SABERABIBI YAKUBBHAI SHAIKH & ORS.
v.
NATIONAL INSURANCE CO. LTD. & ORS.
(Civil Appeal No.8 of 2014)

JANUARY 02, 2014

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

WORKMEN'S COMPENSATION ACT, 1923:

Interest on compensation – Relevant date – Held: Claimants are entitled to interest @12% from the date of accident and not from the date of award.

Pratap Narain Singh Deo v. Srinivas Sabata **(1976) 1 SCC 289;** *Oriental Insurance Company Limited vs. Siby George and others* **2012 (6) SCR 1079 = (2012) 12 SCC 540 – relied on.**

National Insurance Co. Ltd. v. Mubasir Ahmed **2007 (2) SCR 117 = (2007) 2 SCC 349 and (2011) 14 SCC 758;** *Oriental Insurance Co. Ltd. v. Mohd. Nasir* **2009 (8) SCR 829 = (2009) 6 SCC 280 – stood held per incuriam.**

Uttar Pradesh State Road Transport Corporation now Uttarakhand Transport Corporation versus Satnam Singh **(2011) 14 SCC 758 – cited.**

Case Law Reference :

(2011) 14 SCC 758	**cited**	**para 7**
2012 (6) SCR 1079	**relied on**	**para 9**
2007 (2) SCR 117	**held per incuriam**	**para 10**
2009 (8) SCR 829	**held per incuriam**	**para 10**

(1976) 1 SCC 289 relied on para 10

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8 of 2014.

From the Judgment and Order dated 24.01.2012 of the High Court of Gujarat at Ahmedabad in First Appeal No. 197 of 2012.

O.P. Bhadani, Ashok Anand, Rakesh Kumar Singh, Fazal Ahmad for the Appellants.

S.L. Gupta, Ram Ashray, D.P. Singh Yadav, J.P. Jayant, Shalu Sharma for the Respondents.

The following order of the Court was delivered

ORDER

1. Delay condoned.

2. Leave granted.

3. The appellants are the wife and the relatives of deceased driver who died in a road accident. The deceased driver was driving a truck bearing No. GJ-17-T-8607, which was owned by Yunusbhai Gulambhai Shaikh, respondent No.2 herein. The deceased was 36 years of age at the time of the accident. On 20th November, 1996, the appellants raised a claim of compensation for a sum of Rs.2,15,280/- and 12% interest therein from the date of accident by filing a claim application before the Workmen Compensation Commissioner/ Labour Court. After passage of more than 16 years, the wife and children of the deceased driver had still not received any compensation.

4. The appellants filed a compensation application before the Workmen Compensation Commissioner/Labour Court on 20th November, 1996. The appellants made a claim of Rs.2,15,280/- and also penalty to the tune of 50% of the

compensation i.e. a sum of Rs.1,07,640/-, thus, making the grand total of Rs.3,22,920/-. Respondent No.1- the Insurance Company, contested the compensation application. On 23th December, 2010, the learned Commissioner awarded compensation on account of death in the sum of Rs.2,13,570/- with 12% interest from the date of accident. The learned Commissioner also awarded Rs.1,06,785/- as penalty.

5. Aggrieved and dissatisfied with the aforesaid judgment and award passed by the learned Commissioner, the Insurance Company filed First Appeal before the High Court.

6. By judgment and order, dated 24th January, 2012, the High Court has partly allowed the First Appeal. The High Court directed the respondent No.1 - Insurance Company to pay interest on the amount of compensation from the date of adjudication of claim application i.e. 23th December, 2010 and not from one month after from the date of accident i.e. 21st August, 1996. A further direction was issued that the excess amount towards interest, if any, deposited by the respondent No.1 – Insurance Company be refunded to it. The judgment and order of the Commissioner for Workmen Compensation was modified to that extent.

7. In coming to the aforesaid conclusion, the High Court relied upon the judgment of this Court reported in *Uttar Pradesh State Road Transport Corporation now Uttarakhand Transport Corporation versus Satnam Singh*, (2011) 14 SCC 758, wherein it has been held that the interest was payable under the Workmen Compensation Act from the date of the Award and not from the date of accident.

8. Aggrieved by the aforesaid judgment of the Hgh Court, the appellants have filed the present appeal.

9. Learned counsel for the appellants has submitted that the aforesaid judgment of the High Court is contrary to the law laid down by this Court in the case of *Oriental Insurance*

Company Limited versus *Siby George and others* [(2012) 12 SCC 540].

10. We have perused the aforesaid judgment. We are of the considered opinion that the aforesaid judgment relied upon by the learned counsel for the appellants is fully applicable to the facts and circumstances of this case. This Court considered the earlier judgment relied upon by the High Court and observed that the judgments in the case of *National Insurance Co. Ltd. v. Mubasir Ahmed* [(2007) 2 SCC 349] and *Oriental Insurance Co. Ltd. v. Mohd*. Nasir [(2009) 6 SCC 280] were *per incuriam* having been rendered without considering the earlier decision in *Pratap Narain Singh Deo v.* Srinivas Sabata [(1976) 1 SCC 289]. In the aforesaid judgment, upon consideration of the entire matter, a four-judge Bench of this Court had held that the compensation has to be paid from the date of the accident.

11. Following the aforesaid judgments, this Court in *Oriental Insurance Company Limited* versus *Siby George and others* (supra) reiterated the legal position and held as follows:

> "11. The Court then referred to a Full Bench decision of the Kerala High Court in United India Insurance Co. Ltd. v. Alavi and approved it insofar as it followed the decision in Pratap Narain Singh Deo.
>
> 12. The decision in Pratap Narain Singh Deo was by a four-judge Bench and in Valsala K. by a three-judge Bench of this Court. Both the decisions were, thus, fully binding on the Court in Mubasir Ahmed and Mohd. Nasir, each of which was heard by two Judges. But the earlier decisions in Pratap Narain Singh Deo and Valsala K. were not brought to the notice of the Court in the two later decisions in Mubasir Ahmed and Mohd. Nasir.
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> 13. In the light of the decisions in Pratap Narain Singh Deo and Valsala K., it is not open to contend that the payment

of compensation would fall due only after the Commissioner's order or with reference to the date on which the claim application is made. The decisions in Mubasir Ahmed and Mohd. Nasir insofar as they took a contrary view to the earlier decisions in Pratap Narain Singh Deo and Valsala K. do not express the correct view and do not make binding precedents."

12. In view of the aforesaid settled proposition of law, the appeal is allowed and the judgment and order of the High Court is set aside. The appellants shall be entitled to interest at the rate of 12% from the date of the accident.

13. No cost.

R.P. Appeal allowed.

DR. SUBRAMANIAN SWAMY
v.
STATE OF TAMIL NADU & ORS.
(Civil Appeal No. 10620 of 2013)

JANUARY 6, 2014

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

CONSTITUTION OF INDIA, 1950:

Art. 26 – Freedom to manage religious affairs – 'Religious denomination' – Connotation of – Held: Art. 26(d) protects the rights of 'religious denomination' to establish and administer the properties as clauses (c) and (d) guarantee a fundamental right to any religious denomination to own, acquire, establish and maintain such properties — Rights of 'denominational religious institutions' are to be preserved and protected from any invasion by State as guaranteed under Art. 26 and as statutorily embodied in s.107 of Madras Hindu Religious and Charitable Endowments Act, 1959 — A law which takes away the right to administer religious denomination altogether and vests it in any other authority would amount to a violation of right guaranteed in clause (d) of Art. 26 — Madras Hindu Religious and Charitable Endowments Act, 1959 –s.107.

MADRAS HINDU RELIGIOUS AND CHARITABLE ENDOWMENTS ACT, 1959:

s. 107 r/ w ss. 44 and 45 (2) – Protection of rights of 'religious denomination' in consonance with Art. 26 of Constitution of India – Rights of Dikshitars to maintain Sri Sabhanayagar Temple at Chidambaram — Appointment of Executive Officer to maintain the Temple – Writ petition dismissed by High Court holding that the earlier judgment in

Marimuthu Dikshitar[1] *did not operate as res judicata — Held: In* ***Marimuthu Dikshitar****, which had attained finality, it was recognized: (a) That Dikshitars, who are Smarthi Brahmins, form and constitute a 'religious denomination'; (b) Dikshitars are entitled to participate in administration of the Temple; and (c) It was their exclusive privilege which had been recognised and established for over several centuries — These issues stood finally determined by High Court and, thus, doctrine of* ***res judicata is applicable in full force*** *– The declaration that "Dikshitars are religious denomination or section thereof" is a declaration of their status and making such declaration is a judgment in rem — Res judicata – Code of Civil Procedure, 1908 – O. 47, r. 1 – Review.*

s. 107 r/w ss. 45 and 116 — Appointment of Executive Officer to manage Sri Sabhanayagar Temple at Chidambaram – Held: In view of the fact that rights of Dikshitars to administer the Temple had already been finally determined by High Court in 1951, State authorities under the Act 1959 could not pass any order denying those rights — Act 1959 had been enacted after pronouncement of the judgment in Marimuthu Dikshitar's case, but there is nothing in the Act taking away the rights of Dikshitars declared by the court, in the Temple or in the administration thereof — An Executive Officer could not have been appointed in the absence of any rules prescribing conditions subject to which such appointment could have been made.

ss. 44 and 45 r/w s. 107 – Super-session of administration of Temple – Held: Super-session of rights of administration cannot be of a permanent enduring nature — Its life has to be reasonably fixed so as to be co-terminus with the removal of the consequences of maladministration — Even if the management of a temple is taken over to remedy the evil, the management must be handed over to the person concerned immediately after the evil stands remedied — Continuation

1. *Marimuthu Dikshitar v. The State of Madras & Anr.* 1952 (1) MLJ 557.

thereafter would tantamount to usurpation of such proprietary rights or violation of fundamental rights guaranteed by the Constitution in favour of the person(s) concerned — Impugned order is liable to be set aside for failure to prescribe the duration for which it will be in force.

Code of Civil Procedure, 1908:

O.47, r.5 – Review – Scope of – Explained – Held: Even an erroneous decision cannot be a ground for the court to undertake review, as the first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and in absence of any such error, ***finality attached to the judgment/order cannot be disturbed.***

RES JUDICATA:

Res judicata – Meaning of – Explained – Maxims, "res judicata pro varitate accipitur", "interest reipublicae ut sit finis litium" and "nemo debet bis vexari pro uno et eadem causa".

A Notification No.G.O.Ms.894 dated 28.8.1951 notifying Sri Sabhanayagar Temple at Chidambaram (the 'Temple') to be subjected to the provisions of Chapter VI of the Madras Hindu Religious and Charitable Endowments Act 1951 was issued enabling the Government to promulgate a Scheme for the management of the Temple. The Hindu Religious Endowments Board, Madras (the 'Board'), by order dated 31.8.1951, appointed an Executive Officer for the management of the Temple etc. The Dikshitars, i.e. respondent no.6 and/or their predecessors-in-interest, who claimed to have been called for the establishment of the Temple in the name of Lord Natraja, and had been administering it for a long time, challenged the said orders dated 28.8.1951 and 31.8.1951 by filing Writ Petition Nos. 379-380 of 1951 before the High Court, which by

judgment and order dated 13.12.1951 in *Marimuthu Dikshitar,* allowed the writ petition holding that the Dikshitars constituted a 'religious denomination' and their position vis-à-vis the Temple was analogous to muttadhipati of a mutt; and the orders impugned in the writ petitions were violative of the provisions of Art. 26 of the Constitution. The appeals filed by the State Government before the Supreme Court stood dismissed, as the notification was withdrawn by the State Government. Subsequently, the Act 1951 was repealed by the Madras Hindu Religious and Charitable Endowments Act, 1959. The Commissioner of Religious Endowment, in exercise of power under the Act 1959, appointed an Executive Officer for administration of the Temple. The writ petition filed by respondent no. 6 was, ultimately, dismissed by single Judge of the High Court holding that the judgment in *Marimuthu Dikshitar*, would not operate as *res judicata*. The writ appeal was also dismissed by the Division Bench of the High Court.

In the instant appeals it was contended for the appellants that the Dikshitars had been declared, in a lis between Dikshitars and the State and the Religious Endowments Commissioner, that they were an acknowledged 'religious denomination' and in that capacity they had a right to administer the properties of the Temple. It was further submitted that the High Court committed an error by holding that the earlier judgment of the Division Bench in *Marimuthu Dikshitar* would not operate as *res judicata*.

Allowing the appeals, the Court

HELD: 1.1. The rights of the 'denominational religious institutions' are to be preserved and protected from any invasion by the State as guaranteed under Art. 26 of the Constitution, and as statutorily embodied in s.107 of the

Madras Hindu Religious and Charitable Endowments Act, 1959. [para 9] [329-B-C]

1.2. The term 'religious denomination' means collection of individuals having a system of belief, a common organisation; and designation of a distinct name. The right to administration of property by a 'religious denomination' would stand on a different footing altogether from the right to maintain its own affairs in matters of religion. [para 10] [329-D, E-F]

Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj etc. etc. v. The State of Gujarat & Ors. **1975 (2) SCR 317 =AIR 1974 SC 2098;** *T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors.,* **2002 (3) Suppl. SCR 587 = AIR 2003 SC 355; and** *Nallor Marthandam Vellalar & Ors. v. Commissioner, Hindu Religious and Charitable Endowments & Ors.,* **2003 (1) Suppl. SCR 920 = AIR 2003 SC 4225 – relied on.**

1.3. The right to maintain institutions would necessarily include the right to administer them. Art. 26(d) of the Constitution protects the rights of 'religious denomination' to establish and administer the properties as clauses (c) and (d) guarantee a fundamental right to any religious denomination to own, acquire, establish and maintain such properties. [para 11-12] [330-C-E-F]

S. Azeez Basha & Anr. v. Union of India, **1968 SCR 833 = AIR 1968 SC 662; and** *Khajamian Wakf Estates etc. v. State of Madras etc.* **1971 (2) SCR 790 = AIR 1971 SC 161 relied on.**

Central Bank of India v. Ravindra & Ors. **2001 (4) Suppl. SCR 323 =AIR 2001 SC 3095;** *Ombalika Das & Anr. v. Hulisa Shaw* **2002 (2) SCR 902 = AIR 2002 SC 1685 – referred to.**

2.1. It is evident from the judgment of the High Court in *Marimuthu Dikshitar*, which attained finality, as the State withdrew the notification, that the Court recognised: (a) That Dikshitars, who are Smarthi Brahmins, form and constitute a 'religious denomination'; (b) Dikshitars are entitled to participate in administration of the Temple; and (c) It was their exclusive privilege which had been recognised and established for over several centuries. These issues stood finally determined by the High Court in the earlier judgment of *Marimuthu Dikhsitars,* as the State Government had withdrawn the notification in the appeal before this Court and, thus, doctrine of *res judicata* is applicable in full force.[para 18,21, and 36] [334-H; 335-A; 336-G-H; 337-A-B; 343-E]

2.2. An issue in a case between the same parties, which had been finally determined could not be negated relying upon interpretation of law given subsequently in some other cases. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as *res judicata*. It is a settled legal proposition that the ratio of any decision must be understood in the background of the facts of that case and the case is only an authority for what it actually decides, and not what logically follows from it. [para 22, 24 and 31] [337-C-D; 338-A; 341-D]

Shah Shivraj Gopalji v. ED-, Appakadh Ayiassa Bi & Ors., **AIR 1949 PC 302; and** *Mohanlal Goenka v. Benoy Kishna Mukherjee & Ors.,* **1953 SCR 377 = AIR 1953 SC 65 ;** ***Smt. Raj Lakshmi Dasi & Ors. v. Banamali Sen & Ors.,*** **1953 SCR 154 =AIR 1953 SC 33,** *Sheoparsan Singh v. Ramnandan Singh*, **AIR 1916 PC 78;** *Satyadhyan Ghosal & Ors. v. Smt. Deorajin Debi & Anr.* **1960 SCR 590 = AIR 1960 SC 941;** *Daryao & Ors. v. The State of U.P. & Ors.* **1962 SCR 574 = AIR 1961 SC 1457;** *Greater Cochin Development Authority v. Leelamma Valson & Ors.,* **AIR 2002**

SC 952; and *Bhanu Kumar Jain v. Archana Kumar & Anr.*, **2004 (6) Suppl. SCR 1104 = AIR 2005 SC 626;** *Amalgamated Coalfields Ltd. & Anr. v. Janapada Sabha Chhindwara & Ors.*, **1963 Suppl. SCR 172 = AIR 1964 SC 1013;** *Hope Plantations Ltd. v. Taluk Land Board, Peermade & Anr.* **1998 (2) Suppl. SCR 514 = (1999) 5 SCC 590;** *Burn & Co., Calcutta v. Their Employees* **1956 SCR 781 = AIR 1957 SC 38;** *G.K. Dudani & Ors. v. S.D. Sharma & Ors.* **1986 SCR 250 = AIR 1986 SC 1455; and** *Ashok Kumar Srivastav v. National Insurance Co. Ltd. & Ors.*, **1998 (2) SCR 1199 = AIR 1998 SC 2046;** *The State of Punjab v. Bua Das Kaushal* **AIR 1971 SC 1676;** *Union of India v. Nanak Singh* **1968 SCR 887 = AIR 1968 SC 1370 – referred to.**

2.3. The declaration that "Dikshitars are religious denomination or section thereof" is in fact a declaration of their status and making such declaration is in fact a judgment in *rem.* [para 32] [341-G]

Madan Mohan Pathak & Anr. v. Union of India & Ors. **1978 (3) SCR 334 = AIR 1978 SC 803; and** *State of Gujarat & Anr. v. Mr. Justice R.A. Mehta (Retd.) & Ors.* **2013 (1) SCR 1 = AIR 2013 SC 693 – referred to.**

2.4. Further, Explanation to Order XLVII, Rule 1 of Code of the Civil Procedure, 1908 provides that if the decision on a question of law on which the judgment of the court is based, is reversed or modified by the subsequent decision of a superior court in any other case, it shall not be a ground for the review of such judgment. Thus, even an erroneous decision cannot be a ground for the court to undertake review, as the first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and in absence of any such error, finality attached to the judgment/order cannot be disturbed. [para 35] [343-B-D]

Rajendra Kumar & Ors. v. Rambhai & Ors., **AIR 2003 SC 2095 — relied on**

2.5. Thus, it was not permissible for the High Court to assume that it had jurisdiction to sit in appeal against its earlier judgment of 1951 which had attained finality. Even otherwise, the High Court has committed an error in holding that the said judgment in *Marimuthu Dikshitar* would not operate as res judicata. Even if the Temple was neither established, nor owned by the said respondent, nor such a claim has ever been made by the *Dikshitars*, once the High Court in earlier judgment has recognised that they constituted 'religious denomination' or section thereof and had right to administer the Temple since they had been administering it for several centuries, the question of re-examination of any issue in this regard could not arise. [para 38] [344-C-E]

3.1. Admittedly, the Act 1959 had been enacted after pronouncement of the judgment in *Marimuthu Dikshitar,* but there is nothing in the Act taking away the rights of respondent no. 6, declared by the court, in the Temple or in the administration thereof. Therefore, the State authorities under the Act 1959 could not pass any order denying those rights. [para 36] [343-E-F]

3.2. The fundamental rights as protected under Art. 26 of the Constitution are already indicated for observance in s.107 of the Act 1959 itself. Such rights cannot be treated to have been waived nor its protection denied. Consequently, the power to supersede the functions of a 'religious denomination' is to be read as regulatory for a certain purpose and for a limited duration, and not an authority to virtually abrogate the rights of administration conferred on it. In such a fact-situation, it was not permissible for the authorities to pass any order divesting the said respondent from administration of the Temple and thus, all orders passed

in this regard are liable to be held inconsequential and unenforceable. [Para 37] [343-G-H; 344-A-B]

3.3. Section 116 of the Act 1959 enables the State Government to frame rules to carry out the purpose of the Act for "all matters expressly required or allowed by this Act to be prescribed**". Section 45 of the Act 1959 provides for appointment of an Executive Officer, subject to such conditions as may be** prescribed**. The term 'prescribed' has not been defined under the Act. Prescribed means prescribed by rules. [s.2(16) CPC]. If the word 'prescribed' has not been defined specifically, the same would mean to be prescribed in accordance with law and not otherwise. Therefore, a particular power can be exercised only if a specific enacting law or statutory rules have been framed for that purpose. [para 40 and 43] [344-H; 345-A, G-H; 346-A]**

Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal, **1962 Suppl. SCR 450 = AIR 1962 SC 527;** *Hindustan Ideal Insurance Co. Ltd. v. Life Insurance Corporation of India,* **1963 Suppl. SCR 56 = AIR 1963 SC 1083;** *Maharashtra SRTC v. Babu Goverdhan Regular Motor Service Warora & Ors.,* **1970 (2) SCR 319 = AIR 1970 SC 1926; and** *Bharat Sanchar Nigam Ltd. & Anr. v. BPL Mobile Cellular Ltd. & Ors.*, **2008 (8) SCR 729 = (2008) 13 SCC 597 – relied on.**

3.4. An Executive Officer could not have been appointed in the absence of any rules prescribing conditions subject to which such appointment could have been made. [Para 44] [346-D-E]

M.E. Subramani & Ors. v. Commissioner, HR&CE & Ors., **AIR 1976 Mad 264 – disapproved.**

3.5. Super-session of rights of administration cannot be of a permanent enduring nature. Its life has to be reasonably fixed so as to be co-terminus with the removal

of the consequences of maladministration. The reason is that the objective to take over the management and administration is not the removal and replacement of the existing administration but to rectify and stump out the consequences of maladministration. Even if the management of a temple is taken over to remedy the evil, the management must be handed over to the person concerned immediately after the evil stands remedied. Continuation thereafter would tantamount to usurpation of their proprietary rights or violation of the fundamental rights guaranteed by the Constitution in favour of the persons deprived. This Court is of the view that the impugned order is liable to be set aside for failure to prescribe the duration for which it will be in force. [para 47] [347-G-H; 348-A-D]

Sri Sri Sri Lakshamana Yatendrulu & Ors. v. State of A.P. & Anr. **1996 (1) SCR 929 = AIR 1996 SC 1414 - referred to.**

3.6. Power to regulate does not mean power to supersede the administration for indefinite period. The word 'regulate' is a word of broad import, having a broad meaning and may be very comprehensive in scope. Thus, it may mean to control or to subject to governing principles. Regulate has different set of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation. The word 'regulate' is elastic enough to include issuance of directions etc. [para 47] [348-E-F]

K. Ramanathan v. State of Tamil Nadu & Anr., **1985 (2) SCR 1028 = AIR 1985 SC 660; and** *Balmer Lawrie & Company Limited & Ors. Partha Sarathi Sen Roy & Ors*. **(2013) 8 SCC 345 – referred to.**

3.7. Even otherwise it is not permissible for the State/ Statutory Authorities to supersede the administration by adopting any oblique/circuitous method. [para 48] [348-H]

Sant Lal Gupta & Ors. v. Modern Coop. Group Housing Society Ltd. & Ors. **2010 (13) SCR 621 = (2010) 13 SCC 336;** *Jagir Singh v. Ranbir Singh* **1979 (2) SCR 282 = AIR 1979 SC 381;** *A.P. Diary Dev. Corporation federation v. B. Narsimha Reddy & Ors.* **2011(14) SCR 1 =AIR 2011 SC 3298; and** *State of Tamil Nadu & Ors. v. K. Shyam Sunder & Ors*. **2011 (11) SCR 1094 = AIR 2011 SC 3470 – referred to.**

3.8. The Constitution Bench of this Court in *Shirur Mutt* categorically held that a law which takes away the right to administer the religious denomination altogether and vests it in any other authority would amount to a violation of right guaranteed in clause (d) of Art. 26 of the Constitution. Therefore, the law could not divest the administration of religious institution or endowment. However, the State may have a general right to regulate **the right of administration of a religious or charitable institution or endowment and by such a law, State may also choose to impose such restrictions as are felt most acute and provide a remedy therefor. [para 15] [332-E-G]**

The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt **1954 SCR 1005 = 1954 SC 282 – relied on.**

Ratilal Panachand Gandhi & Ors. v. State of Bombay & Ors. **1954 SCR 1035 = AIR 1954 SC 388; and** *Pannalal Bansilal Pitti & Ors. v. State of A.P. & Anr.* **1996 (1) SCR 603 = AIR 1996 SC 1023 – referred to.**

3.9. In view of the provisions of ss.44 and 45(2) of the Act 1959, the State Government can regulate the secular activities without interfering with the religious activities. [para 17] [334-F-G]

3.10. The power under the Act 1959 for appointment of an Executive Officer could not have been exercised in the absence of any prescription of circumstances/

conditions in which such an appointment may be made. More so, the order of appointment of the Executive Officer does not disclose as for what reasons and under what circumstances his appointment was necessitated. Even otherwise, the order in which no period of its operation is prescribed, is not sustainable being *ex facie* arbitrary, illegal and unjust. Therefore, judgments/orders impugned are set aside. [para 49-50] [349-E-G]

Case Law Reference:

1954 SCR 1005	**relied on**	**para 2**
2001 (4) Suppl. SCR 323	**referred to**	**para 8**
2002 (2) SCR 902	**referred to**	**Para 8**
1975 (2) SCR 317	**relied on**	**para 10**
2002 (3) Suppl. SCR 587	**relied on**	**para 10**
2003 (1) Suppl. SCR 920	**relied on**	**para 10**
1968 SCR 833	**relied on**	**para 11**
1971 (2) SCR 790	**relied on**	**para 12**
1996 (1) SCR 929	**referred to**	**para 13**
1954 SCR 1035	**referred to**	**para 15**
1996 (1) SCR 603	**referred to**	**para 15**
AIR 1949 PC 302	**referred to**	**para 24**
1953 SCR 377	**referred to**	**para 24**
1953 SCR 154	**referred to**	**para 25**
AIR 1916 PC 78	**referred to**	**para 25**
1960 SCR 590	**referred to**	**para 26**
1962 SCR 574	**referred to**	**Para 26**

AIR 2002 SC 952	**referred to**	**Para 26**
2004 (6) Suppl. SCR 1104	**referred to**	**Para 26**
1963 Suppl. SCR 172	**referred to**	**para 27**
1998 (2) Suppl. SCR 514	**referred to**	**para 28**
1956 SCR 781	**referred to**	**para 28**
1986 SCR 250	**referred to**	**para 28**
1998 (2) SCR 1199	**referred to**	**para 28**
AIR 1971 SC 1676	**referred to**	**para 29**
1968 SCR 887	**referred to**	**para 30**
1978 (3) SCR 334	**referred to**	**para 33**
2013 (1) SCR 1	**referred to**	**para 34**
AIR 2003 SC 2095	**relied on**	**para 35**
1962 Suppl. SCR 450	**relied on**	**para 45**
1963 Suppl. SCR 56	**relied on**	**para 45**
1970 (2) SCR 319	**relied on**	**para 45**
2008 (8) SCR 729	**relied on**	**para 45**
AIR 1976 Mad 264	**disapproved**	**Para 44**
1985 (2) SCR 1028	**referred to**	**para 47**
(2013) 8 SCC 345	**referred to**	**para 48**
2010 (13) SCR 621	**referred to**	**para 48**
1979 ( ) SCR 282	**referred to**	**para 48**
2011 (14) SCR 1	**referred to**	**para 48**
2011 (11) SCR 1094	**referred to**	**para 48**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10620 of 2013.

From the Judgment and Order dated 15.09.2009 of the High Court of Judicature at Madras in W.A.(C) No. 181 of 2009.

WITH

C.A. Nos. 10621 and 10622 of 2013.

R. Venkataramani, C.S. Vaidyanathan, Dhruv Mehta, Colin Gonsalves, Subramonium Prasad, AAG, Dr. Subramanian Swamy (Petitioner-In-Person), Dr. Roxna S. Swamy, Ishkaran Singh Bhandari, Supriya Manan, V. Vijaylakshmi, Bindu K. Nair, Chandra Shekhar, Neelam Singh, Shodhan Babu, Pavni Poddar (for K.R. Sasiprabhu), K. Parameshwawr, S.R. Setia, P.R. Kovilan Poongkuntran, Geetha Kovilan, S. Raju, Melton, R. Sagadevan, R.V. Kameshwaran, M. Yogesh Kanna, A. Santha Kumaran, Vanita C. Giri, B. Balaji, Govindaramanuja Dasu (Respondent-In -Person in C.A. No. 10621 of 2013), Abhisth Kumar, Naresh Kumar, S.K. Verma for the appearing parties.

The Judgment of the Court was delivered by

Dr. B. S. CHAUHAN, J. 1. All these appeals have been filed against the impugned judgment and order dated 15.9.2009 passed in Writ Appeal No.181 of 2009 by the High Court of Madras affirming the judgment and order dated 2.2.2009 of the learned Single Judge passed in Writ Petition No.18248 of 2006 rejecting the claim of the writ petitioner – Podhu Dikshitars to administer the Temple.

In Civil Appeal No. 10620/2013, the appellant has raised the issue of violation of the constitutional rights protected under Article 26 of the Constitution of India, 1950 (hereinafter referred to as 'Constitution') in relation to the claim by Podhu Dikshitars (Smarthi Brahmins) to administer the properties of the Temple in question dedicated to Lord Natraja. The same gains further importance as it also involves the genesis of such pre-existing

rights even prior to the commencement of the Constitution and the extent of exercise of State control under the statutory provisions of The Madras Hindu Religious and Charitable Endowments Act 1951 (hereinafter referred to as the 'Act 1951') as well as the Tamil Nadu Hindu Religious and Charitable Endowments Act 1959 (hereinafter referred to as the 'Act 1959').

Civil Appeal No. 10621/2013 is on behalf of Podhu Dikshitars claiming the same relief and Civil Appeal No. 10622/2013 has been filed by the appellants supporting the claim of the appellant in Civil Appeal No. 10621/2013.

2. For convenience in addressing the parties and deciding the appeals, we have taken Civil Appeal No. 10620/2013 as the leading appeal. The facts and circumstances giving rise to the appeal are as under:

A. That Sri Sabhanayagar Temple at Chidambaram (hereinafter referred to as the 'Temple') is in existence since times immemorial and had been administered for a long time by Podhu Dikshitars (all male married members of the families of Smarthi Brahmins who claim to have been called for the establishment of the Temple in the name of Lord Natraja).

B. The State of Madras enacted the Madras Hindu Religious and Charitable Endowments Act, 1927 (hereinafter referred to as the 'Act 1927'), which was repealed by the Act 1951. A Notification No.G.O.Ms.894 dated 28.8.1951 notifying the Temple to be subjected to the provisions of Chapter VI of the Act 1951 was issued. The said notification enabled the Government to promulgate a Scheme for the management of the Temple.

C. In pursuance to the same, the Hindu Religious Endowments Board, Madras (hereinafter called the 'Board') appointed an Executive Officer for the management of the Temple in 1951 vide order dated 28.8.1951 etc.

D. The Dikshitars, i.e. respondent no.6 and/or their

predecessors in interest challenged the said orders dated 28.8.1951 and 31.8.1951 by filing Writ Petition nos. 379-380 of 1951 before the Madras High Court which were allowed vide judgment and order dated 13.12.1951 quashing the said orders, holding that the Dikshitars constituted a '**religious denomination'** and their position vis-à-vis the Temple was analogous to muttadhipati of a mutt; and the orders impugned therein were violative of the provisions of Article 26 of the Constitution.

E. Aggrieved, the State of Madras filed appeals before this Court, which stood dismissed vide order dated 9.2.1954 as the notification was withdrawn by the State-respondents. After the judgment in the aforesaid case as well as in *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt,* AIR 1954 SC 282 (hereinafter referred to as *'Shirur Mutt* Case'), the Act 1951 was repealed by the Act 1959. Section 45 thereof empowers the Statutory Authorities to appoint an Executive Officer to administer the religious institutions. However, certain safeguards have been provided under various provisions including Section 107 of the Act 1959.

F. On 31.7.1987, the Commissioner of religious endowment in exercise of his power under the Act 1959 appointed an Executive Officer. Consequent thereto, the Commissioner HR&CE passed an order dated 5.8.1987 defining the duties and powers of the Executive Officer, so appointed for the administration of the Temple.

G. Aggrieved, the respondent no.6 challenged the said order by filing Writ Petition No.7843 of 1987. The High Court of Madras granted stay of operation of the said order dated 5.8.1987. However, the writ petition stood dismissed vide judgment and order dated 17.2.1997.

H. Aggrieved, the respondent no.6 preferred Writ Appeal No.145 of 1997 and the High Court vide its judgment and order

dated 1.11.2004 disposed of the said writ appeal giving liberty to respondent no.6 to file a revision petition before the Government under Section 114 of the Act 1959 as the writ petition had been filed without exhausting the statutory remedies available to the said respondent.

