosecution version. More than all that is the non-production of evidence which the prosecution has unjustifiably withheld, resulting in dashing all the State efforts to the ground. Therefore, the High Court through the impugned order, rightly considered it just and appropriate to grant the accused-respondent, the benefit of doubt. [para 12] [238-F-H; 239-A]

1.4. Having considered the totality of the facts and circumstances of the case, specially the glaring lapses committed in the investigation and prosecution of the case as also the inconsistencies in the evidence produced by the prosecution, this Court is of the considered view that judgment of acquittal passed by the High Court needs no interference. [para 14] [242-G-H; 243-A and F]

Ram Prasad & Ors. v. State of UP **(1974) 1 SCR 650;** *Takhaji Hiraji v. Thakore Kubersing Camansing & Ors.,* **(2001) 6 SCC 145;** *Laxman Naik v. State of Orissa,* **1994 (2) SCR 94 = (1994) 3 SCC 381,** *State of Maharashtra v. Suresh,* **1999 (5) Suppl. SCR 215 = (2000) 1 SCC 471,** *Amar Singh v. Balwinder Singh* **2003 (1) SCR 754 =2003 (2) SCC 518;** *State Government of NCT Delhi v. Sunil* **2000 (5) Suppl. SCR 144 = (2001) 1 SCC 652;** *Joseph v. State of Kerala,* **(2005) 5 SCC 197;** *State of UP v. Satish* **2005 (2) SCR 1132 = (2005) 3 SCC 114;** *Bishnu Prasad Sinha v State of Assam* **2007 (1) SCR 916 = (2007) 11 SCC 467;** *Aftab Ahmad Anasari v. State of Uttaranchal* **2010 (1) SCR 1027 = (2010) 2 SCC 583;** *Sambhu Das v. State of Assam* **2010 (11) SCR 493 = (2010) 10 SCC 374;** *Haresh Mohandas Rajput v. State of Maharashtra* **2011 (14) SCR 921 = (2011) 12 SCC 56;** *Rajendra Prahladrao Wasnik v. State of Maharashtra* **2012 (2) SCR 225 = (2012) 4 SCC 37 – cited.**

2.1. The investigating officials and the prosecutors involved in presenting the instant case, have miserably failed in discharging their duties. They have been

instrumental in denying to serve the cause of justice. The misery of the family of the victim has remained unredressed. At the same time, it is necessary not to overlook even the hardship suffered by the accused, first during the trial of the case, and then at the appellate stages. An innocent person does not deserve to suffer the turmoil of a long drawn litigation, spanning over a decade, or more. [para 15 and 17] [243-G; 245-B]

2.2. Just like it is the bounden duty of a court to serve the cause of justice to the victim, so also, it is the bounden duty of a court to ensure that an innocent person is not subjected to the rigours of criminal prosecution. The situation needs to be remedied. For the said purpose, adherence to a simple procedure could serve the objective. It is, therefore, directed that on the completion of the investigation in a criminal case, the prosecuting agency should apply its independent mind, and ensure that all shortcomings are rectified, if necessary by requiring further investigation. It should also be ensured, that the evidence gathered during investigation is truly and faithfully utilized, by confirming that all relevant witnesses and materials for proving the charges are conscientiously presented during the trial of a case. This would achieve two purposes – (1) only persons against whom there is sufficient evidence, will have to suffer the rigors of criminal prosecution; and (2) in most criminal prosecutions, the agencies concerned will be able to successfully establish the guilt of the accused. [para 18 and 19] [246-B-C and D-F]

2.3. Every acquittal should be understood as a failure of the justice delivery system, in serving the cause of justice. Likewise, every acquittal should ordinarily lead to the inference, that an innocent person was wrongfully prosecuted. It is therefore, essential that every State should put in place a procedural mechanism, which

would ensure that the cause of justice is served, and would simultaneously ensure the safeguard of interest of those who are innocent. It is, therefore, directed:

(i) The Home Department of every State shall examine all orders of acquittal and record reasons for the failure of each prosecution case. A standing committee of senior officers of the police and prosecution departments should be vested with this responsibility. The consideration at the hands of such committee should be utilized for crystalizing mistakes committed during investigation, and/or prosecution, or both. The Home Department of every State Government will incorporate in its existing training programmes for junior investigation/ prosecution officials course-content drawn in the light of the instant judgment. The same should also constitute course-content of refresher training programmes, for senior investigating/prosecuting officials. Judgments like the one in hand (depicting more than 10 glaring lapses in the investigation/ prosecution of the case), and similar other judgments, may also be added to the training programmes. [para 20] [246-G-H; 247-A-C]

(ii) On the culmination of a criminal case in acquittal, the investigating/prosecuting official(s) concerned responsible for such acquittal must necessarily be identified. A finding needs to be recorded in each case, whether the lapse was innocent or blameworthy. [para 21] [247-G-H]

(iii) The Home Department of every State Government shall formulate a procedure for taking action against all erring investigating/prosecuting officials/officers. All such erring officials/officers identified, as responsible for failure of a prosecution case, on

account of sheer negligence or because of culpable lapses, must suffer departmental action. All the Home Secretaries concerned shall ensure compliance. The records of consideration, in compliance with the direction, shall be maintained. [para 21-22] [248-C and E-F]

(iv) The Home Department of the State will identify the erring officers in the instant case, and will take appropriate departmental action against them, as may be considered appropriate, in accordance with law. [para 23] [248-F-G]

Case Law Reference:

(1974) 1 SCR 650	**cited**	**para 12**
(2001) 6 SCC 145	**cited**	**para 12**
1994 (2) SCR 94	**cited**	**para 12**
1999 (5) Suppl. SCR 215	**cited**	**para 12**
2003 (1) SCR 754	**cited**	**para 12**
2000 (5) Suppl. SCR 144	**cited**	**para 12**
(2005) 5 SCC 197	**cited**	**pa ra 12**
2005 (2) SCR 1132	**cited**	**para 12**
2007 (1) SCR 916	**cited**	**para 12**
2010 (1) SCR 1027	**cited**	**para 12**
2010 (11) SCR 493	**cited**	**para 12**
2011 (14) SCR 921	**cited**	**para 12**
2012 (2) SCR 225	**cited**	**para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1485 of 2008.

From the Judgment & Order dated 30.8.2005 of the High Court of Gujarat at Ahmedabad in Crl. Confirmation Case No. 7 of 2004 with Crl. Appeal No. 1549 of 2004.

Vibha Dutta Makhija, Archi Agnihotri, Hemantika Wahi for the Appellant.

Rishi Malhotra for the Respondent.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. A complaint was lodged at Navrangpura Police Station, Ahmedabad, alleging the kidnapping/abduction of a six year old girl child Gomi daughter of Keshabhai Mathabhai Solanki and Laliben on 27.2.2003 at around 6:00 p.m. by the accused Kishanbhai son of Velabhai Vanabhai Marwadi. It was alleged, that the accused had enticed Gomi with a "gola" (crushed ice, with sweet flavoured syrup), and thereupon had taken her to Jivi's field, where he raped her. He had murdered her by inflicting injuries on her head and other parts of the body with bricks. In order to steal the "jhanjris" (anklets) worn by her, he had chopped off her feet just above her ankles. The aforesaid complaint was lodged, after the body of the deceased Gomi was found from Jivi's field, at the instance of the accused Kishanbhai. On the receipt of the above complaint, the first information report came to be registered at Navrangpur Police Station, Ahmedabad.

2. The prosecution version which emerged consequent upon the completion of the investigation reveals, that the family of the deceased Gomi was distantly related to the family of the accused Kishanbhai. In this behalf it would be pertinent to mention that Baghabhai Naranbhai Solanki was a resident of Gulbai Tekra, in the Navrangpura area of Ahmedabad. He resided there, along with his family. For his livelihood, Baghabhai Naranbhai Solanki was running a shop in the name of Mahakali Pan Centre. The said shop was located near his

residence. Baghabhai Naranbhai Solanki was running the business of selling "pan and bidi" in his shop. Naranbhai Manabhai Solanki, father of Baghabhai Naranbhai Solanki used to live in the peon's quarters at Ambavadi in Ahmedabad. Modabhai Manabhai Solanki, uncle of Baghabhai Naranbhai Solanki, had expired. His son Devabhai's daughter Laliben, was married to Keshabhai Mathabhai Solanki. Keshabhai Mathabhai Solanki and Laliben were residing at Shabamukhiwas, Gulbai Tekra in Ahmedabad. Keshabhai Mathabhai Solanki and Laliben had two children, a daughter Gomi aged six years, and a son Himat aged three years. Laliben's sister-in-law (her husband's, elder brother's wife) Fuliben Valabhai was residing near the residence of Keshabhai Mathabhai Solanki and Laliben. Kishanbhai the accused, is the brother of Fuliben, and was residing with her. It is therefore, that the family of the deceased as also the accused, besides being distantly related, were acquainted with one another as they were residing close to one another.

3. Insofar as the occurrence is concerned, according to the prosecution, on 27.2.2003 Laliben, niece of Baghabhai, was confined to her residence, as she was expecting. At about 6:00 p.m. her daughter Gomi, then aged 6 years, had wandered out of her house. The accused Kishanbhai then aged 19 years, entice her by giving her a "gola". Having enticed her he had carried Gomi to Jivi's field. On the way to Jivi's field, he stole a knife with an 8 inch blade from Dineshbhai Karsanbhai Thakore PW6, a "dabeli" (bread/bun, with spiced potato filling) seller. Having taken Gomi to Jivi's field he had raped her. He had then killed her by causing injuries on her head and other parts of the body with bricks. In order to remove the "jhanjris" worn by her, he had amputated her legs with the knife stolen by him, from just above her ankles. He had then covered her body with his shirt, and had left Jivi's field. Kishanbhai the accused, then took the anklets stolen by him to Mahavir Jewellers, a shop owned by Premchand Shankerlal. He pledged the anklets at the above shop, for a sum of Rs.1,000/

-. The accused Kishanbhai was confronted by Baghabhai and others constituting the search party, whilst he was on his way back to his residence. Kishanbhai, despite stating that he had not taken her away, had informed those searching for Gomi, that she could be at Jivi's field. On the suggestion of Kishanbhai, the search party had gone to Jivi's farm, where they found the body of Gomi.

4. Based on the aforesaid fact situation, confirmed through the investigation carried on by the Police, a charge-sheet was framed against the accused Kishanbhai under Sections 363, 369, 376, 394, 302 and 201 of the Indian Penal Code, and Section 135(1) of the Bombay Police Act. The above charge-sheet was filed before the Metropolitan Magistrate, Ahmedabad. Since the offences involved could be tried only by a Court of Session, the Metropolitan Magistrate, committed the matter to the Court of Session. On 8.3.2004, the Sessions Court to which the matter came to be assigned, for trial, framed charges. Since the accused Kishanbhai denied his involvement in the matter, the court permitted the prosecution to lead evidence.

5. The prosecution examined 14 witnesses. The statement of the accused Kishanbhai was thereafter recorded under Section 313 of the Code of Criminal Procedure. In his above statement, the accused Kishanbhai denied his involvement. Even though an opportunity was afforded to Kishanbhai, he did not lead any evidence in his defence. After examining the evidence produced by the prosecution, the Trial Court vide its judgment dated 18.8.2004, arrived at the conclusion that prosecution had successfully proved its case beyond reasonable doubt. By a separate order dated 18.8.2004 the Trial Court sentenced Kishanbhai to death by hanging, subject to confirmation of the said sentence by the High Court of Gujarat at Ahmedabad (hereinafter referred to as the 'High Court') under Section 366 of the Code of Criminal Procedure.

6. In the above view of the matter, the proceedings

conducted by the Court of Session, were placed before the High Court at the behest of the State of Gujarat, as Confirmation Case No. 7 of 2004. Independently of the confirmation proceedings, the accused Kishanbhai, aggrieved by the judgment and order of sentence dated 18.8.2004, in Sessions Case No. 346 of 2003, filed Criminal Appeal No. 1549 of 2004 before the High Court.

7. The criminal appeal filed by the accused Kishanbhai was accepted by the High Court. Kishanbhai was acquitted by giving him the benefit of doubt. The Confirmation Case No. 7 of 2004 was turned down in view of the judgment of acquittal rendered by the High Court while allowing Criminal Appeal no. 1549 of 2004.

8. Dissatisfied with the order passed by the High Court, the State of Gujarat approached this Court by filing Petition for Special Leave to Appeal (Crl.) No. 599 of 2006. On 11.9.2008 leave to appeal was granted. Thereupon, the matter came to be registered as Criminal Appeal No. 1485 of 2008.

9. Before this Court, learned counsel for the appellant, in order to substantiate the guilt of the accused-respondent Kishanbhai, has tried to project that the prosecution was successful in demonstrating an unbroken chain of circumstances, clearly establishing the culpability of the accused. In fact, the endeavour at the hands of the learned counsel for the appellant was to project an unbroken chain of circumstances to establish the guilt of the accused. Despite the defects in investigation and the prosecution of the case, as also, the inconsistencies highlighted by the High Court in the evidence produced by the prosecution, learned counsel for the State expressed confidence, to establish the guilt of the accused-respondent. In this behalf, it is essential to record the various heads under which submissions were advanced at the hands of the learned counsel for the appellant-State. We shall, therefore, briefly summarise all the contentions, and while doing so, refer to the evidence brought to our notice by the learned

counsel for the appellant, to establish the guilt of the accused-respondent, Kishanbhai. The submissions advanced before us are accordingly being recorded hereunder :

(a) First and foremost, learned counsel for the appellant, in order to connect the accused with the crime under reference, extensively relied upon the evidence produced by the prosecution to show that the accused-respondent Kishanbhai was last seen with the victim. He was seen taking away the victim Gomi. For the above, reliance was placed on the statement of Naranbhai Manabhai Solanki PW5, who had deposed that he had seen the deceased Gomi with the accused-respondent Kishanbhai on 27.2.2003 at around 6:00 p.m. As per his deposition, he had seen Gomi eating a "gola" outside his (the witness's) residence. At the same juncture, he had also seen the accused-respondent Kishanbhai coming from the side of Polytechnic. Kishanbhai, according to the deposition of PW5, had approached Gomi. Thereafter, as per the statement of PW5, the accused had carried away Gomi towards the side of the Polytechnic. In his testimony, Naranbhai Manabhai Solanki PW5, had also stated, that at about 9:00 pm, when he had again seen the accused-respondent Kishanbhai coming from the road leading to the Gulbai Tekra Police Chowki, he was asked, by those who were searching for Gomi, about her whereabouts. The accused was also asked about the whereabouts of Gomi, by Naranbhai Manabhai Solanki PW5 and by the son of PW 5 i.e., by Bababhai Naranbhai Solanki PW2. To the aforesaid queries, according to Naranbhai Manabhai Solanki PW5, the accused-respondent Kishanbhai had stated, that she might be sitting in Jivi's field. In addition to the testimony of Naranbhai Manabhai Solanki PW5, reference was also made to the testimony of Dinesh Karshanbhai Thakore PW6. PW6, during his deposition, had asserted, that the accused-respondent Kishanbhai had come to his "lari" (handcart used by hawkers, to sell their products) for purchasing a "dabeli". It was pointed out by Dinesh Karshanbhai Thakore PW6, that he had noticed the accused

carrying a child aged about seven years, wearing a red frock. In his statement, he also affirmed that the accused-respondent Kishanbhai, had asked him for a knife but he had declined to give it to him. Thereupon, whilst leaving his "lari", Kishanbhai had stolen a knife from his "lari". It was also pointed out, that the knife recovered at the instance of the accused-respondent Kishanbhai, was identified by him as the one stolen from his "lari". According to the learned counsel for the appellant, the last seen evidence referred to above stands duly corroborated by the deposition of Bababhai Naranbhai Solanki PW2, not only in his deposition before the Trial Court, but also in the complaint filed by him at the first instance at Navrangpur Police Station, Ahmedabad, immediately after the recovery of the dead body of Gomi from Jivi's field.

(b) Learned counsel for the appellant also laid emphasis on the recovery of the weapon of offence, i.e., a blood stained knife, at the instance of none other than the accused-respondent Kishanbhai himself. In order to substantiate the instant aspect of the matter, learned counsel placed reliance on the testimony of Dinesh Karshanbhai Thakore PW6, who deposed that the accused had visited his "lari" on the evening of 27.2.2003 for the purchase of a "dabeli". The accused respondent, as noticed earlier, as per the statement of Dinesh Karshanbhai Thakore PW6, was carrying a small girl aged about 7 years. He also deposed, that the accused-respondent had asked him for his knife, but upon his refusal, had stolen the same from his "lari". Dinesh Karshanbhai Thakore PW6, had identified the knife which had been recovered at the instance of the accused, as the one stolen by the accused-respondent Kishanbhai from his "lari". Additionally it was submitted, that the accused had led the police to Jivi's field, from where he got recovered the murder weapon, i.e., the same knife which he had stolen from the "lari" of Dinesh Karshanbhai Thakore PW6. The above knife had a blade measuring eight inches, including a steel handle of four inches. At the time of recovery of the knife, the same had stains of blood. The above knife was recovered by the police on

1.3.2003, in the presence of an independent witness, namely, Rameshbhai Lakhabhai Bhati PW1, who in his deposition clearly narrated, that the knife in question was recovered from Jivi's field, from under some stones at the instance of the accused-respondent Kishanbhai.

(c) Learned counsel for the appellant, then referred to the medical evidence produced by the prosecution, so as to contend that the wounds inflicted on the person of Gomi, were with the murder weapon, i.e., the knife recovered at the instance of the accused-respondent Kishanbhai. For this, learned counsel placed reliance on the statement of Dr. Saumil Premchandbhai Merchant PW8, who had conducted the post-mortem examination of the deceased Gomi on 28.2.2003. In the post-mortem report, according to learned counsel, mention was made about several incised injuries which could have been inflicted with the knife stolen by the accused-respondent Kishanbhai. In this respect, reference was made to serial No.14 of the post-mortem notes (Exhibit 29) proved by Dr. Saumil Premchandbhai Merchant PW8, clearly indicating, that the injuries caused to the victim which have been referred to at serial No.7, could have been caused with the knife (muddamal Article No.19), i.e., the same knife, which had been recovered at the instance of the accused. Even in the inquest panchnama (Exhibit 14), it was recorded that both legs of the victim Gomi were mutated from just above the ankle with a sharp weapon, with the object of removing the anklets in the feet of the victim Gomi. This document, according to the learned counsel, also indicates the use of a knife in the occurrence under reference.