I. The revision petition was preferred, however, the same stood dismissed vide order dated 9.5.2006 rejecting the contention of the respondent no.6 that the order dated 5.8.1987 violated respondent's fundamental rights under Article 26 of the Constitution observing that by virtue of the operation of law i.e. statutory provisions of Sections 45 and 107 of the Act 1959, such rights were not available to the respondent no.6. In this order, the entire history of the litigation was discussed and it was also pointed out that the Executive Officer had taken charge of the Temple on 20.3.1997 and had been looking after the management of the Temple since then. The said order also revealed that the respondent no.6 could not furnish proper accounts of movable and immovable properties of the Temple and recorded the following finding of fact:

> "The powers given to the Executive Officer, are the **administration of the Temple** and its properties and maintain these in a secular manner. Hence, the rights of the petitioners are not at all affected or interfered with, in any manner whatsoever the aim and reason behind the appointment of the Executive Officer is not for removing the petitioners who call themselves as trustees to this Temple." (Emphasis added)

J. The respondent no.6 preferred Writ Petition No.18248 of 2006 for setting aside the order dated 9.5.2006 which was dismissed by the High Court vide judgment and order dated 2.2.2009 observing that the judgment referred to hereinabove in Writ Petition (C) Nos. 379-380 of 1951 titled *Marimuthu Dikshitar v. The State of Madras & Anr.,* reported in 1952 (1) MLJ 557, wherein it was held that Dikshitars were a 'religious denomination', would not operate as *res judicata*.

K. Aggrieved, the respondent no.6 filed Writ Appeal No.181 of 2009. The present appellant Dr. Subramanian Swamy was allowed by the High Court to be impleaded as a party. The Writ Appeal has been dismissed vide impugned judgment and order dated 15.9.2009.

Hence, these appeals.

3. The appellant-in-person has submitted that Article 26 of the Constitution confers certain fundamental rights upon the citizens and particularly, on a 'religious denomination' which can neither be taken away nor abridged. In the instant case, the Dikshitars had been declared by this Court, in a lis between Dikshitars and the State and the Religious Endowments Commissioner, that they were an acknowledged `religious denomination' and in that capacity they had a right to administer the properties of the Temple. Though in view of the provisions of Section 45 read with Section 107 of the Act 1959, the State may have a power to regulate the activities of the Temple, but lacks competence to divest the Dikshitars from their right to manage and administer the Temple and its properties. It was strenuously contended that the High Court committed an error by holding that the earlier judgment of the Division Bench in *Marimuthu Dikshitar* (Supra) would not operate as *res judicata*. Therefore, the appeal deserves to be allowed.

4. Per contra, Shri Dhruv Mehta and Shri Colin Gonsalves, learned Senior counsel, and Shri Yogesh Kanna, learned counsel have opposed the appeal contending that no interference is required by this court as the High Court has rightly held that the aforesaid judgment of the Madras High Court or the judgment of this Court in *Shirur Mutt* case (Supra) would not operate as *res judicata* even if the earlier dispute had been contested between the same parties and touches similar issues, for the reason that Article 26(d) applies only when the temple/property is owned and established by the 'religious denomination'. In the instant case, the Temple is

neither owned by respondent No. 6, nor established by it. Thus, the appeal is liable to be dismissed.

Shri Subramonium Prasad, learned Addl. Advocate General appearing for the State and the Statutory authorities has opposed the appeal contending that the Executive Officer has been appointed to assist the Podhu Dikshitars and to work in collaboration with them and the said respondent has not been divested of its powers at all, so far as the religious matters are concerned. Thus, the matter should be examined considering these aspects.

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

6. Before entering into the merits of the case, it may be relevant to refer to the relevant statutory provisions.

Section 27 of the Act 1959 provides that the trustee would be bound to obey all lawful orders issued by the Government or the statutory authorities.

Section 45 of the Act 1959 provides for appointment and duties of Executive Officer and relevant part thereof reads:

> "(1) Notwithstanding anything contained in this Act, the Commissioner may appoint, subject to such conditions as may be prescribed, an Executive Officer for any religious institution other than a Math or a specific endowment attached to a Math.
>
> (2) The Executive Officer shall exercise such powers and discharge such duties as may be assigned to him by the Commissioner.
>
> Provided that only such powers and duties as appertain to the administration of the properties of the religious institutions referred to in sub-section (1) shall be assigned to the executive officer.

xxx xxx xxx xxx

On the other hand, Section 107 of the Act 1959 provides that the Act would not affect the rights guaranteed under Article 26 of the Constitution. It reads:

"Nothing contained in this Act shall, save as otherwise provided in Section 106 and in Clause (2) of Article 25 of the Constitution, be deemed to confer any power or impose any duty in contravention of the rights conferred on any religious denomination or any Section thereof by Article 26 of the Constitution."

Section 116 of the Act 1959 reads as under:

"116. **Power to make rules**-

(1) The Government may, by notification, make rules to carry out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for-

(i) all matters expressly required or allowed by this Act to be prescribed;

xx xx xx

(3) All rules made and all notifications issued under this Act shall, as soon as possible after they are made or issued, be placed on the table of the Legislative Assembly and shall be subject to such modifications by way of amendment or repeal as the Legislative Assembly may make either in the same session or in the next session."

7. Article 26 of the Constitution provides for freedom to manage religious affairs and it reads as under:

"26. Freedom to manage religious affairs - Subject to public order, morality and health, every religious

denomination or any section thereof shall have the right –

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer **such** property in accordance with law."

(Emphasis added)

8. The word "such" has to be understood in the context it has been used. A Constitution Bench of this Court in *Central Bank of India v. Ravindra & Ors.,* AIR 2001 SC 3095 dealt with the word "such" and held as under:

"43. Webster defines "such" as "having the particular quality or character specified; certain, representing the object as already particularised in terms which are not mentioned. In New Webster's Dictionary and Thesaurus, meaning of "such" is given as "of a kind previously or about to be mentioned or implied; of the same quality as something just mentioned (used to avoid the repetition of one word twice in a sentence); of a degree or quantity stated or implicit; the same as something just mentioned (used to avoid repetition of one word twice in a sentence); that part of something just stated or about to be stated". Thus, generally speaking, the use of the word "such" as an adjective prefixed to a noun is indicative of the draftsman's intention that he is assigning the same meaning or characteristic to the noun as has been previously indicated or that he is referring to something which has been said before. This principle has all the more vigorous application when the two places employing the same expression, at earlier place

the expression having been defined or characterised and at the latter place having been qualified by use of the word "such", are situated in close proximity."

(See also: *Ombalika Das & Anr. v. Hulisa Shaw,* AIR 2002 SC 1685).

9. The aforesaid provisions make it clear that the rights of the 'denominational religious institutions' are to be preserved and protected from any invasion by the State as guaranteed under Article 26 of the Constitution, and as statutorily embodied in Section 107 of the Act 1959.

10. Undoubtedly, the object and purpose of enacting Article 26 of the Constitution is to protect the rights conferred therein on a 'religious denomination' or a section thereof. However, the rights conferred under Article 26 are subject to public order, morality and health and not subject to any other provision of Part III of the Constitution as the limitation has been prescribed by the law makers by virtue of Article 25 of the Constitution.

The term 'religious denomination' means collection of individuals having a system of belief, a common organisation; and designation of a distinct name. The right to administration of property by a 'religious denomination' would stand on a different footing altogether from the right to maintain its own affairs in matters of religion. (Vide: *Acharya Maharajshri Narendra Prasadji Anandprasadji Maharaj etc.etc. v. The State of Gujarat & Ors.,* AIR 1974 SC 2098; *T.M.A. Pai Foundation & Ors. v. State of Karnataka & Ors.,* AIR 2003 SC 355; and *Nallor Marthandam Vellalar & Ors. v. Commissioner, Hindu Religious and Charitable Endowments & Ors.,* AIR 2003 SC 4225).

11. The Constitution Bench of this Court in *S. Azeez Basha & Anr. v. Union of India,* AIR 1968 SC 662, while dealing with the rights of minority to establish educational institutions, also

dealt with the provisions of Article 26 of the Constitution and observed that the words "establish and maintain" contained in Article 26 (a) must be read conjunctively. A 'religious denomination' can only claim to maintain that institution which has been established by it. The right to maintain institutions would necessarily include the right to administer them. The right under Article 26(a) of the Constitution will **only** arise where the institution is established by a 'religious denomination' and **only** in that event, it can claim to maintain it. While dealing with the issue of Aligarh Muslim University, this Court rejected the claim of Muslim community of the right to administer on the ground that it had not been established by the Muslim community and, therefore, they did not have a right to maintain the university within the meaning of Article 26(a) of the Constitution.

12. In *Khajamian Wakf Estates etc. v. State of Madras etc.,* AIR 1971 SC 161, the Constitution Bench of this Court held that the religious denomination can own, acquire properties and administer them in accordance with law. In case they lose the property or alienate the same, the right to administer automatically lapses for the reason that property ceases to be their property. Article 26(d) of the Constitution protects the rights of 'religious denomination' to establish and administer the properties as clauses (c) and (d) guarantee a fundamental right to any religious denomination to own, acquire, establish and maintain such properties.

13. In *Sri Sri Sri Lakshamana Yatendrulu & Ors. v. State of A.P. & Anr.,* AIR 1996 SC 1414, this Court examined the constitutional validity of some of the provisions of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act 1987. The Court also examined the object of the scheme framed under Section 55 of the said Act and held as under:

*"..That the **power of the Commissioner to frame scheme is not absolute but is conditioned** upon reasonable belief on the basis of the report submitted by*

the Deputy Commissioner and there must be some material on record for entertaining a ***reasonable belief that the affairs of the Math and its properties are being mismanaged or that funds are misappropriated*** *or that the mathadhipathi grossly neglected in performing his duties. Prior enquiry in that behalf is duly made in accordance with the rules prescribed thereunder. The members of the committee so appointed shall be the persons who are genuinely interested in the proper management of the Math, management of the properties and useful utilization of the funds for the purpose of which the endowment is created. Thus,* ***the paramount consideration is only proper management of the Math*** *and utilisation of the funds for the purpose of the Math as per its customs, usage etc." (*Emphasis added)

The Court further held:

"Such a scheme can be ***only to run day-to-day management*** *of the endowment and the committee would be of supervisory mechanism as overall incharge of the Math."* (Emphasis added)

As the Act 1987 did not provide the duration for which the scheme would remain in force, the court held that "the duration of the scheme thus framed may also be specified either in the original scheme or one upheld with modification, if any, in appeal." The Court held:

"36. The object of Section 55 ***appears to be to remedy mismanagement of the math or misutilisation of the funds of the math or neglect in its management****. The scheme envisages modification or its cancellation thereof, which would indicate that* ***the scheme is of a temporary nature and duration till the evil,*** *which was recorded by the Commissioner after due enquiry,* ***is remedied*** *or a fit person is nominated as mathadhipathi and is recognised by the Commissioner. The scheme is*

required to be cancelled as soon as the nominated mathadhipathi assumes office and starts administering the math and manages the properties belonging to, endowed or attached to the math or specific endowment." (Emphasis added)

Thus, this Court clarified that there cannot be super-session of administration in perpetuity. It is a temporary measure till the evil gets remedied.

14. In the aforesaid backdrop, we shall examine the present appeals.

The learned Single Judge while deciding Writ Petition No. 18248/2006 examined the case raising the following question:

"Observations of the Division Bench in 1952 (1) MLJ 557 that Podhu Dikshitars are a 'denomination' are to be tested in the light of well-settled principles laid down in various decisions of the Supreme Court."

The learned Single Judge as well as the Division Bench made it a pivotal point while dealing with the case.

15. The Constitution Bench of this Court in *Shirur Mutt* (Supra) categorically held that a law which takes away the right to administer the religious denomination altogether and vests it in any other authority would amount to a violation of right guaranteed in clause (d) of Article 26 of the Constitution. Therefore, the law could not divest the administration of religious institution or endowment. However, the State may have a general right to **regulate** the right of administration of a religious or charitable institution or endowment and by such a law, State may also choose to impose such restrictions whereof as are felt most acute and provide a remedy therefore. (See also: *Ratilal Panachand Gandhi & Ors. v. State of Bombay & Ors.,* AIR 1954 SC 388; and *Pannalal Bansilal Pitti & Ors. v. State of A.P. & Anr.,* AIR 1996 SC 1023).

16. The *Shirur Mutt* case (Supra) had been heard by the Division Bench of the Madras High Court alongwith *Marimuthu Dikshitar* (Supra), and against both the judgments appeals were preferred before this court. However, in the case of respondent no.6, the appeal was dismissed as the State of Madras had withdrawn the impugned notification, while in *Shirur Mutt* case the judgment came to be delivered wherein this Court held as under:

> "15. As regards Art. 26. the first question is, what is the precise meaning or connotation of the expression "religious denomination" and whether a Math could come within this expression. The word "denomination" has been defined in the Oxford Dictionary to mean "a collection of individuals classed together under the same name : a religious sect or body having a common faith and organisation and designated by a distinctive name". It is well known that the practice of setting up Maths as centres of theological teaching was started by Shri Sankaracharya and was followed by various teachers since then. After Sankara came a galaxy of religious teachers and philosophers who founded the different sects and sub sects of the Hindu religion that we find in India at the present day.
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> *Each one of such sects or sub-sects can certainly be called a religious denomination, as it is designated by a distinctive name, —in many cases it the name of the founder — and has a common faith and common spiritual organization. The followers of Ramanuja, who are known by the name of Shri Vaishnabas, undoubtedly constitute a religious denomination; and so do the followers of Madhwacharya and other religious teachers. It is a fact well established by tradition that the Udipi Maths were founded by Madhwacharya himself and the trustees and the beneficiaries of these Maths profess to be followers of that teacher. The High Court has found that the Math in question is in charge of the Sivalli*

> *Brahmins who constitute a Section of the followers of Madhwacharya.As Art. 26 contemplates not merely a religious denomination but also a Section thereof, the Math or the spiritual fraternity represented by it can legitimately come within the purview of this Article.*
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> *16. The other thing that remains to be considered in regard to Art. 26 is, what, is the scope of clause (b) of the Article which speaks of management 'of its own affairs in matters of religion?" The language undoubtedly suggests that there could be other affairs of a religious denomination or a Section thereof which are not matter of religion and to which the guarantee given by this clause would not apply. The question is, where is the line to be drawn between what are matters of religion and what are not?*
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> *xx xx xx*
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> *22. Under Art. 26(b), therefore a religious denomination or organization enjoys complete autonomy in the matter of deciding as to what rites and ceremonies are essential according to the tenets of the religion they hold and no outside authority has any jurisdiction to interfere with their decision in such matters."*

This Court upheld the validity of Section 58 of the Act 1951 which had been struck down by the Division Bench which is analogous to Section 64 of the Act 1959.

17. In view of the provisions of Sections 44 and 45(2) of the Act 1959, the State Government can regulate the secular activities without interfering with the religious activities.

18. The issues involved herein are as to whether Dikshitars constitute a 'religious denomination' and whether they have a right to participate in the administration of the Temple. In fact, both the issues stood finally determined by the High Court in the earlier judgment of *Marimuthu Dikhsitars* (Supra) referred

to hereinabove and, thus, doctrine of *res judicata* is applicable in full force.

19. The Division Bench of Madras High Court while deciding the dispute earlier in *Marimuthu Dikshitar* (Supra), traced the history of Dikshitars and examined their rights, etc. The Court concluded:

> *"Looking at it from the point of view, whether the Podu Dikshitars are a denomination, and whether their right as a denomination is to any extent infringed within the meaning of Article 26, it seems to us that it is a clear case, in which it can safely be said that the* ***Podu Dikshitars*** *who are Smartha Brahmins, form and* ***constitute a religious denomination*** *or in any event, a* ***section thereof****. They are even a closed body, because no other Smartha Brahmin who is not a* ***Dikshitar is entitled to participate in the administration*** *or in the worship or in the services to God.* ***It is their exclusive and sole privilege which has been recognized and established for over several centuries.***
>
> *In the case of Sri Sabhanayakar Temple at Chidambaram, with which we are concerned in this petition, it should be clear from what we have stated earlier in this judgment, that the position of the Dikshitars, labelled trustees of this Temple, is virtually analogous to that of a* ***Matathipathi of a Mutt****, except that the Podu Dikshitars of this Temple, functioning as trustees, will not have the same dominion over the income of the properties of the Temple which the Matathipathi enjoys in relation to the income from the Mutt and its properties.* ***Therefore, the sections which we held ultra vires in relation to Mutts and Matathipathis will also be ultra vires the State Legislature in relation to Sri Sabhanayakar Temple, Chidambaram and the Podu Dikshitars who have the right to administer the affairs and the properties of the Temple.*** *As we have already pointed out even more than the case of the Shivalli Brahmins, it can be asserted that the Dikshitars of Chidambaram form a religious denomination within the meaning of Article 26 of the Constitution.*
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> *We certify under Article 132 of the Constitution that it is a fit case for appeal to the Supreme Court. Notification quashed."* (Emphasis added)

20. On the basis of the certificate of fitness, the State of Madras preferred Civil Appeal No.39 of 1953 before this Court against the said judgment and order of the Madras High Court, which was heard by the Constitution Bench of this Court on 9.2.1954. However, the said appeal stood dismissed as the State withdrew the notification impugned therein. Relevant part of the order runs as under :

> "The Appeal and the Civil Miscellaneous Petition above mentioned being called on for hearing before this Court on the 9th day of February, 1954 upon hearing the Advocate-General of Madras on behalf of the Appellants and counsel for the respondents and upon the said advocate-General appearing on behalf of the State of Madras agreeing to withdraw the notification G.O. Ms. No.894 Rural Welfare dated 28.8.1951 published in Fort St. George Gazette dated 4.9.1951 in the matter of the Sabhanayagar Temple, Chidambaram, Chidambaram Taluk, South Arcot District/the Temple concerned in this appeal/this Court doth order that the appeal and the civil miscellaneous petition above mentioned be and the same are hereby dismissed."

21. It is evident from the judgment of the High Court of Madras, which attained finality as the State withdrew the notification, that the Court recognised:

> (a) That Dikshitars, who are Smarthi Brahmins, form and constitute a 'religious denomination';

(b) Dikshitars are entitled to participate in administration of the Temple; and

(c) It was their exclusive privilege which had been recognised and established for over several centuries.

22. It is not a case to examine whether in the facts and circumstances of the case, the judgments of this court in various cases are required to be followed or the ratio thereof is binding in view of the provisions of Article 141 of the Constitution. Rather the sole question is whether an issue in a case between the same parties, which had been finally determined could be negated relying upon interpretation of law given subsequently in some other cases, and the answer is in the negative. More so, nobody can claim that the fundamental rights can be waived by the person concerned or can be taken away by the State under the garb of regulating certain activities.

23. The scope of application of doctrine of *res judicata* is in question.

The literal meaning of "*res*" is "everything that may form an object of rights and includes an object, subject-matter or status" and "*res judicata*" literally means "a matter adjudged a thing judicially acted upon or decided; a thing or matter settled by judgments". "*Res judicata pro veritate accipitur*" is the full maxim which has, over the years, shrunk to mere "*res judicata*", which means that *res judicata* is accepted for truth.

24. The doctrine contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence "*interest reipublicae ut sit finis litium*" (it concerns the State that there be an end to law suits) and partly on the maxim "*nemo debet bis vexari pro uno et eadem causa*" (no man should be vexed twice over for the same cause).

Even an erroneous decision on a question of law attracts the doctrine of *res judicata* between the parties to it. The

correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as *res judicata.* (Vide: *Shah Shivraj Gopalji v. ED-, Appakadh Ayiassa Bi & Ors.,* AIR 1949 PC 302; and *Mohanlal Goenka v. Benoy Kishna Mukherjee & Ors.,* AIR 1953 SC 65).

25. In *Smt. Raj Lakshmi Dasi & Ors. v. Banamali Sen & Ors.,* AIR 1953 SC 33, this Court while dealing with the doctrine of *res judicata* referred to and relied upon the judgment in *Sheoparsan Singh v. Ramnandan Singh,* AIR 1916 PC 78 wherein it had been observed as under:

> *"…….. the rule of res judicata, while founded on ancient precedents, is dictated by a wisdom which is for all time….. Though the rule of the Code may be traced to an English source, it embodies a doctrine in no way opposed to the spirit of the law as expounded by the Hindu commentators. Vijnanesvara and Nilakantha include the plea of a former judgment among those allowed by law, each citing for this purpose the text of Katyayana, who describes the plea thus: 'If a person though defeated at law, sue again, he should be answered, "you were defeated formerly". This is called the plea of former judgment.'... And so the application of the rule by the courts in India should be influenced by no technical considerations of form, but by matter of substance within the limits allowed by law"*

26. This Court in *Satyadhyan Ghosal & Ors. v. Smt. Deorajin Debi & Anr.,* AIR 1960 SC 941 explained the scope of principle of *res-judicata* observing as under:

> *"7. The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation, When a matter - whether on a question of fact or a question of law - has been decided between two*

parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in S. 11 of the Code of Civil Procedure; but even where S. 11 does not apply, the principle of res judicata has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct."

A similar view has been re-iterated by this court in *Daryao & Ors. v. The State of U.P. & Ors.,* AIR 1961 SC 1457; *Greater Cochin Development Authority v. Leelamma Valson & Ors.,* AIR 2002 SC 952; and *Bhanu Kumar Jain v. Archana Kumar & Anr.,* AIR 2005 SC 626.

27. The Constitution Bench of this Court in *Amalgamated Coalfields Ltd. & Anr. v. Janapada Sabha Chhindwara & Ors.,* AIR 1964 SC 1013, considered the issue of *res judicata* applicable in writ jurisdiction and held as under:

"…Therefore, there can be no doubt that the general principle of res judicata applies to writ petitions filed under Article 32 or Article 226. It is necessary to emphasise that the application of the doctrine of res judicata to the petitions filed under Art. 32 does not in any way impair or affect the content of the fundamental rights guaranteed to the citizens of India. It only seeks to regulate the manner in which the said rights could be successfully asserted and vindicated in courts of law."

28. In *Hope Plantations Ltd. v. Taluk Land Board, Peermade & Anr.,* (1999) 5 SCC 590, this Court has explained the scope of finality of the judgment of this Court observing as under:

"One important consideration of public policy is that the decision pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by the appellate authority and other principle that no one should be made to face the same kind of litigation twice ever because such a procedure should be contrary to consideration of fair play and justice. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it."

(See also: *Burn & Co., Calcutta v. Their Employees,* AIR 1957 SC 38; *G.K. Dudani & Ors. v. S.D. Sharma & Ors.,* AIR 1986 SC 1455; and *Ashok Kumar Srivastav v. National Insurance Co. Ltd. & Ors.,* AIR 1998 SC 2046).

29. A three-Judge Bench of this court in *The State of Punjab v. Bua Das Kaushal,* AIR 1971 SC 1676 considered the issue and came to the conclusion that if necessary facts were present in the mind of the parties and had gone into by the court, in such a fact-situation, absence of specific plea in written statement and framing of specific issue of *res judicata* by the court is immaterial.

30. A similar view has been re-iterated by this court in *Union of India v. Nanak Singh,* AIR 1968 SC 1370 observing as under:

"This Court in Gulabchand Chhotalal v. State of Gujarat, AIR 1965 SC 1153 observed that the provisions of Section 11 of the Code of Civil Procedure are not exhaustive with respect to all earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit, and on the general principle of res judicata, any previous

decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as res judicata in a subsequent regular suit. It is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter. There is no good reason to preclude, such decisions on matters in controversy in writ proceedings under Article 226 or Article 32 of the Constitution from operating as res judicata in subsequent regular suits on the same matters in controversy between the same parties and thus to give limited effect to the principle of the finality of decisions after full contest."

31. It is a settled legal proposition that the ratio of any decision must be understood in the background of the facts of that case and the case is only an authority for what it actually decides, and not what logically follows from it. "The court should not place reliance on decisions without discussing as to how the factual situation fits in with the fact-situation of the decision on which reliance is placed."

32. Even otherwise, a different view on the interpretation of the law may be possible but the same should not be accepted in case it has the effect of unsettling transactions which had been entered into on the basis of those decisions, as reopening past and closed transactions or settled titles all over would stand jeopardized and this would create a chaotic situation which may bring instability in the society.

The declaration that "Dikshitars are religious denomination or section thereof" is in fact a declaration of their status and making such declaration is in fact a judgment in *rem.*

33. In *Madan Mohan Pathak & Anr. v. Union of India & Ors.,* AIR 1978 SC 803, a seven-Judge Bench of this Court dealt with a case wherein the question arose as to whether the

order passed by the Calcutta High Court issuing writ of mandamus directing the Life Insurance Corporation of India (hereinafter referred to as L.I.C.) to pay cash bonus for the year 1975-76 to its class 3 and 4 employees in terms of the settlement between the parties was allowed to become final. Immediately after the pronouncement of the judgment, the Parliament enacted the LIC (Modification of Settlement) Act, 1976. The appeal filed against the judgment of Calcutta High Court was not pressed by LIC and the said judgment was allowed to become final. This Court rejected the contention of the LIC that in view of the intervention of legislation, it was not liable to meet the liability under the said judgment. The Court held that there was nothing in the Act which nullifies the effect of the said judgment or which could set at naught the judgment or take away the binding character of the said judgment against LIC. Thus, the LIC was liable to make the payment in accordance with the said judgment and it could not be absolved from the obligation imposed by the said judgment.

34. This Court, while considering the binding effect of the judgment of this Court, in *State of Gujarat & Anr. v. Mr. Justice R.A. Mehta (Retd.) & Ors.,* AIR 2013 SC 693, held:

"There can be no dispute with respect to the settled legal proposition that a judgment of this Court is binding,.....It is also correct to state that, even if a particular issue has not been agitated earlier, or a particular argument was advanced, but was not considered, the said judgment does not lose its binding effect, provided that the point with reference to which an argument is subsequently advanced, has actually been decided. The decision therefore, would not lose its authority, "merely because it was badly argued, inadequately considered or fallaciously reasoned". (Vide: Smt. Somavanti & Ors. v. The State of Punjab & Ors., AIR 1963 SC 151; Ballabhdas Mathuradas Lakhani & Ors. v. Municipal Committee, Malkapur, AIR 1970 SC 1002; Ambika

Prasad Mishra v. State of U.P. & Ors., AIR 1980 SC 1762; and Director of Settlements, A.P. & Ors. v. M.R. Apparao & Anr., AIR 2002 SC 1598).”

35. The issue can be examined from another angle. Explanation to Order XLVII, Rule 1 of Code of Civil Procedure, 1908 (hereinafter referred to as the ‘CPC’) provides that if the decision on a question of law on which the judgment of the court is based, is reversed or modified by the subsequent decision of a superior court in any other case, it shall not be a ground for the review of such judgment. Thus, even an erroneous decision cannot be a ground for the court to undertake review, as the first and foremost requirement of entertaining a review petition is that the order, review of which is sought, suffers from any error apparent on the face of the order and in absence of any such error, **finality attached to the judgment/order cannot be disturbed.** (Vide: *Rajendra Kumar & Ors. v. Rambhai & Ors.,* AIR 2003 SC 2095).

36. In view of the fact that the rights of the respondent no. 6 to administer the Temple had already been finally determined by the High Court in 1951 and attained finality as State of Madras (as it then was) had withdrawn the notification in the appeal before this Court, we are of the considered opinion that the State authorities under the Act 1959 could not pass any order denying those rights. Admittedly, the Act 1959 had been enacted after pronouncement of the said judgment but there is nothing in the Act taking away the rights of the respondent no. 6, declared by the court, in the Temple or in the administration thereof.

37. The fundamental rights as protected under Article 26 of the Constitution are already indicated for observance in Section 107 of the Act 1959 itself. Such rights cannot be treated to have been waived nor its protection denied. Consequently, the power to supersede the functions of a ‘religious denomination‘ is to be read as regulatory for a certain purpose and for a limited duration, and not an authority to

virtually abrogate the rights of administration conferred on it.

In such a fact-situation, it was not permissible for the authorities to pass any order divesting the said respondent from administration of the Temple and thus, all orders passed in this regard are liable to be held inconsequential and unenforceable. More so, the judgments relied upon by the respondents are distinguishable on facts.

38. Thus, in view of the above, it was not permissible for the High Court to assume that it had jurisdiction to sit in appeal against its earlier judgment of 1951 which had attained finality. Even otherwise, the High Court has committed an error in holding that the said judgment in *Marimuthu Dikshitar* (Supra) would not operate as *res judicata*. Even if the Temple was neither established, nor owned by the said respondent, nor such a claim has ever been made by the Dikshitars, once the High Court in earlier judgment has recognised that they constituted ‘religious denomination’ or section thereof and had right to administer the Temple since they had been administering it for several centuries, the question of re-examination of any issue in this regard could not arise.

39. Relevant features of the order passed by the Commissioner are that the Executive Officer shall be incharge of all immovable properties of the institution; the Executive Officer shall be entitled to the custody of all immovables, livestock and grains; the Executive Officer shall be entitled to receive all the income in cash and kind and all offerings; all such income and offerings shall be in his custody; all the office holders and servants shall work under the immediate control and superintendence of the Executive Officer, though subject to the disciplinary control of the Secretary of the respondent no.6., etc.

40. Section 116 of the Act 1959 enables the State Government to frame rules to carry out the purpose of the Act for “all matters expressly required or allowed by this Act to be

prescribed". Clause 3 thereof requires approval of the rules by the House of State Legislature. The Executive Officer so appointed by the Commissioner has to function as per assigned duties and to the extent the Commissioner directs him to perform.

41. It is submitted by Dr. Swamy that rules have to be framed defining the circumstances under which the powers under Section 45 of the Act 1959 can be exercised. The Act 1959 does not contemplate unguided or unbridled functioning. On the contrary, the prescription of rules to be framed by the State Government under Sections 116 read with Sections 45 and 65, etc. of the Act 1959 indicates that the legislature only intended to regulate and control any incidence of maladministration and not a complete replacement by introducing a Statutory authority to administer the Temple.

42. Section 2(16) CPC defines the term **'prescribed'** as prescribed by rules. Further, Section 2(18) CPC defines rules as Rules and forms as contained in the First Schedule or made under Section 122 or Section 125 CPC. Sections 122 and 125 CPC provide for power of the High Court to make rules with respect to its own functioning and procedure. Therefore, it appears that when the legislature uses the term 'prescribed', it only refers to a power that has simultaneously been provided for or is deemed to have been provided and not otherwise. Similarly, Section 2(n) of the Consumer Protection Act, 1986 defines prescribed as "prescribed by rules made by the State Government or as the case may be, by the Central Government under the Act".

43. Section 45 of the Act 1959 provides for appointment of an Executive Officer, subject to such conditions as may be **prescribed**. The term 'prescribed' has not been defined under the Act. Prescribed means prescribed by rules. If the word 'prescribed' has not been defined specifically, the same would mean to be prescribed in accordance with law and not otherwise. Therefore, a particular power can be exercised only

if a specific enacting law or statutory rules have been framed for that purpose. (See: *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal,* AIR 1962 SC 527; *Hindustan Ideal Insurance Co. Ltd. v. Life Insurance Corporation of India,* AIR 1963 SC 1083; *Maharashtra SRTC v. Babu Goverdhan Regular Motor Service Warora & Ors.,* AIR 1970 SC 1926; and *Bharat Sanchar Nigam Ltd. & Anr. v. BPL Mobile Cellular Ltd. & Ors.,* (2008) 13 SCC 597).

44. Shri Subramonium Prasad, learned AAG, has brought the judgment in *M.E. Subramani & Ors. v. Commissioner, HR&CE & Ors.,* AIR 1976 Mad 264, to our notice, wherein the Madras High Court while dealing with these provisions held that the Commissioner can appoint an Executive Officer under Section 45 even if no conditions have been prescribed in this regard. It may not be possible to approve this view in view of the judgments of this Court referred to in para 41 supra, thus, an Executive Officer could not have been appointed in the absence of any rules prescribing conditions subject to which such appointment could have been made.

45. However, Shri Subramonium Prasad, learned AAG, has submitted that so far as the validity of Section 45 of the Act 1959 is concerned, it is under challenge in Writ Petition (C) No. 544 of 2009 and the said petition had earlier been tagged with these appeals, but it has been de-linked and is to be beard after the judgment in these appeals is delivered. Thus, in view of the stand taken by the State before this court, going into the issue of validity of Section 45 of the Act 1959 does not arise and in that respect it has been submitted in written submissions as under:

> (a) The scheme of administration in Board's Order No.997 dated 8.5.1933 under the Act 1927 contained various provisions *inter-alia* that **active management** would rest in the committee consisting of nine members who were to be elected from among the Podhu Dikshitars (clause 4);

(b) At the time of issuing the order of appointment of Executive Officer, the Podhu Dikshitars were given full opportunity of hearing and the powers and duties of the Executive Officer as defined by the Commissioner would show that the religious affairs have not been touched at all and the trustees and the Executive Officers are jointly managing the temple. The Podhu Dikshitars **have not been divested of the properties** and it was not the intention of the State Government to remove the trustees altogether, rather the Executive Officers function alongwith the trustees;

(c) In any event, the Podhu Dikshitars are trustees in the temple and **they have not been divested of their properties**. The Executive Officer is only collaborating with the trustees in administering the properties. Their religious activities have not been touched. Neither the powers of the trustees have been suspended nor the Executive Officers have been vested with their powers and the Executive Officers **only assist the trustees in management of the temple.** It was not the intention to remove the trustees altogether, nor the order of appointment of the Executive Officer suspends the scheme already framed way back in 1939.

46. Be that as it may, the case is required to be considered in light of the submissions made on behalf of the State of Tamil Nadu and particularly in view of the written submissions filed on behalf of the State.

47. Even if the management of a temple is taken over to remedy the evil, the management must be handed over to the person concerned immediately after the evil stands remedied. Continuation thereafter would tantamount to usurpation of their proprietary rights or violation of the fundamental rights guaranteed by the Constitution in favour of the persons

deprived. Therefore, taking over of the management in such circumstances must be for a limited period. Thus, such expropriatory order requires to be considered strictly as it infringes fundamental rights of the citizens and would amount to divesting them of their legitimate rights to manage and administer the temple for an indefinite period. We are of the view that the impugned order is liable to be set aside for failure to prescribe the duration for which it will be in force.

Super-session of rights of administration cannot be of a permanent enduring nature. Its life has to be reasonably fixed so as to be co-terminus with the removal of the consequences of maladministration. The reason is that the objective to take over the management and administration is not the removal and replacement of the existing administration but to rectify and stump out the consequences of maladministration. Power to regulate does not mean power to supersede the administration for indefinite period.

Regulate is defined as to direct; to direct by rule or restriction; to direct or manage according to the certain standards, to restrain or restrict. The word 'regulate' is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning and may be very comprehensive in scope. Thus, it may mean to control or to subject to governing principles. Regulate has different set of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation. The word 'regulate' is elastic enough to include issuance of directions etc. (Vide: *K. Ramanathan v. State of Tamil Nadu & Anr.,* AIR 1985 SC 660; and *Balmer Lawrie & Company Limited & Ors. Partha Sarathi Sen Roy & Ors.,* (2013) 8 SCC 345)

48. Even otherwise it is not permissible for the State/ Statutory Authorities to supersede the administration by adopting any oblique/circuitous method. In *Sant Lal Gupta &*

Ors. v. Modern Coop. Group Housing Society Ltd. & Ors., (2010) 13 SCC 336, this Court held:

> *"It is a settled proposition of law that what cannot be done directly, is not permissible to be done obliquely, meaning thereby, whatever is prohibited by law to be done, cannot legally be effected by an indirect and circuitous contrivance on the principle of "quando aliquid prohibetur, prohibetur et omne per quod devenitur ad illud". An authority cannot be permitted to evade a law by "shift or contrivance"."*

(See also: *Jagir Singh v. Ranbir Singh,* AIR 1979 SC 381; *A.P. Diary Dev. Corporation federation v. B. Narsimha Reddy & Ors.* AIR 2011 SC 3298; and *State of Tamil Nadu & Ors. v. K. Shyam Sunder & Ors.* AIR 2011 SC 3470).

49. We would also like to bring on the record that various instances whereby acts of mismanagement/maladministration/ misappropriation alleged to have been committed by Podhu Dikshitars have been brought to our notice. We have not gone into those issues since we have come to the conclusion that the power under the Act 1959 for appointment of an Executive Officer could not have been exercised in the absence of any prescription of circumstances/ conditions in which such an appointment may be made. More so, the order of appointment of the Executive Officer does not disclose as for what reasons and under what circumstances his appointment was necessitated. Even otherwise, the order in which no period of its operation is prescribed, is not sustainable being *ex facie* arbitrary, illegal and unjust.

50. Thus, the appeals are allowed. Judgments/orders impugned are set aside. There shall be no order as to costs.

R.P. Appeals allowed.

R. UNNIKRISHNAN AND ANR.

v.

V.K. MAHANUDEVAN AND ORS.

(Civil Appeal No. 3468 of 2007)

JANUARY 10, 2014

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

Social status certificate:

Scheduled caste certificate – Claim of respondent that he belonged to 'Thandan' caste, a Scheduled Caste, allowed by High Court by order dated 25.2.1987 on the report of KIRTADS and statement made by State counsel – Subsequently, on the basis of observations made by Full Bench of High Court in Pattika Jathi's case, caste certificate of respondent scrutinized and Government declaring him not to belong to 'Thandan' caste, but to 'Ezhava' community, an OBC – High Court holding the judgment dated 25.2.1987 as binding between parties – Held: order dated 25.2.1987 passed by High Court which had attained finality did not permit a fresh enquiry into the caste status of writ-petitioner — Inasmuch as High Court quashed the said proceedings and the order passed by State Government pursuant thereto, it committed no error to warrant interference – However, in view of Presidential Order in terms of the Constitution (Scheduled Castes) Order Amendment Act, 2007 which was published in the official gazette on 30.8. 2007 and Order dated 30.8.2010 issued by State Government that 'Ezhuvas' and 'Thiyyas' to be treated as OBCs, and the decision being prospective in nature, benefit granted to respondent till 30.8.2007 shall remain undisturbed – Respondent shall not be entitled to claim any benefit in future as a scheduled caste candidate but no benefit admissible to him as an OBC candidate shall be denied.

Judgements:

Finality of judgment – Order dated 25.2.1987 passed by High Court allowing the claim of respondent (Petitioner before High Court) to belong to 'Thandan' caste, a Scheduled caste – Subsequently, on the basis of observations of a Full Bench of High Court in Pattika Jathi's case, caste certificate of respondent scrutinized and Government passed order declaring him not tobelong to 'Thandan' Scheduled caste, but to 'Ezhava' caste, an OBC – Held: Law favours finality to binding judicial decisions pronounced by courts that are competent to deal with the subject matter – Public interest is against individuals being vexed twice over with the same kind of litigation – The only exception to the doctrine of res-judicata is "fraud" that vitiates the decision and renders any judgment, decree or orders a nullity and non-est in the eyes of law – Judgement and order dated 25.2.1987 passed by High Court having attained finality, no fresh or further enquiry into the question settled thereby could be initiated, the observations of the Full Bench of the High Court to the contrary notwithstanding – Res judicata.

Respondent no. 1 applied for and, pursuant to order dated 25.2.1987 passed by High Court in O.P. No. 9216 of 1986, was issued a caste certificate showing that he was a 'Thandan', which was a notified Scheduled Caste. He was appointed as an Assistant Executive Engineer under a special recruitment scheme for ST/SC candidates. Subsequently, a Full Bench of the High Court in *Pattika Jathi's case* held that a large number of applications for change of caste name from 'Thiyya' to 'Thandan' had been received pursuant to the Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976 and ordered that all such certificates as were corrected on the basis of such applications after 27.7.1977 ought to be scrutinized by a Scrutiny Committee. Consequently, the caste certificate issued in

favour of the respondent also came under scrutiny and it was found that the respondent actually belonged to Ezhuva community which fell under the OBC category. Ultimately, State Government concurred with the report and declared respondent no. 1 as not belonging to Thandan Community, a Scheduled Caste, but belonging to 'Ezhava' Community included in the list of Other Backward Classes. Respondent no. 1 and his brother (respondent in C.A. No. 3470 of 2007) challenged the order passed by the Government before the High Court in O.P. No.5596 of 2003 and Writ Petition (C) No.20434 of 2004 respectively which were allowed by a Single Judge of the High Court primarily on the ground that the issue of caste certificate to the respondent had already been concluded by the High Court by its judgment dated 25.2.1987 in O.P. No.9216 of 1986, and that the said question could not be re-opened so long as it was effective. The writ appeal and the review petition were dismissed by the Division Bench of the High Court.

In the instant appeals, the questions for consideration before the Court were: (1) "whether the appellants could have re-opened for examination the caste status of respondent no. 1 no matter judgment of the High Court in O.P No.9216 of 1986 had declared him to be a 'Thandan' belonging to a Scheduled Caste community"; and (2) "whether respondent no. 1 can claim protection against ouster from service and, if so, what is the effect of the change in law relevant to the caste status of the respondent".

Dismissing the appeals, the Court

HELD: 1.1. In O.P No. 9216 of 1986, the respondent (petitioner in OP) had claimed to be a Thandan by Caste and, as such, a Schedule Caste in terms of the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act,

1976. Before the single judge of the High Court, it was reported that Director, Kerala Institute for Research Training and Development Studies of Scheduled Castes and Scheduled Tribes (KIRTADS) had conducted an anthropological study and recorded a finding that the respondent belonged to Thandan Community and that he was entitled to be treated as a Scheduled Caste. The Government advocate representing the authorities also submitted before the High Court that the findings recorded by the KIRTADS had been communicated to the Director of Harijan Welfare, Trivandrum (respondent no.3 in the petition) and accepted by him. Accordingly, the High Court passed the Order dated 25.2.1987. A caste certificate was, in the circumstances, issued in favour of the respondent. [para 13-14] [366-C, E-H; 367-D]

1.2. The subsequent enquiry was initiated in the light of observations made by the Full Bench of the High Court in *Pattika Jathi's* case whereby the High Court had entertained suspicion about the validity of certificates that were corrected after 27.7.1997. That pronouncement came nearly eight years after the High Court had disposed of O.P. No.9216 of 1986 and a resultant certificate issued in favour of the respondent. [para 14] [367-F]

Pattika Jathi Samrekshana Samithy v. State **AIR 1995 Ker 337 – referred to.**

1.3. The judgement and order dated 25.2.1987 passed by the High Court in O.P No.9216 of 1986 having attained finality, no fresh or further enquiry into the question settled thereby could be initiated, the observations of the full bench of the High Court to the contrary notwithstanding. [para 14] [367-F-H]

1.4. The judgement of the High Court in *Pattika Jathi's* case does not deal with situations where the issue regarding grant of validity of a caste certificate secured

earlier than the said judgment had been the subject matter of judicial proceedings and effectively and finally resolved in the same. That apart, the respondent was not a party to the proceedings before the Full Bench nor was the certificate issued in his favour under challenge in those proceedings. The Full Bench did not even incidentally have to examine the validity of the certificate issued to the respondent or the correctness of the order passed by the High Court pursuant to which it was issued. Such being the position the direction issued by the Full Bench of the High Court could not possibly have the effect of setting at naught a judgment delivered inter-parties which had attained finality and remained binding on all concerned. [para 14] [367-H; 368-A-C]

1.5. It is trite that law favours finality to binding judicial decisions pronounced by courts that are competent to deal with the subject matter. Public interest is against individuals being vexed twice over with the same kind of litigation. The binding character of judgments pronounced by the courts of competent jurisdiction has always been treated as an essential part of the rule of law which is the basis of the administration of justice in this country. [para 15] [368-D-E]

Daryao v. State of U.P. **1962 SCR 574 = AIR 1961 SC 1457 – relied on**

1.6. That even erroneous decisions can operate as *res-judicata is also* fairly well settled by a long line of decisions rendered by this Court.The only exception to the doctrine of *res-judicata* is *"fraud"* that vitiates the decision and renders it a nullity, as fraud renders any *judgment, decree or orders a nullity and non-est in the eyes of law*. [para 16 and 19] [368-H; 370-B-C]

Mohanlal Goenka v. *Benoy Kishna Mukherjee* **1953 SCR 377 = AIR 1953 SC 65** *A.V. Papayya Sastry v.*

Government of A.P. **2007 (3) SCR 603 =(2007) 4 SCC 221;** *Raju Ramsingh Vasave v. Mahesh Deorao Bhivapurkar and Ors.* **2008 (12) SCR 992 = (2008) 9 SCC 54- relied on.**

State of West Bengal v. Hemant Kumar Bhattacharjee **1963 Suppl. SCR 542 = AIR 1966 SC 1061;** *Kalinga Mining Corporation v. Union of India* **2013 (1) SCR 814 = (2013) 5 SCC 252;** *Mathura Prasad v. Dossibai* **1970 (3) SCR 830 = (1970) 1 SCC 613 – referred to.**

1.7. In the case at hand, there is no element of fraud in the order dated 25.2.1987 passed by the High Court in O.P.No.9216 of 1986. The order relies more upon the submissions made before it by the Government Counsel than those urged on behalf of the writ-petitioners (respondents). That there was an enquiry by KIRTADS into the caste status of the writ petitioners (respondents) which found his claim of being a Thandan justified and, as such, entitled to a scheduled caste certificate, has not been disputed. That the report of KIRTADS was accepted by the Director of Harijan Welfare, is also not denied. That apart, the State Government at no stage either before or after the order passed by the single Judge of the High Court questioned the conclusions recorded therein till the full bench in *Pattika Jathi's* case expressed doubts about the corrections being made in the records and certificates for the grant of scheduled caste status. That being the case, the High Court could not be said to have been misled or fraudulently misguided into passing an order, leave alone, misled by the writ-petitioner (respondent). [para 21] [370-H; 371-A-D]

1.8. Therefore, the order dated 25.2.21987 passed by the High Court in O.P.No.9216 of 1986 which had attained finality did not permit a fresh enquiry into the caste status of writ-petitioner. Inasmuch as the High Court quashed the subsequent proceedings and the order passed by the

State Government pursuant thereto, it committed no error to warrant interference. [para 21] [371-G-H; 372-A]

2.1. On account of the amendment of the Presidential Order in terms of the Constitution (Scheduled Castes) Order Amendment Act, 2007 which was published in the official gazette on 30.8. 2007, there is no manner of doubt that Ezhuvas and Thiyyas who are also known as Thandan, in the erstwhile Cochin and Malabar areas, are no longer scheduled caste w.e.f. 30.8.2007. Parliament has removed the prevailing confusion regarding Ezhuvas and Thiyyas known as Thandan, in the erstwhile Cochin and Malabar areas being treated as scheduled caste. Ezhuvas and Thiyyas even if called Thandans and belonging to the above area will no longer be entitled to be treated as scheduled caste nor will the benefits of reservation be admissible to them. [para 26-27] [375-B and E-F]

2.2. Taking note of the amending legislation, Government of Kerala has by Order No.93/2010/SC/ST dated 30.8.2010 directed that Ezhuvas and Thiyyas who are known as Thandan, in the erstwhile Cochin and Malabar shall be treated as OBCs in List III. This part was not disputed on behalf of the respondent. What is significant is that the deletion is clearly prospective in nature. The law declared by this Court in *Palghat Jilla Thandan Samudhaya Samrakshna Samithi's* case entitled all Thandans including those who were Ezhuvas and Thiyyas from Cochin and Malabar region to claim the scheduled caste status. That entitlement could be taken away retrospectively only by specific provisions to that effect or by necessary intendment. There is no such specific provision or intendment in the amending legislation to hold that the entitlement was taken away retrospectively so as to affect even those who had already benefited from the reservation for scheduled caste candidates. At any rate, a certificate issued to an Ezhuvas

known as Thandan who was a native of Cochin and Malabar region of the State could not be withdrawn as the Constitution (Scheduled Castes) Order, 1950 did not make a distinction between the two categories of Thandans till the Amendment Act of 2007 for the first time introduced such a difference. [para 28] [375-G-H; 376-A-F]

Palghat Jilla Thandan Samudhaya Samrakshna Samithi and Anr. v. State of Kerala and Anr. **1993 (3) Suppl. SCR 872 = (1994) 1 SCC 359 – relied on.**

2.3. That apart, the question of ouster of Ezhuvas and Thiyyas known as Thandan on account of the confusion that prevailed for a considerable length of time till the decision in *Pattika Jathi's* case would be unjustified both in law and on the principles of equity and good conscience. [para 29] [376-F-G]

State of Maharashtra v. Milind **2000 (5) Suppl. SCR 65 = (2001) 1 SCC 4 – relied on.**

Kavita Solunke v. State of Maharashtra, **2012 (7) SCR 251 = (2012) 8 SCC 430;** *Sandeep Subhash Parate v. State of Maharashtra and Others* **2006 (5) Suppl. SCR 282 = (2006) 7 SCC 501;** *State of Maharashtra v. Sanjay K. Nimje* **2007 (1) SCR 960 = (2007) 14 SCC 481- referred to.**

2.4. In the instant case there is no evidence of lack of bona fide by the respondent. The protection available under the decision of *Milind's* case could, therefore, be admissible even to the respondent. It follows that even if on a true and correct construction of the expression 'Thandan' appearing in the Constitution (Scheduled Castes) Order 2007 did not include 'Ezhuvas' and 'Thiyyas' known as 'Thandan' and assuming that the two were different at all relevant points of time, the fact that the position was not clear till the Amendment Act of 2007

made a clear distinction between the two, would entitle all those appointed to serve the State upto the date of the Amending Act came into force to continue in service. [para 32] [378-F-G]

2.5. In Civil Appeal No. 259 of 2014 filed against an order dated 5.9.2012 passed by the Division Bench of the High Court of Kerala, the High Court has found the cancellation of the Caste Certificate issued in favour of the respondent in that appeal to be legally bad inasmuch as the Scrutiny Committee had not applied its mind to the material which was relied upon by the respondent in that case. No enquiry into the validity of the certificate was found to have been conducted nor was the order passed by the Scrutiny Committee supported by reasons. There is no legal flaw in that reasoning muchless any perversity that may call for interference. The order passed by the High Court takes a fair view of the matter and does not suffer from any illegality or irregularity of any kind. [para 33] [378-H; 379-A-C]

2.6. It is, however, made clear that while the benefit granted to respondent no. 1 as a Scheduled Caste candidate till 30.8.2007 shall remain undisturbed, any advantage in terms of promotion or otherwise which the respondent may have been granted after the said date solely on the basis of his being treated as a Scheduled Caste candidate may if so advised be withdrawn by the competent authority. Respondent no. 1 shall not be entitled to claim any benefit in future as a scheduled caste candidate but no benefit admissible to him as an OBC candidate shall be denied. [para 34] [379-D-F]

Case Law Reference:

AIR 1995 Ker 337	**referred to**	**para 14**
1962 SCR 574	**relied on**	**para 15**

1953 SCR 377	**referred to**	**para 16**
1963 Suppl. SCR 542	**referred to**	**para 17**
2013 (1) SCR 814	**referred to**	**para 18**
1970 (3) SCR 830	**referred to**	**para 19**
2007 (3) SCR 603	**relied on**	**para 19**
2008 (12) SCR 992	**relied on**	**para 20**
1993 (3) Suppl. SCR 872	**referred to**	**para 23**
2000 (5) Suppl. SCR 65	**relied on**	**para 29**
2012 (7) SCR 251	**referred to**	**para 30**
2006 (5) Suppl. SCR 282	**referred to**	**para 31**
2007 (1) SCR 960	**referred to**	**para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3468 of 2007.

From the Judgment and Order dated 28.02.2006 of the High Court of Kerala at Ernakulam in W.A. No. 410 of 2006.

WITH

C.A. Nos. 3469, 3470 of 2007 & 259 of 2014.

V. Giri, Huzefa Ahmadi, Malini Poduval, Babita Sant, R. Sathish, Liz Mathew, M.F. Philip, M.T. George, Kavitha K.T., Rajasekhar Rao, Nishe Rajen Shonker (for T.T.K. Deepak & Co.), P.B. Suresh, Vipin Nair, Udayaditya Banerjee (for Temple Law Firm) for the appearing parties.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. Leave granted in Petition for Special Leave to Appeal (Civil) No.24775 of 2013.

2. Common questions of law arise for consideration in these appeals which shall stand disposed of by this common order. But before we formulate the questions that fall for determination the factual matrix in which the same arise need to be summarised for a proper appreciation of the controversy.

3. Respondent-V.K. Mahanudevan in Civil Appeal No.3468 of 2007 applied to Tehsildar, Alathur in the State of Kerala for grant of a Scheduled Caste Certificate on the basis that he was a 'Thandan' which was a notified Scheduled Caste. The Tehsildar held an enquiry and found that the appellant did not belong to the Scheduled Caste community and reported the matter to the Director, Scheduled Caste Development Department, who in turn forwarded the case to Director, Kerala Institute for Research, Training and Development Studies of Scheduled Castes and Scheduled Tribes, ('KIRTADS' for short) for investigation and report.

4. Aggrieved by the denial of the certificate the respondent filed O.P. No.9216 of 1986 before the High Court of Kerala which was disposed of by the High Court in terms of its order dated 25th February, 1987 with a direction to the Tehsildar concerned to issue a caste certificate in favour of the said respondent. A certificate was accordingly issued in his favour. It is common ground that the respondent was appointed as an Assistant Executive Engineer under a special recruitment scheme for SC/ST candidates.

5. Long after the certificate had been issued in favour of the respondent and his appointment as an Assistant Executive Engineer in the State service, a Full Bench of the Kerala High Court in *Kerala Pattika Jathi Samrekshana Samithy v. State AIR 1995 Ker 337* observed that a large number of applications for change of caste name from 'Thiyya' to 'Thandan' had been received pursuant to The Scheduled Castes and Scheduled Tribes Order (Amendment) Act, 1976 and ordered that all such certificates as were corrected on the

basis of such applications after 27th July, 1977 ought to be scrutinized by a Scrutiny Committee. The High Court observed:

> "...The filing of a large number of applications for correction of the name of caste from Ezhava/Thiyya to Thandan alleging one and the same reason immediately after inclusion of Thandan community as Scheduled Caste in the 1976 order can prima facie be considered only as a concerted attempt on the part of Section of Ezhavas/ Thiyyas to take advantage of the benefits of Scheduled Castes as alleged in the counter affidavit of the first respondent and asserted by the petitioner. It cannot be easily believed that if a person was really a Thandan and as such a Scheduled Caste, his caste would have been noted as Ezhava or Thiyya in the school records. It cannot also be believed easily that in large number of cases for no reason whatsoever the same type of mistake was committed allowed to be on record till Thandan community was included in the list of Scheduled Castes. As such taking a serious view of the entire problem we would hold that in all cases where certificates have been issued on and after 27-7-1977 the date of 1976 order correcting the name of Caste from Ezhava/Thiyya to Thandan and other cases where certificates have been issued changing the Caste into a Scheduled Caste or Scheduled Tribe such certificates issued are liable to be declared as of doubtful validly, till they are scrutinised by the scrutiny Committee to be constituted by the first respondent as per the directions we propose to issue in that regard..."
>
> (emphasis supplied)

6. Pursuant to the above directions of the High Court the caste certificate issued in favour of the respondent also came under scrutiny. In the course of scrutiny, it was found that the reports submitted by KIRTADS and relied upon by the High Court while allowing O.P. No.9216 of 1986 was erroneous and that the respondent actually belonged to Ezhuva community

which fell under the OBC category. Director, KIRTADS accordingly issued notice to the respondent to appear before him for a personal hearing in support of the claim that he was a Thandan and hence a Scheduled Caste. Aggrieved by the said proceedings the respondent filed O.P. No.5834 of 1991 before the High Court of Kerala in which he challenged the proposed enquiry proceedings relating to his caste status primarily on the ground that the decision of this Court in *Palaghat Jilla Thandan Samudhaya Samrakshna Samithi and Anr. v. State of Kerala and Anr. (1994) 1 SCC 359* had settled the controversy relating to Ezhuva/Thiyya being a 'Thandan' in the district of Palaghat. It was also contended that the respondent's own case that he was a Thandan Scheduled Caste had been settled by the High Court in terms of the order passed by the High Court in O.P. No.9216 of 1986. These contentions found favour with the High Court who allowed O.P. No.5834 of 1991 filed by the respondent by its order dated 15th December, 1998 and quashed the ongoing enquiry proceedings.

7. Aggrieved by the order passed by the High Court the State of Kerala filed Writ Appeal No.1300 of 1999 which was allowed by a Division Bench of the High Court by its judgment and order dated 14th June, 1999 and directed a fresh enquiry into the caste status of the respondent by KIRTADS. Review Petition No.236 of 1999 filed against the said order by the respondent was dismissed by the Division Bench by its order dated 29th July, 1999. The Division Bench, however, specifically reserved liberty for the respondent to bring the judgments pronounced in O.P. No.9216 of 1986 and O.P.No.5470 of 1988 to the notice of the Director, KIRTADS and declined to express any opinion of its own as to the effect of the said judgments. This is evident from the following passage from the order passed by the High Court:

> *"At the time of argument our attention was drawn to Ext. P7 judgment dated 25.2.87 in O.P. 9216/86 and also the judgment of a Division of this Court in O.P. 5470/88 for*

the proposition that this Court has already accepted the status of the petitioner in the above two cases. We are not inclined to express any opinion on the two judgment referred to above. It is for the review petitioner to place the above two judgments and other materials, if any before the Director for his consideration and report. The Director of Kirtads is directed to send his report to the State government within three months from the date of receipt of copy of the judgment and the Government may consider the entire matter on merits and pass appropriate orders accordingly, Review petition is disposed of as above."

8. A fresh enquiry accordingly commenced in which Vigilance Officer, KIRTADS, reported that the genealogical and documentary evidence available on record proved beyond doubt that the respondent and all his consanguinal and affinal relatives belonged to the 'Ezhuva' and not 'Thandan' community. The Scrutiny Committee acting upon the said report issued a show-cause notice to the respondent to show cause as to why the certificate issued in his favour should not be cancelled.

9. Aggrieved by the notice issued to him the respondent once again approached the High Court in O.P. No.2912 of 2000 which was disposed of by the High Court by its order dated 4th July, 2001 with a direction that the KIRTADS report shall be placed before the State Government for appropriate orders. The State Government accordingly considered the matter and passed an order dated 18th January, 2003 by which it concurred with the report and the view taken by KIRTADS and declared as follow:

"(i) It is declared that Shri. V.K. Mahanudevan, S/o Shri Kunjukuttan, Kunnissery House, Kottaparambil, Vadakkancherry, Alathur, Palakkad District who is now working as Executive Engineer, Minor Irrigation Division, Irrigation Department, Palakkad does not belong to

Thandan Community which is a Sch. Caste, but belongs to Ezhava Community included in the list of Other Backward Classes (OBC).

(ii) None of the members of his family shall be eligible for any of the benefits exclusively intended for members of the Sch. Castes. If any of the members of the family of Shri V.K. Mahanudevan have availed of any of the benefits meant for members of the Sch. Castes, all such benefits availed of shall be recovered.

(iii) If the caste entry in respect of the members of the family of Shri V.K. Mahanudevan as recorded in their academic records is Thandan (SC), it shall be corrected as Ezhava.

(iv) Sch. Caste Certificates shall not be issued to any of the members of the family of Shri V.K. Mahanudevan hereafter. All the Sch. Caste Certificates secured by Shri V.K. Mahanudevan and his family members will stand cancelled.

(v) On completion of the actions as per this order the services of Shri V.K. Mahanudevan, Executive Engineer, Minor Irrigation Division in the Irrigation Department shall be terminated forthwith and a member of Sch. Caste community shall be appointed against the post in which Shri V.K. Mahanudevan was appointed in the Irrigation Department if his appointment was on consideration as member of Sch. Caste."

10. Aggrieved by the order passed by the Government, the respondent and his brother who is respondent in Civil Appeal No.3470 of 2007 challenged the order passed by the Government before the High Court in O.P. No.5596 of 2003 and Writ Petition (C) No.20434 of 2004 respectively which were allowed by a Single Judge of the High Court in terms of its order dated 11th November, 2005, primarily on the ground that

the issue of caste certificate to the respondent had already been concluded by the judgment of the High Court dated 25th February, 1987 in O.P. No.9216 of 1986 and that the said question could not be re-opened so long as the said judgment of the High Court was effective.

11. The State of Kerala then preferred Writ Appeal No.134 of 2006 which was dismissed by a Division Bench of the High Court in terms of its order dated 25th January, 2006 concurring with the view taken by the Single Judge that the issue regarding the caste status of the respondent stood concluded by a judicial order passed inter parties and could not, therefore, be re-opened. Writ Appeal No.410 of 2006 filed by the aggrieved members of the Irrigation Department and Writ Appeal No.193 of 2006 filed by the State in relation to respondent were dismissed by the Division Bench on the same terms by order dated 28th and 27th January, 2006 respectively. So also Review Petition No.263 of 2006 filed by the State against the order passed by the Division Bench was dismissed with the observation that the judgment in O.P. No.9216 of 1986 had effectively settled the question regarding the caste status of the respondent. Civil Appeals No.3469 and 3470 of 2007 have been filed by the State against the said judgment of the High Court while Civil Appeal No.3468 of 2007 has been filed by the members of the Irrigation Department of the Government of Kerala. Civil Appeal arising out of Petition for special leave to appeal (Civil) No.24775 of 2013 has been filed by State against the Order dated 5th September, 2012.

12. Two distinct questions fall for determination in these appeals. The first is whether the appellants could have re-opened for examination the caste status of the respondent-V.K. Mahanudevan no matter judgment of the High Court in O.P No.9216 of 1986 had declared him to be a 'Thandan' belonging to a Scheduled Caste community. The High Court has as seen above taken the view that its judgment and Order in O.P.No.9216 of 1986 effectively settled the question regarding

the caste status of respondent which could not be reopened as the said judgment had attained finality. The second and the only other question that would arise for determination is whether the respondent-V.K. Mahanudevan can claim protection against ouster from service and, if so, what is the effect of the change in law relevant to the caste status of the respondent. We propose to deal with the two questions *ad seriatim*.

13. In O.P No. 9216 of 1986, the respondent (writ petitioners in OP) had claimed to be a Thandan by Caste, hence, a Schedule Caste in terms of the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976. In the SLCC book the respondent was described as a "Thandan Hindu" but falling in the OBC category. He applied for correction of the SLCC book by deleting his description as an OBC and for treating him as a member of the Scheduled Caste. Since the correction did not come about quickly, he moved to the High Court for a direction against the respondents to treat him as a Scheduled Caste and to make appropriate entries in the relevant record. Kerala Public Service Commission, Director, Harijan Welfare Board, Trivandrum were among others arrayed as respondents to the writ petition. When the matter appeared before a Single Bench of the High Court for hearing, it was reported that Director, Kerala Institute for Research Training and Development Studies of Scheduled Castes and Scheduled Tribes, Kozhikode (KIRTADS) had conducted an anthropological study and recorded a finding that the respondent–writ petitioner before the High Court belonged to Thandan Community and that he was entitled to be treated as a Scheduled Caste. Government advocate representing the respondents appears to have submitted before the Court that the findings recorded by the KIRTADS had been communicated to the Director of Harijan Welfare, Trivandrum–respondent no.3 in the writ petition and accepted by him. It was on these submissions made before the High Court that the Single Bench of the High Court passed an Order dated 25th February, 1987, the operative portion whereof read as under :-

"I record the submission of the Government Pleader that the 3rd respondent has accepted the findings of the 4th respondent that the petitioner is a Thandan and hence entitled to the benefits as a scheduled caste. The 6th respondent may implement this finding and issue certificate to the petition in the prescribed form certifying that the petitioner is a Thandan, a member of the scheduled caste. This shall be done within a period of ten days from today. Based thereon the 5th respondent will also make the necessary changes in the S.S.L.C. book of the petitioner treating him as a scheduled caste and not as an D.B.C. This also will be done by the 5th respondent within a period of one month from today."

14. A caste certificate was in the above circumstances issued in favour of the respondent pursuant to the order passed by the High Court which order has attained finality for the same has not been challenged leave alone modified or set aside in any proceedings till date. The question in the above context is whether a fresh enquiry into the Caste Status of the respondent could be instituted by the Government. The enquiry, as seen earlier, was initiated in the light of the certain observations made by the full bench of the Kerala High Court in *Kerala Pattika Jathi Samrekshana Samithy v. State* AIR 1995 Ker 337 whereby the High Court had entertained suspicion about the validity of certificates that were corrected after 27th July, 1997. That pronouncement came nearly eight years after the High Court had disposed of O.P. No.9216 of 1986 and a resultant certificate issued in favour of the respondent. It was in the above backdrop rightly argued by Mr. Giri appearing for the respondent that the judgement and order passed by the High Court in O.P No.9216 of 1986 having attained finality no fresh or further enquiry into the question settled thereby could be initiated, the observations of the full bench of the High Court to the contrary notwithstanding. The judgement of the High Court in *Pattika Jathi's* case (supra), it is obvious, from a reading thereof, does not deal with situations where the issue regarding

grant of validity of a caste certificate secured earlier than the said judgment had been the subject matter of judicial proceedings and effectively and finally resolved in the same. That apart, the respondent was not a party to the proceedings before the full bench nor was the certificate issued in his favour under challenge in those proceedings. The full bench did not even incidentally have to examine the validity of the certificate issued to the respondent or the correctness of the order passed by the High Court pursuant to which it was issued. Such being the position the direction issued by the full bench of the High Court could not possibly have the effect of setting at naught a judgment delivered inter-parties which had attained finality and remained binding on all concerned.