(d) It was also the submission of the learned counsel for the appellant, that at the time of recovery of the body of the victim from Jivi's field, the same was found to be covered with a shirt with stripes. It was submitted, that the aforesaid shirt was identified as the shirt worn by the accused-respondent Kishanbhai, when he was seen carrying away the victim Gomi, on 27.2.2003. In this behalf, reliance was placed by the learned

counsel for the appellant, on the testimony of Naranbhai Manabhai Solanki PW5. The above witnesses had identified the shirt as a white shirt with lines. To give credence to the testimony of Naranbhai Manabhai Solanki PW5, learned counsel also pointed out, that when the accused was found coming from the direction of the police station after the commission of the crime, he was seen wearing a black T-shirt. The statement of Naranbhai Manabhai Solanki PW5, was sought to be corroborated with the statement of Dinesh Karshanbhai Thakore PW6. The accused respondent is stated to have approached the "lari" of Dinesh Karshanbhai Thakore PW6 for purchasing a "dabeli", and at that juncture, the accused-respondent is stated to have been wearing a white lined shirt, and a green trouser. On the recovery of the shirt and trouser, they were marked as Mudammal Articles 8 and 14 respectively. Dinesh Karshanbhai Thakore PW6 had identified the shirt, as also, the trouser during the course of his deposition before the Trial Court. The green trouser worn by the accused-respondent was also identified by Bababhai Naranbhai Solanki PW2. Additionally, Bababhai Naranbhai Solanki PW2 deposed that a black colour T-shirt was worn by the accused-respondent when he was apprehended and brought to the police station. The above articles were also identified by Angha Lalabhai Marwadi PW12 and Naranbhai Lalbhai Desai PW13 who were the panch witnesses at the time of seizure of the abovementioned clothing.

(e) It was also the submission of the learned counsel for the appellant, that the report of the forensic science laboratory was sufficient to confirm, that the accused respondent was the one who was involved in the commission of the crime under reference. In this behalf, it was pointed out that the victim Gomi was shown to have blood group "B+ve". According to the report of the Forensic Science Laboratory, the bricks recovered from the place of occurrence (which had been used in causing injuries on the head and other body parts of the victim), the panties worn by the deceased victim Gomi, the white shirt

which was found on the body of the victim at the time of its recovery from Jivi's field, the T-shirt and the green trouser worn by the accused respondent Kishanbhai (at the time he was apprehended), and even the weapon of the crime, namely, the knife recovered at the instance of the accused-respondent, were all found with blood stains. The forensic report reveals that the blood stains on all the above articles were of blood group "B+ve". It was, therefore, the submission of the learned counsel for the appellant, that the accused-respondent was unmistakably shown to be connected with the crime under reference.

(f) In order to substantiate the motive of the accused-respondent, learned counsel for the appellant relied upon the statement of the investigating officer Ranchhodji Bhojrajji Chauhan PW14, who had stated in his deposition that the owner of Mahavir Jewellers, i.e., Premchand Shankarlal Mehta had presented himself at the police station. The abovementioned jeweler is stated to have informed the police, that the accused respondent Kishanbhai had pawned the anklets belonging to the victim Gomi with him for a sum of Rs.1,000/-. Insofar as the identification of the anklets is concerned, reference was made to the statement of Keshobhai Madanbhai Solanki PW7, i.e., father of the victim who had identified the anklets marked as Muddamal Article No.18, as belonging to his daughter Gomi, which she was wearing when she had gone missing. Reference was also made to the statement of Jagdishbhai Bhagabhai Marwadi PW11, as also, the panchnama of recovery of the silver anklets which also, according to learned counsel, connects the accused to the crime.

(g) Last but not the least, learned counsel for the appellant invited this Court's attention to the statement tendered by the accused under Section 313 of the Code of Criminal Procedure. During the course of his above testimony, he was confronted with the evidence of the relevant witnesses depicting, that the

victim Gomi was last seen in his company at 6:00 p.m. on 27.2.2003. He was also confronted with the fact, that he himself had informed the search party, that Gomi may be found at Jivi's field. It is submitted, that the accused-respondent Kishanbhai, who had special knowledge about the whereabouts of the deceased, was bound to explain and prove when and where he had parted from the company of the victim Gomi. It was submitted that during the course of his deposition under Section 313 of the Code of Criminal Procedure, the accused could not tender any satisfactory explanation.

Based on the above evidence, it was the submission of the learned counsel for the appellant, that even in the absence of any eye witness account, the prosecution should be held to have been successful in establishing the guilt of the accused-respondent Kishanbhai through circumstantial evidence. The claim of circumstantial evidence emerging from different witnesses summarized above, according to the learned counsel, leads to one and only one conclusion, namely, that the accused-respondent Kishanbhai alone had committed the criminal acts under reference. It was submitted, that the chain of circumstantial evidence, was sufficient to establish, that none other than the accused-respondent could have committed the alleged criminal actions. It was also contended, that no link in the chain of circumstantial evidence was missing, so as to render any ambiguity in the matter.

10. We have heard the learned counsels for the parties. To determine the controversy arising out of the instant criminal appeal, we shall first endeavour to summarise the conclusions drawn by the High Court under different heads. We have decided to adopt the above procedure to understand the implications of various aspects of the evidence produced by the prosecution before the Trial Court. This procedure has been adopted by us (even though the same was neither adopted by the Trial Court, or by the High Court) so as to effectively understand, and thereupon, to adequately deal with the

contentions advanced at the hands of the appellant, before this Court.

11. We would first of all, like to deal with the lapses committed by the investigating and prosecuting agencies in the process of establishing the guilt of the accused before the Trial Court. It will be relevant to mention that all these lacunae/ deficiencies, during the course of investigation and prosecution, were pointed out by the High Court, in the impugned judgment. These constitute relevant aspects, which are liable to be taken into consideration while examining the evidence relied upon by the prosecution. We have summarised the aforesaid lapses, pointedly to enable us to correctly deal with the submissions advanced at the behest of the State. Since the guilt of the accused in the instant case is to be based on circumstantial evidence, it is essential for us to determine whether or not a complete chain of events stand established from the evidence produced by the prosecution. The above deficiencies and shortcomings are being summarised below:

(a) According to the prosecution story after having removed the anklets from Gomi's feet, the accused Kishanbai had taken the anklets to Mahavir Jewellers, a shop owned by Premchand Shankerlal. He pledged aforesaid anklets with Premchand Shankerlal, for a sum of Rs. 1,000/-. The anklets under reference, were handed over by Premchand Shankerlal to the investing officer on 1.3.2003, in the presence of two panch witnesses. According to the prosecution case, the jeweller had gone to the police station with the anklets on his own, after having read newspaper reports to the effect, that a girl had been raped and murdered and her anklets had been taken away. He had approached the police station under the suspicion, that the anklets pledged with him, might have belonged to the girl mentioned in the newspaper reports. One of the panch witnesses, namely, Jagdishbhai Marwari PW15 had deposed, that above Premchand Shankerlal had identified the accused Kishanbhai, as the very person who had pledged

the anklets with him. In this behalf it is relevant to mention, that Premchand Shankerlal was not produced as a prosecution witness. It is important to notice, that the anklets handed over to the Police, were successfully established by the prosecution as the ones worn by the deceased Gomi. The lapse of the prosecution on account of not producing Premchand Shankerlal as prosecution witness, according to the High Court, resulted in a missing link in the chain of events which would have established the link of the accused Kishanbhai, with the anklets, and thereby convulsively connecting him with the crime.

(b) The prosecution story further discloses, that Premchand Shankerlal the owner of Mahavir Jewellers, had executed a receipt with the accused Kishanbhai, depicting the pledging of the anklets for a sum of Rs.1,000/-. The aforesaid receipt was placed on record of the Trial Court as exhibit 52. The above receipt according to Premchand Shankerlal, was thumb marked by the accused Kishanbhai. Even though the receipt indicates the name of the person who had pledged the anklets as Rajubhai, the same could clearly be a false name given by the person who pledged the anklets. Certainly, there could be no mistake in the identity of the thumb mark affixed on the said receipt. The prosecution could have easily established the identity of the pledger, by comparing the thumb impression on the receipt (exhibit 52), with the thumb impression of the accused-respondent Kishanbhai. This was however not done. The lapse committed by the prosecution in not producing Premchand Shankerlal as a witness, could have easily been overcome by proving the identity of the person who had pledged the anklets, by identifying the thumb impression on the receipt (exhibit 52), in accordance with law. In case the thumb impression turned out to be that of the accused Kishanbhai, he would be unmistakably linked with the crime. In case it was found not to be the thumb impression of the accused Kishanbhai, his innocence could also have been inferred. According to the High Court this important lapse in proving the

prosecution case before the Trial Court, had resulted in a major obstacle in establishing the guilt/innocence of the accused.

(c) It is also the case of the prosecution, that when the accused Kishanbhai was apprehended, a sum of Rs.940/- was recovered from his possession. According to the prosecution story the accused Kishanbhai had pledged the anklets at Mahavir Jewellers with Premchand Shankerlal for a sum of Rs. 1,000/-. In order to link the money recovered from his possession at the time of his detention, it was imperative for the prosecution to establish how and why a sum of Rs.940/- only, was recovered from the possession of the accused Kishanbhai. He ought to have been in possession of at least Rs.1,000/- i.e., the amount given to him by Premchand Shankerlal when he pledged the anklets at his shop, even if it is assumed that he had no money with him when he had pawned the anklets. This important link having not been established by the prosecution, breaks the chain of events necessary to establish the guilt of the accused Kishanbhai, and constitutes a serious lapse in the prosecution evidence.

(d) It is apparent from the prosecution story, that the victim Gomi was raped. In establishing the factum of the rape the prosecution had relied upon the note prepared at the time of conducting the post-mortem examination of the deceased Gomi. The same inter alia reveals, that dry blood was present over the labia, and deep laceration of subcutaneous tissues was present on the left margin of the vaginal opening, just above the posterior commission. The hymen was also found ruptured at 3 and 6,O' clock. It is therefore, that the accused was deputed for being subjected to medical examination, during the course of investigation. For the above purpose he was examined by Dr. P.D. Shah. In fact Dr. P.D. Shah was a cited witness before the Trial Court. Despite the above Dr. P.D. Shah was not examined as a prosecution witness. Clearly a vital link in a chain of events, to establish the rape of the victim Gomi came to be broken consequent upon by the non-examination of Dr. P.D. Shah as a prosecution witness.

(e) The High Court has also noticed, that even the report/certificate given by the medical officer relating to the medical examination of the accused Kishanbhai was not produced by the prosecution before the Trial Court. It is apparent, that the lapse in not producing Dr. P.D. Shah as a prosecution witness, may have been overcome if the report prepared by him (after examining the accused Kishanbhai) was placed on the record of the Trial Court, after being proved in accordance with law. The action of prosecution in not producing the aforesaid report before the Trial Court, was another serious lapse in proving the case before the Trial Court. This had also resulted a missing vital link, in the chain of events which could have established, whether or not accused Kishanbhai had committed rape on victim Gomi.

(f) The High Court having noticed the injuries suffered by Gomi, a six year old girl child on her genitals, had expressed the view, that the same would have resulted in reciprocal injuries to the male organ of the person who had committed rape on her. It was pointed out, that if the accused Kishanbhai had been sent for medical examination the testimony or the report of the medical officer would have revealed the presence of smegma around the corona-glandis, which would have either established innocence or guilt of the accused, specially if the accused had been medically examined within 24 hours. In the instant case the sequence of the events reveal, that the occurrence had been committed between 6:00 p.m. to 8:00 p.m. on 27.2.2003. At the time of recovery of the body of deceased Gomi from Jivi's field, at about 9:00 pm, it came to be believed that she had been subjected to rape. The accused Kishanbhai was shown to have been formerly arrested at 6:40 a.m. on 28.2.2003 (even if the inference drawn by the High Court, that the accused Kishanbhai was in police custody since 9:00 p.m. on 27.2.2003 itself, is ignored). The accused could have been medically examined within a period of 24 hours of the occurrence. The prosecution case does not show whether or not such action was taken. This lapse in the investigation of the case, had also

resulted the omission of a vital link in the chain of events which would have unquestionably established the guilt of the accused Kishanbhai of having committed rape (or possibly his innocence).

(g) It needs to be noticed, that when the accused Kishanbhai was arrested, there were several injuries on his person. The said injuries were also depicted in his arrest panchnama. At 7:15 am on 28.2.2003, the accused Kishanbhai filed a first information report alleging, that he was beaten by some of the relatives of the victim Gomi, as also, by some unknown persons accompanying the search party, under the suspicion/belief, that he was responsible for the occurrence. In the above first information report, the accused Kishanbhai had also depicted the nature of injuries suffered by him. The statement of the investigating officer Ranchodji Bhojrajji Chauhan PW14 reveals, that the accused Kishanbhai had been sent to Civil Hospital, Ahmedabad, for his medical examination. Neither the doctor who had examined the accused was produced as a prosecution witness, nor the report/certificate given by the medical officer disclosing the details of his observations/findings was placed on record. This evidence was vital for the success of the prosecution case. According to the High Court, blood of group "B +ve" was found on the clothes of the accused Kishanbhai. The important question to be determined thereupon was, whether it was his own blood or blood of the victim Gomi. The statement of the medical officer who had examined the accused Kishabhai, when he was sent for medical examination to Civil Hospital, Ahmedabad, would have disclose whether or not accused Kishanbhai had any bleeding injuries. The importance of nature of the injuries suffered by the accused Kishanbhai emerges from the fact, that both the accused Kishanbhai and the victim Gomi had the same blood group "B +ve". An inference could have only been drawn that the blood on his clothes was that of the victim, in case it was established that the accused-respondent Kishanbhai had not suffered any bleeding injuries, and

therefore, the possibility of his own blood being on his clothes was ruled out. This important link in the chain of events is also missing from the evidence produced by the prosecution, and constitutes a serious lapse in the investigation/prosecution of the case.

In view of the above factual position, the High Court made the following observations "Looking to the advancement in the field of medical science, the investigating agency should not have stopped at this stage. Though ABO system of blood grouping is one of the most important system, which is being normally used for distinguishing blood of different persons, there are about 19 genetically determined blood grouping systems known to the present day science, and it is also known that there are about 200 different blood groups, which have been identified by the modern scientific methods (Source: Mc-Graw-Hill Encyclopedia of Science and Technology, Vol.2). Had such an effort been made by the prosecution, the outcome of the said effort would have helped a lot to the trial Court in ascertaining whether the accused had in fact visited the scene of offence." This also constitutes a glaring lapse in the investigation of the crime under reference.

There has now been a great advancement in scientific investigation on the instant aspect of the matter. The investigating agency ought to have sought DNA profiling of the blood samples, which would have given a clear picture whether or not the blood of the victim Gomi was, in fact on the clothes of the accused-respondent Kishanbhai. This scientific investigation would have unquestionably determined whether or not the accused-respondent was linked with the crime. Additionally, DNA profiling of the blood found on the knife used in the commission of the crime (which the accused-respondent, Kishanbhai had allegedly stolen from Dinesh Karshanbhai Thakore PW6), would have uncontrovertibly determined, whether or not the said knife had been used for severing the legs of the victim Gomi, to remove her anklets. In spite of so

much advancement in the field of forensic science, the investigating agency seriously erred in carrying out an effective investigation to genuinely determine the culpability of the accused-respondent Kishanbhai.

(h) It is also apparent from the complaint submitted by Bababhai Naranbhai Solanki PW 2, that he had been informed by one Kalabhai Ganeshbhai, that he had seen the accused Kishanbhai taking away Gomi. In such an event, the proof of the fact of the accused-respondent having abducted Gomi could have only been substantiated, through the statement of Kalabhai Ganeshbhai who had allegedly actually seen the accused Kishanbhai taking her away. According to the High Court, for the reasons best known to it, the prosecution did not produce Kalabhai Ganeshbhai as a witness. Even though according to the High Court the above-mentioned Kalabhai Ganeshbhai was a resident in one of the peon quarters, and was also a government servant, the absence of the evidence of the above factual position, results in a deficiency in the confirmation of a factual position of substantial importance, from the chain of events necessary for establishing the last seen evidence.

(i) It is also apparent, that there is no dispute about the recovery of a green blood stained "dupatta", from the person of the victim. The green blood stained "dupatta" (veil) was found by the medical officer while conducting the post-mortem examination on Gomi. The existence of the green "dupatta" was also duly mentioned in the post-mortem report. According to the High Court, none of the prosecution witnesses had referred to the factum of the victim having worn a green "dupatta". According to the prosecution evidence, the deceased was wearing a red frock and panties, whereas, the accused was wearing a full sleeve white shirt and green trousers. According to the High Court, if neither the victim nor the accused had a green "dupatta", a question would arise, as to how the green blood stained "dupatta" was found on the dead body of the

victim. Even leading to the inference of the presence of a third party at the time of occurrence. The above omission in not explaining the presence of the green "dupatta", has also been taken by the High Court, as a glaring omission at the hands of the prosecution in the process of investigation/prosecution of the charges levelled against the accused Kishanbhai.

(j) While deposing before the Trial Court, Dinesh Karshanbhai Thakore PW6, affirmed that the accused-respondent Kishanbhai had approached his "lari" for the first time to purchase a "dabeli" on 27.2.2003. It is, therefore, apparent that Dinesh Karshanbhai Thakore PW6 had not known the accused-respondent before 27.2.2003. In the above view of the matter, it was imperative for the investigating agency to hold a test identification parade in order to determine whether Dinesh Karshanbhai Thakore PW6, had correctly identified the accused-respondent, as the person who had come to his "lari" to purchase a "dabeli" on 27.2.2003. And also whether he was the same person, who had stolen a knife from his "lari" on 27.2.2003. This is also a serious deficiency in the investigation/ prosecution of the case.

(k) Bababhai Naranbhai Solanki PW2, the complainant in the present case, during the course of his examination-in-chief, observed as under :

> "This incident was occurred on 27/2/2003, on that day Lilaben came to my house for pregnancy. On the day of the incident at 6.00 o clock in the evening I came to know that Gomiben the daughter of Lilaben is not found. Therefore, all our relatives have started searching her. We went to the quarter of my father, and inquired about the Gomiben, my father told that I saw Gomiben with Lalis Sister in law brother Kisan, he gave ice cream to Gomi. Therefore, we have searched in the quarters and other places. At around 8.00 o clock in the night kishan was coming from police Station, we have started asking him, at that time along with me Shri Jagabhai Molabhai,

Mohanbhai Molabhai, Hirabhai were present. This police Chawky means Gulbai Tekra Police Chawky. He told me that I have left her at Jivivala Field. Therefore, we went at the Jivivala Field, at around 8.00 or 9.00 o clock, we went there and we found Gomiben in dead conditions, she had a several injuries on her head and other parts of the body. She was being raped."