15. It is trite that law favours finality to binding judicial decisions pronounced by Courts that are competent to deal with the subject matter. Public interest is against individuals being vexed twice over with the same kind of litigation. The binding character of judgments pronounced by the Courts of competent jurisdiction has always been treated as an essential part of the rule of law which is the basis of the administration of justice in this country. We may gainfully refer to the decision of Constitution Bench of this Court in the *Daryao v. State of U.P. AIR 1961 SC 1457* where the Court succinctly summed up the law in the following words:

> "*It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation.(***) The binding character of judgments pronounced by courts of competent jurisdiction is itself an essential part of the rule of law, and the rule of law obviously is the basis of the administration of justice on which the Constitution lays so much emphasis.*"

16. That even erroneous decisions can operate as *res-*

judicata is also fairly well settled by a long line of decisions rendered by this Court. In *Mohanlal Goenka* v. *Benoy Kishna Mukherjee AIR 1953 SC 65*, this Court observed:

> "*There is ample authority for the proposition that even an erroneous decision on a question of law operates as 'res judicata' between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as 'res judicata'.*"

17. Similarly in *State of West Bengal v. Hemant Kumar Bhattacharjee AIR 1966 SC 1061*, this Court reiterated the above principles in the following words:

> "*A wrong decision by a court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like review which the law provides.*"

18. The recent decision of this Court in *Kalinga Mining Corporation v. Union of India (2013) 5 SCC 252* is a timely reminder of the very same principle. The following passage in this regard is apposite:

> "*In our opinion, if the parties are allowed to reagitate issues which have been decided by a court of competent jurisdiction on a subsequent change in the law then all earlier litigation relevant thereto would always remain in a state of flux. In such circumstances, every time either a statute or a provision thereof is declared ultra vires, it would have the result of reopening of the decided matters within the period of limitation following the date of such decision.*"

19. In *Mathura Prasad v. Dossibai (1970) 1 SCC 613,* this Court held that for the application of the rule of *res-judicata,* the Court is not concerned with the correctness or otherwise of the earlier judgement. The matter in issue if one purely of fact decided in the earlier proceedings by a competent Court must

in any subsequent litigation between the same parties be recorded as finally decided and cannot be re-opened. That is true even in regard to mixed questions of law and fact determined in the earlier proceeding between the same parties which cannot be revised or reopened in a subsequent proceeding between the same parties. Having said that we must add that the only exception to the doctrine of *res-judicata* is *"fraud"* that vitiates the decision and renders it a nullity. This Court has in more than one decision held that fraud renders any *judgment, decree or orders a nullity and non-est in the eyes of law*. In *A.V. Papayya Sastry v. Government of A.P.*, *(2007) 4 SCC 221*, fraud was defined by this Court in the following words:

> *"Fraud may be defined as an act of deliberate deception with the design of securing some unfair or undeserved benefit by taking undue advantage of another. In fraud one gains at the loss and cost of another. Even most solemn proceedings stand vitiated if they are actuated by fraud. Fraud is thus an extrinsic collateral act which vitiates all judicial acts, whether in rem or in personam. The principle of "finality of litigation" cannot be stretched to the extent of an absurdity that it can be utilised as an engine of oppression by dishonest and fraudulent litigants.*"

20. To the same effect is the decision in *Raju Ramsingh Vasave v. Mahesh Deorao Bhivapurkar and Ors.*, *(2008) 9 SCC 54*, where this Court held:

> "If a fraud has been committed on the court, no benefits therefrom can be claimed on the basis of thereof or otherwise."

21. In the case at hand we see no element of fraud in the Order passed by the High Court in O.P.No.9216 of 1986. The order it is evident from a plain reading of the same relies more upon the submissions made before it by the Government

Counsel than those urged on behalf of the writ-petitioners (respondents herein). That there was an enquiry by KIRTADS into the caste status of the writ petitioners (respondents herein) which found his claim of being a Thandan justified hence entitled to a scheduled caste certificate has not been disputed. That the report of KIRTADS was accepted by the Director of Harijan Welfare, Trivandrum is also not denied. That apart, the State Government at no stage either before or after the Order passed by the Single Judge of the High Court questioned the conclusions recorded therein till the full bench in *Pattika Jathi's* case (supra) expressed doubts about the corrections being made in the records and certificates for the grant of scheduled caste status. That being the case, the High Court could not be said to have been misled or fraudulently misguided into passing an order, leave alone, misled by the writ-petitioners (respondent herein). It is only because the full bench of the Kerala High Court held that anthropological study conducted by KIRTADS may not provide a sound basis for holding Thandan's like the respondent as those belonging to the scheduled caste category that the issue regarding the correctness of the certificate and a fresh investigation into the matter surfaced for consideration. Even if one were to assume that the conclusion drawn by KIRTADS was not for any reason completely accurate and reliable, the same would not have in the absence of any other material to show that such conclusion and enquiry was a complete farce based on wholly irrelevant or inadmissible material and motivated by extraneous considerations by itself provided a basis for unsettling what stood settled by the order passed by the High Court. Suffice it to say that the contention urged on behalf of the appellants that the order passed by the High Court in O.P. No. 9216 of 1986 was a nullity on the ground of fraud has not impressed us in the facts and circumstances of the case. The upshot of the above discussion, therefore, is that the order passed by the High Court in O.P.No.9216 of 1986 which had attained finality did not permit a fresh enquiry into the caste status of writ-petitioner. Inasmuch as the High Court quashed the said proceedings and the order passed by the

State Government pursuant thereto, it committed no error to warrant interference.

22. That brings us to the second question which can be answered only in the perspective in which the same arises for consideration. The Constitution (Scheduled Castes) Order, 1950 specified the castes that are recognised as Scheduled Castes for different states in the Country. Part XVI related to the then State of Travancore and Cochin. Item 22 of that part specified the "Thandan" as a scheduled caste for the purposes of the entire State. The Presidential Order was modified by The Scheduled Castes & Scheduled Tribes Lists (Modification) Order 1956. In the list comprising Part V applicable to the State of Kerala (the successor to the State of Trivandrum, Kochi), 'Thandan' as a caste appeared at Item 14 for the purposes of the entire State except Malabar District. Then came the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976 with effect from 27th July, 1997. In the first Schedule under part VII applicable to the State of Kerala 'Thandan' as a caste was shown at Item 61. Unlike two other castes shown in the said part namely Boyan and Malayan which were shown as scheduled caste for specific areas of the State of Kerala, Thandan had no such geographical or regional limitation. This implied that 'Thandan' was included as a Scheduled Caste for the entire State of Kerala.

23. Consequent upon the promulgation of the Scheduled Castes and Scheduled Tribes Orders (Amendment) Act, 1976, the Kerala State Government started receiving complaints alleging that a section of Ezhuva/Thiyya community of Malabar areas and certain taluk of Malabar districts who were also called 'Thandan' were taking undeserved advantage of the Scheduled Caste reservations. The complaints suggested that these two categories of Thandan were quite different and distinct from each other and that the benefit admissible to Thandans generally belonging to the Scheduled Caste community should not be allowed to be taken by those belonging to the Ezhuva/

Thiyya community as they are not scheduled castes. Acting upon these reports and complaints, the State Government appears to have issued instructions to the effect that applications for issue of community certificates to 'Thandans' of all the four districts of Malabar areas and Taluks of Thalapilly, Vadakkancherry and Chavakka in Trichur District, should be scrutinised to ascertain whether the applicant belongs to the Thandan community of the scheduled caste or the Thandan section of Ezhuva/Thiyya community and that while issuing community certificate to the 'Thandans' who were scheduled caste, the authorities should note the name of the community in the certificate as "Thandans other than Ezhuva/Thiyya". These instructions were withdrawn to be followed by another order passed in the year 1987 by which the Government once again directed that while issuing caste certificate, the Revenue Authority should hold proper verification to find out whether the person concerned belongs to Thandan caste and not to Ezhuva/Thiyya. The matter eventually reached this Court in *Palghat Jilla Thandan Samudhaya Samrakshna Samithi and Anr. v. State of Kerala and Anr. (1994) 1 SCC 359* in which this Court formulated the principal question that fell for consideration in the following words:

> *"The principal question that arises in these writ petitions and appeals is in regard to the validity of the decision of the State of Kerala not to treat members of the Thandan community belonging to the erstwhile Malabar District, including the present Palghat District, of the State of Kerala as members of the Scheduled Castes."*

24. This Court reviewed the legal position and declared that Thandan community having been listed in the Scheduled Caste order as it then stood, it was not open to the State Government or even to this court to embark upon an enquiry to determine whether a section of Ezhuva/Thiyya which was called Thandan in the Malabar area of the State was excluded from the benefits of the Scheduled Caste order. This Court observed:

> *"Article 341 empowers the President to specify not only castes, races or tribes which shall be deemed to be Scheduled Castes in relation to a State but also "parts of or groups within castes, races or tribes" which shall be deemed to be Scheduled Castes in relation to a State. By reason of Article 341 a part or group or section of a caste, race or tribe, which, as a whole, is not specified as a Scheduled Caste, may be specified as a Scheduled Caste. Assuming, therefore, that there is a section of the Ezhavas/Thiyyas community (which is not specified as a Scheduled Caste) which is called Thandan in some parts of Malabar area, that section is also entitled to be treated as a Scheduled Caste, for Thandans throughout the State are deemed to be a Scheduled*
>
> *Caste by reason of the provisions of the Scheduled Castes Order as it now stands. Once Thandans throughout the State are entitled to be treated as a Scheduled Caste by reason of the Scheduled Castes Order as it now stands, it is not open to the State Government to say otherwise, as it has purported to do in the 1987 order."*

(emphasis supplied)

25. What followed from the above is that Thandans regardless whether they were Ezhuvas/Thiyyas known as Thandans belonging to the Malabar area, were by reason of the above pronouncement of this Court held entitled to the benefit of being treated as scheduled caste by the Presidential Order, any enquiry into their being Thandans who were scheduled caste having been forbidden by this Court as legally impermissible. The distinction which the State Government sought to make between Ezhuva/Thiyyas known as Thandans like the respondent on one hand and Thandans who fell in the scheduled caste category, on the other, thus stood abolished by reason of the above pronouncement. No such argument could be countenanced against the respondent especially when

it is not the case of the appellants that the respondent is not an Ezhuva from Malabar area of the State of Kerala.

26. The legal position has since the pronouncement of this Court in *Pattika Jathi's* case (supra) undergone a change on account of the amendment of the Presidential Order in terms of The Constitution (Scheduled Castes) Order Amendment Act, 2007 which received the assent of the President on 29th August, 2007 and was published in the official gazette on 30th August, 2007. The Act, *inter alia*, made the following change in Part VIII – Kerala for entry 61:–

> "61. Thandan (excluding Ezhuvas and Thiyyas who are known as Thandan, in the erstwhile Cochin and Malabar areas) and (Carpenters who are known as Thachan, in the erstwhile Cochin and Travancore State)".

27. There is in the light of the above no manner of doubt that Ezhuvas and Thiyyas who are also known as Thandan, in the erstwhile Cochin and Malabar areas are no longer scheduled caste for the said State w.e.f. 30th August, 2007 the date when the amendment was notified. The Parliament has, it is evident, removed the prevailing confusion regarding Ezhuvas and Thiyyas known as Thandan, in the erstwhile Cochin and Malabar areas being treated as scheduled caste. Ezhuvas and Thiyyas even if called Thandans and belonging to the above area will no longer be entitled to be treated as scheduled caste nor will the benefits of reservation be admissible to them.

28. Taking note of the amending legislation, Government of Kerala has by Order No.93/2010/SC/ST dated 30th August, 2010 directed that Ezhuvas and Thiyyas who are known as Thandan, in the erstwhile Cochin and Malabar shall be treated as OBCs in List III. This part was not disputed even by Mr. Giri, counsel appearing for the respondent who fairly conceded that consequent upon the Amendment Act of 2007 (supra) Ezhuvas and Thiyyas known as Thandan, in the erstwhile Cochin and

Malabar areas stand deleted from the Scheduled Castes List and are now treated as OBCs by the State Government. What is significant is that the deletion is clearly prospective in nature for Ezhuvas and Thiyyas known as Thandan in the above region were in the light of the decision of this Court in *Pattika Jathi's* case (supra) entitled to be treated as scheduled caste and the distinction sought to be made between 'Thandans' who were Ezhuvas and Thiyyas and those who were scheduled caste was held to be impermissible and *non est* in the eye of law. The law declared by this Court in *Pattika Jathi's case* (supra) entitled all Thandans including those who were Ezhuvas and Thiyyas from Cochin and Malabar region to claim the scheduled caste status. That entitlement could be taken away retrospectively only by specific provisions to that effect or by necessary intendment. We see no such specific provision or intendment in the amending legislation to hold that the entitlement was taken away retrospectively so as to affect even those who had already benefited from the reservation for scheduled caste candidates. At any rate, a certificate issued to an Ezhuvas known as Thandan who was a native of Cochin and Malabar region of the State could not be withdrawn as The Constitution (Scheduled Castes) Order, 1950 did not make a distinction between the two categories of Thandans till the Amendment Act of 2007 for the first time introduced such a difference.

29. That apart the question of ouster of Ezhuvas and Thiyyas known as Thandan on account of the confusion that prevailed for a considerable length of time till the decision of this Court in *Pattika Jathi's* case (supra) would be unjustified both in law and on the principles of equity and good conscience. In *State of Maharashtra v. Milind (2001) 1 SCC 4*, this Court was dealing with a somewhat similar situation. That was a case where a student had secured admission to the MBBS degree course by claiming himself to be a Scheduled Tribe candidate. The student claimed that Halba-Koshti were the same as Halba, mentioned in the Constitution (Scheduled

Tribes) Order. This Court held that neither the Government nor the Court could add to the List of castes mentioned in the Order and that Halba-Koshtis could not by any process of reasoning or interpretation treated to be Halbas. Having said that, the question that fell for consideration was whether the benefit of the reservation could be withdrawn and the candidate deprived of the labour that he had put in obtaining a medical degree. This Court while protecting any such loss of qualification acquired by him observed:

> "*In these circumstances, this judgment shall not affect the degree obtained by him and his practising as a doctor. But we make it clear that he cannot claim to belong to the Scheduled Tribe covered by the Scheduled Tribes Order. In other words, he cannot take advantage of the Scheduled Tribes Order any further or for any other constitutional purpose. (***) we make it clear that the admissions and appointments that have become final, shall remain unaffected by this judgment".*

30. *Kavita Solunke v. State of Maharashtra*, *(2012) 8 SCC 430*, was also a similar case where the question was whether the appellant who was a 'Halba-Koshti' could be treated as 'Halba' for purposes of reservation and employment as a Scheduled Tribe candidate. This Court traced the history of the long drawn confusion whether a 'Halba' was the same as 'Halba-Koshti' and concluded that while 'Halba' and 'Halba-Koshti' could not be treated to be one and the same, the principle stated in *Milind's* case (supra) was attracted to protect even appointments that were granted by treating 'Halba-Koshti' as Halba Scheduled Tribe although such extension of the expression 'Halba' appearing in the Presidential Constitution (Scheduled Castes) Order 1950 was not permissible. This Court observed:

> "*If "Halba-Koshti" has been treated as "Halba" even before the appellant joined service as a teacher and if the only reason for her ouster is the law declared by this*

> *Court in Milind case, there is no reason why the protection against the ouster given by this Court to appointees whose applications had become final should not be extended to the appellant also. The Constitution Bench had in Milind case noticed the background in which the confusion had prevailed for many years and the fact that appointments and admissions were made for a long time treating "Koshti" as a Scheduled Tribe and directed that such admissions and appointments wherever the same had attained finality will not be affected by the decision taken by this Court".*

31. In *Sandeep Subhash Parate v. State of Maharashtra and Others, (2006) 7 SCC 501,* also dealing with a similar confusion between 'Halba' and 'Halba-Koshti' and applying the principle underlying in *Milind's* case (supra) this Court held that ouster of candidates who have obtained undeserved benefit will be justified only where the Court finds the claim to be bona fide. In *State of Maharashtra v. Sanjay K. Nimje*, *(2007) 14 SCC 481* this Court held that the grant of relief would depend upon the *bona fides* of the person who has obtained the appointment and upon the facts and circumstances of each case.

32. In the instant case there is no evidence of lack of bona fide by the respondent. The protection available under the decision of *Milind's* case (supra) could, therefore, be admissible even to the respondent. It follows that even if on a true and correct construction of the expression 'Thandan' appearing in The Constitution (Scheduled Castes) Order 2007 did not include 'Ezhuvas' and 'Thiyyas' known as 'Thandan' and assuming that the two were different at all relevant points of time, the fact that the position was not clear till the Amendment Act of 2007 made a clear distinction between the two would entitle all those appointed to serve the State upto the date of the Amending Act came into force to continue in service.

33. In Civil Appeal arising out of SLP (C) No.24775 of 2013 filed against an order dated 5th September, 2012 passed

by the Division Bench of the High Court of Kerala, the High Court has found the cancellation of the Caste Certificate issued in favour of the respondent in that appeal to be legally bad inasmuch as the Scrutiny Committee had not applied its mind to the material which was relied upon by the respondent in that case. No enquiry into the validity of the certificate was found to have been conducted nor was the order passed by the Scrutiny Committee supported by reasons. There is, in our opinion, no legal flaw in that reasoning muchless any perversity that may call for our interference. The order passed by the High Court takes a fair view of the matter and does not suffer from any illegality or irregularity of any kind.

34. In the result these appeals fail and are, hereby, dismissed. We, however, make it clear that while the benefit granted to the respondent V.K. Mahanudevan as a Scheduled Caste candidate till 30th August, 2007 shall remain undisturbed, any advantage in terms of promotion or otherwise which the respondent may have been granted after the said date solely on the basis of his being treated as a Scheduled Caste candidate may if so advised be withdrawn by the Competent Authority. It is axiomatic that the respondent-V.K. Mahanudevan shall not be entitled to claim any benefit in the future as a scheduled caste candidate but no benefit admissible to him as an OBC candidate shall be denied. Parties are directed to bear their own costs.

R.P. Appeals dismissed.

NATIONAL INSURANCE CO. LTD. & ANR.
v.
KIRPAL SINGH
(Civil Appeal No. 256 of 2014)

JANUARY 10, 2014

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

General Insurance Employees Special Voluntary Retirement Scheme, 2004:

Para 3,5 and 6 – Volunary retirement Scheme – Eligibility – Qualifying service – Held: In view of para 6 of SVRs of 2004 and Para 14 of Pension Scheme of 1995, any employee retiring from service of company/corporation would qualify for payment of pension if he/she has rendered a minimum of ten years of service on the date of retirement – Since para 29 and 30 of Pension Scheme 1995 do not govern the entitlement for those seeking the benefit of SVRS of 2004, para 14 can be invoked, which prescribes a qualifying service of ten years only as a condition of eligibility – Expression "retirement" appearing in Para 14 of Pension scheme 1995 should not only apply to cases which fall under Para 30 of the said scheme but also to a case falling under SVRS of 2004 – Thus, those opting for voluntary retirement under SVRS of 2004 would also qualify for payment of pension as they had put in the qualifying service of ten years stipulated under Para 14 of Pension Scheme 1995 – General Insurance (Employees) Pension Scheme, 1995 – Para 14, 29 and 30.

Words and Phrases:

Word 'means' and the expression, "unless the context otherwise requires" – Connotation of – Interpretation of statues.

The respondents opted for voluntary retirement in

terms of the *General* Insurance Employees Special Voluntary Retirement Scheme, 2004 (SVRS of 2004), and claimed pension as one of the benefits admissible to them under para 6 thereof. The claim was rejected by the appellants on the ground that in terms of para 6 of SVRS of 2004, pension would be admissible to those seeking voluntary retirement only if they were eligible for the same under the General Insurance (Employees) Pension Scheme, 1995 (Pension Scheme 1995) and Para 30 of the Pension Scheme 1995 made only such employees eligible for pension who had completed twenty years of qualifying service; and as the respondents had not completed twenty years of qualifying service on the date of their voluntary retirement, they were not eligible for pension 1995. The writ petitions filed by the respondents were allowed holding the respondents to be entitled to claim pension.

Dismissing the appeals, the Court

HELD: 1.1. A conjoint reading of para 6 of SVRS of 2004 and para 14 of the Pension Scheme 1995, would leave no manner of doubt that any employee retiring from the service of the company/corporation would qualify for payment of pension if he/she has rendered a minimum of ten years of service on the date of retirement. [para 7] [387-G]

1.2. Para 29 and Para 30 of the Pension Scheme 1995 provides for "superannuation pension" and "pension on voluntary retirement", respectively. The SVRS of 2004 does not obviously rest the claim for payment of pension on any one of the said two provisions. That is because what is claimed by the employees- respondents is not superannuation pension nor is it pension on voluntary retirement within the meaning of para 30. As a matter of fact, para 6 (1)(c) of the SVRS of 2004 specifically provides that the notional benefit of additional five years

to be added to the service of the retiring employee as stipulated in para 30 of the pension scheme shall not be admissible for purposes of determining the quantum of pension and commutation of pension. It follows that the SVRS of 2004 did not for the purposes of grant of pension adopt the scheme underlying para 30 of the Pension Scheme 1995. [para 10-11] [389-F-H; 390-E-G]

1.3. The provisions of para 6 of the SVRS of 2004 read with para 14 of the Pension Scheme 1995 which stipulates only ten years qualifying service for an employee who retires from service to entitle him to claim pension would entitle those retiring pursuant to the SVRS of 2004 also to claim pension. Since paras 29 and 30 of the Pension Scheme 1995 do not govern the entitlement for those seeking the benefit of SVRS of 2004, para 14 can be invoked, which prescribes a qualifying service of ten years only as a condition of eligibility. Not only because the provision for payment of pension is a beneficial provision which ought to be interpreted more liberally to favour grant rather than refusal of the benefit but also because the Voluntary Retirement Scheme itself was intended to reduce surplus manpower by encouraging the employees to opt for retirement by offering them benefits like ex-gratia payment and pension not otherwise admissible in the ordinary course. [para 11] [390-G-H; 391-A-B, D-E]

1.4. Therefore, this Court holds that the expression "retirement" appearing in Para 14 of the Pension scheme 1995 should not only apply to cases which fall under Para 30 of the said scheme but also to a case falling under a Special Voluntary Retirement Scheme of 2004. So interpreted, those opting for voluntary retirement under the said SVRS of 2004 would also qualify for payment of pension as they had put in the qualifying service of ten years stipulated under Para 14 of the

Pension Scheme 1995. [para 11] [391-E-G]

1.5. The word 'means' used in statutory definitions generally implies that the definition is exhaustive. But that general rule of interpretation is not without an exception. An equally well-settled principle of interpretation is that the use of the word 'means' in a statutory definition notwithstanding the context in which the expression is defined cannot be ignored in any forensic exercise meant to discover the real purport of an expression. [para 12] [391-G-H; 392-A]

Hotel and Catering Industry Training Board v. Automobile Proprietary Ltd. **(1968) 1 W.L.R. 1526;** *The Vanguard Fire & General Insurance Co. Ltd. Madras v. Fraser & Ross & Anr.* **AIR 1960 SC 971;** *Paul Enterprises & Ors. v. Rajib Chatterjee and Co. & Ors.* **2009 (1) SCR 259 = (2009) 3 SCC 709** *State of Maharashtra & Anr. v. B.E. Billimoria & Ors.* **2003 (2) Suppl. SCR 603 = (2003) 7 SCC 336** *K.V. Muthu v. Angamuthu Ammal* **1996 (10) Suppl. SCR 188 = (1997) 2 SCC 53; and** *Reserve Bank of India v. Peerless General Finance* **1987 (2) SCR 1 = (1987) 1 SCC 424 - referred to.**

1.6. In the case at hand, Para 2 of the Pension Scheme 1995 defines the expressions appearing in the scheme. But what is important is that such definitions are good only if the context also supports the meaning assigned to the expressions defined by the definition clause. The context in which the question whether pension is admissible to an employee who has opted for voluntary retirement under the 2004 scheme assumes importance as Para 2 of the scheme starts with the words "In this scheme, unless the context otherwise requires". There is nothing in the context of 1995 Scheme which would exclude its beneficial provisions from application to employees who have opted for voluntary retirement

under the Special Scheme 2004 or vice versa. The term retirement must in the context of the two schemes, and the admissibility of pension to those retiring under the SVRS of 2004, include retirement not only under Para 30 of the Pension Scheme 1995 but also those retiring under the Special Scheme of 2004. That apart, any provision for payment of pension is beneficial in nature which ought to receive a liberal interpretation so as to serve the object underlying not only of the Pension Scheme 1995 but also any special scheme under which employees have been given the option to seek voluntary retirement upon completion of the prescribed number of years of service and age. [para 16] [396-A-F]

Case Law Reference:

(1968) 1 W.L.R. 1526	**referred to**	**Para 12**
AIR 1960 SC 971	**referred to**	**para 13**
2009 (1) SCR 259	**referred to**	**para 14**
2003 (2) Suppl. SCR 603	**referred to**	**para 14**
1996 (10) Suppl. SCR 188	**referred to**	**para 14**
1987 (2) SCR 1	**referred to**	**para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 256 of 2014.

From the Judgment and Order dated 25.01.2008 of the High Court of Punjab and Haryana at Chandigarh in CWP No. 13382 of 2007.

WITH

C.A. Nos. 257 & 258 of 2014.

Jaideep Gupta, Jyoti Dastidar, Dinesh Mathur, S.L. Gupta, Dua Associates, A.K. De, Rajesh Dwivedi, Debasis Misra,

Ranjan Mukherjee, Dr. S.K. Verma, Mohit Saroha, Gautam Narayan, Nikhil Nayyar, Mubashir Mushtaq, TVS. Raghvendra Sreyas for the appearing parties.

The Judgment of the Court was delivered by

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

2. The short question that falls for determination in these appeals is whether the respondents who opted for voluntary retirement from the service of the appellant-companies are entitled to claim pension under the General Insurance (Employees) Pension Scheme 1995. The High Court having answered the question in the affirmative, the appellant-Insurance Companies have appealed to assail that view.

3. The controversy arises in the following backdrop:

4. In exercise of its powers under Section 17A of the General Insurance Business (Nationalisation) Act, 1972, the Central Government made what is described as General Insurance Employee's Special Voluntary Retirement Scheme, 2004 (hereinafter referred to as *"SVRS of 2004*"). Para 3 of the scheme stipulating the eligibility conditions for employees who could opt for voluntary retirement from the services of the insurance company is as under:

"Eligibility

(1) All permanent full time employees will be eligible to seek special voluntary retirement under this Scheme provided they have attained the age of 40 years and completed 10 years of qualifying services as on the date of notification.

(2) An employee who is under suspension or against whom disciplinary proceedings are pending or contemplated shall not be eligible to opt for the scheme;

Provided that the case of an employee who is under suspension or against whom disciplinary proceeding is pending or contemplated made be considered by the Board of the Company concerned having regard to the facts and circumstances of each case and the decision taken by the Board shall be final."

5. In para 5 of the scheme those seeking voluntary retirement were held entitled to ex-gratia amount to be determined according to the said provision. In Para 6 of the scheme were stipulated other benefits to which the employees opting for voluntary retirement under the scheme would be entitled. It reads as under:

"6. Other benefits.-

(1) An employee opting for the scheme shall also be eligible for the following benefits in addition to the ex-gratia amount mentioned in para 5 namely:-

(a) Provident Fund,

(b) Gratuity as per Payment of Gratuity Act, 1972 (39 of 1972) or gratuity payable under the Rationalisation Scheme, as the case may be;

(c) Pension (including commuted value of pension) as per General Insurance (Employee's) Pension Scheme 1995, if eligible. However, the additional notional benefit of the five years of added service as stipulated in para 30 of the said pension Scheme shall not be admissible for the purpose of determining the quantum of pension and commutation of pension.

(d) Leave encashment.

(2) An employee who is opting for the scheme shall

not be entitled to avail Leave Travel Subsidy and also encashment of leave while in service during the period of sixty days from the date of notification of this scheme."

(emphasis supplied)

6. The respondents who opted for voluntary retirement in terms of the SVRS of 2004 afore-mentioned appear to have claimed pension as one of the benefits admissible to them under para 6 above. The claim was rejected by the appellants forcing the respondents to agitate the matter before the High Court in separate writ petitions filed by them. The High Court has by a common order dated 25th January, 2008, allowed the said petitions holding the respondents to be entitled to claim pension. The High Court has taken the view that para 6 of the SVRS of 2004 read with para 14 of the General Insurance (Employees) Pension Scheme 1995 entitled the employees to claim pension so long as they had rendered a minimum of ten years of service in the Corporation/Company from whose service they were seeking retirement. Para 14 of the Pension Scheme 1995 reads as under:

*"**Qualifying Service**: Subject to the other condition contained in this scheme, an employee who has rendered a minimum ten years of service in the Corporation or a Company, on the date of retirement shall qualify for pension."*

7. A conjoint reading of para 6 of SVRS of 2004 and para 14 of the Pension Scheme 1995, would leave no manner of doubt that any employee retiring from the service of the company/corporation would qualify for payment of pension if he/she has rendered a minimum of ten years of service on the date of retirement. The expression *'retirement'* has been defined in para 2 (t) of the Pension Scheme 1995 as under:

"2 Definition:- In this Scheme, unless the context otherwise requires:-

xxx xxx xxx

(t) "retirement" means –

(i) the retirement in accordance with the provisions contained in paragraph 12 of General Insurance (Rationalisation and Revision of Pay Scales and Other Conditions of Service of Supervisory, Clerical and Subordinate Staff) Scheme,1974 notified under the notification of Government of India, in the Ministry of Finance(Department of Revenue and Insurance) number S.O.326(E) dated the 27th May, 1974;

(ii) the retirement in accordance with the provisions contained in paragraph 4 of the General Insurance (Termination, Superannuation and Retirement of Officers and Development Staff) Scheme, 1976notified under notification of Government of India, in the Ministry of Finance (Department of Economic Affairs) number S.O.627(E) dated 21st September,1976;

(iii) voluntary retirement in accordance with the provisions contained in paragraph 30 of this scheme;

8. It was contended on behalf of the appellant-companies that in terms of para 6 of SVRS of 2004 (supra) pension will be admissible to those seeking voluntary retirement only if they were eligible for the same under the Pension Scheme 1995. Para 30 of the Pension Scheme 1995 in turn made only such employees eligible for pension who had completed twenty years of qualifying service. Inasmuch as the respondents had not admittedly completed twenty years of qualifying service on the

date of their voluntary retirement, they were not eligible for pension under the Pension Scheme 1995.

9. On behalf of the respondents, it was argued that the respondents had not sought voluntary retirement in terms of para 30 of the Pension Scheme 1995 which is a general provision and which stipulates twenty years of qualifying service for being eligible to claim pension nor was it a case where the SVRS of 2004 either specifically or by necessary implication adopted para 30 of the Pension Scheme 1995 for determining the eligibility of those seeking retirement under the said scheme. The respondents had, it was contended, voluntarily retired pursuant to the SVRS of 2004 which was different from what was envisaged under para 30 of the Pension Scheme 1995. The condition of eligibility for pension stipulated under para 30 *viz.* twenty years of qualifying service had, therefore, no application to the respondents implying thereby that the claim for pension ought to be seen in the light of Para 14 of the Pension Scheme 1995 treating retirement under the Special Scheme of 2004 also as a retirement for the purposes of that para.

10. We find considerable force in the contention urged on behalf of the respondents. The Pension Scheme 1995 provides for "superannuation pension" and "pension on voluntary retirement". Superannuation pension is regulated by para 29 of the Pension Scheme 1995 while voluntary retirement pension is governed by para 30 which read as under:

> *"**29. Superannuation Pension:** Subject to the other condition contained in this scheme, an employee who has rendered a minimum ten years of service in the Corporation or a Company, on the date of retirement shall qualify for pension.*
>
> ***30. Pension on voluntary retirement**: (1) At any time after an employee has completed twenty years of qualifying service, he may, by giving notice of not less*

> *than ninety days, writing to the appointing authority, retire from service.*
>
> *xxx xxx xxx*
>
> *(5) The qualifying service of an employee retiring voluntarily under this paragraph shall be increased by a period not exceeding five years, subject to the condition that the total qualifying service rendered by the employee shall not in any case exceed thirty years and it does not take him beyond the date of retirement."*
>
> *(6) The pension of an employee retiring under this paragraph shall be based on the average emoluments as defined under clause (d) of paragraph 2 of this scheme and the increase, not exceeding five years in his qualifying service, shall not entitle him to any notional fixation of pay for the purpose of calculating his pension"*

11. The SVRS of 2004 does not obviously rest the claim for payment of pension on any one of the above two provisions. That is because what is claimed by the employees-respondents before us is not superannuation pension nor is it pension on voluntary retirement within the meaning of para 30 (supra). As a matter of fact, para 6 (1)(c) of the SVRS of 2004 specifically provides that the notional benefit of additional five years to be added to the service of the retiring employee as stipulated in para 30 of the pension scheme shall not be admissible for purposes of determining the quantum of pension and commutation of pension. It follows that the SVRS of 2004 did not for the purposes of grant of pension adopt the scheme underlying para 30 of the Pension Scheme 1995. Such being the case, the question is whether the provisions of para 6 of the SVRS of 2004 read with para 14 of the Pension Scheme 1995 which stipulates only ten years qualifying service for an employee who retires from service to entitle him to claim pension would entitle those retiring pursuant to the SVRS of 2004 also to claim pension. Our answer is in the affirmative. If

paras 29 and 30 do not govern the entitlement for those seeking the benefit of SVRS of 2004, the only other provision which can possibly be invoked for such pension is para 14 (supra) that prescribes a qualifying service of ten years only as a condition of eligibility. The only impediment in adopting that interpretation lies in the use of the word 'retirement' in Para 14 of the Pension Scheme 1995. A restricted meaning to that expression may mean that Para 14 provides only for retirements in terms of Para (2)(t) (i) to (iii) which includes voluntary retirement in accordance with the provisions contained in Para 30 of the Pension Scheme. There is, however, no reason why the expression 'retirement' should receive such a restricted meaning especially when the context in which that expression is being examined by us would justify a more liberal interpretation; not only because the provision for payment of pension is a beneficial provision which ought to be interpreted more liberally to favour grant rather than refusal of the benefit but also because the Voluntary Retirement Scheme itself was intended to reduce surplus manpower by encouraging, if not alluring employees to opt for retirement by offering them benefits like ex-gratia payment and pension not otherwise admissible to the employees in the ordinary course. We are, therefore, inclined to hold that the expression "Retirement" appearing in Para 14 of the Pension scheme 1995 should not only apply to cases which fall under Para 30 of the said scheme but also to a case falling under a Special Voluntary Retirement Scheme of 2004. So interpreted, those opting for voluntary retirement under the said SVRS of 2004 would also qualify for payment of pension as they had put in the qualifying service of ten years stipulated under Para 14 of the Pension Scheme 1995.

12. We are mindful of the fact that the word 'means' used in statutory definitions generally implies that the definition is exhaustive. But that general rule of interpretation is not without an exception. An equally well-settled principle of interpretation is that the use of the word 'means' in a statutory definition notwithstanding the context in which the expression is defined

cannot be ignored in any forensic exercise meant to discover the real purport of an expression. Lord Denning's observations in *Hotel and Catering Industry Training Board v. Automobile Proprietary Ltd. (1968) 1 W.L.R. 1526* are, in this regard, apposite when he said:

> *"It is true that 'the industry' is defined; but a definition is not to be read in isolation. It must be read in the context of the phrase which it defines, realising that the function of a definition is to give precision and certainty to a word or phrase which would otherwise be vague and uncertain- but not to contradict it or supplant it altogether"*

13. In *The Vanguard Fire & General Insurance Co. Ltd. Madras v. Fraser & Ross & Anr. AIR 1960 SC 971* one of the questions that fell for determination before this Court was whether the definition of the word "insurer" included a person intending to carry on a business or a person who has ceased to carry on a business. It was contended that the definition started with the words "insurer means" and, therefore, is exhaustive. This Court repelling that contention held that statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or the context. That is why all definitions in statutes generally begin with the qualifying words "unless there is anything repugnant in the subject or context". This Court observed:

> *"The main basis of this contention is the definition of the word "insurer" in the s.2(9) of the Act. It is pointed out that that definition begins with the words "insurer means" and is therefore exhaustive. It may be accepted that generally the word "insurer" has been defined for the purposes of the Act to mean a person or body corporate, etc., which*

is actually carrying on the business of insurance, i.e., the business of effecting contracts of insurance of whatever kind they might be. But s.2 begins with the words "in this Act, unless there is anything repugnant in the subject or context" and then come the various definition clauses of which (9) is one. It is well settled that all statutory definitions or abbreviations must be read subject to the qualification variously expressed in the definition clauses which created them and it may be that even where the definition is exhaustive inasmuch as the word defined is said to mean a certain thing, it is possible for the word to have a somewhat different meaning in different sections of the Act depending upon the subject or the context. That is why all definitions in statues generally being with the qualifying words similar to the words used in the present case, namely, unless there is anything repugnant in the subject or context. therefore in finding out the meaning to the word "insurer" in various sections of the Act, the meaning to be ordinarily given to it is that given in the definition clause. But this is not inflexible and there may be sections in the Act where the meaning may have to be departed from on account of the subject or context in which the word has been used and that will be giving effect to the opening sentence in the definition section, namely, unless there is anything repugnant in the subject or context. In view of this qualification, the court has not only to look at the words but also to look at the context, the collocation and the object of such words relating to such matter and interpret the meaning intended to be conveyed by the use of the words under the circumstances. Therefore, though ordinarily the word "insurer" as used in the Act would mean a person or body corporate actually carrying on the business of insurance it may be that in certain sections the word may have a somewhat different meaning."

(emphasis supplied)

14. To the same effect is the decision of this Court in *Paul Enterprises & Ors. v. Rajib Chatterjee and Co. & Ors. (2009) 3 SCC 709* where this Court once again reiterated that the interpretation clause should be given a contextual meaning and that all statutory definitions must be read subject to the qualification variously expressed in the interpretation clause, which created them. In *State of Maharashtra & Anr. v. B.E. Billimoria & Ors. (2003) 7 SCC 336* also this Court restated the principle that meaning of an expression must be determined in the context in which the same has been used. Reference may also be made to *K.V. Muthu v. Angamuthu Ammal (1997) 2 SCC 53* where this Court made the following apposite observations:

"Apparently, it appears that the definition is conclusive as the word "means" has been used to specify the members, namely, spouse, son, daughter, grand-child or dependent parent, who would constitute the family. Section 2 of the Act in which various terms have been defined, open with the words "in this Act, unless the context otherwise requires" which indicates that the definitions, as for example, that of "Family", which are indicated to be conclusive may not be treated to be conclusive if it was otherwise required by the context. This implies that a definition, like any other word in a statute, has to be read in the light of the context and scheme of the Act as also the object for which the Act was made by the Legislature.

While interpreting a definition, it has to be borne in mind that the interpretation placed on it should not only be not repugnant to the context, it should also be such as would aid the achievement of the purpose which is sought to be served by the Act. A construction which would defeat or was likely to defeat the purpose of the Act has to be ignored and not accepted.

Where the definition or expression, as in the instant case,

is preceded by the words "unless the context otherwise requires", the said definition set out in the Section is to be applied and given effect to but this rule, which is the normal rule may be departed from if there be something in the context to show that the definition could not be applied".

(emphasis supplied)

15. We may also gainfully refer to the decision of this Court in *Reserve Bank of India v. Peerless General Finance (1987) 1 SCC 424* where this Court declared that the best interpretation is the one in which the Court relies upon not only the test but also the context in which the provision has been made. We can do no better than to extract the following passage from that decision:

"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statutemaker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place."

(emphasis supplied)

16. In the case at hand Para 2 of the Pension Scheme 1995 (extracted earlier) defines the expressions appearing in the scheme. But what is important is that such definitions are good only if the context also supports the meaning assigned to the expressions defined by the definition clause. The context in which the question whether pension is admissible to an employee who has opted for voluntary retirement under the 2004 scheme assumes importance as Para 2 of the scheme starts with the words "In this scheme, unless the context otherwise requires". There is nothing in the context of 1995 Scheme which would exclude its beneficial provisions from application to employees who have opted for voluntary retirement under the Special Scheme 2004 or vice versa. The term retirement must in the context of the two schemes, and the admissibility of pension to those retiring under the SVRS of 2004, include retirement not only under Para 30 of the Pension Scheme 1995 but also those retiring under the Special Scheme of 2004. That apart any provision for payment of pension is beneficial in nature which ought to receive a liberal interpretation so as to serve the object underlying not only of the Pension Scheme 1995 but also any special scheme under which employees have been given the option to seek voluntary retirement upon completion of the prescribed number of years of service and age.

17. In the result these appeals fail and are hereby dismissed but in the circumstances without any order as to costs.

R.P. Appeals dismissed.

STATE OF GUJARAT
v.
RATANSINGH @ CHINUBHAI ANOPSINH CHAUHAN
(Criminal Appeal No. 403 of 2007)

JANUARY 10, 2014

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

Penal Code, 1860:

ss.376, 302 and 21 – Rape and murder – Charges of – Circumstantial evidence – Conviction by trial court and sentence of death – Set aside by High Court – Held: High Court has rightly held that the evidence led by the prosecution does not establish a complete chain of circumstances to connect the accused with the murder of deceased — There are significant defects and shortcomings in the investigation; witnesses have come out with contradictory versions; and have made significant improvements in their versions in their depositions in the court — In a case of circumstantial evidence, it would be unwise to record conviction on the basis of such a scanty, weak and incomplete evidence — As the prosecution has not been able to prove the charges beyond reasonable doubt, High Court has rightly set aside the judgment of the trial court.

s.376 – Rape – Victim, a 7 year old girl – Death of – Held: There was no direct evidence and High Court has rightly recorded a finding that on the basis of medical evidence offence of rape was not proved by prosecution beyond reasonable doubt.

Evidence:

Circumstantial evidence – Last seen theory – Held: This is one of the major circumstances pressed by prosecution — High Court has rightly found certain inherent contradictions in the deposition of witnesses as regards the prosecution case that deceased was last seen with accused – Investigation has also not been carried properly and does not inspire confidence – Investigation.

The respondent was prosecuted for committing offences punishable u/ss 376, 302 and 201, IPC on the allegations that he committed rape on a 7 years old girl, who was her neighbor, and killed her. The trail court convicted him of the offences charged and sentenced him to life imprisonment u/s 376 IPC and awarded him death sentence u/s 302 IPC. However, the High Court acquitted the accused holding that the case being one of circumstantial evidence, the prosecution failed to establish the chain of circumstances to connect the accused with the crime.

Dismissing the appeal, the Court

HELD: 1.1. As far as charge of rape is concerned, the High Court has rightly observed that there was no direct evidence and on the basis of medical evidence, which was only a circumstantial evidence, offence of rape was not proved by the prosecution beyond reasonable doubt. [para 5-6] [405-E-F; 406-B]

1.2. It is a case of circumstantial evidence and the prosecution case starts with the theory of last seen. For this purpose the prosecution has relied upon the testimonies of PW12, PW16, PW17 and PW18. The High Court has found certain inherent contradictions in the depositions of these witnesses on the basis of which it has come to the conclusion that it is difficult to accept their version, which is even contrary to each other about the details of the events. PW12 was playing with the deceased and another girl in the court yard of the residence of the accused and when accused-reached the

spot, he asked them to leave. As per the prosecution version itself, the deceased had left that place; elbeit at the asking of the respondent who had sent her to the market to purchase Gutka and she returned back to the respondent after purchasing the said Gutka, to hand it over to the deceased. As regards her returning back also, according to the High Court, there are various contradictions in the depositions of the witnesses. As per PW7, the shopkeeper from whom the deceased had gone to purchase Gutka, the deceased had come to his shop on that date at about 3 p.m. He also admitted that in his statement before the police on 19.8.2003, he had not stated that the deceased had come to his shop to purchase eatable. On specific question put to him in the cross-examination as to why he did not tell the police about the victim's visit to his shop to purchase eatable, he did not give any specific reply. [para 13] [409-F, G-H; 410-A-F]

1.3. As per PW16, who is the neighbour of the respondent, she had seen the three girls playing in the courtyard of the respondent. She further stated that the respondent drove away two girls and then caught the victim and pushed her into his house. Thereafter she heard cries of the victim and then she heard sound of beating. The witness has further stated that on the next day when mother of the victim was searching her, she did tell her about the incident and joined the search. During cross-examination, the witness has admitted that she had not stated in her statement before police that the accused had intimidated her. She says that she did not tell her husband or her son about the incident. Apart from the omissions on the part of PW16 and PW17 in not mentioning to the police when they gave their statements, immediately after the incident, the High Court has also analyzed their statements along with deposition of PW12 and found them to be inconsistent and self-contradictory

as regards the accused last seen with the victim. [para 14-15] [410-G-H; 411-B]

1.4. After analyzing the evidence of PW-16, PW-12 and PW-17, the High Court has rightly held that the evidence led by the prosecution on last seen together aspect cannot be accepted. It is not only contradictory, inconsistent and improbable, but it also suffers from vice of improvements and, therefore, it sounds unreliable. The case is founded on circumstantial evidence. This is one of the major circumstances pressed by the prosecution. The investigation is also not carried out properly and does not inspire confidence. The evidence on last seen together aspect, therefore, cannot be accepted as a link in the chain of circumstances leading to exclusive hypothesis of guilt of the accused. This Court, therefore, holds that prosecution has not been able to establish, with clinching evidence that the deceased was seen lastly in the company of the accused. [para 15-16] [411-E-F; 414-C-F]

1.5. Even the medical evidence is of no help to arrive at the conclusion that guilt of the respondent stands proved beyond reasonable doubt. When the respondent was arrested on 19.8.2003, a Panchnama (Ex.14) was drawn. In that it is recorded that the accused had abrasions on chest, back and shoulder caused by nail and also that there was swelling on his penis and swelling on skin with abrasion. Immediately after his arrest, the respondent was sent for medical check up. The doctor admitted in his cross-examination that he did not notice any injury on the penis of the accused. Therefore, this shows contradiction between the recording of medical condition in the Panchnama and the medical examination conducted by the doctor. It reflects adversely on the prosecution case. As regards injuries found on chest and back of the respondent, they are tried to be shown as

injuries caused with nail of the deceased. However, the post mortem note does not indicate presence of any traces of skin of the accused in nail of the deceased. [para 17] [414-G-H; 415-A-D]

1.6. The High Court has also expressed its doubts on recovery of grinding stone from the house of the respondent which was allegedly used for committing murder of the deceased. It is pointed out by the High Court that the evidence suggests that the officer of the FSL was summoned on 19.8.2003 who inspected the place of incident and instructed the Inquiry Officer to recover the stone which was, accordingly, recovered. Thus, as per the deposition of the officer of FSL, stone was recovered on 19.8.2003. As against this, as per discovery Panchnama drawn on 23.8.2003 the said grinding stone was recovered from beneath steel cupboard at the instance of the respondent. This casts doubt about the relevant documents and the discovery of stone itself. [para 18] [416-D-G]

1.7. There is another aspect which is very pertinent and cannot be ignored. After the incident when sniffer dog was brought to the site. The said dog had tracked to the house of PW16 and not to that of the respondent. In fact, on this basis the son of PW 16 was even taken into custody by the police and was detained for 2 days. Thereafter, he was allowed to go inasmuch, as per the police he had not committed any offence. This version has come from the testimony of PW16 herself. On the other hand, I.O. has totally denied that the son of PW16 was ever detained for 2 days. There is no such entry in the daily diary as well. It also speaks volumes about the reliability of the investigation and evidence collected, more so when no explanation is coming forward as to why the son of PW16 was released by the police and the respondent arrested. [para 19] [416-H; 417-A-C, E]

1.8. Thus, the High Court has rightly held that the evidence led by the prosecution does not establish a complete chain of circumstances to connect the accused with the murder of the deceased. There are significant defects and shortcomings in the investigation; witnesses have come out with contradictory versions; and have made significant improvements in their versions in their depositions in the court. In a case of circumstantial evidence, it would be unwise to record conviction on the basis of such a scanty, weak and incomplete evidence. As the prosecution has not been able to prove the charges beyond reasonable doubt, the High Court has rightly set aside the judgment of the trial court. [para 20] [417-F-H]

CRIMINAL APPELLLATE JURISDICTION : Criminal Appeal No. 403 of 2007.

From the Judgment and Order dated 14.09.2006 of the High Court of Gujarat at Ahmedabad in Crl. Confirmation Case No. 9 of 2004 with Crl. Appeal No. 1915 of 2004.

Nitin Sangra, Pinky Behra, Parul Kumari, Hemantika Wahi for the Appellant.

Nidhi for the Respondent.

The Judgment of the Court was delivered by

A.K.SIKRI, J. 1. The present appeal is directed against the final judgment and order dated 14th September 2006 passed by the Hon'ble High Court of Gujarat in Criminal Confirmation Case No.9 of 2004 with Criminal Appeal No.1915/2004, setting aside the judgment and order passed by the Ld. Additional Sessions Judge and second Fast Track Court in Sessions Case No.4/2004 convicting the respondent under Section 376,302 and 201 IPC for the offence of rape and murder of a seven year old girl and punishing him with sentence of death. The High Court found severe loopholes and

shortcomings in the prosecution story, rendering it unbelievable and thereby acquitted the respondent in the aforesaid case.

2. The prosecution case, in nutshell, was that the respondent/accused was the neighbour of the deceased girl Komal aged 7 years r/o village Bhammiya. On the day of incident i.e. 16.8.2003 the victim was playing with her two friends viz. Parul and Saroj in the courtyard of the respondent. The respondent/accused came to his house between 15.00 to 15.30 hrs. and scolded the girls for playing there. Parul and Saroj ran away whereas, however, the deceased girl was forcibly caught by the respondent and pushed her into his house and he shut the door. Shakriben Chandrasinh, a neighbour who was washing clothes, heard the cries of victim which got silent after sometimes. Thereafter Savitaben mother of the deceased girl, who returned from work at about 16.00 hrs. and not finding her daughter started searching for the victim along with Shakriben. A day after the incident, dead body of the victim was recovered from a nearby field wearing a white frock with undergarment missing, which was later found from the hedge falling between the house of the respondent and Shakriben Chandrasinh. A complaint was lodged and FIR registered by Arvindbhai Khatubhai, the father of the victim. The police started investigation and recorded the statements of witnesses. Necessary samples were also collected during the investigation and sent to FSL. The dead body of the deceased was sent for the post mortem which was conducted by Dr. Shashikant Nagori between 16.45 hrs. & 17.45 hrs. on 17.8.2003. The post mortem report mentioned following injuries:-

* Abrasion on both thighs, both knees and bruises over the legs.

* The injuries found on labia majora had a swelling of 3 x 2 cms. on right majora and abrasion on left majora, such injuries were possible in an attempted rape. There was penetration on the private parts of the victim girl.

* The presence of injuries on left mastoid region, which was bone deep and brain matter had come out of the wound.

* There was haematoma over whole skull on both parietal and frontal region and blood was oozing out of the left ear.

* There was a depressed fracture of skull on frontal and left parietal region.

The doctor opined that the injuries were sufficient in ordinary course of nature to cause death and it was homicidal death.

3. The respondent was arrested after two days i.e. on 19.8.2003 from a nearby village, who had allegedly fled after committing the offence. On search, a suicide note purportedly written by the respondent was recovered from his pocket. Besides, blood stained clothes and blood group of the deceased was noticed on other articles. He was found to have sustained injuries on his person, which was recorded in the arrest panchnama. Upon disclosure of the accused, the grinding stone used in inflicting injuries on head of the deceased was recovered from his house. After the recovery of the stone, a panchnama of recovery of the stone was drawn in the presence of panch witnesses on 20.8.2003. Thereafter discovery panchnama of the articles was drawn which were concealed beneath the steel cupboard. After the completion of investigation, the charge sheet was filed before the Ld. Chief Judicial Magistrate, Godhra on 22.8.2003. After committal, the case was registered as Sessions Case No.4 of 2004 and charge against the respondent accused was framed under Sections 376,302 and 201 of the IPC. The respondent denied the charge and claimed to be tried. The prosecution examined 23 witnesses in support of its case. None was examined by the accused in his defence. The statement of the respondent was recorded under Section 313 of the Cr.P.C. On 7.10.2004 the learned Sessions Judge after examining the oral and

documentary evidence, returned the finding of guilt and convicted the respondent for the offence of rape and murder. The learned Sessions Judge awarded capital punishment for the offence of murder u/s 302 and imprisonment for life and fine of Rs.1000/- for the offence of rape u/s 376 and in default to undergo SI for 3 months. The record of the case was forwarded to the High Court u/s 366 of the Cr.P.C. for approval of the death sentence awarded by the Sessions Court. The accused also preferred Criminal Appeal No.1915/2004 before the High Court of Gujarat against the judgment and order dated 7.10.2004.

The Impugned Judgment:

4. As is clear from the above, the precise charge against the respondent was of raping the minor girl Komal and thereafter murdering her. The High Court, on the basis of medical evidence namely the post-mortem report of the deceased found that it was case of homicidal death. There is no quarrel about the same and this aspect is not disputed by the respondent before us as well.

5. As far as charge of rape is concerned, the High Court observed that there was no direct evidence and medical evidence was the only circumstantial evidence which could be relied upon. It discussed the evidence of Dr. Nagori to this effect, who had conducted the post mortem on the dead body. It was found that there was swelling of 3x2 cms on right labia majora and abrasion over left labia majora. It is also recorded in the postmortem notes that as per vagina examination, it was found that little finger passed with difficulty and there was no internal injury. The post mortem notes also indicated abrasions on both thighs, both knees and bruises over legs. In his deposition, the doctor has deposed, after describing the injuries, that the injuries found on labia majora were possible in an attempted rape. During cross-examination he deposed that, if there was penetration of penis in the vagina, there was possibility of internal injuries. He stated, in terms, that from the

post mortem examination, in the instant case, there was no penetration of penis in the vagina.

6. On the basis of aforesaid, the High Court acquitted that offence of rape was not proved by the prosecution beyond reasonable doubt and it could, at the most, be considered an attempted rape. The finding of the trial court recording the conviction for offence of rape under section 376 of the IPC has, accordingly, been set aside. It is primarily on the ground that even if it is to be accepted that in a case of rape of a minor, complete penetration of penis with emission of semen and rupture of hymen is not necessarily to be established, in the instant case, the medical evidence clearly suggests that there was no penetration at all i.e. the factor which influenced the High Court to set aside the conviction based on section 376, IPC.

7. The High Court, thus, proceeded on the basis that the deceased was murdered and there was an attempted rape on her. It then addressed the central issue viz. whether the respondent could be connected with the said murder and attempted rape. It was a case of circumstantial evidence, in the absence of any eye witness. After discussing the evidence, the High Court found that prosecution had failed to establish the chain of circumstances could connect the accused with the crime. There were material contradictions and inconsistencies in the depositions of various witnesses etc. which did not form a complete chain. The High Court has, accordingly, set aside the order of conviction of the trial court as unsustainable and acquitted the accused of the charges. It is, inter-alia, held that the evidence led by the prosecution on last seen together cannot be accepted. It is not only contradictory, inconsistent and improbable, but also suffers from vice of improvements and therefore, it sounds unreliable. As regards injuries found on chest and back of the person of accused are concerned, which the prosecution tried to show as injuries caused with nail, possibly by the deceased, the High Court has discounted this prosecution version on the ground that the Post Mortem note does not indicate presence of any traces of skin of the accused

in the nail of the deceased. As per the High Court the investigation is not found to be independent, trustworthy or reliable, the evidence does not establish a complete chain of circumstances to connect the accused with the crime. There are major defects in the investigations which render it doubtful when the case is founded on circumstantial evidence. It, thus, set aside the judgment of the Trial Court on the ground that the conviction cannot be recorded on such scanty, weak and incomplete evidence.

The Arguments:

8. The learned counsel for the State argued that High Court committed grave error in holding that there was no complete chain of the circumstances connecting the respondent to the incident. He pointed out that certain samples of blood, clay etc. were collected from the spot and FSM report (Ex.54) was obtained therefrom which was duly proved in the trial court through witness No.20-Chandubhai Nagjibhai Pargi who had stated in his deposition that on receiving the message from control room on 17.8.2003 he along with FSL Mobile Van had gone to the place of incident and collected the following samples:

- Clay with blood from the place of incident.

  Clay bearing doubtful spot recovered from the place in between two legs.

- Control clay recovered from the place at the distance of 5 feet from the dead body.

- Clay bearing pan padiki spittle recovered from the place at the distance of 7 feet from the dead body.

- One red colour knickers bearing spots from the vada behind the house of Chandrasinh Laxmansinh Chauhan, situated in the south direction from the dead body.

9. He further drew the attention of this Court to post mortem report (Ex.7) containing external examination of the deceased. As per the said post mortem report, the following aspects were established:

1.	Condition of the clothes whether wet with water, stained with blood, soiled with vomit or foecal matter.	Stained with blood
2.	Injuries to external genitals, indication of purging.	Swelling (hemetomal) 3x2 cm over Rt.Labia mejora abrasion` over lt.labia mejora.
3.	Surface wounds and injuries their natural position, dimensions (measured) and directions to be accurately stated: their probable ages and cause to be noted.	a.Abrasions over medical upper of both thighs. b.Abrasions over both knee. c.Bruises over both legs.

10. He also pointed out that opinion as to the cause or probable cause of death recorded by the Medical Officer was "cause of death is shocked due to head injury leading to skull injury over brain". He also pointed out that cloth of the deceased was stained with blood and there were abrasions over medial upper both thighs, over both knees and bruises over both legs. According to the learned counsel, this shows that the deceased was subjected to sexual assault and murdered.

11. In order to connect the accused with the said incident, the learned counsel referred to the testimony of PW12, Saroj who was playing along with Parul and deceased on the fateful day, on the courtyard of the residence of the accused when the

accused reached there and scolded these girls. His submission was that there was no cross-examination by the defence on this aspect and from this testimony it stood proved that the deceased was last seen with the accused, as PW12 had categorically stated that she and Parul left the place but the deceased remained there. He further submitted that this was corroborated by the neighbour Shakriben Chandrasinh (PW16) as well.

12. In nutshell, the submission of the learned counsel for the State was that the circumstances formed a complete chain of events connecting the crime to the accused inasmuch as: (1) the victim was last seen in the company of the accused; (2) certain samples were collected from the residence of the accused including plaster bearing blood, blood taken on thread by rubbing from ground floor of western wall, support (datto) of wooden plate bearing blood spots, pieces of paper affixed on the metal barrel, bearing blood spots etc.; the blood on the aforesaid as found was of "B" Group which is the blood group of the deceased; (3)clay from thighs with semen from the deceased was collected and semen was found to be of "O" Group which is that of the accused; (4) the medical evidence, which clearly nails the respondent and there could be no other person who would have committed this crime.

Our Analysis:

13. Since it is a case of circumstantial evidence and the prosecution case starts with the theory of last seen, the first place is as to whether the prosecution has been able to conclusively and beyond reasonable doubt prove that the deceased was last seen in the company of the respondent. For this purpose, as already noted above, the prosecution has relied upon the testimonies of PW12,PW16,PW17 and PW18. The paramount question is as to whether testimonies of these witnesses is reliable. The High Court has found certain inherent contradictions in the depositions of the aforesaid witnesses on the basis of which it has come to the conclusion that it is difficult

to accept their version, which is even contrary to each other about the details of the events. No doubt PW12, Sarojben was playing with the deceased and Parul on the grounds of the residence of the accused and when respondent reached the spot, he asked them to left. However, thereafter whether the deceased remained there and was not seen at all thereafter till her dead body was found , is a pertinent question. As per the prosecution version itself the deceased had left that place; elbeit at the asking of the respondent who had sent her to the market to purchase Vimal Gutka and she returned back to the respondent after purchasing the said Gutka, to hand it over to the deceased. Whether it is conclusively proved that she returned back to the respondent? Here, according to the High Court, there are various contradictions in the depositions of the witnesses. As per PW7, the shopkeeper from where the deceased had gone to purchase Gutka, the deceased had come to his shop on that date at about 3 p.m. She purchased eatable (and not Gutka) for Rupee one and then she went away. During cross-examination, he stated that it had not happened that the victim had come to his shop to purchase Vimal Gutka. So according to him deceased had come to his shop to purchase some eatable. He also admitted that in his statement before the police on 19th August 2003, he had not stated that the deceased had come to his shop to purchase eatable. On specific question put to him in the cross-examination as to why he did not tell the police about the victim's visit to his shop to purchase eatable, he did not give any specific reply.

14. As per PW16(Shakriben),who is the neighbour of the respondent, she had seen the three girls playing in the courtyard of the respondent. She further stated that the respondent drove away Parul and Saroj and then caught the victim and pushed her into his house. Thereafter she heard cries of the victim and then she heard sound of beating. She has further stated that she went into the house thereafter but was threatened by the respondent that if she talked to anyone in the town, he would

kill her and her son. She has further stated that the accused had arrived at about 2.30 p.m. on the day of the incident and he was drunk. He tried to push open the rear door of the house. The witness said that mother of the accused, Divaliben had given the key of the house to her and, therefore, she gave the key to the accused. The witness has further stated that on the next day when mother of the victim was searching the victim, she told her that she had not seen the victim and she joined the search. During cross-examination, the witness has admitted that she had not stated in her statement before police that the accused had intimidated her. She says that she does not know whether the victim had gone to purchase Gutka packet. The distance between her house and the house of the accused is 25 to 30 feet. She says that she did not tell her husband or her son about the incident. She admits that she did not state before police that, at the time of the incident, she went into the house after washing clothes and sat in the house and, at that time, accused had intimidated her that, if she tells anyone in the village, he would kill her and her son. She admits that, on the day of incident as well as on the next day, when people were searching for the girl, she did not tell anyone about the incident.

15. Apart from the aforesaid omissions on the part of PW16 and PW17 in not mentioning to the police when they gave their statements, immediately after the incident, the High Court has also analyzed their statements along with deposition of PW12 and found them to be inconsistent and self-contradictory in the following manner:

> "From depositions of these three witnesses, the prosecution has tried to establish the circumstances of the accused having been seen in company of the deceased last. But scrutiny of this evidence leads us to negative this aspect. According to PW12-Saroj, she was playing with the victim and Parul. Accused arrived around 3O' clock and shouted "Ladidiyo" (meaning young girls). Therefore, she and Parul ran away and the victim was left behind. She says that accused sent the victim to purchase a packet of

Vimal. She also says that, thereafter, she went home and was doing lesson. She saw the victim going with a packet of Vimal to give it to the accused. Therefore, necessarily, if her say is taken at face value, then also the victim was seen going to the house of accused with a packet of Vimal and if she did factually reach there, at that point of time, neither Saroj nor Parul was present.

Against the above situation emerging from deposition of Saroj, if deposition of Shakariben (Ex.49) is seen, she says that when Saroj, the victim and Parul were playing in the courtyard of the accused, the accused arrived and drove away Parul and Saroj and caught hold of the victim and pushed her into the house, whereafter she heard cry of the victim and then sound of beating, meaning thereby that when the deceased was taken into the house, that was the last point of time when she was seen in company of the accused and, at that point of time, both Saroj and Parul were present, which is just contrary to what Saroj says. Viewed from another angle, Shakariben does not speak of any even taking place before the victim was pushed into the house and thereafter the incident has occurred, as against the say of Saroj that the accused sent the victim to get a packet of Vimal. Necessarily, therefore, what Shakariben saw was not the last point of time when the victim and the accused were together. The victim was seen by Saroj at a later point of time and also by witness-Himatbhai. Parul has not been examined by the prosecution as a witness. Therefore, the evidence regarding the accused seen last in company of the deceased, as led by the prosecution, is inconsistent and self-contradictory.

That apart, the conduct of PW16 seems to be unnatural and thus unworthy of reliance. The High Court has rightly observed that it does not inspire confidence for several reasons, namely: (1) though she claims to have the

witness the accused pushing the victim into the house and then hearing her cry followed by sound of beating, she did not take any steps to rescue her. (2) She did not even tell about this incident to anyone, including her husband and son till 19th August 2003 when her statement was recorded. (3) Even in her statement to the police she has omitted to state the aforesaid purported facts.(4) On the next day of the incident, when the search for the victim was on, she still kept quite and did not disclose the incident to anybody. Strangely, she joins the group searching for the victim.(5) There is no explanation as to when and why the respondent could have intimidated her. As per the sequence of events narrated by her, the respondent came; she gave him the key of his house; the respondent went to his house and shouted at girls; the two other girls went away and respondent pushed the victim into house; and thereafter she (the witness went to her house). If these sequences are to be seen, there was no occasion for the accused to intimidate her.