From the above statement, it is apparent that Gomi was found missing for the first time at 6:00 pm. The search for her began immediately thereafter. The search party met the accused-respondent Kishanbhai coming from the side of the police station at 8:00 p.m. All the prosecution witnesses have been equivocal about the fact that Gomi went missing at about 6:00 p.m., i.e., the time when she was last seen in the company of the accused-respondent Kishanbhai, and thereafter, the search party met Kishanbhai at 8:00 pm. In order to give credence to the prosecution version, it was imperative to establish that it was possible for the accused-respondent Kishanbhai, after having taken Gomi at 6:00 p.m., to have stopped at the "lari" of Dinesh Karshanbhai Thakore PW6, purchased a "dabeli" from him. Thereupon, to have had time to steal his knife, the accused-respondent proceeded on with Gomi to Jivi's field. There ought to have been enough time for him thereafter to have raped her, then assaulted her with bricks on her head and other parts of the body leading to her death, and finally to cut her legs just above her ankles, to remove her anklets. He should thereupon have also had time to hide the knife used in the commission of the crime, under the stones. And thereafter further time, to have taken the anklets to Mahavir Jewellers so as to pawn the same with Premchand Shankarlal Mehta, as also, time to execute a receipt in token thereof. Over and above the above, he ought have had time, to visit his residence so as to able to wear a fresh shirt i.e., the shirt which he was wearing when he was detained. After all that, he should have had time to cover the area from Jivi's field to Premchand Shankarlal Mehta's shop and further on from the above shop

to his residence and finally from his residence till the place where he was detained. It is difficult to appreciate how all the activities depicted in the prosecution story, could have been carried out from 6:00 p.m. on 27.2.2003 to 8:00 p.m. on the same day, i.e., all in all within a period of two hours. It is in the above context that the cross-examination of Naranbhai Manabhai Solanki PW5, assume significance. Relevant extract from his cross-examination is being reproduced hereunder :

"It is true that the accused was coming from police Chawky at around 8.00 or 8.30 p.m. as I was not wearing the watch I cannot say the exact time. It is true that it takes 15 to 20 minutes to go to Panjrapole from my quarters, and it will take 30 to 35 minutes to go to the field of JIVI. It is true that it will taken half an hour to come to the Office of BSNL through Jivi's Field and C.N. Vidhayalaya. It is true that from the Jivis field towards Panjrapole and through Panjrapole main road towards BSNL office, by walking it will take 40 minutes. It is true that both the roads are public roads, and many people are passing through this road."

(emphasis is ours)

Whether or not the above sequence of events could have taken place in the time referred to above, would have been easily overcome if the prosecution had placed on record a sketch map providing details with regard to the distance between different places. In that event, it would have become possible to determine whether the activities at different places, projected through the prosecution version of the incident were possible. In the absence of any knowledge about the distance between the residence of the victim Gomi as well as that of the accused from the Polytechnic or from Jivi's field; it would be impossible to ascertain the questions which emerge from the cross-examination of Naranbhai Manabhai Solanki PW5. Had a sketch map been prepared or details with regard to the distance been given, the courts concerned would have been able to determine all that was alleged in the prosecution version

of the incident. This deficiency in the prosecution evidence, must be construed as a serious infirmity in the matter.

12. We would now like to deal with the discrepancies found in the evidence produced by the prosecution before the Trial Court. We would also simultaneously summarise the effect of defences adopted on behalf of the accused-respondent Kishanbhai. These aspects of the matter are also being summerised hereunder, so as to enable us to effectively deal with the submissions advanced at the behest of the State. These aspects of the matter are liable to be taken into consideration, to determine whether or not, a complete chain of events stands proved to establish the guilt of the accused-respondent. The above considerations are summarized hereunder:

(a) The post mortem report relied upon by the prosecution leaves no room for any doubt that injuries on the genitals of Gomi were post mortem in nature. The question which arises for consideration is whether the injuries under reference had been inflicted on the victim first, and thereupon, rape was committed on the victim. It is natural to assume, that the first act of aggression by the person who had committed assault on Gomi, was by inflicting injuries on her head and other parts of the body, only thereafter the legs just above the ankles, would have been cut (with the object of removing her anklets). It is not possible for us to contemplate that the legs of the deceased were cut whilst she was in her senses, is incomprehensible and therefore, most unlikely. Now, the question to be considered is, whether it was humanly possible for even the most perverted person, to have committed rape on a child, who had been killed by causing injuries on head and other parts of body, and after her feet had been severed from her legs. We would have no hesitation by responding in the negative. The prosecution in the instant case apparently projected a version including an act of rape, which is

impossible to accept on the touchstone of logic and common sense.

(b) The evidence produced by the prosecution also reveals, that pubic hair of the accused-respondent Kishanbhai, had been examined by the scientific officer of the Forensic Science Laboratory. The report submitted by the Forensic Science Laboratory (Exhibit 48) reveals, that there was neither any semen nor any blood on the pubic hair of the accused. Reference to the possibility of there being blood on the public hair of the accused-respondent Kishanbhai emerges from the fact, that the post mortem report of the deceased revealed, that there was blood on the vagina of the deceased. Whilst accusing the respondent-Kishanbhai of the offence under Section 376 of the Indian Penal Code, it was imperative for the prosecution to have kept in its mind the aforesaid aspects of the matter. Absence of semen or blood from the pubic hair of the accused-respondent, would prima facie exculpate him from the offence of rape.

(c) According to the testimony of the complainant Bababhai Naranbhai Solanki PW2, the accused-respondent Kishanbhai was wearing a white shirt at the time of occurrence. It is, therefore, when a white shirt was found covering the dead body of the victim Gomi, he had identified the same as the shirt which the accused-respondent Kishanbhai was wearing, before the offence was committed. From the prosecution story, as it emerged from the statements of different witnesses, it is apparent that Bababhai Naranbhai Solanki PW2, had had no occasion to have seen the accused-respondent Kishanbhai, wearing the said white shirt. When Bababhai Naranbhai Solanki PW2, was questioned as to how he knew that the accused-respondent was wearing a white shirt, when he first saw the shirt covering the dead body of the victim, his response was, that he had been told about that by his father Naranbhai Manabhai Solanki PW5. In the above view of the matter, the question arises whether the testimony of Bababhai, Naranbhai

Solanki PW2 about the shirt referred to above was truthful. And whether his testimony can be described as fair and honest.

(d) Additionally when the accused–respondent Kishanbhai was arrested, the T-shirt worn by him, was taken from him by recording a panchnama. The said T-shirt is available on the record of the Trial Court as Exhibit-39. It is not a matter of dispute that the T-shirt (Exhibit 39), worn by the accused-respondent, Kishanbhai at the time of his arrest, is actually a white T-shirt with a trident design on it. But, as per the narration recorded by Bababhai Naranbhai PW2, contained in the complaint which constituted the basis of registering the first information, it is mentioned that the accused-respondent Kishanbhai was wearing a black T-shirt at the time of his detention. It is apparent from the factual position noticed hereinabove, that the factual position expressed by the complainant Bababhai Naranbhai Solanki PW2 was absolutely incorrect, and contrary to the factual position. In the above view of the matter, a question would arise, whether the deposition of Bababhai Naranbhai Solanki PW2 was fair and honest.

(e) According to the prosecution version of the incident, the search party met the accused-respondent Kishanbhai at about 8:00 p.m. The said party had thereupon proceeded to Jivi's field, from where the dead body of the victim was recovered. According to Naranbhai Manabhai Solanki PW5, after finding the dead body, he had proceeded to the police station. At the police station, he had requested the police personnel to visit the site of occurrence. Simultaneously, Naranbhai Manabhai Solanki PW5 had stated, that when enquiries were being made from Kishanbhai, police personnel had taken away the accused-respondent. According to the testimony of Naranbhai Manabhai Solanki PW5, therefore, at the most, the accused-respondent must be deemed to have been taken into police custody from about 9:00 p.m. on 27.2.2003. It is apparent, that the occurrence had come to the knowledge of a large number of persons constituting the search

party, when the victim's body was found on Jivi's field. Even before that, the accused-respondent was already in police custody. As if, the police had already concluded on the guilt of Kishanbhai, even before the recovery of Gomi's body from Jivi's farm. Despite the above, the arrest of the accused-respondent Kishanbhai was shown at 6.40 a.m. on 28.3.2003. The detention of the accused-respondent Kishanbhai from 9:00 pm on 27.2.2003 to 6.40 a.m. on 28.2.2003, shows that the prosecution has not presented the case in the manner the events unfolded to the investigating agencies.

(f) It also needs to be noticed, that the inquest panchnama besides mentioning the amputation of the legs of the victim above her ankles, also records, that the silver anklets worn by Gomi were missing. In this behalf, it would also be relevant to mention, that even though the inquest panchnama was drawn at 0030 a.m. on 28.2.2003, the complaint resulting in the registration of the first information report was lodged by Bababhai Naranbhai Solanki PW2 at 3:05 a.m. on 28.02.2003. It is strange, that the inquest panchnama should be drawn before the registration of the first information report. It is also strange as to how, while drawing the inquest panchnama, the panchas of the same could have recorded, that after amputation of the victim's legs, her silver anklets had been taken away by the offender. There was no occasion for the panchas to have known, that Gomi used to wear silver anklets. Accordingly, there was no occasion for them to have recorded that the silver anklets usually worn by Gomi had been taken away by the offender.

(g) From the prosecution version (emerging from the evidence recorded before the Trial Court), it is apparent, that the search party, as also, the relatives of the victim were aware at about 8:00 p.m. on 27.2.2003 that Gomi had been murdered, with a possibility of her having been raped also, and her silver anklets had been stolen. Despite the above, no complaint whatsoever came to be filed in connection with the above

occurrence at the police station on 27.2.2003, despite the close coordination between the search party and the police from 8:00 pm onwards no 27.2.2003 itself. The complaint leading to the filing of the first information was made at about 3:05 a.m. on 28.2.2003. Not only is the delay of seven hours in the registration of the complaint ununderstandable, but the same is also rendered extremely suspicious, on the account of the fact that the accused-respondent Kishanbhai is acknowledged to be in police detention since 9:00 p.m. on 27.2.2003 itself. This may be the result of fudging the time and date at which the victim Gomi went missing, as also, the time and date on which the body of the victim was discovered resulting in the discovery of the occurrence itself. The question which arises for consideration is, whether the investigation agency adopted the usual practice of padding so as to depict the occurrence in a manner different from the actual occurrence. A question also arises as to why it was necessary for the investigating agency to adopt the above practice, despite the fact that it was depicted as an open and shut case.

(h) As noticed above, that from the statements of Bababhai Naranbhai Solanki PW2 and Naranbhai Manabhai Solanki PW5, it is apparent that the accused was detained by the police informally around 9:00 p.m. on 27.2.2003. It is also essential to notice, that an acknowledgement was made to the above effect even by Sub Inspector Naranbhai Lalbhai Desai PW13, who had commenced investigation of the crime under reference. It is apparent that when Bababhai Naranbhai Solanki PW2, had contacted him with details about the offence under reference, he had not recorded any entry in the station diary before leaving the police station. This constitutes a serious lapse in itself. In his cross-examination, he had affirmed that he was taken by Bababhai Naranbhai Solanki PW2, i.e., the complainant to the scene of occurrence. Having gone to the scene of occurrence, and having made on the spot investigation, he acknowledged having returned to the police station. In his statement, he accepted, that when he had returned to the police

station after visiting the site of occurrence, the accused-respondent Kishanbhai was already present at the police station. When questioned, he could not tender any explanation, as to how the accused-respondent Kishanbhai had come to the police station. In his statement as a witness, he had expressed, that for the first time he had seen the accused-respondent Kishanbhai only on 28.2.2003 at around 5:30 a.m. Whereafter, the accused-respondent was formally arrested at 6.40 a.m. The inconsistency between the statements made by the complainant (Bababhai Naranbhai Solanki PW2) and his father (Naranbhai Manabhai Solanki PW5) on the one hand, and by Sub-Inspector Naranbhai Lalbhai Desai PW13 on the other, discloses a serious contradiction with respect to the time of the detention of the accused-respondent Kishanbhai. It needs to be noticed, that it was an aberration for Naranbhai Lalbhai Desai PW13, to have left the police station without making an entry in the station diary. Why should a police officer, investigating a crime of such a heinous nature, commit such a lapse? The fact that he did so, is not a matter of dispute. The truth of the matter is, that Naranbhai Lalbhai Desai PW13, did not make any note either in the station diary or in any other register; he did not take any informal complaint from the complainant, even though he had been apprised about the commission of an offence. It is therefore clear that Naranbhai Lalbhai Desai PW13, had left the police station without making an entry depicting the purpose of his departure. All this further adds to the suspicion of the manner in which investigation of the matter was conducted.

(i) So far as the statement of Dinesh Karshanbhai Thakore PW6 is concerned, he had supported the prosecution story by deposing, that the accused had visited his “lari” with a small child, about seven years old. He had further asserted, that the accused-respondent Kishanbhai had purchased a “dabeli” from him. He had also testified that the accused –respondent had asked for a knife but he had refused to give it to him because, at the time when the accused-respondent had visited the “lari”, there were several customers waiting for purchasing “dabelis”.

He further confirmed, that the accused-respondent had stolen a knife, used by him for cutting vegetables from his "lari". Another important aspect of the matter, out of the statement of Dinesh Karshanbhai Thakore PW6 is, that he identified the shirt that the accused-respondent Kishanbhai was wearing, at the time when he had visited his "lari" for purchasing a "dabeli" on 27.2.2003. He had also identified the red frock which the victim was wearing at the said juncture. Additionally, he identified the knife which the accused-respondent Kishanbhai had stolen from his "lari". The statement of Dinesh Karshanbhai Thakore PW6 was considered to be untrustworthy by the High Court, primarily for the reason that he could identify the shirt worn by the accused-respondent, Kishanbhai when he had approached his "lari" for the purchase of a "dabeli", at which juncture, the accused-respondent Kishanbhai may have remained at the "lari" at the most for 10 to 15 minutes, when there was a rush of customers. As against the above, he had remained with the accused-respondent Kishanbhai at Navrangpur Police Station, Ahmedabad, for approximately four hours. During the course of his cross-examination, he could not depose about the sort of shirt which the accused respondent was wearing, at the Navrangpur Police Station, Ahmedabad. It is, therefore, apparent that Dinesh Karshanbhai Thakore PW6 was deposing far in excess of what he remembered, and/or in excess of what was actually to his knowledge. He appears to be a tutored witness. This aspect of the matter also renders the testimony of Dinesh Karshanbhai Thakore PW6, suspicious.

(j) There is yet another aspect of the controversy relating to Dinesh Karshanbhai Thakore PW6. The investigating agency became aware from the disclosure statement of the accused-respondent Kishanbhai tendered on 1.3.2003, that he had procured the weapon of offence by way of theft from the "lari" of Dinesh Karshanbhai Thakore PW6. The above knife was recovered at the instance of the accused-respondent Kishanbhai on 1.3.2003, in the presence of panch witnesses. In the above view of the matter, in the ordinary course of

investigation, it would have been imperative for the investigating agency to have immediately approached Dinesh Karshanbhai Thakore PW6, to record his statement. His statement was extremely important for the simple reason, that it would have connected the accused with the weapon with which the crime had been committed, as also with the victim. Despite the above, the investigating agency recorded the statement of Dinesh Karshanbhai Thakore PW6, for the first time on 4.3.2003. No reason is forthcoming why his statement was not recorded either on 1.3.2003, or on the intervening dates before 4.3.2003. The inordinate delay by the investigating agency, in confirming the version of the accused-respondent, in respect of the weapon of the crime, renders the prosecution version suspicious. Such delay would not have taken place in the ordinary course of investigation. If there were good reasons for the delay, they ought to have been made known to the Trial Court by way of reliable evidence. This fact too raises a doubt about the correctness of the prosecution version of the incident.

The above discrepancies in the prosecution version, were duly noticed by the High Court. These constitute some of the glaring instances recorded in the impugned order. Other instances of contradiction were also noticed in the impugned order. It is not necessary for us to record all of them, since the above instances themselves are sufficient to draw some vitally important inferences. Some of the inferences drawn from the above, are being noticed below. The prosecution's case which mainly rests on the testimony of Bababhai Naranbhai Solanki PW2, Naranbhai Manabhai Solanki PW5 and Dinesh Karshanbhai Thakore PW6, is unreliable because of the glairing inconsistencies in their statements. The testimony of the investigating officer Naranbhai Lalbhai Desai PW13 shows fudging and padding, making his deposition untrustworthy. In the absence of direct oral evidence, the prosecution case almost wholly rested on the above mentioned witnesses. It is for the above reasons, that the High Court through the

impugned order, considered it just and appropriate to grant the accused-respondent Kishanbhai, the benefit of doubt.

13. Learned counsel for the appellant, in order to support the submissions advanced before this Court in the present criminal appeal (which have been recorded in paragraph 9 hereinabove), with judicial precedent, placed reliance on a number of judgments rendered by this Court. We shall now summarise hereunder, the judgment relied upon, as also, the submissions of the learned counsel on the basis thereof:

(a) Referring to the judgment rendered by this Court in *Ram Prasad & Ors. v. State of UP,* (1974) 1 SCR 650, it was asserted at the hands of the learned counsel for the appellant, that non-examination of some of the eye-witnesses would not introduce a fatal infirmity to the prosecution case, specially when conviction could be based on evidence produced by the prosecution.

(b) Reference was also made to *Takhaji Hiraji v. Thakore Kubersing Camansing & Ors.,* (2001) 6 SCC 145, and it was pointed out, that this Court has ruled that in cases where witnesses already examined were reliable, and the testimony coming from the mouth was unimpeachable, a court could safely act upon the same uninfluenced by the factum of non-examination of other witnesses. Yet again the conclusion was, that reliable evidence should be available, to determine the culpability of an accused, and in the above view of the matter it would be irrelevant whether some others who could have deposed on the facts in issue had not been examined.

(c) Based on the judgment rendered in *Laxman Naik v. State of Orissa,* (1994) 3 SCC 381, it was submitted, that in a case relating to a seven year old child, who had been raped and murdered by her own uncle, relying upon incriminating evidence and testimony of witnesses, it came to be held that when circumstances form a complete chain of incidents, then the same is sufficient to establish, that the accused is the

perpetrator of the crime and conviction can be based on the complete chain of circumstantial evidence.

(d) Based on the judgment in *State of Maharashtra v. Suresh,* (2000) 1 SCC 471, where four years' girl child was a victim of rape and murder, it was contended, that this Court had held that it was open to a court to presume that the accused knew about the incriminating material or dead body due to his involvement in the alleged offence. When he discloses the location of such incriminating material without disclosing the manner in which he came to know of the same, the Court would presume that the accused knew about the incriminating material.