As far as evidence of PW12,Saroj is concerned, she stated that she had lastly seen the deceased going with packet of Vimal. She simply presumed that the victim was going to give the said packet to the accused. However, she did not see the deceased going with packet of Vimal Gutka to the respondent as she specifically stated that after seeing the deceased carrying the packet of Vimal she went home and started doing her lesson. There is no evidence to show that the deceased reached the house of the accused and met him. In fact, there is some contradiction even on the purchase of the item inasmuch as as per PW17 the deceased had purchased eatable whereas PW-12 says that she was carrying Vimal Gutka. PW17 has specifically said that the deceased had not purchased Vimal Gutka from him. From the aforesaid testimonies of Saroj Shakariben the High Court has also observed that from both the evidence taken together,

prosecution story cannot be believed inasmuch as if the situation is examined from a different angle, if what Saroj says had happened, then what Shakariben says could not have happened, because according to Shakariben, on arrival, the accused shouted at the girls and drove away Parul and Saroj and pushed the deceased into the house and, if what Shakariben says is correct, what Saroj says could not have happened. The doubt assumes greater strength because of certain circumstances which would be discussed in the paragraphs to follow.

Examined from any angle, the evidence led by the prosecution on last seen together aspect cannot be accepted. It is not only contradictory, inconsistent and improbable, but it also suffers from vice of improvements and, therefore, to us, it sounds unreliable. The case is founded on circumstantial evidence. This is one of the major circumstances pressed by the prosecution. We also find that the investigation is not carried out properly and does not inspire confidence. The evidence on last seen together aspect, therefore, cannot be accepted as a link in the chain of circumstances leading to exclusive hypothesis of guilt of the accused."

16. We are in agreement with the aforesaid analysis of the evidence by the High Court and, therefore, hold that prosecution has not been able to establish, with clinching evidence that the deceased was seen lastly in the company of the accused.

17. Even the medical evidence on which strong reliance was placed by the learned counsel for the State, is of no help to arrive at the conclusion that guilt of the respondent stands proved beyond reasonable doubt. When the respondent was arrested on 19th August 2003 a Panchnama (Ex.14) was drawn. In that it is recorded that the accused had abrasions on chest, back and shoulder caused by nail and also that there was swelling on his penis and swelling on skin with abrasion. Immediately after his arrest, the respondent was sent for

medical check up. As per the medical report (Ex.17) there were injuries on chest and back which is described by the doctor as linear abrasions. There were no foreign particles in his nails. The doctor also admitted in his cross-examination that he did not notice any injury on the penis of the accused. Therefore, this shows contradiction between the recording of medical condition in the Panchnama and the medical examination conducted by the doctor, in so far as they relate to the injury on the penis of the respondent. High Court has rightly observed that the Panchnama has recorded abrasions and therefore it could not have disappeared within such a short time. It reflects adversely on the prosecution case. As regards injuries found on chest and back of the respondent, they are tried to be shown as injuries caused with nail of the deceased. However, the post mortem note does not indicate presence of any traces of skin of the accused in nail of the deceased. Further, comments of the High Court in the impugned judgment about the medical evidence, pertinent for our purposes, are reproduced below as we entirely agree with the said analysis:

> "From the above discussion of evidence, it is clear that even according to doctor, there was no bleeding injury on penis of the accused. There was no bleeding injury to the deceased either. There were no internal injuries in the vagina of the deceased. Against this, if the results of vaginal swab are seen, presence of blood and semen is found. How this could have been found is a question which has remained unexplained and unanswered. This would cast heavy doubt about the reliability of investigation. That apart, the group has remained unidentified so far as vaginal swab is concerned.
>
> If evidence of Shakariben is seen and, even as per prosecution case, the incident occurred in the house of the accused and this is tried to be proved through deposition of Shakariben, who says that accused pushed the deceased into his house and, thereafter, she heard cry of

> the deceased and then sound of beating. As per the prosecution case, blood stains of the group of the deceased were found in the house of the accused at various places. No trace of semen was found in the house of the accused. But, surprisingly, at the place where the dead body was found, semen was found on the ground. That was of the group of the accused. If the incident occurred in the house, the traces of semen ought to have been found in the house and not at the place where the dead body was found. No motive is indicated for the accused to murder the deceased immediately after pushing her into the house and, if the rape or attempted rape was committed in the house followed by alleged murder, there would have been traces of semen in the house. These factors have remained unexplained and seem to have gone unnoticed by the trial court."

18. The High Court has also expressed its doubts on recovery of grinding stone from the house of the respondent which was allegedly used for committing murder of the deceased. It is pointed out by the High Court that evidence suggests that the officer of the FSL was summoned on 19th August 2003 who inspected the place of incident and instructed the Inquiry Officer to recover the stone which was, accordingly, recovered. It is so stated in his report as well as in his deposition. Thus, as per the deposition of the officer of FSL, stone was recovered on 19th August 2003. As against this, as per discovery Panchnama drawn on 23rd August 2003 the said grinding stone was recovered from beneath steel cupboard at the instance of the respondent. How this recovery could have taken place if the stone had already been recovered on 19th August 2003. This casts doubt about the aforesaid documents and the discovery of stone itself.

19. There is another aspect highlighted by the High Court which is very pertinent and cannot be ignored. After the incident when sniffer dog was brought to the site. The said dog had

tracked to the house of PW16 and not the respondent. In fact, on this basis the son of PW 16 was even taken into custody by the police and was detained for 2 days. Thereafter, he was allowed to go inasmuch, as per the police he had not committed any offence. This version has come from the testimony of PW16 herself. On the other hand, I.O. has totally denied that son of PW16 was ever detained for 2 days. There is no such entry in the daily diary as well. From this evidence appearing on record, the High Court has concluded that investigation cannot be considered as honest inasmuch as it would indicate to two possibilities, namely:

(1) The investigating officer did not detain or interrogate the son of PW16 for 2 days. If that is so he failed in his duty when the sniffer dog tracked to the house of PW16.

(2) If I.O. had detained the son of PW16, then case diary does not record the events correctly and he is not telling the truth before the Court.

That apart, it also speaks volumes about the reliability of the investigation and evidence collected, more so when no explanation is coming forward as to why the son of PW16 was released by the police and the respondent arrested.

20. We, thus, agree with the findings of the High Court that the evidence led by the prosecution does not establish a complete chain of circumstances to connect the accused with the murder of Komal, the deceased. There are significant defects and shortcomings in the investigation; witnesses have come out with contradictory version; and have made significant improvements in their versions in their depositions in the Court. In a case of circumstantial evidence, it would be unwise to record conviction on the basis of such a scanty, weak and incomplete evidence. As the prosecution has not been able to prove the charges beyond reasonable doubt, agreeing with the conclusions of the High Court we dismiss the present appeal.

R.P. Appeal dismissed.

STATE OF RAJASTHAN
v.
ROSHAN KHAN & ORS.
(Criminal Appeal Nos. 79-80 of 2005)

JANUARY 15, 2014.

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

Penal Code, 1860:

ss.376(2)(g) and s.366 – Gang rape – Six accused convicted by trial court – Acquittal by High Court – Held: Prosecution case that the six accused committed gang rape on the prosecutrix has been established by her evidence and the evidence of her father as corroborated by medical evidence and FSL report – Judgment of High Court set aside and that of trial court convicting all accused of offences charged and sentencing them to 10 years RI and 4 years RI under the two counts, restored.

s.376(2)(g), Explanation 1 – Gang rape – Presumption – Held: In the instant case as per medical evidence, four persons had committed rape on prosecutrix — Explanation 1 to s.376(2)(g) states that where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of the sub-section — It is, therefore, not necessary that prosecution should adduce clinching proof of a completed act of rape by each one of the accused on the victim.

Evidence Act, 1872:

s.114-A – Presumption in a gang rape u/s 376(2)(g), IPC – Held: Since prosecutrix has categorically said that sexual intercourse was committed by accused persons without her

consent and forcibly, court has to draw the presumption that she did not give consent to the sexual intercourse committed on her by accused persons — — The defence has not led any evidence to rebut the presumption — High Court could not have, therefore, held that there were circumstances to show that prosecutrix had gone on her own and on this ground acquitted the respondents —Penal Code, 1860 – ss.376(2)(g).

FIR

Gang rape – Four hours delay in filing FIR – Held: Delay has been sufficiently explained by informant.

Accused-respondents nos. 1 to 6 were prosecuted for committing offences punishable u/ss 376(2)(g) and 366 IPC on the allegations that in the night of occurrence, they took away a 16 years old mentally deficient girl to a secluded place and committed rape on her. The trial court convicted all the six accused of the offences charged and sentenced each of them to 10 years RI and 4 years RI under the two counts. However, the High Court acquitted them of both the charges.

Allowing the appeals, the Court

HELD 1.1. The informant (PW-1), father of the prosecutrix, has deposed that 28.04.1999 was the date of marriage of the daughter of his brother and during dusk time on 27.04.1999, his daughter (the prosecutrix), who was 14 years old and not mentally balanced, had gone to call the ladies of the locality and when she did not return, he went to search her, on the scooter driven by his brother. They saw five persons, standing near an old dilapidated building, who on seeing them, fled away. When they went inside, they found that the prosecutrix was crying and accused 'A' was lying over her and having sexual intercourse with her. The prosecutrix (PW-2) has categorically stated that all the six persons

committed rape on her without her consent and forcibly. The evidence of PW-1 and PW-2 that all the six respondents had committed rape on the prosecutrix is also corroborated by the complaint (Ext.P-1) made by PW-1 to the police within a few hours of the incident, as provided in s.157 of the Evidence Act. PW-7, the doctor has opined after medically examining the prosecutrix that there was nothing to suggest that she had not been raped. The report of the FSL supports the prosecution case. The medical evidence, therefore, also corroborates the evidence of PW-1 and PW-2 that there was sexual intercourse between the prosecutrix and the accused persons. [para 10, 11 and 14] [427-D-G; 428-B, D; 430-F-G; 431-B-C]

1.2. Section 114A of the Evidence Act, 1872 clearly provides that in a prosecution for rape under clause (g) of sub-s. (2) of s.376, IPC, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the court shall presume that she did not consent. Since the prosecutrix (PW-2) has categorically said that sexual intercourse was committed by accused persons without her consent and forcibly, the court has to draw the presumption that she did not give consent to the sexual intercourse committed on her by the accused persons. The defence has not led any evidence to rebut this presumption. The High Court could not have, therefore, held that there were circumstances to show that PW-2 had gone on her own and on this ground acquitted the respondents. [para 15] [431-D-G]

1.3. As per the medical evidence, four persons had committed rape on the prosecutrix. *Explanation* 1 to s.376(2)(g), IPC, states that where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be

deemed to have committed gang rape within the meaning of the sub-section. This Court has, therefore, consistently held that where there are more than one person acting in furtherance of their common intention of committing rape on a victim, it is not necessary that the prosecution should adduce clinching proof of a completed act of rape by each one of the accused on the victim. [para 16] [432-A-C]

Om Prakash v. State of Haryana **2011 (7) SCR 1080 = (2011) 14 SCC 309,** *Ashok Kumar v. State of Haryana* **(2003) 2 SCC 143,** *Bhupinder Sharma v. State of H.P.* **2003 (4) Suppl. SCR 792 = (2003) 8 SCC 551,** *Pardeep Kumar v. Union Admn.* **2003 (4) Suppl. SCR 792 = (2006) 10 SCC 608 and** *Priya Patel v. State of M.P.* **2006 (3) Suppl. SCR 456 = (2006) 6 SCC 263 – relied on.**

1.4. PW-1, in his evidence, has explained the delay in lodging the FIR. He has stated that after he found his daughter at about 1.00 a.m. on 28.04.1999 at the place of occurrence with accused 'A' and after the five other accused persons had fled, they returned to their house at 2.00 a.m. and remained at their house till before sunrise and thereafter lodged the FIR at the Police Station. He has further stated that the delay from 2.00 a.m. to 6.00 a.m. in lodging the report was on account of the fact that his wife was sick and he was also frightened and there was no other person to go to the police station. The SHO, has in his evidence, stated that on 28.04.1999 the informant appeared in the police station and produced a written report (Ext.P-1) before him at 6.00 A.M. Thus, the report (Ext.P-1) was filed by PW-1 at 6.00 a.m. and the period from 2.00 a.m. to 6.00 a.m. has been sufficiently explained in his evidence that he could not leave his wife alone until sunrise. No father would lodge a false complaint that his daughter has been gang-raped. The High Court should not have doubted the prosecution story on the ground of delay in lodging the FIR. [para 17] [432-F-H; 433-A-B, C-D]

1.5. The judgment of the High Court is, thus, contrary to the evidence on record and, as such, is set aside. The judgment of the trial court convicting the respondents of the offences u/ss 366 and 376(2)(g), IPC is restored and the sentences imposed for the two offences on the respondents by the trial court are maintained. [para 18] [433-E-F]

Balwant Singh and Others v. State of Punjab **(1987) 2 SCC 27;** *State of H.P. v. Gian Chand* **2001 (3) SCR 247 = (2001) 6 SCC 71** *Tulshidas Kanolkar v. State of Goa* **2003 (4) Suppl. SCR 978 = (2003) 8 SCC 590;** *State of Rajsthan v. N.K.* **2000 (2) SCR 818 = (2000) 5 SCC 30; and** *State of Rajasthan vs. Shera Ram* **2011 (15) SCR 485 = (2012) 1 SCC 602 – cited.**

Case Law Reference:

(1987) 2 SCC 27	**cited**	**para 6**
2001 (3) SCR 247	**cited**	**para 7**
2003 (4) Suppl. SCR 978	**cited**	**para 7**
2000 (2) SCR 818	**cited**	**para 7**
2011 (15) SCR 485	**cited**	**para 9**
2011 (7) SCR 1080	**relied on**	**para 16**
(2003) 2 SCC 143	**relied on**	**para 16**
2003 (4) Suppl. SCR 792	**relied on**	**para 16**
2006 (3) Suppl. SCR 456	**relied on**	**para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 79-80 of 2005.

Form the Judgment and Order dated 21.11.2003 of the High Court of Judicature for Rajasthan at Jodhpur in S.B. Criminal Appeal No. 765 & 743 of 2000.

Dr. Manish Singhvi, AAG, Amit Lubhaya, Milind Kumar for the Appellant.

Mukesh Sharma, Rameshwar Prasad Goyal, Siddharth Dave (A.C.), Jemtiben Ao, for the Respondents.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. These are appeals by way of Spicel Leave under Ariticle 136 of the Constitution against the judgment dated 21.11.2003 of the Rajasthan High Court convicting the respondents of the offences punishable under SDection 366 and 376(2)(g) of the Indian Penal Code, 1860 (for short 'IPC')

Facts

2. The facts very briefly are that on 28.04.1999 Ruliram lodged a complaint at the Bhadra Police Station in District Hanumangarh, stating as follows: There was a marriage of the daughter of his brother Gyan Singh for which a feast was arranged by him on 27.04.1999. His 15-16 years old daughter, who was slightly weak-minded, disappeared. When she did not return for quite some time, he and others started searching her. At about 9.00 p.m., a milkman informed him that he had seen six boys taking away a girl towards Kalyan Bhoomi. About 1.00 a.m. on 28.04.1999, when Ruliram was on a scooter with Gyan Singh still looking for his daughter, he noticed five boys in the light of the scooter near the old dilapidated office building of the Sheep and Wool Department and all the five, seeing the light of the scooter fled. When they went into the old building, they found Akbar having sexual intercourse with his daughter and she was shouting. They caught hold of Akbar who later informed them that all the remaining five had also performed sexual intercourse with his daughter and they knew the remaining five persons. The police registered a case under Sections 147 and 376, IPC, and carried out investigation and

filed a charge-sheet against the six respondents under Sections 376/34, IPC, and the case was committed for trial.

3. In the course of trial before the Additional Sessions Judge, Nohar Camp, Bhadra, the prosecution examined as many as nine witnesses. Ruliram was examined as PW-1, his daughter (prosecutrix) was examined as PW-2, and Dr. Ramlal, who had medically examined the prosecutrix, was examined as PW-7 and the report of the Forensic Science Laboratory was marked as Ext.P-39. The Additional Sessions Judge relied on the evidence of PW-1, PW-2 and PW-7 and the Ext.P-39 and convicted the six respondents under Section 376(2)(g) and Section 366, IPC, by judgment dated 18.11.2000, and after hearing them on the question of sentence, sentenced them for rigorous imprisonment for ten years each and a fine of Rs.5,000/- each, in default a further sentence of two months rigorous imprisonment each for the offence under Section 376(2)(g), IPC, and rigorous imprisonment for four years each and a fine of Rs.3,000/- each, in default a further sentence of one month rigorous imprisonment each for the offence under Section 366, IPC. The Additional Sessions Judge, however, directed that the sentences for the two offences are to run concurrently and upon deposit of fine by the accused persons, a compensation of Rs.25,000/- be paid to the prosecutrix.

4. The respondents filed criminal appeals before the High Court and the High Court held in the impugned judgment that the deposition of the prosecutrix (PW-2) was not believable and the evidence of Dr. Ramlal (PW-7) did not corroborate the prosecution story in some respects. The High Court further held that the evidence given by Ruliram (PW-1) that the prosecutrix was only aged 14 years cannot be believed and that she could be aged up to 19 years and there were circumstances to suggest that she went with the respondents on her own. The High Court was also of the view that the delay on the part of Ruliram (PW-1) to lodge the FIR on 28.04.1999 at 11.00 a.m. when the incident came to his knowledge at 1.00 a.m. cast

serious doubts on the prosecution case. The High Court accordingly set aside the judgment of the Additional Sessions Judge, allowed the appeals and acquitted all the six respondents of the charges.

Contentions of learned counsel for the parties:

5. Dr. Manish Singhvi, learned counsel for the State submitted that the High Court should not have disbelieved the evidence of PW-1 and PW-2 as there was no enmity between these witnesses and the accused persons. He referred to the evidence of PW-1, PW-2 and PW-7 as well as FSL report (Ext.P-39) to show that a case of gang rape by the six accused persons had been established beyond reasonable doubt. He further submitted that the High Court could not have held that there were circumstances to suggest that the prosecutrix could have gone on her own with the accused persons. He relied on Section 114A of the Indian Evidence Act, 1872 which provides that where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent. He submitted that the High Court has lost sight of this presumption under Section 114A of the Indian Evidence Act.

6. Dr. Singhvi next submitted that the High Court should not have entertained doubts about the prosecution story on the ground of delay in lodging the FIR. He submitted that no father would like to lodge a complaint making a false allegation of rape of his daughter. He relied on the decision of this Court in *Balwant Singh and Others v. State of Punjab* [(1987) 2 SCC 27] in which a similar contention that the father of the prosecutrix had lodged the FIR on account of previous enmity with the accused was rejected on the ground that a father of the proscutrix would not falsely involve his daughter in a case of rape by the accused.

7. Dr. Singhvi finally submitted that the prosecutrix in this case was a mentally deficient girl and was vulnerable to sexual abuse and, therefore, the High Court should have been sensitive while deciding the case. He cited the decisions of this Court in *State of H.P. v. Gian Chand* [(2001) 6 SCC 71] as well as in *Tulshidas Kanolkar v. State of Goa* [(2003) 8 SCC 590] in support of this submission. He submitted that in the present case the trial court had rightly convicted the respondents under Sections 366 and 376(2)(g), IPC but the High Court reversed the conviction of the respondents and acquitted them of the charges. He submitted that on almost similar facts this Court in *State of Rajsthan v. N.K.* [(2000) 5 SCC 30] has set aside the judgment of the High Court and restored the conviction of the accused persons by the trial court.

8. In reply, Mr. Mukesh Sharma, learned counsel for respondent Nos. 1, 2, 3, 4 and 6, submitted that Dr. Ramlal (PW-7) has not found any injury on the private parts of the prosecutrix and that he has found only some marks of eczema. He further submitted that PW-1 has only stated that with the help of the scooter light, he saw five persons running away but he has not been able to properly identify these five persons, namely, respondents Nos. 1, 2, 3, 4 and 6. He submitted that as he had only found Akbar (respondent No.5) having sexual intercourse with the prosecutrix, no case of gang rape under Section 376(2)(g), IPC, is made out.

9. Mr. Sidharth Dave, amicus curiae for respondent No.5, submitted that the prosecution story that the prosecutrix was a mentally deficient girl has not been proved. He argued that, on the contrary, the doctor (PW-7) has opined that the mental condition and equilibrium of the prosecutrix were normal. He next submitted that the High Court has rightly come to the conclusion that the FIR was actually lodged at 11.00 a.m. on 28.04.1999 and had been *ante* timed to 6.00 a.m. on 28.04.1999. He argued that this manipulation casts serious doubts on the prosecution story that rape has been committed

on the prosecutrix. He submitted that Dr. Ramlal (PW-7) has found on examination of the prosecutrix that there was one posterior perineal tear of the size 1/4" x 1/8" x 1/8" caused within 24 hours and had also given his opinion that this injury may result from the fall on some hard surface and, therefore, a case of rape by Akbar had not been established beyond reasonable doubt. He submitted that the view taken by the High Court was a plausible one on the facts of this case and should not be interfered with an appeal under Article 136 of the Constitution. He relied on the judgment of this Court in *State of Rajasthan vs. Shera Ram* [(2012) 1 SCC 602] in support of this submission.

Findings of the Court

10. We have perused the evidence of informant (PW-1). He has stated that 28.04.1999 was the date of marriage of Manju, the daughter of his brother Gyan, and during dusk time on 27.04.1999, his daughter (the prosecutrix), who was 14 years old and not mentally balanced, had gone to call the ladies of the locality but did not return. He searched the entire village and thereafter he went on the scooter driven by his brother Gyan Singh towards village Rajpura and on the way a milkman told them that six boys catching the hand of a girl were taking her towards the cremation ground. They went searching for the prosecutrix in the cremation ground but did not find her there. Thereafter, they turned the scooter towards village Motipura and they found that five persons were standing in the cluster of keekar trees near the *Bhedia Daftar* (an old dilapidated building) and on seeing them, five persons fled away. When they went inside the dilapidated building they found that the prosecutrix was crying and Akbar was lying over her and having sexual intercourse with her. PW-1 has also stated that the five persons who fled away are Roshan, Jangsher, Yakoob, Shafi and Kadar. He has also said that all the aforesaid six persons are residents of his *Mohalla* (locality) and were present in Court. PW-1 has further stated that by the time they reached

the *Bhedia Daftar*, it was about 1.00 a.m. of 28.04.1999 and he took the prosecutrix and Akbar to the Police Station and submitted the complaint (Ext.P-1) at 6.00 a.m. of 28.04.1999.

11. We have also perused the evidence of prosecutrix (PW-2). She has stated that when the marriage of the daughter of his uncle Gyan was to take place, she had gone out at dusk time from her house to call ladies to sing songs and on the way she met Akbar who told her that her uncle was looking for her. Then she accompanied with Akbar proceeded further and met Jangsher near the railway crossing who also told her that her uncle was looking for her. She then started walking and Akbar and Jangsher followed her and after some time she found Shafi and Yakoob and all the four persons started following her and after some time she saw Kadar and Roshan and all the six persons took her to a bridge on the road and from there they brought her to the tree of Tali in the field. Thereafter, all the six persons made her fall beneath the Tali tree forcibly and removed her *salwar*, caught hold of her and took her to a distance of two-three fields and then to a hut. Then they took her to *Bhedia Daftar* where also they committed sexual intercourse with her and when Akbar was committing rape on her, PW-1 and her uncle came and the remaining five persons fled away. She has stated that all these six accused persons belong to her *Mohalla* (locality) and they were present in Court. She has also identified six accused persons in Court. She has categorically stated that all the six persons committed rape on her without her consent and forcibly.

12. We have also read the evidence of Dr. Ramlal (PW-7) He has stated that he has examined the prosecutrix and prepared the medical examination report (Ext.P-15) and he had not found any mark of injury on her hidden parts, breast, thighs and forearm. He has further stated that her hymen was already ruptured and there was one posterior perineal tear of the size 1/4" x 1/8" x 1/8" caused within 24 hours. His opinion is that prosecutrix was habitual to sexual intercourse and there was nothing to suggest that she had not been raped but the vaginal

swab and smear slides could be tested to find out the presence of sperms. PW-7 has also examined all the six accused persons and also stated that their *pants* and underwears were taken into possession and sealed and delivered to the SHO, Bhadara. The SHO, Bhadara, has been examined as PW-9 and he has stated that he handed over the pieces of medical evidence received from the Medical Officer of Govt. Hospital, Bhadara to the in-charge of the *Malkhana* and later on he got all such evidence in eight packets sent to the FSL, Rajasthan for test and the FSL, Rajasthan, submitted the test report (Ext.P-39).

13. Ext. P-39, which is the report under Section 293, Cr.P.C. of the FSL, Rajasthan, gives the following descriptions of the articles and result of examination:

"**Description of Articles**

Packet Parcel No.	Exhibit No. marked by me	Details of exhibits
A	1	Vaginal Swab
"	2	Vaginal smear
B.	3	Salwar
"	4	Kameej
1.	5	Pants
2.	6	Pants
"	7	Underwear
3.	8	Pants
4.	9	Pants

"	10	Underwear
5.	11	Pants
"	12	Underwear
A.	13	Underwear

Result of Examination

Human semen was detected in exhibit No.1, 2 (from packet marked A), 3, 4 (from B), 5 (from 1), 7 (from 2), 8 (from 3) & 10 (from 4).

Semen was not detected in exhibit No.6 (from 2), 9 (from 4), 11, 12 (from 5) & 13 (from A).

Exhibit No.1, 2 (from A) have been consumed during the examination.

(Dr. PRABHA SHARMA)"

14. Thus, the evidence of the prosecutrix (PW-2) is clear that all the six respondents, Akbar, Jangsher, Roshan, Yakoob, Kadar and Shafi, committed rape on her without her consent and forcibly. This evidence of the prosecutrix (PW-2) is also corroborated by the evidence of the informant (PW-1), who had himself witnessed Akbar committing rape on the prosecutrix. PW-2 had also informed PW-1 soon after the rape by the accused persons that not only Akbar but the other five respondents also had forcibly committed rape on her. The evidence of PW-1 and PW-2 that all the six respondents had committed rape on the prosecutrix is also corroborated by the complaint (Ext.P-1) made by PW-1 to the police within a few hours of the incident as provided in Section 157 of the Indian Evidence Act. Dr. Ramlal (PW-7) has opined after medically examining the prosecutrix that there was nothing to suggest that she had not been raped. To confirm whether rape was committed on the prosecutrix by the six accused persons, the vaginal swab and vaginal smear as well as *salwar* and *kameej* of the prosecutrix and the pants and underwears of the accused

persons were sent by the letter (Ext.P-31) to the FSL, Rajasthan, and as per the report of the FSL, Rajasthan (Ext.P-39), human semen was detected in the vaginal swab and vaginal smear (Exts.1 & 2 from packet 'A'), *salwar* and *kameej* of the prosecutrix (Exts.3 & 4 from packet 'B'), two pants (Ext.5 from packet 1, and Ext. 8 from packet 3) and two underwears (Ext.7 from packet 2, and Ext.10 from packet 4). The medical evidence, therefore, also corroborates the evidence of PW-1 and PW-2 that there was sexual intercourse between the prosecutrix and the accused persons.

15. We cannot accept the submission of Mr. Siddharth Dave, learned amicus curiae for respondent No.5 that the finding given by the High Court that the prosecutrix may have gone with the accused persons on her own is a plausible one and should not be interfered with under Article 136 of the Constitution. As we have already noticed, the prosecutrix (PW-2) has deposed categorically that all the six persons had raped her without her consent and forcibly. Section 114A of the Indian Evidence Act, 1872 clearly provides that in a prosecution for rape under clause (g) of sub-section (2) of Section 376, IPC, where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent. Since the prosecutrix (PW-2) has categorically said that sexual intercourse was committed by the accused without her consent and forcibly, the Court has to draw the presumption that she did not give consent to the sexual intercourse committed on her by the accused persons. The defence has not led any evidence to rebut this presumption. In our considered opinion, the High Court could not have, therefore, held that there were circumstances to show that PW-2 had gone on her own and on this ground acquitted the respondents.

16. From Ext.P-31 read with Ext.P-39, it is also clear that

human semen was detected from the pants of Akbar and Jangsher and the underwears of Safi and Yakub. As per the medical evidence, four persons had committed rape on the prosecutrix. *Explanation* 1 to Section 376(2)(g), IPC, states that where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of the sub-section. This Court has, therefore, consistently held that where there are more than one person acting in furtherance of their common intention of committing rape on a victim, it is not necessary that the prosecution should adduce clinching proof of a completed act of rape by each one of the accused on the victim. (see *Om Prakash v. State of Haryana* [(2011) 14 SCC 309], *Ashok Kumar v. State of Haryana* [(2003) 2 SCC 143], *Bhupinder Sharma v. State of H.P.* [(2003) 8 SCC 551], *Pardeep Kumar v. Union Admn.* [(2006) 10 SCC 608] and *Priya Patel v. State of M.P.* [(2006) 6 SCC 263]). Thus, we cannot accept the submissions of Mr. Mukesh Sharma, learned counsel for respondent nos.1, 2, 3, 4 and 6, and Mr. Siddharth Dave, learned amicus curiae for respondent No.5, that the medical evidence do not establish a case of gang rape under Section 376(2)(g), IPC.

17. The High Court, however, has considered the delay on the part of informant (PW-1) to lodge the FIR as a relevant factor to doubt the prosecution story. We find that PW-1 has explained the delay in his evidence. He has stated that after he found his daughter at about 1.00 a.m. on 28.04.1999 at the *Bhedia Daftar* with Akbar and after the five other accused persons had fled, they returned to their house at 2.00 a.m. and remained at their house till before sunrise and thereafter lodged the FIR at the Police Station. He has further stated that the delay from 2.00 a.m. to 6.00 a.m. in lodging the report was on account of the fact that his wife was sick and he was also frightened and there was no other person to go to the police station. He has also stated that he returned home from the police station at about 9.00 a.m. The SHO of Bhadara Police Station has in his

evidence stated that on 28.04.1999 the informant appeared in the police station and produced a written report (Ext.P-1) before him. In cross-examination on behalf of the accused-Roshan, Shafi and Yakoob, PW-9 has stated that Ext.P-1 was produced before him at 6.00 a.m. on 28.04.1999. Yet the High Court has come to the conclusion that the report (Ext.P-1) must have been filed at about 11.15 am. and was *ante* timed to 6.00 a.m. For this conclusion, we do not find any evidence, but only a surmise that Ext.P-1 must have been typed at the court premises after 11.00 a.m. Thus, the report (Ext.P-1) was filed by PW-1 at 6.00 a.m. in the morning reporting an incident that he had witnessed between 1.00 a.m. and 2.00 a.m. on 28.04.1999 and the period from 2.00 a.m. to 6.00 a.m., in our considered opinion, has been sufficiently explained by PW-1 in his evidence that he could not leave his wife alone until sunrise. As has been rightly submitted by Dr. Singhvi, no father would lodge a false complaint that his daughter has been gang-raped. The High Court should not have doubted the prosecution story on the ground of delay in lodging the FIR.

18. The judgment of the High Court is thus contrary to the evidence on record and is liable to be set aside. We accordingly set aside the judgment of the High Court acquitting the respondents and restore the judgment of the trial court convicting the respondents for the offences under Sections 366 and 376(2)(g), IPC, and maintain the sentences imposed for the two offences on the respondents by the trial court.

19. The appeals are accordingly allowed. The respondents will be taken into custody forthwith to undergo the remaining sentence.

R.P. Appeals allowed.

TULIP STAR HOTELS LTD.
v.
SPECIAL DIRECTOR OF ENFORCEMENT
(Civil Appeal No. 680 of 2014)

JANUARY 16, 2014

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

Memorandum of FLM issued by RBI — *Clause 9 – Sale of foreign currency – Restriction – Held: Under paragraph 9, as between the money changers, a free hand has been given for purchase and sale of any foreign currency notes etc. in rupee value – The only restriction imposed therein is that the Indian rupee value of the foreign currency should not be paid by way of cash, but should always be paid in the form of a negotiable instrument or by debiting to the purchasers' bank account – In the instant case, transaction was carried on by way of payment in the form of pay-orders — It cannot be held that whole transaction was in contravention of paragraph 3 of FLM.*

Clause 3— Sale of foreign currency – 'Authorised officials' – Held: When a money changer operates its business from its premises, any transaction by way of sale or purchase as part of its money changing business should be carried out only through an authorized representative – In the instant case, it is not the case of respondent that neither of the two persons who indulged in the transaction of money changing business were not the authorized officials of their respective establishments and, as such, violation of paragraph 3 cannot be alleged as against appellants – Sale effected by appellants on a rate higher than the rate prevailing in the market was not the basis for the alleged violation of paragraph 3 of the FLM read with ss. 6(4), 6(5) and 7 of FERA –

Impugned orders by which appellants were found guilty of the violation of paragraph 3 of FLM read with ss. 6(4), 6(5) and 7 of FERA and the consequential imposition of penalty being wholly unjustified, are set aside — Foreign Exchange Regulation Act, 1973 — ss.6 (4), 6(5), 7 and 8.

The appellant in C.A. No. 680 of 2014, a company, and its Executive Director (appellant in C.A. 681 of 2014), were proceeded against on the allegations that they sold foreign currency through unauthorized persons deputed by the purchaser in violation of ss 6(4), 6(5), 7 and 8 of the Foreign Exchange Regulation Act, 1973 ("*FERA*") as well as paragraph 3 of the Memorandum of FLM issued by RBI. It was also alleged that the foreign exchange was purchased from the appellant at a higher rate than the exchange rate fixed by the RBI. The respondent imposed a penalty of Rs.50,000/- each on both the appellants. Their appeals were dismissed by the Appellate Tribunal for Foreign Exchange as also the Division Bench of the High Court.

Allowing the appeals, the Court

HELD: 1.1. The impugned orders disclose that the only violation or contravention related to the stipulations contained in paragraph 3 of the Memorandum of FLM issued by RBI read with s.6(4) and 6(5) of FERA. Under paragraph 9 of the FLM as between the money changers, a free hand has been given for purchase and sale of any foreign currency notes etc. in rupee value. The only restriction imposed therein is that the Indian rupee value of the foreign currency should not be paid by way of cash, but should always be paid in the form of a negotiable instrument such as banker's cheque/pay-order/demand draft etc., or by debiting to the purchasers' bank account. In the instant case, transaction had taken place in between two licensed FFMCs and the said transaction was carried on by exchange of foreign

currency by way of payment in the form of pay-orders. Therefore, it cannot be held that the transaction was in contravention of ss.6(4) and 6(5) of FERA and paragraph 3 of FLM so as to attract a penalty. [para 14] [445-H; 446-A, C-D, E-G]

1.2. The caption of paragraph 3 of FLM is "*Authorized Officials*". The purport of the said paragraph was to ensure that any licensed money changers should allow transaction of its money changing business in its premises only through such persons who are the listed authorized officials as certified by the office of the Reserve Bank under whose jurisdiction such money changers operate their business. The last part of paragraph 3 makes the position a little more clear which states that "*no person other than the authorized representative should be allowed to transact money-changing business on behalf of the money-changer*". Apparently, when a money changer operates its business from its premises, any transaction by way of sale or purchase as part of its money changing business should be carried out only through an authorized representative. [para 15] [446-H; 447-A-C]

1.3. If such transaction had taken place as between the appellants and the purchaser, it should have been carried on only through their respective authorized representatives. The statement of the appellant in CA No. 681 of 2014 discloses that on each occasion the transaction was negotiated by the Branch Manager of the appellant with one 'P' of the purchaser establishment. It is not the case of the respondent that neither of these two persons who indulged in the transaction of money changing business were not the authorized officials of their respective establishments. Therefore, violation of paragraph 3 cannot be alleged as against the appellants. [para 16] [447-D-G]

1.4. It can also be safely held that for any violation or contravention of the provisions of FERA or FEMA at the instance of the purchaser in the instant case, after the money changing transaction as between the appellants and the said concern had come to an end, the appellants cannot in any way be held responsible or proceeded against. [para 17] [448-A-B]

1.5. In the peculiar facts of the case and having regard to the nature of transactions which had taken place as between the appellants and the purchaser in the manner in which it has been narrated in the impugned order of the Original Authority as noted by the Tribunal, as well as the Division Bench of the High Court, there was no scope to allege a violation of paragraph 3 of the FLM or for that matter, ss.6(4) and 6(5) of FERA, 1973. [para 18] [448-B-D]

Collector of Customs vs. Swastic Woollens Pvt. Ltd. **1988 Suppl. SCR 370 =1988 (Supp) SCC 796,** *Commissioner of Central Excise vs. Charminar Non-Wovens Ltd*. **2009 (14) SCR 205 = (2009) 10 SCC 770 and** *Ghisalal vs. Dhapubai (dead) by LRs & Ors*. **2011 (1) SCR 651 = (2011) 2 SCC 298 – help inapplicable.**

1.6. As regards the question of the higher value at which the foreign currency was alleged to have been sold by the appellants to the purchaser, suffice it to say that in the impugned orders of the Original Authority, as well as the Tribunal and the Division Bench, the sale effected by the appellants on a rate higher than the rate prevailing in the market was not the basis for the alleged violation of paragraph 3 of the FLM read with ss. 6(4), 6(5) and 7 of FERA. In the confiscation order passed by the Customs authorities, where the appellants were also the noticees, no fault was found against the appellants on that ground. [para 19 and 21] [448-F; 449-G-H; 450-A-B]

P.V. Mohammad Barmay Sons vs. Director of Enforcement **– 1992 (61) ELT 337 – help inapplicable.**

1.7. The impugned orders by which the appellants were found guilty of the violation of paragraph 3 of FLM read with ss. 6(4), 6(5) and 7 of FERA and the consequential imposition of penalty of Rs.50,000/- being wholly unjustified, are set aside. The penalty amount, if recovered be refunded to the appellants along with simple interest at the rate of 6% per annum. [para 22] [450-C-E]

Case Law Reference:

1988 Suppl. SCR 370	**help inapplicable**	**para 6**
2009 (14) SCR 205	**help inapplicable**	**para 6**
2011 (1) SCR 651	**help inapplicable**	**para 6**
1992 (61) ELT 337	**help inapplicable**	**para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 680 of 2014.

From the Judgment and Order dated 14.10.2010 of the High Court of Judicature at Bombay in Fema Appeal No. 3 of 2008.

WITH

C.A. NO. 681 of 2014.

H.N. Salve, Sanjiv Sen, Abhinav Agrawal, Mahesh Agarwal, Rishi Agrawala, E.C. Agrawala for the Appelllant.

S.K. Bagaria, ASG, P.K. Dey, Anando Mukherjee, Sidhartha Panda, B. Krishna Prasad, for the Respondent.

The Judgment of the Court was delivered by

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

2. In these two appeals, the challenge is to a common judgment of the Division Bench of the High Court of Judicature at Bombay in FEMA Appeal Nos.3 & 4 of 2008, dated 14th October 2010.

3. Brief Facts which led to the culmination of the present appeals are required to be stated. The Appellant in SLP No.7655 of 2011 is the company and the Appellant in SLP No.7657 of 2011 was also proceeded against as the Executive Director of the company. The Respondent issued a show cause notice against the Appellants dated 29th April 2002, wherein it was alleged that the Appellant in SLP No.7655 of 2011 sold foreign currency to the value of 1,47,000 US$ and 1000 Sterling £ of UK between 29.4.1997 to 5.6.1997 through unauthorized persons deputed by M/s Hotel Zam Zam in violation of Sections 6(4), 6(5), 7 & 8 of the Foreign Exchange Regulation Act, 1973 (hereinafter called "*FERA*") as well as paragraph 3 of the Memorandum of FLM issued by RBI. The Appellants were called upon to show-cause why penalty should not be imposed against them under Section 50 of FERA read with Section 49 (3) & (4) of Foreign Exchange Management Act (hereinafter called "*FEMA*"). Subsequently, by order dated 28.10.2004 the Respondent imposed a penalty of Rs.50,000/- each on both the Appellants. The Appellants preferred appeals before the Appellate Tribunal for Foreign Exchange in Appeal Nos.1259 and 1260 of 2004, which were also dismissed by order dated 2.7.2008. The above said orders of the Original Authority, as well as the Appellate Authority, were the subject matter of challenge before the Division Bench of the High Court in FEMA Appeal Nos.3 & 4 of 2008. The Division Bench having confirmed the orders of the lower authority, as well as the tribunal, the Appellants have come forward with these appeals.

4. We heard Mr. H.N. Salve, learned Senior Advocate for the Appellants and Mr. S.K. Bagaria, learned Addl. Solicitor

General for the Respondent. We also perused the written submissions filed on behalf of the appellant as well as the respondent. We also perused the order of the Original Authority, the Tribunal, as well as the Division Bench and having heard the counsel for the respective parties we proceed to decide these appeals.

5. Mr. Salve, learned senior counsel, appearing on behalf of the Appellants in his submissions mainly contended that there was no violation at all in the matter of Sale and Purchase by the Appellant company to M/s Hotel Zam Zam in relation to the sale of 1,47,000 US$, as well as 1000 Sterling £ of UK in between 29.4.1997 and 5.6.1997, inasmuch as both the Appellant company, as well as M/s Hotel Zam Zam are duly licensed Full Fledged Money Changers, in short FFMC. According to the learned senior counsel, such transactions as between the licensed FFMCs are wholly authorized under the provisions of FERA, as well as the Memorandum of FLM of the Reserve Bank of India. The learned senior counsel further contended that in the confiscation proceedings initiated against the Appellants, as well as M/s Hotel Zam Zam, as per the order dated 21.8.1998 it was found that no statutory violation can be attributed to the Appellants and therefore, the imposition of penalty as against the Appellants by the Original Authority and the confirmation of the same by the Tribunal and the Division Bench are therefore liable to be set aside.

6. As against the above submissions, Mr. Bagaria, learned Addl. Solicitor General would contend that by virtue of the statutory stipulations contained in sub-sections (4) and (5) of Section 6, Section 7 and 8 of FERA read along with paragraph 3 of the Memorandum of FLM of the RBI, there was a clear violation of the statutory provisions committed by the Appellants, hence the penalty imposed by the Original Authority as confirmed by the Appellate Authority, as well as the High Court cannot be faulted. It was also submitted that the Original Authority, the Appellate Tribunal and the High Court have reached a concurrent finding based on documents, materials,

as well as statements on record and the said conclusions are not perverse and therefore, the same do not call for interference. Reliance was placed upon the decisions in *Collector of Customs vs. Swastic Woollens Pvt. Ltd. - 1988 (Supp) SCC 796, Commissioner of Central Excise vs. Charminar Non-Wovens Ltd. – (2009) 10 SCC 770 and Ghisalal vs. Dhapubai (dead) by LRs & Ors. – (2011) 2 SCC 298.* It was also contended that Hotel Zam Zam purchased the foreign exchange from the appellant at a higher rate than the exchange rate fixed by the RBI and on this ground as well the proceedings initiated against the appellant and the imposition of penalty was justified. To support the said contention, reliance was placed upon the decision in *P.V. Mohammad Barmay Sons vs. Director of Enforcement – 1992 (61) ELT 337.*

7. When we consider the submissions of the respective counsel we find Sections 6(4), 6(5), 8(2) of FERA and Para 3 and 9 of the Memorandum of FLM of RBI, are required to be noted which are as under:

*"**Section 6 Authorised dealers in foreign exchange:-***

6(4) An authorized dealer shall, in all his dealings in foreign exchange and in the exercise and discharge of the powers and of the functions delegated to him under Section 74, comply with such general or special directions or instructions as the Reserve Bank may, from time to time, think fit to give, and except with the previous permission of the Reserve Bank, an authorized dealer shall not engage in any transaction involving any foreign exchange which is not in conformity with the terms of his authorization under this section.

6(5) An authorized dealer shall, before undertaking any transaction in foreign exchange on behalf of any person, require that person to make such declaration and to give such information as will reasonably satisfy him that the transaction will not involve, and is not designed for the purpose of, any contravention or evasion of the provisions of this Act or of any rule, notification, direction or order made thereunder, and where the said person refuses to comply with any such requirement or makes only unsatisfactory compliance therewith, the authorized dealer shall refuse to undertake the transaction and shall, if he has reason to believe that any such contravention or evasion as aforesaid is contemplated by the person report the matter to the Reserve Bank.

Section 8: Restrictions on dealings in foreign exchange:-

(2) Except with the previous general or special permission of the Reserve Bank, no person, whether an authorized dealer or a money-changer or otherwise, shall enter into any transaction which provides for the conversion of Indian currency into foreign currency or foreign currency into Indian currency at rates of exchange other than the rates for the time being authorized by the Reserve Bank.

Paragraphs 3 and 9 of the FLM

Authorised Officials

3. All money-changers should arrange to forward lists giving full names and designations of their representatives who are authorized to buy and sell foreign currency notes, coins and travelers cheques on their behalf together with their specimen signatures, at the end of each calendar year to the office of Reserve Bank under whose jurisdiction they are functioning. Any changes in their list should also be brought to the notice of Reserve Bank. No person other than the authorized representative should be allowed to transact money-changing business on behalf of the money-changer

Purchases from other Money-changers and Authorized Dealers:-

9. *Money-changers may freely purchase from other money-changers and authorized dealers in foreign exchange or their exchange bureau, any foreign currency notes and coins tendered by the letter. Rupee equivalent of the amount of foreign currency purchased should, however, be paid by way of a cross cheque drawn on their bank account or if made by way of a bankers' cheque/ pay order/demand draft, it should be accompanied by a certificate from the bank issuing the relative instrument certifying that the funds for the instrument have been received by it by debit to the applicants bank account. In no circumstances should payments in respect of such sale be made in cash."*

8. Under Section 6(4) it is stipulated that a full fledged money changer (FFMC) as an authorized dealer in foreign exchange should strictly comply with the general or special directions or instructions that may be issued by the RBI and that except with the previous permission of the RBI, authorized dealers should not engage in any transaction involved in any foreign exchange, which is not in conformity with the terms of his authorization. Under Section 6(5) it is stipulated that an authorized dealer should before undertaking any transaction in foreign exchange should ensure verification on certain aspects in order to ensure that there is no contravention of the provisions of FERA and if the FFMC has any reason to believe that any such contravention or evasion is contemplated by a person who seeks to indulge in any transaction in foreign exchange, the FFMC should report the matter to the RBI.

9. Section 8 of FERA imposes restrictions on dealings in foreign exchange. The said provision imposes restriction to the effect that no person other than the authorized dealer in India, shall purchase or otherwise acquire or borrow any foreign exchange. Under sub section 2, it is stipulated that except with the previous general or special permission of RBI, an authorized dealer or a money changer should enter into any transaction

providing conversion of Indian currency into foreign currency or vice versa, at rates of exchange other than the rates for the time-being authorized by RBI.

10. *De hors* the above provisions, the other relevant provisions are paragraphs 3 & 9 of the Memorandum of FLM issued by the RBI. A close scrutiny of paragraph 3 disclose that the said paragraph has been issued by the RBI to state as to who can be called as '*authorized officials'* of money changers. The said paragraph also imposes a restriction to the effect that other than an authorized representative, nobody else should be allowed to transact money changing business on behalf of the money changer.

11. Paragraph 9 virtually gives a free hand for the money changers to indulge in purchase of foreign currency etc., and the only restriction is that while making such purchase, the purchase value should be paid only by way of an instrument and not by way of cash.

12. Keeping the above provisions in mind, when we refer to the nature of transaction that had taken place as between the Appellants and M/s Hotel Zam Zam, the following facts are not in controversy:

(a) The Appellants, as well as M/s Hotel Zam Zam, are licensed FFMC.

(b) The Appellants sold foreign exchange of 1,47,000 US $ and 1,000/- sterling £ of UK as between April 1997 to June 1997 to M/s Hotel Zam Zam.

(c) The purchase value of the above foreign currency was at a higher rate than the existing retail rate that prevailed in the market.

(d) The purchase value was paid by M/s Hotel Zam Zam by way of Pay Orders.

(e) Prior to the transaction, at the instance of the Appellants, a Xerox copy of the RBI license of M/s Hotel Zam Zam was produced and based on which the transaction was effected.

(f) The transactions were effected on 29.04.1997, 06.05.1997, 29.05.1997 and 05.06.1997 and the amounts transacted were 7,000 US$, 1000 Sterling £ of UK, 40,000 US$ and 1,00,000 US$ on the respective dates. In all 1,47,000 US$ and 1000 Sterling £ of UK were sold by the Appellants to M/s Hotel Zam Zam.

(g) All the above transactions were made and the foreign currency was handed over to Shri Rakesh Mahatre, a representative of M/s Hotel Zam Zam.

13. Based on the above undisputed facts relating to the transaction as between the Appellants and M/s Hotel Zam Zam, the Original Authority reached a conclusion that the Appellants failed to verify the authorization in favour of the persons concerned to buy/sell foreign exchange on behalf of the said money changers as contemplated under the relevant provisions. In other words, it was concluded that it was incumbent upon the Appellants by virtue of the terms of instructions contained in paragraph 3 of the Memorandum of FLM issued by RBI to have verified the bonafides of the persons deputed to them by M/s Hotel Zam Zam before handing over the foreign currencies to such persons. It was, therefore, ultimately concluded that the said failure on the part of the Appellants resulted in contravention of the directions contained in paragraph 3 of the Memorandum of FLM read with Section 6(4), 6(5) and 7 of FERA. Ultimately the Appellants were found guilty for the said contraventions and the penalty came to be imposed. The said order of the Original Authority was confirmed by the Tribunal, as well as the Division Bench of the High Court.

14. The above impugned orders disclose that the only

violation or contravention related to the stipulations contained in paragraph 3 read with Section 6(4) and 6(5) of FERA. It will be relevant to note that the variation in the rates of purchase value of the foreign currency was not the basis for the ultimate conclusion about the contravention held against the Appellants. Therefore, keeping aside the said aspect, when we examine the contravention held proved against the Appellants, we feel it appropriate to make a reference to paragraph 9 in the forefront. Under paragraph 9 of the FLM as between the money changers, a free hand has been given for purchase and sale of any foreign currency notes etc. in rupee value. The only restriction imposed therein is that the Indian rupee value of the foreign currency should not be paid by way of cash, but should always be paid in the form of an instrument such as banker's cheque/pay-order/demand draft etc., or by debiting to the purchasers' bank account. Therefore, if under paragraph 9 such a free hand has been given to the money changers, namely, FFMCs in the matter of purchase of foreign currency etc., by making payments in the form of negotiable instruments under the relevant statutes, the question that would arise for consideration would be whether in a case of this nature where such a transaction had taken place in between two licensed FFMCs and the said transaction was carried on by exchange of foreign currency by way of payment in the form of pay-orders and that the sale effected by the Appellants and the purchase made by the other FFMC, namely, M/s Hotel Zam Zam was not disputed, can it still be held that there was any violation at all in order to proceed against the Appellants for imposing a penalty? When we examine the said issue, we are unable to accede or countenance the stand of the Respondent that the foreign currencies to the values mentioned in the earlier paragraphs were handed over to the representative of M/s Hotel Zam Zam by one Mr. Rakesh Mahatre and, therefore, the whole transaction was in contravention of Sections 6(4) and 6(5) of FERA and paragraph 3 of FLM.

15. When we examine paragraph 3 of FLM, we find that

the caption of the said paragraph is "*Authorized Officials*". The purport of the said paragraph was to ensure that any licensed money changers should allow transaction of its money changing business in its premises only through such persons who are the listed authorized officials as certified by the office of the Reserve Bank under whose jurisdiction such money changers operate their business. The last part of paragraph 3 makes the position a little more clear which states that "*no person other than the authorized representative should be allowed to transact money-changing business on behalf of the money-changer*". Apparently when a money changer operates its business from its premises, any transaction by way of sale or purchase as part of its money changing business should be carried out only through an authorized representative.

16. When we extend the application of the said stipulation to the case of present nature, it can only be said that if such transaction had taken place as between the Appellants and the purchaser M/s Hotel Zam Zam, it should have been carried on only through their respective authorized representatives. The statement of Mr. Peter Kerkar, the Appellant in SLP (C) No.7657 of 2011, disclose that on each occasion the transaction was negotiated by the Branch Manager of the Appellant with one Ms. Pinky of M/s Hotel Zam Zam. It is not the case of the Respondent that neither of these two persons who indulged in the transaction of money changing business were not the authorized officials of their respective establishments. If the said factum relating to the business transactions, which had taken place as between the Appellants and M/s Hotel Zam Zam is not in controversy, we fail to see how a violation of paragraph 3 can be alleged as against the Appellants.

17. It is stated that after the transaction as between the Appellants and M/s Hotel Zam Zam concluded, M/s Hotel Zam Zam stated to have indulged in some transaction, which was in violation of the provisions of FERA with which the Appellants

were not in any way concerned. It can also be safely held that for any violation or contravention of the provisions of FERA or FEMA at the instance of M/s Hotel Zam Zam after the money changing transaction as between the Appellants and the said concern had come to an end, the Appellants cannot in any way be held responsible or proceeded against.

18. In our considered opinion that in the peculiar facts of this case and having regard to the nature of transactions which had taken place as between the Appellants and M/s Hotel Zam Zam in the manner in which it has been narrated in the impugned order of the Original Authority as noted by the Tribunal, as well as the Division Bench of the High Court, we are convinced that there was no scope to allege a violation of paragraph 3 of the FLM or for that matter Sections 6(4) and 6(5) of FERA, 1973. Based on the interpretation of Sections 6(4), 6(5) of FERA, 1973 and paragraphs 3 & 9 of the FLM, we have held that the Original Authority, the Appellate Tribunal as well as the Division Bench of the High Court failed to appreciate the issue in the proper perspective while holding the appellant guilty of the violation alleged. Therefore, none of the judgments relied upon by the respondents for the proposition that concurrent findings of fact should not be interfered with does not apply to the facts of this case**.**

19. Once we steer clear of the above position, we come to the question of the higher value at which the foreign currency was alleged to have been sold by the Appellants to M/s Hotel Zam Zam. As pointed out by us earlier, the said act was not the basis for the contravention and imposition of the penalty as against the Appellants. To rule out any controversy, the conclusion of the Original Authority as recorded in its order for finding the Appellants guilty of paragraph 3 of the FLM read with Sections 6(4), 6(5) and 7 of FERA, can be usefully extracted which reads as under:

"*…….Thus by not insisting on the authorization from the said Hotel Zam Zam disclosing the names, address and*

other particulars of the persons deputed by them for purchasing foreign exchange from M/s Cox and Kings Travel & Finance Ltd., the said M/s Cox and Kings Travel & Finance Ltd. has contravened the directions contained in para 3 of the Memorandum FLM R/w SEC. 6(4), 6(5) and 7 of the FERA, 1973. I, therefore hold them guilty for the said contraventions."

20. This apart, when we refer to the confiscation order passed by the Commissioner of Customs in its order dated 21.08.1998, it has been specifically stated as under:

"*The statements of Mr. Chitrang Mehta, Manager of M/s LKP dated 06/7-08-97 indicated that there is transaction at prices higher than those prevailing market rates. However, it is also a known fact that the rates for the foreign exchange can be fluctuating and there is hardly any transaction effected at the rates which are recorded for that day to be prevailing in the market not only for the foreign currency but also for to be other goods e.g. shares in the stock market or the metals and other commodities being traded in the specific markets. It is also to be considered that large transactions were being entered into by them and profit made on the sales of such large transactions would not ipso facto induce me to conclude that the mere fact of sales at higher prices would be a preconcerted knowledge that the dollars sold are to be smuggled out of India. I find that the price at which Ms. Pinky Jaisinghani was purchasing the dollars from other FFMCs were settled between her mentor Shri Suleman Tajuddin Patel and not considerations of any other kind.*"

21. Therefore, in the impugned orders of the Original Authority, as well as the Tribunal and the Division Bench, the sale effected by the Appellants on a rate higher than the rate prevailing in the market was not the basis for the alleged violation of paragraph 3 of the FLM read with Sections 6(4),

6(5) and 7 of FERA. In the confiscation order passed by the Customs Authorities, where again the Appellants were also one of the noticees, no fault was found as against the Appellants on that ground. In the light of our above conclusions, as regards the higher value at which foreign currency alleged to have been sold by the appellant to Hotel Zam Zam, the reliance placed upon the decision in P.V. Mohammad Barmay Sons (supra) has also no application. The said decision came to be rendered entirely under different facts which cannot be applied to the facts of the present case.

22. Having reached the above conclusions, we are convinced that the impugned orders by which the Appellants were found guilty of the violation of paragraph 3 of FLM read with Sections 6(4), 6(5) and 7 of FERA and the consequential imposition of penalty of Rs.50,000/- was wholly unjustified. The impugned orders are liable to be set aside and they are accordingly set aside. If the Appellants have parted with the penalty amount imposed under the impugned orders, the Respondent is directed to refund the same to the Appellants along with simple interest at the rate of 6% per annum, within two months from the date of this judgment. The appeals are allowed with the above directions.

R.P. Appeals allowed.

PARMINDER ALIAS LADKA POLA
v.
STATE OF DELHI
(Criminal Appeal No.133 of 2006)

JANUARY 16, 2014.

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

Penal Code, 1860:

s.376 and s.506 – Rape of 14 year old girl – Conviction and seven years sentence by courts below – On appeal, held: Medical evidence corroborated the evidence of the prosecutrix that rape was committed on her – Non-rupture of hymen not sufficient ground to dislodge the theory of rape, as there was penetration which had caused bleeding in the private parts of the prosecutrix and therefore, the plea that there was an attempt to rape but not rape by the appellant not accepted – No interference called for with the conviction and sentence – Crime against woman.

s.376, proviso – Imposition of a sentence of imprisonment for a term of less than seven years in rape case – When called for – Held: The proviso to s.376(1), as it stood prior to its amendment in the year 2013 expressly states that the Court may impose a sentence of imprisonment for a term of less than seven years in an offence u/s.376(1), IPC, "for adequate and special reasons to be mentioned in the judgment" – What is adequate and special depend upon several factors and on the facts of each case and no straitjacket formula has been laid down by the Court – In the facts of the instant case, the prosecutrix was a student of eighth class and about 14 years of age at the time of incident – Thereafter, she had stopped going to school and was studying eighth class privately – In view of the age of the

prosecutrix, the conduct of the appellant and the consequences of the rape on the prosecutrix, no adequate and special reasons in this case to reduce the sentence to less than the minimum sentence u/s.376(1) – Sentence/ Sentencing.

The questions which have arisen for consideration in the instant appeal were whether the High Court was right in coming to the conclusion that the appellant-accused was guilty under Section 376 IPC for the offence of rape or whether the evidence on record only made out an offence of attempt to rape under Section 376, IPC r/w Section 511 IPC and that whether the court should invoke the proviso to Section 376 (1) IPC and impose a sentence of imprisonment for a term of less than seven years in the instant case.

Dismissing the appeal, the court

HELD: 1. The High Court while coming to the conclusion that the appellant was guilty of the offence of rape under Section 376, IPC, had considered the evidence of the prosecutrix (PW-1), the medical evidence and the report of CFSL. The prosecutrix had stated that the appellant had pushed her on the cot, put off her underwear and salwar and forcibly raped her. The salwar and underwear of the prosecutrix, which she was wearing at the time of incident, were sent to CFSL for analysis and after examination the CFSL had found in its report that there was human semen and blood on the underwear of the prosecutrix. Therefore, there was corroboration of the testimony of the prosecutrix that rape was committed on her. PW-15, the doctor who conducted the medical examination of the prosecutrix, however, had stated that there was no sign of injury on the prosecutrix and the hymen was found intact. The High Court had considered this evidence and had held that the non-rupture of hymen was not sufficient to dislodge the theory of rape. Section

375, IPC, defines the offence of 'rape' and the Explanation to Section 375, IPC, states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. In the instant case, even though the hymen of the prosecutrix was not ruptured, the High Court had held that there was penetration which had caused bleeding in the private parts of the prosecutrix as would be evident from the fact that the underwear of the prosecutrix was blood stained. The High Court was right in holding the appellant guilty of the offence of rape and there was no merit in the contention that there was only an attempt to rape and not rape by the appellant. [Paras 8 and 9] [459-E-H; 460-A, D-E, F-G]

Wahid Khan vs. State of Madhya Pradesh **2010 (2) SCC 9 = 2009(15) SCR 1207 – relied on.**

Modi in Medical Jurisprudence and Toxicology (Twenty First **Edition) – referred to.**

2. The proviso to Section 376(1), IPC, as it stood prior to its amendment in the year 2013 expressly states that the Court may impose a sentence of imprisonment for a term of less than seven years in an offence under Section 376(1), IPC, "for adequate and special reasons to be mentioned in the judgment". What is adequate and special would depend upon several factors and on the facts of each case and no straitjacket formula has been laid down by this Court. The legislature, however, requires the Court to record the adequate and special reasons in any given case where the punishment less than the minimum sentence of seven years is to be imposed. The conduct of the accused at the time of commission of the offence of rape, age of the prosecutrix and the consequences of rape on the prosecutrix are some of the relevant factors which the Court should consider while considering the question of reducing the sentence to less than the minimum sentence. In the facts

of the instant case, the prosecutrix was a student of eighth class and was about 14 years on 28.01.2001 and she was of a tender age. She had gone to the house of the appellant looking for her friend who was sister of the appellant. When she asked the appellant as to where the sister of the accused was, he told her that she was in the room and when she went inside the room, he followed her into the room, bolted the room from inside and forcibly put her on the cot. The appellant then took out the s*alwar* and the underwear of the prosecutrix and raped her. As a result of this incident, her parents stopped her from going to the school and asked her to study eighth class privately. In view of the age of the prosecutrix, the conduct of the appellant and the consequences of the rape on the prosecutrix, there were not adequate and special reasons in this case to reduce the sentence to less than the minimum sentence under Section 376(1), IPC. [Paras 10, 16] [461-A-B; 463-F-H; 464-A-D]

State of Rajasthan vs. N.K. The Accused **(2000) 5 SCC 30 = 2000(2) SCR 818;** *Sukhwinder Singh vs. State of Punjab* **(2000) 9 SCC 204;** *Baldev Singh and Ors. vs. State of Punjab* **(2011) 13 SCC 705 = 2011(15) SCR 927;** *State of Madhya Pradesh vs. Bablu Natt* **(2009) 2 SCC 272 = (2008) 17 SCR 1096;** *State of Rajasthan vs. Vinod Kumar* **(2012) 6 SCC 770 = 2012(6) SCR 1 – relied on.**

Narender Kumar vs. State (NCT of Delhi) **2012 (7) SCC 171 = 2012(6) SCR 148 – referred to.**

Case Law Reference:

2012(6) SCR 148	**Para 4**	**referred to**
2000(2) SCR 818	**Para 5**	**relied on**
(2000) 9 SCC 204	**Para 5**	**relied on**
2011(15) SCR 927	**Para 5**	**relied on**

(2008) 17 SCR 1096	**Para 7**	**relied on**
2012(6) SCR 1	**Para 7**	**relied on**
2009(15) SCR 1207	**Para 9**	**relied on**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 133 of 2006.

From the Judgment and Order dated 06.03.2003 of the High Court of Delhi at New Delhi in Criminal Appeal No. 696 of 2002.

Jana Kalyan, Avijeet Bhujabal, Sandeep Devashish Das S.K. Das, Swetaketu Mishra, D.M. Sharma, Parmanand Gaur for the Appellant.

Rakesh Khanna, ASG, S. Nanda, Kumar, C.B. Prasad, D.S. Mahra, Anjani Aiyagari, Anil Katiyar for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is an appeal by way of special leave under Article 136 of the Constitution against the judgment dated 06.03.2003 of the Delhi High Court in Criminal Appeal No. 696 of 2002 by which the conviction of the appellant under Sections 376 and 506 of the Indian Penal Code, 1860 (for short 'IPC') and the sentences imposed by the trial court on the appellant have been maintained.

Facts:

2. The facts very briefly are that on 30.01.2001 at about 8.00 p.m., a young girl of about fourteen years accompanied by her parents, lodged the First Information Report (for short 'the FIR') in Police Station, Khajoori Khas, Delhi, in which she stated as follows: She was a student of Higher Secondary School and residing with her parents at House No.131, Gali No.12, Khajoori Khas, Delhi. Opposite to their house was the

house of Sardar Jagir Singh. Babbo, daughter of Sardar Jagir Singh, was her friend and she used to visit the house of Sardar Jagir Singh to meet Babbo. On 28.01.2001 at about 8.30 p.m., the lights in the area went off and as the generator at the house of Sardar Jagir Singh was on, the prosecutrix went to meet Babbo. She enquired from the appellant, the son of Sardar Jagir Singh, as to whether Babbo was in the house and the appellant told her that Babbo was inside the room. When she entered inside the room, the appellant followed her into the room, bolted the room from inside and forcibly put her on the cot. When she raised an alarm, the appellant slapped her. He then took out her s*alwar* and underwear and raped her. He also threatened her with death if she narrated the incident to anybody. Out of fear and shame, she did not narrate the incident to anybody, but in the evening of 30.01.2001 she narrated the incident to her mother.