(e) Relying on the judgment in *Amar Singh v. Balwinder Singh,* 2003 (2) SCC 518, it was contended, that where the prosecution case is fully established by the testimony of witnesses which stood corroborated by medical evidence, any failure or omission of the investigating officer could not be treated as sufficient to render the prosecution case doubtful or unworthy of belief. This determination leads to the same inference, namely, when reliable evidence to prove the guilt of an accused is available, lapses in investigation would not result in grant of the benefit of doubt to an accused.

(f) Referring to *State Government of NCT Delhi v. Sunil,* (2001) 1 SCC 652, it was asserted, that in a case where a child of four years was brutally raped and murdered and incriminating articles were recovered on the basis of the statement of the accused, the same could not be discarded on the technical ground that no independent witness was examined.

(g) Referring to the judgment in *Joseph v. State of Kerala,* (2005) 5 SCC 197, wherein, according to the learned counsel, it was held that where the circumstances proved form themselves into a complete chain unerringly pointing to the guilt of the appellant, then the same can be the basis of the conviction of the accused. This, according to learned counsel,

represents the manner of proving the guilt of an accused based on circumstantial evidence.

(h) Based on the judgment in *State of UP v. Satish* (2005) 3 SCC 114, it was contended that it could not be laid down as a rule of universal application that if there is any delay in examination of a particular witness, the prosecution version becomes suspect. Therefore, the facts surrounding the delay ought to be considered in every case to determine whether or not the testimony is rendered suspicious.

(i) Relying on the judgment in *Bishnu Prasad Sinha v State of Assam,* (2007) 11 SCC 467, it was submitted, that in the above case where a child of 7-8 years was a victim of rape and murder, the grounds that the investigation was done in an improper manner did not render the entire prosecution case to be false. Namely, where reliable evidence is available, the same would determine the guilt of an accused.

(j) Referring to the judgment in *Aftab Ahmad Anasari v. State of Uttaranchal,* (2010) 2 SCC 583, it was asserted, that where a child of five years was a victim of rape and murder and the accused disclosed the location of the crime as also of the incriminating articles, the said disclosure was admissible and would constitute a complete chain in the circumstances. Further, according to the learned counsel, it was held that the inquest panchnama may not contain every detail and the absence of some details would not affect the veracity of the deposition made by witnesses. Needless to mention, that absence of vital links in the claim of circumstantial evidence would result in the exoneration of the accused.

(k) Reliance was placed on *Sambhu Das v. State of Assam,* (2010) 10 SCC 374, so as to contend, that any discrepancy occurring in the inquest report or the post mortem report could neither be fatal nor be termed as a suspicious circumstance as would warrant a benefit to the accused and the resultant dismissal of the prosecution case. Needless to

add, that there should be sufficient independent evidence to establish the guilt of the accused.

(l) Based on the judgment in *Haresh Mohandas Rajput v. State of Maharashtra,* (2011) 12 SCC 56, it was contended, that in a case of murder and rape of a ten year old child, it was found that where the circumstances taken cumulatively led to the conclusion of guilt and no alternative explanation is given by the accused, the conviction ought to be upheld. This case reiterates that in a case based on circumstantial evidence the evidence should be such as would point to the inference of guilt of the accused alone and none others.

(m) Relying on *Rajendra PrahladraoWasnik v. State of Maharashtra,* (2012) 4 SCC 37, it was submitted that where a three years old child was a victim of rape and murder by the accused who lured her under the pretext of buying biscuits, circumstances showed the manner in which the trust/belief/ relationship was violated resulting in affirming the death penalty imposed on the accused.

14. We have given our thoughtful consideration to the submissions advanced at the hands of the learned counsel for the appellant, which have been duly noticed in paragraph 9 hereinabove. It is also relevant for us to record, that the learned counsel for the appellant did not advance a single submission in addition to the contentions we have noticed in paragraph 9 above. The submissions advanced at the hands of the learned counsel for the appellant, were sought to be supported by judgments rendered by this Court, all of which have been referred to in paragraph 13 above. The submissions advanced at the hands of the learned counsel for the appellant, based on each of the judgments cited, have also been recorded by us in the said paragraph. Having considered the totality of the facts and circumstances of this case, specially the glaring lapses committed in the investigation and prosecution of the case (recorded in paragraph 11 of the instant judgment), as also the inconsistencies in the evidence produced by the prosecution

(summarized in paragraph 12 hereinabove), we are of the considered view, that each one of the submissions advanced at the hands of the learned counsel for the appellant is meritless. For the circumstantial evidence produced by the prosecution, primary reliance has been placed on the statements of Bababhai Naranbhai Solanki PW2, Naranbhai Manabhai Solanki PW5, and Dinesh Karshanbhai Thakore PW6. By demonstrating inconsistencies and infirmities in the statements of the above witnesses, their statements have also been rendered suspicious and accordingly unreliable. There is also a serious impression of fudging and padding at the hands of the agencies involved. As a matter of fact, the lack of truthfulness of the statements of witnesses has been demonstrated by means of simple logic emerging from the factual position expressed through different prosecution witnesses (summarized in paragraphs 11 and 12 above). The evidence produced to prove the charges, has been systematically shattered, thereby demolishing the prosecution version. More than all that, is the non production of evidence which the prosecution has unjustifiably withheld, resulting in dashing all the States efforts to the ground. It is not necessary for us to record our detailed determination on the submissions advanced at the hands of the learned counsel for the appellant, for such reasons clearly emerge from the factual position noticed in paragraphs 11 and 12 hereinabove. Recording of reasons all over again, would just be a matter of repetition. In view of the above, we find no merit in this appeal and the same is accordingly dismissed.

15. The investigating officials and the prosecutors involved in presenting this case, have miserably failed in discharging their duties. They have been instrumental in denying to serve the cause of justice. The misery of the family of the victim Gomi has remained unredressed. The perpetrators of a horrendous crime, involving extremely ruthless and savage treatment to the victim, have remained unpunished. A heartless and merciless criminal, who has committed an extremely heinous crime, has

gone scot-free. He must be walking around in Ahmedabad, or some other city/town in India, with his head held high. A criminal on the move. Fearless and fearsome. Fearless now, because he could not be administered the punishment, he ought to have suffered. And fearsome, on account of his having remained unaffected by the brutal crime committed by him. His actions now, know of no barriers. He could be expected to act in an unfathomable savage manner, uncomprehendable to a sane mind.

16. As we discharge our responsibility in deciding the instant criminal appeal, we proceed to apply principles of law, and draw inferences. For, that is our job. We are trained, not to be swayed by mercy or compassion. We are trained to adjudicate without taking sides, and without being mindful of the consequences. We are required to adjudicate on the basis of well drawn parameters. We have done all that. Despite thereof, we feel crestfallen, heartbroken and sorrowful. We could not serve the cause of justice, to an innocent child. We could not even serve the cause of justice, to her immediate family. The members of the family of Gomi must never have stopped cursing themselves, for not adequately protecting their child from a prowler, who had snatched an opportunity to brutalise her, during their lapse in attentiveness. And if the prosecution version about motive is correct, the crime was committed for a mere consideration of Rs.1,000/-.

17. Every time there is an acquittal, the consequences are just the same, as have been noticed hereinabove. The purpose of justice has not been achieved. There is also another side to be taken into consideration. We have declared the accused-respondent innocent, by upholding the order of the High Court, giving him the benefit of doubt. He may be truly innocent, or he may have succeeded because of the lapses committed by the investigating/prosecuting teams. If he has escaped, despite being guilty, the investigating and the prosecution agencies must be deemed to have seriously messed it all up. And if the

accused was wrongfully prosecuted, his suffering is unfathomable. Here also, the investigating and prosecuting agencies are blameworthy. It is therefore necessary, not to overlook even the hardship suffered by the accused, first during the trial of the case, and then at the appellate stages. An innocent person does not deserve to suffer the turmoil of a long drawn litigation, spanning over a decade, or more. The expenses incurred by an accused in his defence can dry up all his financial resources – ancestral or personal. Criminal litigation could also ordinarily involve financial borrowings. An accused can be expected to be under a financial debt, by the time his ordeal is over.

18. Numerous petitions are filed before this Court, praying for anticipatory bail (under Section 438 of the Code of Criminal Procedure) at the behest of persons apprehending arrest, or for bail (under Section 439 of the Code of Criminal Procedure) at the behest of persons already under detention. In a large number of such petitions, the main contention is of false implication. Likewise, many petitions seeking quashing of criminal proceeding (filed under Section 482 of the Code of Criminal Procedure) come up for hearing day after day, wherein also, the main contention is of fraudulent entanglement/ involvement. In matters where prayers for anticipatory bail or for bail made under Sections 438 and 439 are denied, or where a quashing petition filed under Section 482 of the Code of Criminal Procedure is declined, the person concerned may have to suffer periods of incarceration for different lengths of time. They suffer captivity and confinement most of the times (at least where they are accused of serious offences), till the culmination of their trial. In case of their conviction, they would continue in confinement during the appellate stages also, and in matters which reach the Supreme Court, till the disposal of their appeals by this Court. By the time they are acquitted at the appellate stage, they may have undergone long years of custody. When acquitted by this Court, they may have suffered imprisonment of 10 years, or more. When they are acquitted

(by the trial or the appellate court), no one returns to them; what was wrongfully taken away from them. The system responsible for the administration of justice, is responsible for having deprived them of their lives, equivalent to the period of their detention. It is not untrue, that for all the wrong reasons, innocent persons are subjected to suffer the ignominy of criminal prosecution and to suffer shame and humiliation. Just like it is the bounden duty of a court to serve the cause of justice to the victim, so also, it is the bounden duty of a court to ensure that an innocent person is not subjected to the rigours of criminal prosecution.

19. The situation referred to above needs to be remedied. For the said purpose, adherence to a simple procedure could serve the objective. We accordingly direct, that on the completion of the investigation in a criminal case, the prosecuting agency should apply its independent mind, and require all shortcomings to be rectified, if necessary by requiring further investigation. It should also be ensured, that the evidence gathered during investigation is truly and faithfully utilized, by confirming that all relevant witnesses and materials for proving the charges are conscientiously presented during the trial of a case. This would achieve two purposes. Only persons against whom there is sufficient evidence, will have to suffer the rigors of criminal prosecution. By following the above procedure, in most criminal prosecutions, the concerned agencies will be able to successfully establish the guilt of the accused.

20. Every acquittal should be understood as a failure of the justice delivery system, in serving the cause of justice. Likewise, every acquittal should ordinarily lead to the inference, that an innocent person was wrongfully prosecuted. It is therefore, essential that every State should put in place a procedural mechanism, which would ensure that the cause of justice is served, which would simultaneously ensure the safeguard of interest of those who are innocent. In furtherance

of the above purpose, it is considered essential to direct the Home Department of every State, to examine all orders of acquittal and to record reasons for the failure of each prosecution case. A standing committee of senior officers of the police and prosecution departments, should be vested with aforesaid responsibility. The consideration at the hands of the above committee, should be utilized for crystalizing mistakes committed during investigation, and/or prosecution, or both. The Home Department of every State Government will incorporate in its existing training programmes for junior investigation/ prosecution officials course- content drawn from the above consideration. The same should also constitute course-content of refresher training programmes, for senior investigating/ prosecuting officials. The above responsibility for preparing training programmes for officials, should be vested in the same committee of senior officers referred to above. Judgments like the one in hand (depicting more than 10 glaring lapses in the investigation/prosecution of the case), and similar other judgments, may also be added to the training programmes. The course content will be reviewed by the above committee annually, on the basis of fresh inputs, including emerging scientific tools of investigation, judgments of Courts, and on the basis of experiences gained by the standing committee while examining failures, in unsuccessful prosecution of cases. We further direct, that the above training programme be put in place within 6 months. This would ensure that those persons who handle sensitive matters concerning investigation/prosecution are fully trained to handle the same. Thereupon, if any lapses are committed by them, they would not be able to feign innocence, when they are made liable to suffer departmental action, for their lapses.

21. On the culmination of a criminal case in acquittal, the concerned investigating/prosecuting official(s) responsible for such acquittal must necessarily be identified. A finding needs to be recorded in each case, whether the lapse was innocent or blameworthy. Each erring officer must suffer the

consequences of his lapse, by appropriate departmental action, whenever called for. Taking into consideration the seriousness of the matter, the concerned official may be withdrawn from investigative responsibilities, permanently or temporarily, depending purely on his culpability. We also feel compelled to require the adoption of some indispensable measures, which may reduce the malady suffered by parties on both sides of criminal litigation. Accordingly we direct, the Home Department of every State Government, to formulate a procedure for taking action against all erring investigating/ prosecuting officials/officers. All such erring officials/officers identified, as responsible for failure of a prosecution case, on account of sheer negligence or because of culpable lapses, must suffer departmental action. The above mechanism formulated would infuse seriousness in the performance of investigating and prosecuting duties, and would ensure that investigation and prosecution are purposeful and decisive. The instant direction shall also be given effect to within 6 months.

22. A copy of the instant judgment shall be transmitted by the Registry of this Court, to the Home Secretaries of all State Governments and Union Territories, within one week. All the concerned Home Secretaries, shall ensure compliance of the directions recorded above. The records of consideration, in compliance with the above direction, shall be maintained.

23. We hope and trust the Home Department of the State of Gujarat, will identify the erring officers in the instant case, and will take appropriate departmental action against them, as may be considered appropriate, in accordance with law.

24. The instant criminal appeal is accordingly disposed of.

R.P. Appeal dismissed.

SADASHIV PRASAD SINGH
v.
HARENDAR SINGH & ORS.
(Civil Appeal No.161 of 2014)

JANUARY 8, 2014

[A.K. PATNAIK AND JAGDISH SINGH KHEHAR, JJ.]

Auction:

Auction sale – Rights of auction purchaser in the property purchased – Held: Cannot be extinguished except in cases where the said purchase can be assailed on grounds of fraud or collusion – In the instant case, there was no allegation of fraud or collusion as regards auction purchase by a third party – It was no body's case that at the time of auction purchase, the value of the property purchased by him was in excess of his bid – Besides, no objection was raised to attachment proclamations and notices in newspapers for auction – Auction sale was confirmed and possession of property was handed over to auction purchaser – Mutation proceedings were finalized – Challenge raised by first respondent ought to have been rejected on the ground of delay and laches — Interference by High Court even on ground of equity was clearly uncalled for — Impugned order passed by High Court is set aside — Right of appellant-auction purchaser in plot in question is confirmed – Delay/ laches – Equity.

A partnership firm comprising three partners, including the brother of respondent no. 1, obtained a loan of Rs.12.70 lac from Allahabad Bank after mortgaging certain properties. Since the loan amount was not repaid, the Bank, in 1998, preferred Original Application before the Debt Recovery Tribunal for recovery of its dues. The application was allowed on 21.11.2000 and a direction

was issued for the recovery of Rs.75,75,564/- from the firm. During the pendency of the recovery proceedings, plot No.722 was attached which was in the ownership of the brother of respondent no. 1, who had died meanwhile. On 10.6.2004, respondent no. 1 filed an objection before the Recovery Officer stating that the attached property did not belong to the judgment debtors, but had been purchased by him from his brother under an unregistered agreement of sale dated 10.1.1991. He, however, chose to abandon the proceedings. The Recovery Officer passed an order dated 5.5.2008, for the sale of the property by way of public auction. As the appellant turned to be the highest bidder, the Recovery Officer ordered the sale of the property in his favour on 28.8.2008. On 27.11.2009, the appellant filed a writ petition before the High Court assailing the order dated 5.5.2008 passed by the Recovery Officer. The High Court dismissed the writ petition. However, in the Letters Patent Appeal filed by respondent no. 1, the Division Bench of the High Court, besides adjudicating the matter on its merits, finally concluded that the proceedings before the Recovery Officer were in flagrant violation of the provisions of r.11(2) of the Income Tax (Certificate Proceedings) Rules, and set aside the proceedings conducted by the Recovery Officer, including the sale of the property by public auction.

Allowing the appeal, the Court

HELD: 1.1. The rights of an auction-purchaser in the property purchased by him cannot be extinguished except in cases where the said purchase can be assailed on grounds of fraud or collusion. [para 12] [264-F]

Ashwin S. Mehta & Anr. vs. Custodian & Ors. **2006 (1) SCR 56 = (2006) 2 SCC 385;** *Janatha Textiles & Ors. vs. Tax Recovery Officer & Anr.* **2008 (8) SCR 1148 = (2008) 12**

SCC 582, *Nawab Zain-Ul-Abdin Khan v. Mohd. Asghar Ali Khan*, **(1887-88) 15 IA 12;** *Janak Raj vs. Gurdial Singh* **1967 SCR 77 = AIR 1967 SC 608;** *Gurjoginder Singh vs. Jaswant Kaur,* **1994 (1) SCR 794 = (1994) 2 SCC 368;** *Padanathil Ruqmini Amma vs. P.K. Abdulla* **1996 (1) SCR 651 = (1996) 7 SCC 668;** *Velji Khimji and Company vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Limited & Ors*. **2008 (12) SCR 1 = (2008) 9 SCC 299 – referred to.**

1.2. In the instant case, there is no allegation of fraud or collusion. Therefore, irrespective of the merits of the lis between the rival parties, namely, the Allahabad Bank and the partners of the borrower firm, it is not open for anyone to assail the purchase of the property made by the auction purchaser in the public auction held in furtherance of the order passed by the Recovery Officer on 28.8.2008. In this view of the matter, this Court is of the view that the High Court clearly erred while setting aside the auction ordered in favour of the auction-purchaser-appellant. [para 13] [265-D-F]

1.3. The High Court in ignoring the vested right of the appellant in the property in question, after his auction bid was accepted and confirmed, subjected him to grave injustice by depriving him of the property which he had genuinely and legitimately purchased at a public auction. It is nobody's case that at the time of the auction-purchase, the value of the property purchased by him was in excess of his bid. Since it was nobody's case that the highest bidder at the auction conducted on 28.8.2008, had purchased the property in question at a price lesser than the prevailing market price, there was no justification whatsoever to set aside the auction-purchase made by him on account of escalation of prices thereafter. In the considered view of this Court, not only did the Division Bench of the High Court in the matter ignored the sound, legal and clear principles laid down by this Court in

respect of a third party auction purchaser, it also clearly overlooked the equitable rights vested in the auction-purchaser during the pendency of a lis. [para 14] [266-C-E]

1.4. Even otherwise, the objections of respondent no. 1 have no substance. The claim of respondent no. 1 in his objection petition was based on an unregistered agreement to sell dated 10.1.1991, which would not vest any legal right in his favour. Further, it is apparent that it may not have been difficult for him to have had the said agreement to sell notarized in connivance with his brother. Secondly, it is apparent from the factual position that respondent no. 1 despite his having filed objections before the Recovery Officer, had abandoned the contest raised by him and, as such, it was not open to him to have re-agitated the same by filing a writ petition before the High Court. Thirdly, a remedy of appeal was available to him in respect of the order of the Recovery Officer u/s 30. Fourthly, respondent no. 1 could not be allowed to raise a challenge to the public auction held on 28.8.2008 because he had not raised any objection to the attachment of the property in question or the proclamations and notices issued in newspapers in connection with the auction thereof. All these facts cumulatively lead to the conclusion that after 26.10.2005, respondent no. 1 had lost all interest in the property in question and had remained a silent spectator to various orders which came to be passed from time to time. He had, therefore, no equitable right in his favour to assail the auction-purchase made by the appellant on 28.8.2008. Finally, the public auction under reference was held on 28.8.2008. Thereafter the same was confirmed on 22.09.2008. Possession of the property was handed over to the auction-purchaser on 11.3.2009. The auction-purchaser initiated mutation proceedings in respect of the property in question. Respondent no. 1 did not raise any

objections in the said mutation proceedings, which were also finalized in favour of the applicant. [para 15] [267-A-E; 268-A-E]

1.5. The challenges raised by respondent no. 1 ought to have been rejected on the grounds of delay and latches, especially because third party rights had emerged in the meantime. More so, because the auction purchaser was a bona fide purchaser for consideration, having purchased the property in furtherance of a duly publicized public auction, interference by the High Court even on ground of equity was clearly uncalled for. The impugned order passed by the High Court is set aside. The right of the appellant in plot in question is confirmed. [para 15] [268-E-H; 269-A-B]

Case Law Reference:

2006 (1) SCR 56	**referred to**	**para 12**
2008 (8) SCR 1148	**referred to**	**para 12**
(1887-88) 15 IA 12	**referred to**	**para 12**
1967 SCR 77	**referred to**	**para 12**
1994 (1) SCR 794	**referred to**	**para 12**
1996 (1) SCR 651	**referred to**	**para 12**
2008 (12) SCR 1	**referred to**	**para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No.161 of 2014.

From the Judgment & Order dated 17.05.2010 of the High Court of Judicature at Patna in L.P.A No. 844 of 2010.

WITH

C.A. No. 162 of 2014.

S.B. Upadhyay, Amarendra Sharan, Santosh Mishra,

Param Mishra, Alok Kumar, Vivek Singh, Somesh Chandra Jha, Rakesh K. Sharma, Sanjay Mishra, Sangeeta Chauhan, Gopal Singh, Chandan Kumar for the appearing parties.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. On 11.9.1989, The Allahabad Bank (hereinafter referred to as 'the Bank') sanctioned a loan of Rs.12.70 lac to M/s. Amar Timber Works, a partnership firm having three partners, Jagmohan Singh, Payam Shoghi and Dev Kumar Sinha. The above loan was sanctioned to M/s. Amar Timber Works, after its partners had mortgaged certain properties to secure the loan amount. Since the loan amount was not repaid in compliance with the commitment made by M/s. Amar Timber Works, nine years later, in 1998, the Bank preferred Original Application No.107 of 1998 before the Debt Recovery Tribunal for the recovery of the Bank's dues. The above Original Application was allowed on 21.11.2000. Accordingly, a direction was issued for the recovery of Rs.75,75,564/- from M/s. Amar Timber Works. For the execution of the order passed by the Debt Recovery Tribunal, the Bank initiated recovery proceedings on 28.11.2000. During the pendency of the recovery proceedings, Jagmohan Singh, one of the partners of M/s. Amar Timber Works, died (on 27.1.2004). On 16.4.2004, the Recovery Officer attached plot No.722, located at Exhibition Road, P.S. Gandhi Maidan, Patna (hereinafter referred to as 'the property') measuring 1298 sq.ft. It would be pertinent to mention that the aforesaid plot was in the ownership of Jagmohan Singh, one of the partners in M/s. Amar Timber Works.

2. On 10.6.2004, Harender Singh, brother of Jagmohan Singh, filed an objection petition before the Recovery Officer alleging, that the attached property did not belong to the judgment debtors, but had been purchased by him from his brother Jagmohan Singh, by executing an agreement of sale dated 10.1.1991, which was duly notarized though not registered. It would be relevant to mention, that Harender Singh

pursued the objection petition filed by him before the Recovery Officer till 26.10.2005, but chose to abandon the proceedings thereafter. The order passed by the Recovery officer when the Objector was represented for the last time on 26.10.2005 is being extracted below:

> "Ld. Advocate of Bank and objectors appears. Objector reiterated his points and invited attention towards Section 53 of TP Act. Counsel of the bank submits that he had to say nothing more than what was said/submitted earlier. He also submits that D.Drs. was guarantor also in this case hence his properties attached. Put up on 28.12.08 for further hearing.
>
> Sd/- Illegible
>
> I/C R.O."

3. The recovery proceedings referred to above remained pending for a further period of more than two years. Finally, the Recovery Officer passed an order dated 5.5.2008, for the sale of the property by way of public auction on 4.7.2008. The Recovery Officer fixed Rs.12.92 lacs as the reserve price, and also fixed 28.8.2008 as the date of its auction. At the auction held on 28.8.2008, Sadashiv Prasad Singh, was the highest bidder. Accordingly, the Recovery Officer ordered the sale of the property in his favour on 28.8.2008. On 22.9.2008, the Recovery Officer, in the absence of any objections, confirmed the sale of the property in favour of Sadashiv Prasad Singh. The Recovery Officer also ordered, the handing over of physical possession of the property to the auction purchaser. Sadashiv Prasad Singh, the auction purchaser, took physical possession of the property on 11.3.2009.

4. In furtherance of the proceedings initiated through Mutation Case No.295/2/09-10, the land in question was mutated in favour of the auction purchaser. It would be relevant to mention that the application for mutation filed by the auction

purchaser, Sadashiv Prasad Singh, was supported by letter dated 14.10.2008 of the Ministry of Finance, Government of India, Realization Authority, Patna. It would be relevant to mention, that no objections were filed in the mutation case preferred by Sadashiv Prasad Singh, by or on behalf of Harender Singh, before the Mutation Officer.

5. On 27.11.2009, CWJC No.16485 of 2009 was filed by Harender Singh before the High Court of Judicature at Patna (hereinafter referred to as the 'High Court'). In the aforesaid writ petition, Harender Singh assailed the order of the Recovery Officer dated 5.5.2008, whereby, the property had been ordered to be sold by public auction in discharge of the debt owed by M/s Amar Timber Works to the Allahabad Bank. Vide its order dated 23.3.2010, the High Court ordered the auction purchaser, i.e. Sadashiv Prasad Singh to be impleaded as a party-respondent. On 27.11.2010, the High Court dismissed the above writ petition by accepting the objections raised on behalf of the Bank, as well as, the auction purchaser by holding as under :

> "The above facts do weigh with the Court in not interfering with the sale or the proceeding where it has been reached. The petitioner has no satisfactory explanation for not approaching the Court well within time challenging such a decision or the subsequent proceedings or orders of the Recovery Officer at an appropriate time. The conduct of the petitioner by itself has precluded and prevented this Court from passing any order in his favour at this belated stage.
>
> The writ application has not merit. It is dismissed accordingly."

6. Dissatisfied with the order dated 27.4.2010 whereby the writ petition filed by Harender Singh was dismissed by a Single Bench of the High Court, he preferred Letters Patent Appeal No.844 of 2010. Before the Letters Patent Bench, Harender

Singh, brother of Jagmohan Singh, asserted that his brother Jagmohan Singh had availed a loan of Rs.14.70 lacks. As against the aforesaid loan amount, the Bank had initiated proceedings before the Debt Recovery Tribunal for the realization of a sum of 75,75,564/-. The property under reference was sold by way of public auction to Sadashiv Prasad Singh for a sum of Rs.13.20 lacs. As against the aforesaid sale consideration paid by the auction purchaser, Harender Singh, offered a sum of Rs.39 lacs before the Letters Patent Bench. In the order passed by the Letters Patent Bench disposing of Letters Patent Appeal No.844 of 2010, it stands noticed that the Bank had accepted to finally settle the matter on being paid a sum of Rs.45 lacs, subject to the condition that the Harender Singh pays a sum of Rs.15 lacs immediately, and the balance amount of Rs.30 lacs within a period of two years in a phased manner. Even though the learned counsel representing the appellant, Harender Singh was agreeable to proposal of the Bank, the rival parties could not amicably settle the matter. It is, therefore, that the letters patent Bench went on to adjudicate the matter on its merits. The above factual position has been noticed for the reason that it has a nexus to the final order which was eventually passed by the Letters Patent Bench disposing of LPA No.844 of 2010. In fact, it would be in the fitness of matters to extract paragraph 8 from the impugned judgment rendered in LPA No.844 of 2010 in order to appreciate the niceties of the matter. The aforesaid paragraph is, accordingly, being extracted herein :

> "8. At this juncture, we may state that the brother of the appellant had availed a loan of Rs.14.70 lacs. The said aspect is not disputed by Mr. Ajay Kumar Sinha, learned counsel for the Bank. The Bank had initiated a proceeding before the Tribunal for realization of approximately a sum of Rs.75.75 lacs. The property has been sold for Rs.13.20 lacs. It is submitted by Mr. Ojha that the prices have gone up and he is being offered more than 39 lacs for the same. It is not in dispute that the price, the auction-purchaser has tendered, is Rs.13.20 lacs. On the earlier occasion, a suggestion was given whether the Bank would accept Rs.45 lacs in toto to settle the dispute. Mr. Sinha, learned counsel for the Bank has obtained instructions that the Bank has no objection to settle the same, if the appellant pays Rs.15 lacs immediately so that the same can be paid to the auction-purchaser and Rs.30 lacks should be paid within a period of two years in a phased manner. Mr. Choubey, learned counsel for the appellant submitted that the appellant is agreeable to pay the same. Mr. Ojha submitted that he has instructions not to accept the suggestion."

7. During the course of appellate proceedings, the High Court referred to Chapter V of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the Debt Recoveries Act) and particularly to Section 29 which is being extracted hereunder:

> "**29. Application of certain provisions of Income-tax Act.—**The provisions of the Second and Third Schedules to the Income-tax Act, 1961 (43 of 1961) and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the Income-tax :
>
> Provided that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act."

The High Court while interpreting Section 29 extracted above, concluded that certain provisions of the Income Tax Act and Income Tax (Certificate Proceedings) Rules would be applicable mutatis mutandis in the matter of recovery of debts under the Debt Recoveries Act. The High Court then referred to Rule 11 of the Income Tax (Certificate Proceedings) Rules

and arrived at the conclusion that sub-rule (2) of Rule 11, had not been complied with by the Recovery Officer, inasmuch as, the objection raised by Harender Singh had not been adjudicated upon. As such, the High Court finally concluded that the proceedings before the Recovery Officer were in flagrant violation of the provisions of Rule 11(2) of the Income Tax (Certificate Proceedings) Rules. Having so concluded, the High Court set aside the proceedings conducted by the Recovery Officer, including the sale of the property by public auction. In order to appreciate the basis of the order passed by the High Court, Rule 11 of the Second Schedule of the Income Tax Act, 1961, is being extracted herein:

"Investigation by Tax Recovery Officer.

11. (1) Where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or objection:

Provided that no such investigation shall be made where the Tax Recovery Officer considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Tax Recovery Officer ordering the sale may postpone it pending the investigation of the claim or objection, upon such terms as to security or otherwise as the Tax Recovery Officer shall deem fit.

(3) The claimant or objector must adduce evidence to show that-

(a) (in the case of immovable property) at the date of the service of the notice issued under this Schedule to pay the arrears, or

(b) (in the case of movable property) at the date of the attachment,

he had some interest in, or was possessed of, the property in question.

(4) Where, upon the said investigation, the Tax Recovery Officer is satisfied that, for the reason stated in the claim or objection, such property was not, at the said date, in the possession of the defaulter or of some person in truest for him or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the defaulter at the said date, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Tax Recovery Officer shall make an order releasing the property, wholly or to such extent as he thinks fit, from attachment or sale.

(5) Where the Tax Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Tax Recovery Officer shall disallow the claim.

(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive."

8. Having dealt with the controversy in the manner expressed in the foregoing paragraphs, the Division Bench of the High Court was of the view that the matter in hand ought to

be settled by working out the equities between the parties. Accordingly, the High Court disposed of the matter in the following manner:

> "12. Though we have held the same could not have been sold in auction, yet equities are to be worked out. Regard being had to the fact that the respondent-purchaser has deposited Rs.13.20 lac between 28.8.2008 to 22.9.2009 and thus the amount is with the Bank for almost more than one year and 10 months and thereafter there had been challenge to the order in the writ petition and after dismissal of the writ petition the present L.P.A. has been filed in quite promptitude and that the amount of the respondent-purchaser was blocked, it will be obligatory on the part of the appellant to compensate the respondent-purchaser at least by way of payment of interest at the Bank rate. We are disposed to think that if a sum of Rs.17 lacs is paid to the auction-purchaser, it would sub-serve the cause of justice and house of the appellant shall be saved and, accordingly, it is directed that the appellant shall deposit a sum of Rs.17 lacks within a period of four weeks from today in the Bank. After such deposit, the Bank shall hand it over to the purchaser by way of a bank draft. The same shall be sent by registered post with acknowledgment due. Thereafter the appellant shall deposit a further sum of Rs.32 lacs within a period of two years; sum of Rs.16 lacs by 25th March, 2011 and further sum of Rs.16 lacs by 25th March, 2012. Needless to say pro-rate interest shall accrue in favour of the Bank for the said period.
>
> 13. After the amount is paid to the purchaser, it would be the duty of the Recovery Officer to hand over the possession to the appellant."

9. Sadashiv Prasad Singh, the auction purchaser, has assailed the impugned order passed by the Division Bench of the High Court in LPA No.844 of 2010 praying for the setting

aside of the order by which he has been deprived of the property purchased by him in the public auction held on 28.8.2008, which was subsequently confirmed by the Recovery Officer of the Debt Recovery Tribunal on 23.9.2008. This challenge has been made by Sadashiv Prasad Singh by filing Special Leave Petition (C) No.23000 of 2010. The impugned order passed by the High Court on 17.5.2010, has also been assailed by Harender Singh by preferring Special Leave Petition (C) No.26550 of 2010. The prayer made by Harender Singh is, that order passed by the Division Bench places him in the shoes of the auction purchaser, and as such, he could have only been asked to pay a sum of Rs.17 lacs. Requiring him to pay a further sum of Rs.32 lacs is unsustainable in law, and accordingly, deserved to be set aside.

10. Leave granted in both the Special Leave Petitions.

11. For the narration of facts, we have relied upon the pleadings and the documents appended to Special Leave Petition (C) No.23000 of 2010.

12. Learned counsel for the auction purchaser Sadashiv Prasad Singh, in the first instance vehemently contended, that in terms of the law declared by this Court, property purchased by a third party auction purchaser, in compliance of a court order, cannot be interfered with on the basis of the success or failure of parties to a proceeding, if auction purchaser had bonafidely purchased the property. In order to substantiate his aforesaid contention, learned counsel representing Sadashiv Prasad Singh placed emphatic reliance, firstly, on a judgment rendered by this Court in *Ashwin S. Mehta & Anr. vs. Custodian & Ors.,* (2006) 2 SCC 385). Our attention was drawn to the following observations recorded therein :

> "In that view of the matter, evidently, creation of any third-party interest is no longer in dispute nor the same is subject to any order of this Court. In any event, ordinarily, a bona fide purchaser for value in an auction-sale is

treated differently than a decree-holder purchasing such properties. In the former event, even if such a decree is set aside, the interest of the bona fide purchaser in an auction-sale is saved. (See *Nawab Zain-ul-Abdin Khan v. Mohd. Asghar Ali Khan (1887) 15 IA 12)* The said decision has been affirmed by this Court in *Gurjoginder Singh v. Jaswant Kaur (1994) 2 SCC 368).*"

(emphasis is ours)

On the same subject, and to the same end, learned counsel placed reliance on another judgment rendered by this Court in *Janatha Textiles & Ors. vs. Tax Recovery Officer & Anr.,* (2008) 12 SCC 582, wherein the conclusions drawn in Ashwin S. Mehta's case (supra) came to be reiterated. In the above judgment, this Court relied upon the decisions of the Privy Council and of this Court in *Nawab Zain-Ul-Abdin Khan v. Mohd. Asghar Ali Khan,* (1887-88) 15 IA 12; *Janak Raj vs. Gurdial Singh,* AIR 1967 SC 608; *Gurjoginder Singh vs. Jaswant Kaur,* (1994) 2 SCC 368; *Padanathil Ruqmini Amma vs. P.K. Abdulla,* (1996) 7 SCC 668, as also, on *Ashwin S. Mehta* (supra) in order to conclude, that it is an established principle of law, that a third party auction purchaser's interest, in the auctioned property continues to be protected, notwithstanding that the underlying decree is subsequently set aside or otherwise. It is, therefore, that this Court in its ultimate analysis observed as under:

"**20**. Law makes a clear distinction between a stranger who is a bona fide purchaser of the property at an auction-sale and a decree-holder purchaser at a court auction. The strangers to the decree are afforded protection by the court because they are not connected with the decree. Unless the protection is extended to them the court sales would not fetch market value or fair price of the property."

(emphasis is ours)

On the issue as has been dealt with in the foregoing paragraph, this Court has carved out one exception. The aforesaid exception came to be recorded in *Velji Khimji and Company vs. Official Liquidator of Hindustan Nitro Product (Gujarat) Limited & Ors.,* (2008) 9 SCC 299, wherein it was held as under :

"**30**. In the first case mentioned above i.e. where the auction is not subject to confirmation by any authority, the auction is complete on the fall of the hammer, and certain rights accrue in favour of the auction-purchaser. However, where the auction is subject to subsequent confirmation by some authority (under a statute or terms of the auction) the auction is not complete and no rights accrue until the sale is confirmed by the said authority. Once, however, the sale is confirmed by that authority, certain rights accrue in favour of the auction-purchaser, and these rights cannot be extinguished except in exceptional cases such as fraud.

31. In the present case, the auction having been confirmed on 30.7.2003 by the Court it cannot be set aside unless some fraud or collusion has been proved. We are satisfied that no fraud or collusion has been established by anyone in this case."

(emphasis is ours)

It is, therefore, apparent that the rights of an auction-purchaser in the property purchased by him cannot be extinguished except in cases where the said purchase can be assailed on grounds of fraud or collusion.

13. It is imperative for us, to adjudicate upon the veracity of the sale of the property by way of public auction, made in favour of Sadashiv Prasad Singh on 28.8.2008. It is not a matter of dispute, that the lis in the present controversy was between the Allahabad Bank on the one hand and the partners of M/s. Amar Timber Works, namely, Jagmohan Singh, Payam Shoghi

and Dev Kumar Sinha on the other. Sadashiv Prasad Sinha was not a party to the proceedings before the Debt Recovery Tribunal or before the Recovery Officer. By an order dated 5.5.2008, the Recovery Officer ordered the sale of the property by way of public auction. On 4.7.2008, the Recovery Officer fixed Rs.12.92 lacs as the reserve price, and also fixed 28.8.2008 as the date of auction. At the public auction held on 28.8.2008, Sadashiv Prasad Sinha was the highest bidder, and accordingly, the Recovery officer ordered the sale of the property in his favour on 28.8.2008. In the absence of any objections, the Recovery Officer confirmed the sale of the property in favour of Sadashiv Prasad Sinha on 22.9.2008. Thereafter possession of the property was also handed over to the auction-purchaser on 11.3.2009. Applying the law declared by this Court in the judgments referred in the foregoing paragraphs irrespective of the merits of the lis between the rival parties, namely, the Allahabad Bank and the partners of M/s. Amar Timber Works, it is not open for anyone to assail the purchase of the property made by Sadashiv Prasad Sinha in the public auction held in furtherance of the order passed by the Recovery Officer on 28.8.2008. In the above view of the matter, especially in the absence of any allegation of fraud or collusion, we are of the view that the High Court clearly erred while setting aside the auction ordered in favour of the auction-purchaser, Sadashiv Prasad Sinha in the impugned order dated 17.5.2010.

14. A perusal of the impugned order especially paragraphs 8, 12 and 13 extracted hereinabove reveal that the impugned order came to be passed in order to work out the equities between the parties. The entire deliberation at the hands of the High Court were based on offers and counter offers, inter se between the Allahabad Bank on the one hand and the objector Harender Singh on the other, whereas the rights of Sadashiv Prasad Sinha – the auction-purchaser, were not at all taken into consideration. As a matter of fact, it is Sadashiv Prasad Sinha who was to be deprived of the property which came to be

vested in him as far back as on 28.8.2008. It is nobody's case, that at the time of the auction-purchase, the value of the property purchased by Sadashiv Prasad Sinha was in excess of his bid. In fact, the factual position depicted under paragraph 8 of the impugned judgment reveals, that the escalation of prices had taken place thereafter, and the value of the property purchased by Sadashiv Prasad Sinha was presently much higher than the bid amount. Since it was nobody's case that Sadashiv Prasad Sinha, the highest bidder at the auction conducted on 28.8.2008, had purchased the property in question at a price lesser than the then prevailing market price, there was no justification whatsoever to set aside the auction-purchase made by him on account of escalation of prices thereafter. The High Court in ignoring the vested right of the appellant in the property in question, after his auction bid was accepted and confirmed, subjected him to grave injustice by depriving him to property which he had genuinely and legitimately purchased at a public auction. In our considered view, not only did the Division Bench of the High Court in the matter by ignoring the sound, legal and clear principles laid down by this Court in respect of a third party auction purchaser, the High Court also clearly overlooked the equitable rights vested in the auction-purchaser during the pendency of a lis. The High Court also clearly overlooked the equitable rights vested in the auction purchaser while disposing of the matter.

15. At the time of hearing, we were thinking of remanding the matter to the Recovery Officer to investigate into the objection of Harender Singh under Rule 11 of the Second Schedule to the Income Tax Act, 1961. But considering the delay such a remand may cause, we have ourselves examined the objections of Harender Singh and reject the objections for a variety of reasons. Firstly, the contention raised at the hands of the respondents before the High Court, that the facts narrated by Harender Singh (the appellant in Special Leave Petition (C) No.26550 of 2010) were a total sham, as he was actually the brother of one of the judgment-debtors, namely, Jagmohan

Singh. And that Harender Singh had created an unbelievable story with the connivance and help of his brother, so as to save the property in question. The claim of Harender Singh in his objection petition, was based on an unregistered agreement to sell dated 10.1.1991. Not only that such an agreement to sell would not vest any legal right in his favour; it is apparent that it may not have been difficult for him to have had the aforesaid agreement to sell notarized in connivance with his brother, for the purpose sought to be achieved. Secondly, it is apparent from the factual position depicted in the foregoing paragraphs that Harender Singh, despite his having filed objections before the Recovery Officer, had abandoned the contest raised by him by not appearing (and by not being represented) before the Recovery Officer after 26.10.2005, whereas, the Recovery Officer had passed the order of sale of the property by way of public auction more than two years thereafter, only on 5.5.2008. Having abandoned his claim before the Recovery Officer, it was not open to him to have reagitated the same by filing a writ petition before the High Court. Thirdly, a remedy of appeal was available to Harender Singh in respect of the order of the Recovery Officer assailed by him before the High Court under Section 30, which is being extracted herein to assail the order dated 5.5.2008:

> "**30. Appeal against the order of Recovery Officer.—** (1) Notwithstanding anything contained in section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.
>
> (2) On receipt of an appeal under sub-section (1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under section 25 to 28 (both inclusive)."

The High Court ought not to have interfered with in the matter agitated by Harender Singh in exercise of its writ jurisdiction. In fact, the learned Single Judge rightfully dismissed the writ petition filed by Harender Singh. Fourthly, Harender Singh could not be allowed to raise a challenge to the public auction held on 28.8.2008 because he had not raised any objection to the attachment of the property in question or the proclamations and notices issued in newspapers in connection with the auction thereof. All these facts cumulatively lead to the conclusion that after 26.10.2005, Harender Singh had lost all interest in the property in question and had therefore, remained a silent spectator to various orders which came to be passed from time to time. He had, therefore, no equitable right in his favour to assail the auction-purchase made by Sadashiv Prasad Sinha on 28.8.2008. Finally, the public auction under reference was held on 28.8.2008. Thereafter the same was confirmed on 22.09.2008. Possession of the property was handed over to the auction-purchaser Sadashiv Prasad Sinha on 11.3.2009. The auction-purchaser initiated mutation proceedings in respect of the property in question. Harender Singh did not raise any objections in the said mutation proceedings. The said mutation proceedings were also finalized in favour of Sadashiv Prasad Sinha. Harender Singh approached the High Court through CWJC No.16485 of 209 only on 27.11.2009. We are of the view that the challenged raised by Harender Singh ought to have been rejected on the grounds of delay and latches, especially because third party rights had emerged in the meantime. More so, because the auction purchaser was a bona fide purchaser for consideration, having purchased the property in furtherance of a duly publicized public auction, interference by the High Court even on ground of equity was clearly uncalled for.

For the reasons recorded hereinabove, we are of the view that the impugned order dated 17.5.2010 passed by the High Court allowing Letters Patent Appeal No.844 of 2010 deserves to be set aside. The same is accordingly set aside. The right

of the appellant Sadashiv Prasad Sinha in Plot No.2722, Exhibition Road, P.S. Gandhi Maidan, Patna, measuring 1289 sq.ft. is hereby confirmed. In the above view of the matter, while the appeal preferred by Sadashiv Prasad Sinha stands allowed, the one filed by Harender Singh is hereby dismissed.

R.P. Appeal allowed.

MAJOR GENERAL H.M. SINGH, VSM

v.

UNION OF INDIA AND ANR.

(Civil Appeal No. 192 of 2014)

JANUARY 9, 2014

[A.K. PATNAIK AND JAGDISH SINGH KHEHAR, JJ.]

Army Rules:

r.16-A – Extension of service in 'exigency of service' – Senior most Major General in DRDO recommended by Selection Board for promotion as Lieutenant General – Extension of service granted by Presidential orders — Held: President of India was conscious of the fact while granting extension in service to appellant that his case for promotion as Lieutenant General was under consideration – Orders allowing extension of service to appellant so as to enable his claim to be considered for promotion as Lieutenant General, cannot be held to be in violation of statutory provisions – Extension of service granted to the senior most eligible officer for the purpose of consideration of his promotional claim, for all intents and purposes will be deemed to satisfy the parameters of exigency of service, stipulated in r. 16A - Administrative law - Legitimate expectation.

Service Law:

Promotion – Major General in DRDO – Recommended by Selection Board for promotion as Lieutenant General – Granted extensions to enable his case for promotion to be considered by Appointment Committee of the Cabinet – ACC not granting approval to recommendations, as rules would not permit promotion on extension — Held: Selection Board, out of a panel of four names, had recommended promotion of appellant as Lieutenant General on the basis of his record of

service, past performance, qualities of leadership, as well as vision– ACC did not in any manner upset the finding recorded by Selection Board nor did it negate the said recommendation – Therefore, appellant must be deemed to have been found suitable for promotion as Lieutenant General, even by ACC and, as such, appellant deserves promotion to the rank of Lieutenant General from the date due to him and he shall be deemed to have been in service as Lieutenant General till 28.2.2009 and entitled to all monetary benefits which would have been so due to him.

Promotion during extension of service – Held: The vacancy against which appellant was considered had arisen well before date of his superannuation, but since Service Selection Board was convened only two days prior to date of his superannuation as Major General, respondents must squarely shoulder the blame and responsibility of the delay – It is not as if the vacancy came into existence after appellant had reached the age of retirement on superannuation – The denial of promotion to him mainly for the reason that he was on extension in service, is unsustainable besides being arbitrary – Therefore, the basis on which the claim of appellant for promotion as Lieutenant General was declined by ACC is rejected – Accordingly, operative part of order of ACC is set aside.

Constitution of India, 1950:

Arts. 14 and 16 – Claim for promotion – Held:Division Bench of High Court has rightly held that recommendations of Selection Board were merely recommendatory in nature and, therefore, appellant had no fundamental right for promotion solely on the basis of such recommendation – However, non-consideration of claim of appellant would violate fundamental rights vested in him under Arts. 14 and 16, as respondents were desirous of filling up the said vacancy and appellant being the senior most serving Major General

eligible for consideration had fundamental right of being considered against the said vacancy, and also the fundamental right of being promoted if he was adjudged suitable – It was in order to extend the benefit of the fundamental right enshrined under Art. 14 of India, that he was allowed extension in service on two occasions by Presidential orders – By the said orders, respondents desired to treat the appellant justly, so as to enable him to acquire the honour of promotion to the rank of Lieutenant General, in case the recommendation made in his favour by the Selection Board was approved by ACC – The action of authorities in depriving the appellant due consideration for promotion to the rank of the Lieutenant General, would have been arbitrary and resulted in violation of his fundamental right under Art. 14.

The appellant, who was commissioned as Second Lieutenant in the Indian Army on 15.6.1969 and was inducted into the Armoured Corps, permanently moved into the Defence Research and Development Organisation (DRDO) w.e.f. 25.5.1983, where he rose up to the rank of Major General. In the Government of India gazette published on 6.12.2007 the appellant was shown as having been promoted as substantive Major General with effect from 7.1.2004. A vacancy in the rank of Lieutenant General became available with effect from 1.1.2007. The appellant, as Major General, would retire at the age of 59 years, on 29.2.2008 but on his promotion to the rank of Lieutenant General his age of retirement would stand extended to 28.2.2009 i.e., up to 60 years. On 27.2.2008 i.e. two days prior to the appellant's retirement on superannuation a meeting of the Selection Board for promotion to the rank of Lieutenant General was convened. The Selection Board recommended only the name of the appellant for promotion. The President of India by an order dated 29.2.2008, granted the appellant extension of service, for a period of three months and a further extension in service for a period of one month i.e.,

up to 30.6.2008 or "till the approval of the Appointments Committee of the Cabinet (ACC), whichever was earlier". On 2.6.2008, the Secretariat of the ACC issued a communication to the effect that ACC did not approve the promotion of the appellant to the rank of Lieutenant General. Consequently, the appellant retired from the rank of Major General w.e.f. 3.6.2008. The appellant filed a writ petition before the High Court. The stand of the Union of India was that the appellant having attained the age of superannuation on 29.2.2008, he could not be promoted as Lieutenant General "while he was on extension". Writ petition was dismissed by the single Judge of the High Court. The Division Bench also dismissed the writ appeal of the appellant.

Allowing the appeal, the Court

HELD: 1.1. The Division Bench of the High Court has rightly held that the recommendations of the Selection Board were merely recommendatory in nature and, therefore, the appellant had no fundamental right for promotion solely on the basis of the recommendation of the Selection Board. [para 12] [284-F, G-H]

Dr. H. Mukherjee Vs. Union of India and Others, **1993 (2) Suppl. SCR 529 = 1994 Supp. (1) SCC 250,** *Union of India and Others Vs. N.P. Dhamania and Others* **1994 (4) Suppl. SCR 628 = 1995 Supp. (1) SCC 1, and** *Food Corporation of India and Others Vs. Parashotam Das Bansal and Others,* **(2008) 5 SCC 100 - referred to.**

1.2. However, it is significant to note that the Appointments Committee of the Cabinet did not in any manner upset the finding recorded by the Selection Board, in respect of the merit and suitability of the appellant for promotion to the rank of Lieutenant General. Therefore, the appellant must be deemed to have been found suitable for promotion to the rank of Lieutenant

General, even by the ACC. [Para 20]

1.3. The vacancy against which the claim of the appellant was considered, had arisen on 1.1.2007, and he was the senior most eligible officer holding the rank of Major General whose name fell in the zone of consideration for promotion. The Selection Board also having conducted its deliberations, singularly chose his name from the panel of four names before it and recommended him for promotion. Having been so recommended, the President of India , in the first instance, by an order dated 29.2.2008, extended the service of the appellant, for the period of three months with effect from 1.3.2008 and by another order dated 30.5.2008 for a further period of one month with effect from 1.6.2008, "or till the approval of the ACC whichever is earlier". The President of India, therefore, was conscious of the fact while granting extension in service to the appellant that his case for promotion to the rank of Lieutenant General was under consideration. It cannot be accepted that the said determination in allowing extension in service to the appellant can be described as being in violation of the norms stipulated in r 16A of the Army Rules. The delay in convening the Selection Board and conducting its proceedings may not be deliberate or mala fide, but since the Selection Board came to be convened for the vacancy which had arisen on 1.1.2007 only on 27.2.2008, the respondents must squarely shoulder the blame and responsibility of the delay. [para 21] [296-A-C, E and 297-B-C]

2.1. The non-consideration of the claim of the appellant would violate the fundamental rights vested in him under Arts. 14 and 16 of the Constitution, as the respondents were desirous of filling up the said vacancy. In this view of the matter, the appellant being the senior most serving Major General eligible for consideration, most definitely had the fundamental right of being

considered against the said vacancy, and also the fundamental right of being promoted if he was adjudged suitable. It was in order to extend the benefit of the fundamental right enshrined under Art. 14 of the Constitution, that he was allowed extension in service on two occasions. By the said orders, the respondents desired to treat the appellant justly, so as to enable him to acquire the honour of promotion to the rank of Lieutenant General, in case the recommendation made in his favour by the Selection Board was approved by the ACC. The action of the authorities in depriving the appellant due consideration for promotion to the rank of the Lieutenant General, would have resulted in violation of his fundamental right under Art. 14 of the Constitution of India. Such an action at the hands of the respondents would unquestionably have been arbitrary. [para 22] [297-D-G; 298-C]

2.2. The Presidential orders allowing extension of service to the appellant so as to enable his claim to be considered for promotion to the rank of Lieutenant General, cannot be held to be in violation of the statutory provisions. Rule 16A of the Army Rules, postulates extension in service, if the exigencies of service so require. The said parameter must have been duly taken into consideration when the two Presidential orders were passed. The respondents have neither revoked, nor sought revocation of the said orders. Therefore, the respondents cannot question the veracity of the said orders, which were passed to ensure due consideration of the appellant's claim for promotion to the rank of Lieutenant General. Without rejecting the claim on merits, the appellant was deprived of promotion to the rank of Lieutenant General. [para 22] [298-C-G]

2.3. Besides, this Court is of the considered view, that consideration of the promotional claim of the senior most eligible officer, would also fall in the parameters of the rule

providing for extension, if the exigencies of service so require. It would be a sad day if the armed forces decline to give effect to the legitimate expectations of the highest ranked armed forces personnel, specially when, blame for delay in such consideration, rests squarely on the shoulders of the authorities themselves. Surely, extension of service, for the purpose granted to the appellant, would most definitely fall within the realm of r.16A of the Army Rules. Accordingly, extension in service granted to the appellant, for all intents and purposes, in the considered view of this Court, will be deemed to satisfy the parameters of 'exigency of service', stipulated in r. 16A of the Army Rules. [Para 22] [298-H; 299-A-B, C-D]

2.4. The deliberations of the Appointments Committee of the Cabinet make it clear that where an officer attains the age of retirement without there being a vacancy for his consideration to a higher rank, even though he is eligible for the same, and such an officer is granted extension in service, he cannot claim consideration for promotion against a vacancy which has become available during the period of his extension in service. Retention in service, so as to consider an officer for a vacancy which has not become available prior to his retirement, but is in the offing, cannot be allowed. [para 24] [300-C-F]

2.5. In the instant case, a clear vacancy against the rank of Lieutenant General became available with effect from 1.1.2007. At that juncture, the appellant had 14 months of service remaining. It is not as if the vacancy came into existence after the appellant had reached the age of retirement on superannuation. The denial of promotion to the appellant mainly for the reason, that the appellant was on extension in service, is unsustainable besides being arbitrary, specially in the light of the fact that the vacancy had become available, well before the

date of his retirement on superannuation. Therefore, the basis on which the claim of the appellant for promotion to the rank of Lieutenant General was declined by the ACC, is rejected. Accordingly, the operative part of the order of the ACC is set aside. [para 24] [300-H; 301-A-C]

2.6. It is apparent, that the Selection Board had recommended the promotion of the appellant on the basis of his record of service, past performance, qualities of leadership, as well as vision, out of a panel of four names. The ACC, in its deliberations, did not record any reason to negate the said recommendation. Therefore, that the appellant deserves promotion to the rank of Lieutenant General, from the date due to him. Ordered accordingly. On account of his promotion to the post of Lieutenant General, the appellant would also be entitled to continuation in service till the age of retirement on superannuation stipulated for Lieutenant Generals, i.e., till his having attained the age of 60 years. As such, the appellant shall be deemed to have been in service against the rank of Lieutenant General till 28.2.2009, and accordingly, entitled to all monetary benefits which would have been so due to him. [para 25] [301-D-F]

Case Law Reference:

1993 (2) Suppl. SCR 529	**referred to**	**para 12**
1994 (4) Suppl. SCR 628	**referred to**	**para 12**
(2008) 5 SCC 100	**referred to**	**para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 192 of 2014.

From the Judgment & Order dated 21.07.2009 of the High Court of Madras in Writ Appeal No. 779 of 2009.

H.M. Singh (Petitioner-In-Person).

Paras Kuhad, ASG, Brijender Chahar, Chandra Bhushan Prasad, Anil Katiyar for the Respondents.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. The appellant was commissioned as Second Lieutenant in the Indian Army on 15.6.1969. His initial induction was into the Armoured Corps. On 25.5.1983 the appellant changed his cadre. He permanently moved into the Defence Research and Development Organisation (hereinafter referred to as 'the DRDO'). Having gone through decades of rigorous military service and having consistently earned onward promotions to higher ranks, as were due to him from time to time, he was granted acting rank of Major General on 1.6.2004, after he had been approved for promotion to the rank of Major General by a duly constituted Selection Board.

2. On 31.3.2005 Lieutenant General Ravinder Nath retired from service. Resultantly a vacancy in the rank of Lieutenant General became available. On 1.1.2006 the appellant claims to have become eligible for the consideration for promotion to the above vacancy. It would be relevant to mention, that at that juncture, in the cadre of Major Generals, the appellant was the senior most serving officer (as per seniority list dated 29.12.2006) eligible for promotion to the rank of Lieutenant General. In the Government of India gazette (published on 6.12.2007) the appellant was shown as having been promoted as substantive Major General with effect from 7.1.2004. It would also be relevant to mention, that the name of the appellant was included in the name announced by the President of India for the award of the Vishist Seva Medal on 26.1.2007. The said award was sought to be bestowed upon the appellant, for his having rendered distinguished service of an exceptional order to the nation. It is therefore, that the appellant was desirous, that his claim be considered for onward promotion to the rank of Lieutenant General. At that juncture, the appellant had not only held the rank of Major General for more 18 months, he had also

earned two confidential reports in the said rank. The record appended to the pleadings indicates, that he had also been granted vigilance clearance. Despite the above, the appellant was not considered eligible for promotion to the rank of Lieutenant General as he had not completed two years' service in the rank of Major General at that time.

3. Under the circumstances mentioned in the foregoing paragraph, AVM R. Yadav, an officer from the Indian Air Force was inducted into the DRDO on 29.12.2005, against the vacancy in the rank of Lieutenant General created by Lieutenant General Ravinder Nath. AVM R. Yadav retired from service with effect from 31.12.2006. As such, a vacancy in the rank of Lieutenant General became available with effect from 1.1.2007.

4. On 30.4.2007, the appellant addressed a representation to the Director General DRDO asserting, that he was eligible for promotion against the existing vacancy of Lieutenant General, as he fulfilled the laid down criteria. He expressly pointed out in his above representation, that in the event of his promotion to the rank of Lieutenant General his age of retirement would stand extended. As Major General he would retire at the age of 59 years, on 29.2.2008 (as the appellant date of birth is 2.2.1949). On his promotion to the rank of Lieutenant General his age of retirement would stand extended to 28.2.2009 i.e., to 60 years. The appellant therefore requested the authorities, to immediately constitute and convene a meeting of the Selection Board, for considering his claim for onward promotion to the rank of Lieutenant General. For the above purpose, the appellant also met various higher authorities. On all such occasions he was informed, that the action to convene a meeting of the Selection Board was under process. In fact, in November, 2007 the appellant was assured, that the meeting of Selection Board would be held in December, 2007. He was also assured, that in the event of his being considered suitable for promotion by the Selection Board, he will actually be promoted to the rank of Lieutenant

General, before the date of his retirement (29.2.2008) as Major General.

5. Since the date of appellant's retirement – 29.2.2008 was fast-approaching, and because it seemed to the appellant that nothing was moving, the appellant submitted his grievance to the authorities in writing, praying for immediate action in the matter. In this behalf he also sought personal hearing, to present his case. These pleas were raised by the appellant through separate communications dated 26.12.2007 (to the SA to the Defence Minister, and to the DRDO). On 28.2.2008 he addressed a letter for the same purpose, to the Personal Secretary to the Defence Minister.

6. Two days prior to the appellant's retirement on superannuation (29.2.2008, as Major General), on 27.2.2008 a meeting of the Selection Board for promotion to the rank of Lieutenant General was convened. The Selection Board cleared the appellant for promotion to the rank of Lieutenant General. The Selection Board cleared only the name of the appellant for the above promotion, from out of a panel of 4 names.

7. In order to ensure that the appellant's claim for promotion to the rank of Lieutenant General is not frustrated, the President of India by an order dated 29.2.2008, was pleased to grant the appellant extension of service, for a period of three months. A relevant extract of the above order is being reproduced hereinunder:

> "I am directed to convey the sanction of the President to the grant of extension in service to IC-23289 Maj Gen H.M. Singh, VSM, AC, CVRDE, Avadi a permanently seconded officer of Defence Research & Development Organisation, for a period of three months with effect from 01 Mar 2008 or till the approval of ACC, whichever is earlier.
>
> This issues with the concurrence of MOD/Fin(R&D) vide

their Dy No. 582/Fin (R&D) dated 29 Feb 2008."

(emphasis is ours)

A perusal of the above communication reveals, that the aforesaid extension of service was granted to the appellant, to await the approval of the Appointments Committee of the Cabinet. In this behalf it would be relevant to mention, that in the process of consideration for promotion to the rank of Lieutenant General, the recommendation made by the Selection Board requires the approval of the Appointments Committee of the Cabinet, before it is given effect to. It is apparent that the Appointments Committee of the Cabinet, could not finalise the matter during the appellant's extended tenure of three months. As such, for the same reasons, the President of India was pleased to grant the appellant a further extension in service (as Major General) for a period of one month i.e., up to 30.6.2008 or till the approval of the Appointments Committee of the Cabinet, whichever was earlier.

8. On 2.6.2008, the Secretariat of the Appointments Committee of the Cabinet (Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training) issued a communication with the following observations:

"2. The Appointments Committee of the Cabinet has not approved the promotion of IC-23289 Maj Gen H.M. Singh, a permanently seconded officer of DRDO, to the rank of Lieutenant General."

In consonance with the order granting extension in service, the DRDO issued an order dated 3.6.2008, retiring the appellant from the rank of Major General with immediate effect. The appellant assailed the above order dated 2.6.2008 (denying the appellant promotion to the rank of Lieutenant General), and the order dated 3.6.2008 (by which the appellant was retired from service) by filing Writ Petition No. 15508 of 2008 before the

High Court of Judicature at Madras (hereinafter referred to as 'the High Court'). Convening a meeting of the Selection Board on 27.2.2008 i.e., just two days before the appellant was to retire on attaining the age of superannuation, as also, the consideration of the recommendation made by the Selection Board at the hands of the Appointments Committee of the Cabinet, more than three months after the date on which the appellant would retire from service, were vigorously referred to, to demonstrate the apathy at the hands of the authorities, which according to the appellant, had resulted in denial of promotion to him.

9. In response to the alleged delay in the matter of considering the appellant's claim for promotion, it was pointed out that the DRDO had a large number of high value projects viz. design, development and production of Light Combat Aircraft, design and development of Kaveri Engine, design and development of Airborne Early Warning System and a number of projects related to upgradation of avionics and electronics warfare system, Sukhoi, MIG-27 and LCA; accordingly a decision was taken by the DRDO i.e., the appellant's controlling authority, to earmark the vacancy of Lieutenant General (against which the appellant was claiming consideration), for an officer of equivalent rank from the Indian Air Force, who would be in a position to oversee, provide guidance and coordinate all the abovementioned highly sensitive and intricate projects. The above tentative determination for filling up the vacancy of Lieutenant General from the Indian Air Force was, however, subsequently reviewed in consultation with the Government of India. The Government of India on 14.2.2008 finally decided to fill up the vacancy of Lieutenant General by promotion of a permanently seconded service officer of the DRDO. It was therefore asserted, that non-holding of the meeting of the Selection Board, and the non-finalisation of the consideration of the appellant's claim for promotion to the rank of Lieutenant General, could not be described as a deliberate and intentional

attempt by the authorities to deprive the appellant of his promotional opportunity.

10. In its pleadings the Union of India adopt a clear stand, that the appellant having attained the age of superannuation on 29.2.2008, could not be promoted as Lieutenant General "while he was on extension". It was also the contention of the Union of India, that since the Appointments Committee of the Cabinet had not approved the appellant's promotion to the rank of Lieutenant General, the same could not be challenged specially because the Appointments Committee of the Cabinet had given valid reasons to defer the recommendation of the Selection Board / Departmental Promotion Committee. The Union of India acknowledged, that the Appointments Committee of the Cabinet was the competent authority to approve the recommendation for promotion to the rank of Lieutenant General (made by the Selection Board). It was admitted, that the Selection Board in its meeting held on 27.2.2008 had recommended the appellant for promotion to the rank of Lieutenant General. Pending approval of the Appointments Committee of the Cabinet, the appellant had crossed the age of his retirement on superannuation (in the rank of Major General, on 29.2.2008). Thereafter, the appellant was granted extension in service beyond the period of his retirement up to 30.6.2008.

11. Having considered the contentions and prayers made by the appellant, a Single Bench of the High Court while disposing of the Writ Petition No. 15508 of 2008, recorded the following observations:

> "40. When the petitioner's extension of service was not on the ground of exigency, DRDO being mainly civilian, Rules do not permit promotion on extension. ACC's action in not granting approval to the recommendation made by Selection Board is in accordance with the Rules and the same cannot be assailed. Petitioner cannot contend that

> he has been discriminated in not granting promotion while on extension.
>
> 41. There is no substance in the contention that the Petitioner having been extended his service, he ought to have been granted promotion. Extension of service does not give rise the legitimate expectation for promotion. The extensions in tenure were given to the petitioner to ensure that procedure relating to approval of competent authority on the recommendation of Selection Board was completed in an objective manner by following prescribed process. On culmination of process, ACC is the competent authority came to the decision not to promote the petitioner. As such there is not incoherence and arbitrariness in the decision warranting exercise of judicial review."

In the light of the above observations Writ Petition No. 15508 of 2008 was dismissed on 5.5.2009.

12. Dissatisfied with the dismissal of Writ Petition No. 15508 of 2008, the appellant filed an intra court Writ Appeal No. 779 of 2009. In the process of adjudicating upon the controversy raised in the abovementioned Writ Appeal, a Division Bench of the High Court framed two questions for its consideration. Firstly, whether the appellant Major General H.M. Singh had any fundamental right for promotion solely on the basis of the recommendation of the Selection Board. And secondly, whether Appointments Committee of the Cabinet was liable to accept the recommendation made by the Selection Board in favour of the appellant, and consequently, order the appellant's promotion to the rank of Lieutenant General. Relying on paragraph 108 of the Regulation of Army which delineates the constitution and duties of the Selection Board, the Division Bench concluded that the recommendations of the Selection Board were merely recommendatory in nature, and therefore, answered the first question in the negative. The Division Bench further held, that a legitimate claim for the promotion would

arise, only if a recommendation made by the Selection Board gets the approval of the Appointments Committee of the Cabinet. Relying on the judgments rendered by this Court in *Dr. H. Mukherjee Vs. Union of India and Others,* 1994 Supp. (1) SCC 250, *Union of India and Others Vs. N.P. Dhamania and Others,* 1995 Supp. (1) SCC 1, and *Food Corporation of India and Others Vs. Parashotam Das Bansal and Others,* (2008) 5 SCC 100, the Division Bench of the High Court further concluded, that the Appointments Committee of the Cabinet was not bound by the recommendation of the Selection Board. It accordingly held, that for justifiable reasons, the Appointments Committee of the Cabinet had the right to either accept, or to refuse the recommendation of the Selection Board. In sum and substance it came to be concluded, that unless it was shown that the determination of the Appointments Committee of the Cabinet suffered from arbitrariness or malafides and capriciousness, the same could not be interfered with. The Division Bench of the High Court having found none of the above noted vices in the determination of the Appointments Committee of the Cabinet, answered the second question also in the negative.

13. Based on its aforementioned determination, the High Court dismissed Writ Appeal No. 779 of 2009, on 21.7.2009. Dissatisfied with the order dated 5.5.2009 (passed by the Single Judge of the High Court, dismissing Writ Petition No. 15508 of 2009), and the order dated 21.7.2009 (passed by the Division Bench of the High Court dismissing Writ Appeal No. 779 of 2009), the appellant approached this Court by filing Petition for Special Leave to Appeal (C) No. 2008 of 2010. On 11.1.2010 this Court issued notice in this matter. On completion of pleadings the matter was listed for final disposal.

14. Leave granted.

15. On 29.8.2013 while hearing the matter this Court passed the following order:

> "Before we proceed for further hearing in the matter, we would like to go through the deliberations of the Appointments Committee of the Cabinet [for short 'the ACC'] by which the recommendations of the Selection Board was not accepted in the case of the petitioner.
>
> Hence the records of the Selection Board and the final orders passed therein in the case of the petitioner be placed before the Court on the next date of hearing, i.e., 10th September, 2013."

Thereafter on 12.9.2013 this Court passed the following order:

> "We have perused the record produced before us and we have also heard the arguments of learned Additional Solicitor General"
>
> Ld. A.S.G. has sought time to seek instructions.
>
> On the next date, Ld. A.S.G. will ensure that a copy of the note put up to the A.C.C. and the decision of A.C.C. as well as a copy of the recommendation dated 27th February, 2008 of the Selection Board are made available to the Court
>
> List this matter on 23rd September, 2013."

The summoning of the record referred to in the orders extracted hereinabove, had become essential for two reasons. Firstly, the appellant did not contest the findings recorded by the Division Bench of the High Court on the two questions framed by the High Court, for the disposal of Writ Appeal No. 779 of 2009. Having given our thoughtful consideration to the determination rendered by the High Court, on the two questions framed by it, we must acknowledge that the High Court was fully justified in drawing its conclusions. We therefore hereby affirm the above findings recorded by the High Court. According to the appellant, the High Court had misdirected itself in its above determination. It was the submission of the appellant, that the determination

of the Appointments Committee of the Cabinet, was not supported by justifiable reasons. It was asserted, that the determination of the Appointments Committee of the Cabinet was arbitrary, and based on extraneous consideration. Insofar as the instant aspect of the matter is concerned, it was the vehement submission of the appellant, that the High Court had not addressed the issue at all.

16. The solitary contention advanced at the hands of the appellant, was based on the recommendation made by the Selection Board on 27.2.2008, and the consideration of the above recommendation by the Appointments Committee of the Cabinet (leading to the rejection of the appellant's claim for the promotion to the rank of Lieutenant General). For effectively understanding and determining the solitary contention at the hands of the appellant, it is essential to extract the minutes of the meeting of the Selection Board dated 27.2.2008, as also, the proceedings of the Appointments Committee of the Cabinet. Without understanding the tenor and effect of the above deliberations, it would not be possible to express our findings and the reasons. Had the above proceedings revealed sensitive material, improper for public consumption, or detrimental to national interest, we would have chosen to tread cautiously. The deliberations which resulted in denial of promotion to the appellant (to the rank of Lieutenant General), however, have no such misgivings. We have therefore no hesitation in extracting the minutes of the meeting of the Selection Board dated 27.2.2008. The same are being reproduced hereinunder:-

"MINUTES OF (1/2008) DRDO SELECTION BOARD MEETING HELD ON 27 FEB 2008

The Selection Board comprising the following, met on 27 Feb 08 in the office of the Scientific Advisor to Raksha Mantri, Room No. 532, DRDO Bhawan, New Delhi:-

(a) Shri M. Natarajan, SA to RM - Chairman

(b) Shri Pradeep Kumar, Secretary (DP) - Member

(c) Lt. Gen. M.L. Naidu, PVSM, AVSM, YSM, VCOAS - Member

(d) Dr. D. Banerjee, DS & CC R&D (AMS) -Member Secretary

2. Defence Secretary did not attend the meeting due to other prior commitments.

3. SA to RM briefed the Board to say that only one vacancy in the rank of Lt. Gen exists. The other vacancy in lieu of Scientist 'H' has been referred back to the RM for reconsideration and therefore will be considered only after a decision.

4. The Board considered the following 04 officers for promotion to the acting rank of Lt. Gen:-

Ser No.	IC No., Rank, Name & Corps
(i)	MR-03539 Maj Gen J.K. Bansal, AMC
(ii)	IC-23289 Maj Gen H.M. Singh, VSM, AC
(iii)	IC-23850 Maj Gen S.S. Dahiya, AVSM, VSM EME
(iv)	IC-24631 Maj Gen Umang Kapoor, EME

5. Based on deliberations and record of service, past performance, qualities of leadership as well as vision, the Board recommends IC-23289 Maj Gen HM Singh, VSM, AC for promotion.

Sd/- Sd/-
DS&CC R&D (AMS) VCOAS
Member Secretary Member"

(emphasis is ours)

The proceedings recorded by the Appointments Committee of the Cabinet while rejecting the appellant's claim for promotion to the rank of Lieutenant General are also being set out below:-

"The Ministry of Defence has, with the approval of the Raksha Mantri proposed the promotion of IC-23289 Maj Gen HM Singh, a permanently seconded officer of the DRDO, to the rank of Lieutenant General.

2. Maj Gen HM Singh (dob: 02.02.1949) was due for superannuation on 29th February, 2008 on attaining the age of 59 years which is the age of superannuation for officers of the rank of Major Generals who are permanently seconded to the DRDO. A Selection Board which met on 27th February, 2008 to consider eligible officers of the rank of Major General permanently seconded to the DRDO for promotion to the rank of Lieutenant General, recommended Major General Singh for promotion. As the officer was due for retirement on 29th February, 2008 approval of the Raksha Mantri was obtained for giving him extension of service of three months in the rank of Major General or till the approval of the Appointments Committee of the Cabinet to his promotion to the rank of Lieutenant General, whichever is earlier. Officers in the rank of Lieutenant General retire on attaining the age of 60 years.

3. The propriety of grant of extension to the officer at the verge of his superannuation and also, that of grant of promotion to the officer while on extension has been examined. The matter has been discussed, separately, with officers from the Department of Personnel and Training; the DRDO, and also, the Ministry of Defence (Military Secretary's Branch). This apart, a legal notice has been received alleging perjury on the basis of information secured from the Ministry of Defence under the Right to Information Act. A representation has also been received

from an officer, Maj Gen PP Das, alleging discrimination.

4. In terms of the provisions of Section 16A(4) of the Army Act an officer who has attained the age of retirement or has become due for such retirement on completion of his tenure, may be retained in the service for a further period by the Central Government, if the exigencies of the service so require.

5. It is evident from the above provisions that for grant of extension in service, the requirement to be fulfilled, primarily, is the exigencies of service. In the note which was put up to the Raksha Mantri soliciting approval to the proposal for grant of extension, no such exigency has been cited. The only issue that was mentioned in support of the proposal for extension was that the officer had been recommended for promotion to the rank of Lieutenant General. This in the background of the provisions of the Act mentioned above, is no sufficient ground for extension.

6. The Chief Controller Research & Development with whom the matter was discussed has provided copies of orders issued in the years 1995 and 1996 when officers of the rank of Major General were granted extensions. Extensions in service were granted with the approval of the Integrated Finance Division in the Ministry of Defence though approval of the finance angle is not strictly relevant to the grant of extensions. The other two instances cited are of Shri P. Venugopalan, Outstanding Scientist in the DRDL, Hyderabad who was granted extension pending a decision on the question of his regular extension under FR.56 as a Scientist; and of the post retirement appointment of Vice Admiral PC Bhasin on contract basis in the ATVP. These two cases are not relevant to the case of Maj Gen Singh, present under consideration.

7. An instance has been cited, during discussions, of extension of service granted in the year 1997 or thereabouts to Major General Malik who was due for superannuation, and his promotion to the rank of Lt. Gen while on extension.

8. The orders issued by the Department of Personnel and Training lay down that while extension could be granted in exceptional circumstances, there can be no promotion during the period of such extension. These orders apply to the civilian establishment. The instructions which apply to the Defence forces permit extension in service only if the exigencies so demand. DRDO is mainly civilian, and the Rules, as mentioned above, do not permit promotion on extension.

9. The above apart, the plea taken the representation of Maj Gen P.P. Das, and also the legal notice needs to be kept in view. Instances of officers in the Armed Forces retiring just before the vacancies coming their way and being denied empanelment are not uncommon. Extensions motivated by reasons of promotion being close at hand can have repercussions.

10. The above part, the ACR format which is followed for the officers of this rank, seconded to the DRDO, which has been applied for recording of ACRs in the present case reveal that fitness for promotion should be specifically recorded in the ACr. A perusal of the ACR of Maj Gen Singh reveals that specific record of fitness for promotion has not been made.

11. More pointedly, two questions stand out, firstly, the doubtful authority and grounds for granting extensions, taking into account that there was no exigency and, secondly, extensions, motivated by a promotion in the offing during the extension period cannot be allowed. It

cannot be ignored also that such situations trigger litigation, which should best be avoided in such instances.

12. Under the above circumstances, it would be appropriate not to approve the promotion of Maj Gen H.M. Singh to the rank of Lieutenant General.

Sd/-
Cabinet Secretary
22.5.2008

HOME MINISTER Sd/-
28.5.2008

PRIME MINISTER has approved Para 12 above with the direction that the observation in Paras 5 and 8 may be communicated to the MOD for the future.

Sd/-
30.5.2008
Director
Prime Minister's Office
New Delhi"

Sd/-
Cabinet Secretary
2.6.2008

(emphasis is ours)

17. The appellant points out, that the determination of the Appointments Committee of the Cabinet, overlooked the factual position stated in the counter affidavit, filed jointly on behalf of respondent nos. 1 and 2 (respondent no.1 – the Union of India, through Secretariat of the Appointments Committee of the Cabinet; and respondent no. 2 – the DRDO through its Director General). In this behalf our attention was drawn to paragraphs 3 (xvii) and 3 (xviii) which are being extracted below:

"3 (xvii) A meeting of the Selection Board was held on 27.2.2008 and the Selection Board recommended the name of the petitioner for promotion to the rank of Lieutenant General. The post of Lieutenant General then carried the pay scale of Rs.22400-525-24500. Any appointment against this post requires the approval of

Appointments Committee of the Cabinet (ACC) (Respondent No.1), which is a high power body consisting of the Hon'ble Prime Minister of India, Hon'ble Union Home Minister, Hon'ble Union Minister of Department of Personnel and Hon'ble Union Defence Minister. As such, the recommendation of the Selection Board were sent to ACC. In DRDO, the retirement age of an officer of the rank of Maj Gen/equivalent which the petitioner held at that time is 59 years. The petitioner was due to retire from service w.e.f 29.2.2008. Under these circumstances, he was given an extension of service for a period of three months or till the decision of ACC was received whichever was earlier. As the decision of ACC was not received till 31.5.2008, his service was extended further for a period of one month w.e.f 1.6.2008 on the same terms and conditions.

3 (xviii) The decision of ACC (Respondent No.1) regarding non-approval of promotion of the petitioner to the rank of Lieutenant General communicated vide letter dated 2.6.2008 was received by respondent no. 2 on 3.6.2008 and the latter had to issue orders of the petitioner's retirement from service from 3.6.2008."

(emphasis is ours)

18. Referring to the factual position depicted in the joint counter affidavit filed on behalf of the respondent nos. 1 and 2, it was the vehement submission of the appellant, that the Appointments Committee of the Cabinet exceeded its jurisdiction in examining the validity of the orders by which the appellant was granted extension in service. It was the submission of the appellant, that the only question before the Appointments Committee of the Cabinet, consequent upon the recommendations made by the Selection Board on 27.2.2008, was in connection with the merits of the claim of the appellant, for promotion to the rank of Lieutenant General. Adding to the above contention, it was also the submission of the appellant, that the Selection Board, consequent upon its deliberations held

on 27.2.2008, arrived at its findings based on the appellant's service record, past performance, qualities of leadership, as well as, vision, that the appellant was worthy of promotion to the rank of Lieutenant General. The Appointments Committee of the Cabinet, during the course of its deliberations, did not find fault with the above conclusion drawn by the Selection Board. As such, it was sought to be asserted, that even the Appointments Committee of the Cabinet must be deemed to have endorsed the merit and suitability of the appellant, for promotion to the rank of Lieutenant General.

19. In order to contest the submissions advanced at the hands of the appellant, learned senior counsel representing (respondent nos. 1 and 2) emphatically relied upon the proceedings of the Appointments Committee of the Cabinet. The proceedings under reference have been extracted by us hereinabove. Referring to the above proceedings, learned senior counsel for the respondents laid great emphasis on the observations recorded in paragraphs 8 and 9 thereof. It was pointed out, that in terms of the orders issued by the Department of Personnel and Training, promotion during the period of extension was unquestionably barred. In this behalf it was the contention of the learned senior counsel for the respondents, that with effect from 1.3.2008, the appellant (who had attained the age of retirement on superannuation on 29.2.2008), was on extension in service. There was, therefore, no question of his being considered for promotion during the period of such extension. In addition to the aforesaid categoric stand adopted by the learned senior counsel for the respondents, it was sought to be reiterated, that the orders dated 29.2.2008 and 30.5.2008, by which the appellant was granted extension in service, for periods of three months and one month respectively, were not sustainable in law, inasmuch as, they were in violation of Rule 16A of the Army Rules which postulates, that an officers who has attained the age of retirement or has become due for such retirement on completion of his tenure, may be retained in service for a further

period by the Central Government, only if the exigencies of service so require. It was the submission of learned senior counsel for the respondents, that retention in service of the appellant was not on account of any exigency of service.

20. We have given our thoughtful consideration to the submissions advanced at the hands of the learned counsel for the rival parties. First and foremost, we have no hesitation in endorsing the submission advanced at the hands of the appellant, that the Appointments Committee of the Cabinet did not in any manner upset the finding recorded by the Selection Board, in respect of the merit and suitability of the appellant for promotion to the rank of Lieutenant General. On the instant aspect of the matter, the Appointments Committee of the Cabinet has maintained a sullen silence. Even in the pleadings filed on behalf of the respondents, there is an ironic quiescence. Therefore, all other issues apart, the appellant must be deemed to have been found suitable for promotion to the rank of Lieutenant General, even by the Appointments Committee of the Cabinet.

21. We have extracted hereinabove the factual position noticed by the respondents in paragraphs 3(xvii) and 3(xviii) of their counter affidavit. If the aforesaid averments are read in conjunction to the factual position, that the vacancy against which the claim of the appellant was considered, had arisen on 1.1.2007, it clearly emerges, that the appellant was the senior most eligible officer holding the rank of Major General whose name fell in the zone of consideration for promotion. The Selection Board having conducted its deliberations singularly chose the name of the appellant from the panel of four names before it. The proceedings of the Selection Board reveal, that its recommendations were based on record of service, past performance, qualities of leadership, as well as, vision. No other name besides the appellant's name was recommended for promotion. Having been so recommended, the President of India, in the first instance, by an order dated 29.2.2008,

extended the service of the appellant, for the period of three months with effect from 1.3.2008 "or till the approval of the ACC whichever is earlier". Since the Appointments Committee of the Cabinet did not render its determination within the extended period expressed in the order dated 29.2.2008, yet another order to the same effect was issued by the President of India on 30.5.2008 extending the service of the appellant for a further period of one month with effect from 1.6.2008 "or till the approval of the ACC whichever is earlier". The President of India, therefore, was conscious of the fact while granting extension in service to the appellant, the appellant's case for onward promotion to the rank of Lieutenant General was under consideration. Therefore, to ensure that the aforesaid consideration fructified into a result one way or the other, extensions were granted to the appellant twice over. The aforesaid determination at the hands of the President of India in granting extension in service to the appellant, stands noticed in the factual position expressed in paragraphs 3(xvii) and 3(xviii) of the counter affidavit filed on behalf of the respondents 1 and 2. It is not possible for us to accept, that the aforesaid determination in allowing extension in service to the appellant can be described as being in violation of the norms stipulated in Rule 16A of the Army Rules. It is necessary in this behalf, for us to test the above conclusion drawn by us, on the touchstone of Articles 14 and 16 of the Constitution of India. It is not a matter of dispute, that the appellant was promoted to the rank of substantive Major General with effect from 7.1.2004. It is also not a matter of dispute, that the substantive vacancy in the rank of Lieutenant General, against which the appellant was eligible for consideration, became available with effect from 1.1.2007. Even though the appellant had nearly 14 months of military service remaining at the aforesaid juncture, the procedure contemplated for making promotions to the rank of the Lieutenant General was initiated for the first time just two days before the date of retirement of the appellant, on 27.2.2008. Although it is the contention of the learned senior

counsel for the respondents, that the delay in convening the Selection Board and conducting its proceedings was not deliberate or malafide, yet there can be no doubt about the fact, that the appellant was not responsible for such delay. For all intents and purposes, he was repeatedly seeking consideration orally as well as in writing. He had been repeatedly informing the authorities about the approaching date of his retirement. In response, he was always assured, that if found suitable, he would be actually promoted prior to the date of his retirement. It was for the respondents to convene the meeting of the Selection Board. Since the Selection Board came to be convened for the vacancy which had arisen on 1.1.2007 only on 27.2.2008, the respondents must squarely shoulder the blame and responsibility of the above delay.

22. The question that arises for consideration is, whether the non-consideration of the claim of the appellant would violate the fundamental rights vested in him under Articles 14 and 16 of the Constitution of India. The answer to the aforesaid query would be in the affirmative, subject to the condition, that the respondents were desirous of filling the vacancy of Lieutenant General, when it became available on 1.1.2007. The factual position depicted in the counter affidavit reveals, that the respondents indeed were desirous of filling up the said vacancy. In the above view of the matter, if the appellant was the senior most serving Major General eligible for consideration (which he undoubtedly was), he most definitely had the fundamental right of being considered against the above vacancy, and also the fundamental right of being promoted if he was adjudged suitable. Failing which, he would be deprived of his fundamental right of equality before the law, and equal protection of the laws, extended by Article 14 of the Constitution of India. We are of the view, that it was in order to extend the benefit of the fundamental right enshrined under Article 14 of the Constitution of India, that he was allowed extension in service on two occasions, firstly by the Presidential order dated 29.2.2008, and thereafter, by a further Presidential order dated 30.5.2008. The

above orders clearly depict, that the aforesaid extension in service was granted to the appellant for a period of three months (and for a further period of one month), or till the approval of the ACC, whichever is earlier. By the aforesaid orders, the respondents desired to treat the appellant justly, so as to enable him to acquire the honour of promotion to the rank of Lieutenant General, (in case the recommendation made in his favour by the Selection Board was approved by the Appointments Committee of the Cabinet), stands affirmed. The action of the authorities in depriving the appellant due consideration for promotion to the rank of the Lieutenant General, would have resulted in violation of his fundamental right under Article 14 of the Constitution of India. Such an action at the hands of the respondents would unquestionably have been arbitrary. We are therefore of the view, firstly, that the order allowing extension in service of the appellant for a period of three months, dated 29.2.2008, and the order allowing further extension in service by one month to the appellant, dated 30.5.2008, so as to enable his claim to be considered for onward promotion to the rank of Lieutenant General, cannot be held to be in violation of the statutory provisions. Rule 16A of the Army Rules, postulates extension in service, if the exigencies of service so require. The said parameter must have been duly taken into consideration when the Presidential Orders dated 29.2.2008 and 30.5.2008 were passed. The respondents have neither revoked, nor sought revocation of the above orders. Therefore, it does not lie in the mouth of the respondents to question the veracity of the above orders. The above orders were passed to ensure due consideration of the appellant's claim for promotion to the rank of Lieutenant General. Without rejecting the above claim on merits, the appellant was deprived of promotion to the rank of Lieutenant General. Besides the above, we are also of the considered view, that consideration of the promotional claim of the senior most eligible officer, would also fall in the parameters of the rule providing for extension, if the exigencies of service so require.

It would be a sad day if the armed forces decline to give effect to the legitimate expectations of the highest ranked armed forces personnel. Specially when, blame for delay in such consideration, rests squarely on the shoulders of the authorities themselves. This would lead to individual resentment, bitterness, displeasure and indignation. This could also undoubtedly lead to, outrage at the highest level of the armed forces. Surely, extension of service, for the purpose granted to the appellant, would most definitely fall within the realm of Rule 16A of the Army Rules, unless of course, individual resentment, bitterness, displeasure and indignation, of army personnel at the highest level is of no concern to the authorities. Or alternatively, the authorities would like to risk outrage at the highest level, rather than doing justice to a deserving officer. Reliance on Rule 16A, to deprive the appellant of promotion, to our mind, is just a lame excuse. Accordingly, extension in service granted to the appellant, for all intents and purposes, in our considered view, will be deemed to satisfy the parameters of exigency of service, stipulated in Rule 16A of the Army Rules.

23. While dealing with the issue of consideration of the appellant's claim for onward promotion to the rank of Lieutenant General, it is necessary for us to also conclude by observing, that had the claim of the appellant not been duly considered against the vacancy for the post of Lieutenant General, which became available with effect from 1.1.2007, we would have had to hold, that the action was discriminatory. This because, of denial of due consideration to the appellant, who was the senior most eligible serving Major General, as against the claim of others who were junior to him. And specially when, the respondents desired to fill up the said vacancy, and also because, the vacancy had arisen when the appellant still had 14 months of remaining Army service. Surely it cannot be over looked, that the Selection Board had singularly recommended the name of the appellant for promotion, out of a panel of four names. In such an eventuality, we would have no other

alternative but to strike down the action of the authorities as being discriminatory and violative of Article 16 of the Constitution of India.

24. The deliberations recorded by us hereinabove are incomplete, inasmuch as, we have not answered the pointed objection raised by the learned senior counsel for the respondent nos. 1 and 2, namely, that an officer is not entitled to promotion during the period of extension in service. For the instant objection raised at the hands of the respondents, it is necessary to refer to the deliberations of the Appointments Committee of the Cabinet, and specially paragraphs 8 and 9 thereof. A collective reading of the paragraphs 8 and 9 reveals an extremely relevant objective, namely, situations wherein an officer attains the age of retirement without there being a vacancy for his consideration to a higher rank, even though he is eligible for the same. Such an officer who is granted extension in service, cannot claim consideration for promotion, against a vacancy which has become available during the period of his extension in service. The above conclusion drawn by us is clearly apparent from the paragraph 9 of the proceedings of the Appointments Committee of the Cabinet. In fact in the operative part of the proceedings recorded in paragraph 11, it has been noticed, that ."…extensions motivated by a promotion in the offing during the extension period cannot be allowed…" We can derive only one meaning from the above observations, namely, extension being granted for promotion against a vacancy in the offing. That is to say, retention in service, so as to consider an officer for a vacancy which has not become available prior to his retirement, but is in the offing. The above reason recorded in the operative part of the proceedings of the Appointments Committee of the Cabinet, is laudible and legal. Insofar as the present controversy is concerned, there is no doubt whatsoever, that a clear vacancy against the rank of Lieutenant General became available with effect from 1.1.2007. At that juncture, the appellant had 14 months of service remaining. It is not as if the vacancy came

into existence after the appellant had reached the age of retirement on superannuation. The present case is therefore, not covered by the technical plea canvassed at the hands of the learned senior counsel for the respondents. The denial of promotion to the appellant mainly for the reason, that the appellant was on extension in service, to our mind, is unsustainable besides being arbitrary, specially in the light of the fact, that the vacancy for which the appellant was clamouring consideration, became available, well before the date of his retirement on superannuation. We have, therefore, no hesitation in rejecting the basis on which the claim of the appellant for onward promotion to the rank of Lieutenant General was declined, by the Appointments Committee of the Cabinet.

25. In view of the fact, that we have found the order of rejection of the appellant's claim for promotion to the rank of Lieutenant General, on the ground that he was on extended service to be invalid, we hereby set aside the operative part of the order of the Appointments Committee of the Cabinet. It is also apparent, that the Selection Board had recommended the promotion of the appellant on the basis of his record of service, past performance, qualities of leadership, as well as, vision, out of a panel of four names. In its deliberations the Appointments Committee of the Cabinet, did not record any reason to negate the aforesaid interference, relating to the merit and suitability of the appellant. We are therefore of the view, that the appellant deserves promotion to the rank of Lieutenant General, from the date due to him. Ordered accordingly. On account of his promotion to the post of Lieutenant General, the appellant would also be entitled to continuation in service till the age of retirement on superannuation stipulated for Lieutenant Generals, i.e., till his having attained the age of 60 years. As such, the appellant shall be deemed to have been in service against the rank of Lieutenant General till 28.2.2009. Needless to mention, that the appellant would be entitled to all monetary benefits which would have been due to him, on account of his promotion to the rank of Lieutenant General till his retirement on

superannuation, as also, to revised retiral benefits which would have accrued to him on account of such promotion. The above monetary benefits shall be released to the appellant within three months from the date a certified copy of this order becomes available with the respondents.

26. Allowed in the aforesaid terms.

R.P. Appeal allowed.