3. On this statement of the girl (hereinafter referred to as 'the prosecutrix'), a case under Sections 376 and 506, IPC, was registered on 30.01.2001. The prosecutrix was medically examined on the same night. On examination of the *X-rays* report of the prosecutrix, the doctor opined that her age was above fourteen years but below sixteen years. Her clothes and vaginal swab were sent to the Central Forensic Science Laboratory (for short 'CFSL') for analysis and as per the report from CFSL, human semen and blood was detected on the underwear of the prosecutrix, but no semen was detected in the vaginal swab. After investigation, a charge-sheet was filed against the appellant under Sections 342/354/376/506, IPC. Charges, however, were framed only under Sections 376 and 506, IPC, and as the appellant pleaded not guilty, the trial was conducted. At the trial, as many as fifteen witnesses were examined on behalf of the prosecution including the prosecutrix. After considering the evidence on record, the trial court convicted the appellant under Sections 376 and 506, IPC. For the offence under Section 376, IPC, the trial court imposed the minimum sentence of seven years rigorous imprisonment and

a fine of Rs.5,000/-, in default, rigorous imprisonment for one year and for the offence under Section 506, IPC, the trial court imposed a sentence of two years imprisonment and a fine of Rs.5,000/- and in default, a rigorous imprisonment of six months. The trial court further directed that the sentences were to run concurrently. Aggrieved, the appellant filed Criminal Appeal No.696 of 2002 in the High Court, but by the impugned judgment the High Court has dismissed the appeal.

Contentions of the parties:

4. At the hearing of this appeal, Mr. Jana Kalyan Das, learned counsel for the appellant, submitted that at most this is a case of attempt to rape and not rape and hence the appellant should be held guilty under Sections 376/511, IPC, and not under Section 376, IPC. He referred to the evidence of the prosecutrix (PW-1) as well as the medical evidence to support his submission that no offence of rape as such has been committed of the prosecutrix. He cited the decision of this Court in *Narender Kumar v. State (NCT of Delhi)* [(2012 (7) SCC 171] for the proposition that even in a case of rape, the onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and such onus never shifts and it is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witnesses have falsely implicated the accused. He submitted that in the event this Court finds that the appellant is guilty of the attempt to rape and not rape, he will be liable for half the sentence provided for rape as will be clear from Section 511, IPC.

5. Mr. Das next submitted that the appellant while in jail custody studied and passed Class 10 examination and has also appeared in Class 12 examination as a candidate from Central Jail, Tihar, Delhi, and has been released on bail after undergoing three years and nine months of sentence and has thereafter got married on 16.08.2007. He further submitted that on 28.06.2008, a daughter has been born to him who is

studying in lower K.G. Class and on 13.06.2012, a second daughter has been born to him, who is on the lap of her mother. The appellant has filed on 12.02.2013 an affidavit stating all these facts. He submitted that as the appellant is the sole bread earner of the family and has been doing odd jobs in Delhi to earn a living for the family, his family will suffer immensely if he is to undergo imprisonment for the remaining period out of the seven years imprisonment imposed on him by the court. He submitted that under the proviso to Section 376(1), IPC, the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years. He submitted that on the facts and circumstances stated above, this Court should reduce the sentence in this case imposed on the appellant to the period already undergone so that his family does not suffer. In support of this submission, he cited the decisions of this Court in *State of Rajasthan vs. N.K. The Accused* [(2000) 5 SCC 30], *Sukhwinder Singh vs. State of Punjab* [(2000) 9 SCC 204] and *Baldev Singh and Others vs. State of Punjab* [(2011) 13 SCC 705]

6. In reply, learned counsel for the State, Mr. Rakesh Khanna submitted that the prosecution has discharged its onus in establishing beyond reasonable doubt that the appellant has committed rape on the prosecutrix. He relied on the evidence of PW-1 as well as the report of the CFSL to show that it was not a case of only attempt to commit rape by the appellant. He submitted that the High Court was, therefore, right in coming to the conclusion that the appellant had committed rape on the prosecutrix.

7. On the question of sentence, Mr. Khanna submitted that this is a case where an offence has been committed on a minor girl and it is evident from the statement of prosecutrix (PW-1) that on account of the rape, her parents stopped her from going to school and she had to study 8th Class privately. He submitted that considering the serious nature of the sexual offence

committed by the appellant on a minor girl, this is not a fit case in which this Court should invoke the proviso to Section 376(1), IPC and reduce the minimum sentence of seven years for the offence of rape as provided in Section 376(1), IPC, to the period already undergone by the appellant. He cited the decisions of this Court in *State of Madhya Pradesh vs. Bablu Natt* [(2009) 2 SCC 272] and *State of Rajasthan vs. Vinod Kumar* [(2012) 6 SCC 770] in which this Court, after considering the language used in the proviso to Section 376(1), IPC, has set aside the orders of the High Court imposing sentences less than the minimum sentence of seven years in cases of rape under Section 376, IPC.

Findings of the Court:

8. The first question that we have to decide is whether the High Court is right in coming to the conclusion that the appellant was guilty under Section 376, IPC, for the offence of rape or whether the evidence on record in this case only made out an offence of attempt to rape under Section 376, IPC, read with Section 511, IPC. We find that the High Court while coming to the conclusion that the appellant was guilty of the offence of rape under Section 376, IPC, has considered the evidence of the prosecutrix (PW-1), the medical evidence and the report of CFSL. The prosecutrix has stated that the appellant pushed her on the cot, put off her underwear and *salwar* and forcibly raped her. The salwar and underwear of the prosecutrix, which she was wearing at the time of incident, were sent to CFSL for analysis and after examination the CFSL had found in its report dated 30.04.2001 that there was human semen and blood on the underwear of the prosecutrix referred to in the report as Exhibit 4(B). Hence, there is corroboration of the testimony of the prosecutrix that rape was committed on her.

9. PW-15, the doctor who conducted the medical examination of the prosecutrix on 31.01.2001, however, has stated that there was no sign of injury on the prosecutrix and the hymen was found intact. The High Court has considered this

evidence and has held that the non-rupture of hymen is not sufficient to dislodge the theory of rape and has relied on the following passage from Modi in *Medical Jurisprudence and Toxicology* (Twenty First Edition):

> "Thus, to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the Labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genital or leaving any seminal stains."

Section 375, IPC, defines the offence of 'rape' and the Explanation to Section 375, IPC, states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. This Court has accordingly held in *Wahid Khan v. State of Madhya Pradesh* [(2010) 2 SCC 9] that even the slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial. In the aforesaid case, this Court has relied on the very same passage from Modi in *Medical Jurisprudence and Toxicology* (Twenty Second Edition) quoted above. In the present case, even though the hymen of the prosecutrix was not ruptured the High Court has held that there was penetration which has caused bleeding in the private parts of the prosecutrix as would be evident from the fact that the underwear of the prosecutrix was stained by blood. In our considered opinion, the High Court was right in holding the appellant guilty of the offence of rape and there is no merit in the contention of the learned counsel for the appellant that there was only an attempt to rape and not rape by the appellant.

10. The next question that we have to consider is whether the Court should invoke the proviso to Section 376(1), IPC, and impose a sentence of imprisonment for a term of less than

seven years in this case. The proviso to Section 376(1), IPC, as it stood prior to its amendment in the year 2013 expressly states that the Court may impose a sentence of imprisonment for a term of less than seven years in an offence under Section 376(1), IPC, "for adequate and special reasons to be mentioned in the judgment". We may now consider the cases cited by the learned counsel for the parties in which this Court has considered whether or not the proviso should be invoked to reduce the sentence to less than the minimum sentence in cases of rape.

11. In *State of Rajasthan vs. N.K. The Accused* (supra), cited by the learned counsel for the appellant, this Court found that the accused had committed rape on the prosecutrix who was a married woman. This Court found that that the incident was of the year 1993 and the accused was taken into custody by the police on 03.11.1993 and he was not allowed bail and during trial and during hearing of the appeal, he remained in jail and it was only on 11.10.1995 when the High Court acquitted him of the charge that he was released from jail. This Court held that though the accused had remained in jail for a little less than two years and taking into consideration the period of remission for which he would have been entitled as well as the time which has elapsed from the date of commission of the offence, the accused should not be sent back to jail and reduced the sentence to the period already undergone by him.

12. In *Sukhwinder Singh vs. State of Punjab* (supra), cited by the learned counsel for the appellant, this Court found that the prosecutrix was a consenting party to the act of sexual intercourse and that she had willingly left her parents' house to be with the appellant but she was found to be "not more than sixteen years of age" and on that account, the High Court had upheld the conviction of the appellant. This Court held that as the prosecutrix had since got married and she did not want the matter to be carried any further and wanted to lead a happy and healthy married life with her husband and had filed a

compromise petition to that effect, there were adequate and special reasons to reduce the sentence to the period already undergone by the accused.

13. In *Baldev Singh and Others vs. State of Punjab* (supra), cited by the learned counsel for the appellant, the accused was found guilty of gang rape under Section 376(2)(g), IPC, for which the minimum sentence was ten years rigorous imprisonment. The proviso to Section 376(2), IPC, however, stated that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years. This Court held on the facts of the case that as the incident happened in the year 1997 and as the parties have themselves entered into a compromise, the sentence be reduced to the period already undergone in view of the proviso to Section 376(2)(g), IPC.

14. In *State of Madhya Pradesh vs. Bablu Natt* (supra), cited by the learned counsel for the State, this Court, on the other hand, did not find good and adequate reasons to reduce the sentence to less than the minimum sentence of seven years under Section 376(1), IPC, because of the fact that the prosecutrix was a minor and had been subjected to rape and was compelled to live for several days with the accused at Chhatarpur and set aside the judgment of the High Court insofar as it imposed a sentence of less than seven years.

15. In *State of Rajasthan vs. Vinod Kumar* (supra), cited on behalf of the State, the accused-Vinod Kumar had been convicted by the trial court under Section 376, IPC, and sentenced to seven years imprisonment. The High Court, however, reduced the sentence to five years imprisonment without recording adequate and special reasons for doing so. This Court held that the High Court failed to ensure compliance with the mandatory requirement of the proviso to Section 376(1), IPC, to record adequate and special reasons. This Court, after considering the earlier decisions of this Court, held:

"23**.** Thus, the law on the issue can be summarised to the effect that punishment should always be proportionate/ commensurate to the gravity of offence. Religion, race, caste, economic or social status of the accused or victim are not the relevant factors for determining the quantum of punishment. 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 age of the sexually assaulted victim 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.

24**.** 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 legislature introduced the imposition of minimum sentence by amendment in IPC w.e.f. 25-12-1983, therefore, the courts are bound to bear in mind the effect thereof. 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 straitjacket formula can be laid down."

16. It is, therefore, clear that what is adequate and special would depend upon several factors and on the facts of each case and no straitjacket formula has been laid down by this Court. The legislature, however, requires the Court to record the adequate and special reasons in any given case where the punishment less than the minimum sentence of seven years is to be imposed. The conduct of the accused at the time of commission of the offence of rape, age of the prosecutrix and the consequences of rape on the prosecutrix are some of the

relevant factors which the Court should consider while considering the question of reducing the sentence to less than the minimum sentence. In the facts of the present case, we find that the prosecutrix was a student of eighth class and was about 14 years on 28.01.2001 and she was of a tender age. She had gone to the house of the appellant looking for her friend Babbo, the sister of the appellant. When she asked the appellant as to where the sister of the accused was, he told her that she was in the room and when she went inside the room, he followed her into the room, bolted the room from inside and forcibly put her on the cot. The appellant then took out the s*alwar* and the underwear of the prosecutrix and raped her. As a result of this incident, her parents stopped her from going to the school and asked her to study eighth class privately. Considering the age of the prosecutrix, the conduct of the appellant and the consequences of the rape on the prosecutrix, we do not think that there are adequate and special reasons in this case to reduce the sentence to less than the minimum sentence under Section 376(1), IPC.

17. In the result, we do not find any merit in this appeal and we accordingly dismiss the same.

D.G. Appeal dismissed.

KM. HEMA MISHRA
v.
STATE OF U.P. AND OTHERS
(Criminal Appeal No.146 of 2014)

JANUARY 16, 2014

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

Code of Criminal Procedure, 1973:

ss.41(a), 41(b), 41A – Object of – Held: Is to check arbitrary or unwarranted arrest and protect the right to personal liberty guaranteed u/Article 21 of the Constitution of India.

s.438 – State of U.P. – Pre arrest bail – Grant of – Writ jurisdiction, if invokable – Held: s.438 has been specifically omitted and made inapplicable in the State of U.P. – Still, a party aggrieved against whom FIR is lodged and/or charge-sheet is filed in court can invoke the jurisdiction of High Court u/Article 226 of the Constitution for quashing of proceedings – The considerations, however which have to weigh with the High Court to decide as to whether such proceedings are to be quashed or not are entirely different than that of granting interim protection against the arrest – Since the grounds on which such an FIR or charge sheet can be quashed are limited, once the writ petition challenging the validity of FIR or charge-sheet is dismissed, the grant of relief, incidental in nature, against arrest would obviously not arise, even when a justifiable case for grant of anticipatory bail is made out – Though the High Courts have very wide powers u/Art.226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well established principles, so much so that while entertaining writ petitions for granting interim protection from arrest, the Court would not go on to the extent of including the provision of anticipatory bail as a blanket

provision – Thus, such a power has to be exercised very cautiously keeping in view, at the same time, that the provisions of Article 226 are a device to advance justice and not to frustrate it – Constitution of India, 1950 – Article 226.

s.438 – Anticipatory bail – Purpose of – Discussed.

An FIR was lodged against the appellant under sections 419/420 IPC. The appellant filed writ petition seeking quashing of FIR, deferment of arrest until collection of credible evidence sufficient for filing charge sheet by following amended proviso to Sections 41(1)(b) r/w Section 41A Cr.P.C. The High Court dismissed the writ petition. The instant appeal was filed challenging the order of the High Court.

Dismissing the appeal, the Court

HELD:

Per K.S. Radhakrishnan, J.

1. Since the provisions similar to Section 438 Cr.P.C. being absent in the State of Uttar Pradesh, the High Court is burdened with large number of writ petitions filed under Article 226 of the Constitution of India seeking pre-arrest bail. Section 438 was added to the Code of Criminal Procedure in the year 1973, in pursuance to the recommendation made by the 41st Law Commission, but in the State of Uttar Pradesh by Section 9 Criminal Procedure (Uttar Pradesh) Amendment Act, 1976, Section 438 was specifically omitted, the legality of which came up for consideration before the Constitution Bench of this Court in **Kartar Singh case* wherein the Court held that the deletion of the application of Section 438 in the State of Uttar Pradesh by Section 9 of the Amendment Act does not offend either Article 14, Article 19 or Article 21 of the Constitution of India and the State Legislature is

competent to delete that section, which is one of the matters enumerated in the concurrent list, and such a deletion is valid under Article 254(2) of the Constitution of India. Therefore, as per the Constitution Bench, a claim for pre-arrest protection is neither a statutory nor a right guaranteed under Article 14, Article 19 or Article 21 of the Constitution of India. Therefore, there is no concept of "anticipatory bail" as understood in Section 438 of the Code in the State of Uttar Pradesh. [Paras 13, 14 and 16] [477-H; 478-A-E; 479-B-C]

******Kartar Singh v. State of Punjab* **(1994) 3 SCC 569 = 1994 (2) SCR 375;** *Balchand Jain v. State of M.P.* **(1976) 4 SCC 572 = 1977 (2) SCR 52;** *Smt. Amarawati & Ors. v. State of U.P.* **(2005) Cri.L.J. 755;** *Lal Kamlendra Pratap Singh v. State of Uttar Pradesh & Ors.* **(2009) 4 SCC 437 = 2009 (4) SCR 1027;** *Som Mittal v. State of Karnataka* **(2008) 3 SCC 753 & (2008) 3 SCC 574 = 2008 (3) SCR 130– relied on.**

Satya Pal v. State of U.P. **2000 Cri.L.J. 569;** *Ajeet Singh v. State of U.P.* **2007 Cri.L.J. 170;** *Lalji Yadav & Ors. v. State of U.P. & Anr.* **1998 Cri.L.J. 2366;** *Kamlesh Singh v. State of U.P. & Anr.* **1997 Cri.L.J. 2705 and** *Natho Mal v. State of U.P.* **1994 Cri.L.J. 1919 – approved.**

2. In this case, FIR was lodged for offences, under Sections 419 and 420 IPC which carry a sentence of maximum of three years and seven years respectively with or without fine. Benefit of Section 41(a) Cr.P.C. must be available in a given case, which provides that an investigating officer shall not arrest the accused of such offences in a routine manner and the arrest be made, only after following the restrictions imposed under Section 41(b). Amended provisions make it compulsory for the police to record the reasons for making arrest as well as for not making an arrest in respect of a cognizable offence for which the maximum sentence is upto seven years. Section 41 and 41A make it compulsory for the

police to issue a notice in all such cases where arrest is not required to be made under Clause (b) of sub-section (1) of the amended Section 41. But, all the same, unwillingness of a person who has not been arrested to identify himself and to whom a notice has been issued under Section 41A, could be a ground for his arrest. Legislation has laid down various parameters, warranting arrest of a person, which itself is a check on arbitrary or unwarranted arrest and the right to personal liberty guaranteed under Article 21 of the Constitution of India. There is unanimous view that in spite of the fact that Section 438 has been specifically omitted and made inapplicable in the State of Uttar Pradesh, still a party aggrieved can invoke the jurisdiction of the High Court under Article 226 of the Constitution of India, being extraordinary jurisdiction and the vastness of the powers naturally impose considerable responsibility in its application. All the same, the High Court has got the power and sometimes duty in appropriate cases to grant reliefs, though it is not possible to pin-point what are the appropriate cases, which have to be left to the wisdom of the Court exercising powers under Article 226 of the Constitution of India. [Paras 19, 20 21 and 22] [481-G-H; 482-A; 483-D; 484-C-G]

3. When the Court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not, for the purpose of facilitating the institution of such suit, issue directions in the nature of temporary injunctions, under Article 226 of the Constitution. The language of Article 226 does not permit such an action and once the Court finds no merits in the challenge, writ petition will have to be dismissed and the question of granting further relief after dismissal of the writ, does not arise. Consequently, once a writ is dismissed, all the interim reliefs granted would also go. [Paras 23 and 24] [485-E-H]

State of Orissa v. Madan Gopal Rungta **AIR 1952 SC 12 = 1952 SCR 28– relied on.**

Per A.K. Sikri, J. (Supplementing)

HELD: 1. In the absence of any provisions like Section 438, Cr.P.C. applicable in the State of Uttar Pradesh, there is a tendency on the part of the accused persons, against whom FIR is lodged and/or charge-sheet is filed in the Court to file Writ Petition for quashing of those proceedings so that they are able to get protection against the arrest in the interregnum which is the primary motive for filing such petitions. It is for this reason that invariably after the lodging of FIR, Writ Petition under Article 226 is filed with main prayer to quash those proceedings and to claim interim relief against pre-arrest in the meantime or till the completion of the trial. However, the considerations which have to weigh with the High Court to decide as to whether such proceedings are to be quashed or not are entirely different than that of granting interim protection against the arrest. Since the grounds on which such an FIR or charge sheet can be quashed are limited, once the Writ Petition challenging the validity of FIR or charge-sheet is dismissed, the grant of relief, incidental in nature, against arrest would obviously not arise, even when a justifiable case for grant of anticipatory bail is made out. It is for this reason, in appropriate cases, the High Court is empowered to entertain the petition under Article 226 of the Constitution of India where the main relief itself is against arrest. Obviously, when provisions of Section 438 of Cr.P.C. are not available to the accused persons in the State of Uttar Pradesh, under the normal circumstances such an accused persons would not be entitled to claim such a relief under Art. 226 of the Constitution. It cannot be converted into a second window for the relief which is consciously denied statutorily making it a case of *casus omissus*. At the same time, the High Court cannot be

completely denuded of its powers under Article 226 of the Constitution, to grant such a relief in appropriate and deserving cases; albeit this power is to be exercised with extreme caution and sparingly in those cases where arrest of a person would lead to total miscarriage of justice. There may be cases where pre-arrest may be entirely unwarranted and lead to disastrous consequences. Whenever the High Court is convinced of such a situation, it would be appropriate to grant the relief against pre-arrest in such cases. What would be those cases will have to be left to the wisdom of the High Court. The High Court is not bereft of its powers to grant this relief under Art. 226 of the Constitution. [Paras 3, 4] [487-C-H; 488-A-D]

2. There may be imminent need to grant protection against pre-arrest. The object of this provision is to relieve a person from being disgraced by trumped up charges so that liberty of the subject is not put in jeopardy on frivolous grounds at the instance of the unscrupulous or irresponsible persons who may be in charge of the prosecution. An order of anticipatory bail does not in any way, directly or indirectly; take away from the police their right to investigate into charges made or to be made against the person released on bail. [Para 6] [489-C-D]

Joginder Kumar v. State of U.P. & Ors. **1994 Cr L.J. 1981 – relied on.**

3. The purposes for which the provisions of anticipatory bail are made are quite obvious. One of the purposes of the arrest is that the accused should be available to the investigating machinery for further investigation and questioning whenever he is required. Another purpose is that the trial should not be jeopardized and for this purpose the restrictions on the movements of the accused are necessary. The genuineness of the alleged need for police custody has

to be examined and it must be balanced against the duty of courts to uphold the dignity of every man and to vigilantly guard the right to liberty without jeopardizing the state objective of maintenance of law and order. [Para 7] [489-E-G]

Kartar Singh and Ors. V. State of Punjab **(1994) 3 SCC 569 = 1994 (2) SCR 375– relied on.**

4. The High Court would not be incorrect or acting out of jurisdiction if it exercises its power under Art.226 to issue appropriate writ or direction or order in exceptional cases at the behest of a person accused of an offence triable under the Act or offence jointly triable with the offences under the Act. Though the High Courts have very wide powers under Art.226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well established principles, so much so that while entertaining writ petitions for granting interim protection from arrest, the Court would not go on to the extent of including the provision of anticipatory bail as a blanket provision. Thus, such a power has to be exercised very cautiously keeping in view, at the same time, that the provisions of Article 226 are a devise to advance justice and not to frustrate it. The powers are, therefore, to be exercised to prevent miscarriage of justice and to prevent abuse of process of law by authorities indiscriminately making pre-arrest of the accused persons. In entertaining such a petition under Art.226, the High Court is supposed to balance the two interests. On the one hand, the Court is to ensure that such a power under Art.226 is not to be exercised liberally so as to convert it into Section 438, Cr.P.C. proceedings, keeping in mind that when this provision is specifically omitted in the State of Uttar Pradesh, it cannot be resorted to as to back door entry via Art.226. On the other hand,

wherever the High Court finds that in a given case if the protection against pre-arrest is not given, it would amount to gross miscarriage of justice and no case, at all, is made for arrest pending trial, the High Court would be free to grant the relief in the nature of anticipatory bail in exercise of its power under Art. 226 of the Constitution. It is again clarified that this power has to be exercised sparingly in those cases where it is absolutely warranted and justified. [Paras 10, 11 and 12] [494-G-H; 495-A-C]

<u>Per K.S. Radhakrishnan, J.</u>

Case Law Reference:

1994 (2) SCR 375	**Relied on**	**Para 13**
2000 Cri.L.J. 569	**Approved**	**Para 15**
2007 Cri.L.J. 170	**Approved**	**Para 15**
1998 Cri.L.J. 2366	**Approved**	**Para 15**
1997 Cri.L.J. 2705	**Approved**	**Para 15**
1994 Cri.L.J. 1919	**Approved**	**Para 15**
1977 (2) SCR 52	**Relied on**	**Para 16**
(2005) Cri.L.J. 755	**Relied on**	**Para 16**
2009 (4) SCR 1027	**Relied on**	**Para 17**
2008 (3) SCR 130	**Relied on**	**Para 18**
1952 SCR 28	**Relied on**	**Para 23**

<u>Per A.K. Sikri, J. (Supplementing)</u>

Case Law Reference:

1994 Cr L.J. 1981	**relied on**	**Para 5**
1994 (2) SCR 375	**relied on**	**Para 8**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.146 of 2014

From the Judgment and Order dated 09.01.2012 of the High Court of Judicature at Allahabad Lucknow Bench Lucknow in writ Pentition Misc. Bench No. 171 of 2012.

Aseem Chandra, Anurag Singh, Vivek Singh, for the Appellant.

Siddharth Luthra, ASG, Gaurav Bhatia, AAG, Binu Tamta, B. Krishna Prasad, P.K. Dubey, Gurmohan Singh Bedi, Pranay Agarwala, Shiv Pande, Shiv Chopra, Pragati Neekhra, Gautam Talukdar, for the Respondents.

The Judgments of the Court were delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

2. Appellant herein had invoked the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India seeking the following reliefs:

(i) Issue a writ, order or direction in the nature of *Certiorari* thereby quashing the impugned FIR dated 21.12.2011, contained in Annexure No. 1 to this writ petition, lodged at crime No. 797/11 under Sections 419/420 IPC, at Police Station Zaidpur, District Barabanki;

(ii) Issue a writ, order or direction in the nature of *Mandamus* thereby directing the Superintendant of Police, Barabanki, the opposite Party No. 2, and the Investigating Officer, Case Crime No. 797/11, under Sections 419/420 IPC, Police Station, Zaidpur, District Barabanki, the opposite party No. 3, to defer the arrest of the petitioner until collection of the credible evidence sufficient for filing the charge-sheet by following the amended proviso to

Sections 41(1)(b) read with Section 41A CrPC;

(iii) Issue a writ, order or direction in the nature of *Mandamus* thereby directing the Superintendent of Police, Barabanki, the opposite party No. 2, for compliance of the provision of Sections 41(1)(b) and 41A CrPC in the investigation of the impugned FIR dated 21.12.2011 contained in Annexure No. 1 to this writ petition, lodged in crime No. 797/11, under Sections 419/420 IPC, Zaidpur, District Barabanki; and

(iv) Allow this writ petition with costs.

3. The High Court, after hearing the parties as well as the State, dismissed the writ petition on 9.1.2012 and passed the following order:

> "Heard learned counsel for the petitioner and learned Additional Government Advocate. Under challenge in the instant writ petition is FIR relating to Case Crime No. 797 of 2011, under Sections 419 & 420 IPC, police station Zaidpur, district Barabanki. We have gone through the FIR, which discloses commission of cognizable offence, as such, the same cannot be quashed. The writ petition lacks merit and is accordingly dismissed.
>
> However, the petitioner being lady, it is provided that if she surrenders and moves application for bail the same shall be considered and decided by the courts below expeditiously."

4. The appellant, complaining that she was falsely implicated in the case, has approached this Court contending that the High Court had failed to exercise its certiorari jurisdiction under Article 226 of the Constitution of India in not quashing the FIR dated 21.12.2011 and in refusing to grant anticipatory bail to the appellant. Appellant submitted that the

High Court ought to have issued a *writ of mandamus* directing the Superintendent of Police, Barabanki to defer the arrest of the appellant until the collection of credible evidence sufficient for filing the charge-sheet, following the amended proviso to Section 41(1)(b) read with Section 41A Cr.P.C.

5. The Secretary, U.P. Secondary Education Board, Allahabad and the District School Inspector vide their letter dated 8.12.2011 registered a complaint alleging that the appellant had committed fraud and forgery in the matter of preparation of documents of Government Office regarding selection for the post of Assistant Teacher and, consequently, got appointment as the Assistant Teacher in Janpad Inter-College at Harakh, District Barabanki, with payment of salary amounting to Rs.1,10,000/- from the Government exchequer. On the basis of the FIR, Case Crime No. 797 of 2011 was registered under Sections 419/420 IPC before the Police Station, Jaizpur, District Barabanki. After having come to know of the registration of the crime, the appellant filed a representation on 27.12.2011 before the Superintendent of Police, District Barabanki and the Investigating Officer making the following prayer:

> "As such through this application/representation the applicant prays that keeping in view the willingness of the applicant for cooperating in investigation and to appear before the investigating officer upon being called in case crime no. 797/11 u/Ss 419/420 IPC, PS Jaipdur, District Barabanki, order for staying the arrest of applicant be passed so that compliance to the provision 41(1)(B) Section 41(A) amended to CrPC 1973 be made."

6. Since the appellant did not get any reply to the said representation, she invoked the extraordinary jurisdiction of the High Court under Article 226 of the Constitution of India by filing Writ Petition Misc. Bench No. 171 of 2012 which was dismissed, as already indicated, on 9.1.2012.

7. When the matter came up for hearing before this Court, it passed an interim order on 1.3.2013, the operative portion of which reads as under:

> "Considering the facts and circumstances of the case, we are inclined to direct that in the event of arrest of the petitioner, she shall be released on bail on furnishing personal bond of Rs.50,000/- (Fifty Thousand only) with two solvent sureties for the like amount to the satisfaction of the Trial Court, subject to the condition that she will join investigation as and when required and shall abide by the provisions of Section 438(2) of the Code of Criminal Procedure."

8. Shri Aseem Chandra, learned counsel appearing for the appellant, submitted that the High Court has committed an error in not quashing the FIR, since the registration of the crime was with *mala fide* intention to harass the appellant and in clear violation of the fundamental rights guaranteed to the appellant under Articles 14, 19 and 21 of the Constitution of India. Learned counsel submitted that the appellant was falsely implicated and that the ingredients of the offence under Sections 419/420 IPC were not *prima facie* made out for registering the crime. Learned counsel also pointed out that the High Court has not properly appreciated the scope of Sections 41(1)(b) and 41A CrPC, 1973 and that no attempt has been made to follow those statutory provisions by the State and its officials.

9. Shri Gaurav Bhatia, learned AAG, appearing for the State, submitted that the investigation was properly conducted and the crime was registered. Further, it was also pointed out that the President has also withheld the assent of the Code of Criminal Procedure (Uttar Pradesh Amendment) Bill, 2010, since the provisions of the Bill were found to be in contravention to Section 438 of the Cr.P.C. and hence the High Court rightly declined the stay sought for under Article 226 of the Constitution of India.

10. Shri Siddharth Luthra, Additional Solicitor General, who appeared on our request, submitted that the High Court can in only rarest of rare cases grant pre-arrest bail while exercising powers under Article 226 of the Constitution of India, since the provision for the grant of anticipatory bail under Section 438 Cr.P.C. was consciously omitted by the State Legislature. The legislative intention is, therefore, not to seek or provide pre-arrest bail when the FIR discloses a cognizable offence. Shri Luthra submitted that since there is a conscious withdrawal/ deletion of Section 438 CrPC by the Legislature from the Code of Criminal Procedure, by Section 9 of the Criminal Procedure (Uttar Pradesh) Amendment Act, 1976, the relief which otherwise the appellant could not have obtained under the Code, is sought to be obtained indirectly by invoking the writ jurisdiction of the High Court, which is impermissible in law.

11. Shri Luthra also submitted that since the appellant has no legal right to move for anticipatory bail and that practice is not an integral part of Article 21 of the Constitution of India, the contention that the High Court has failed to examine the charges levelled against the appellant, was *mala fide* or violative of Articles 14 and 21 of the Constitution of India, does not arise. Shri Luthra also submitted that the High Court was not correct in granting further reliefs after having dismissed the writ petition and that, only in extraordinary cases, the High Court could exercise its jurisdiction under Article 226 of the Constitution of India and the case in hand does not fall in that category.

12. I may indicate that the legal issues raised in this case are no more *res integra*. All the same, it calls for a relook on certain aspects which I may deal with during the course of the judgment.

13. I am conscious of the fact that since the provisions similar to Section 438 Cr.P.C. being absent in the State of Uttar Pradesh, the High Court is burdened with large number of writ petitions filed under Article 226 of the Constitution of India

seeking pre-arrest bail. Section 438 was added to the Code of Criminal Procedure in the year 1973, in pursuance to the recommendation made by the 41st Law Commission, but in the State of Uttar Pradesh by Section 9 Criminal Procedure (Uttar Pradesh) Amendment Act, 1976, Section 438 was specifically omitted, the legality of which came up for consideration before the Constitution Bench of this Court in *Kartar Singh v. State of Punjab* (1994) 3 SCC 569 and the Court held that the deletion of the application of Section 438 in the State of Uttar Pradesh by Section 9 of the above mentioned Amendment Act does not offend either Article 14, Article 19 or Article 21 of the Constitution of India and the State Legislature is competent to delete that section, which is one of the matters enumerated in the concurrent list, and such a deletion is valid under Article 254(2) of the Constitution of India.

14. I notice, therefore, as per the Constitution Bench, a claim for pre-arrest protection is neither a statutory nor a right guaranteed under Article 14, Article 19 or Article 21 of the Constitution of India. All the same, in *Karatar* Singh's case (supra), this Court in sub-para (17) of Para 368, has also stated as follows:

> "368 xxx xxx xxx
>
> (17) Though it cannot be said that the High Court has no jurisdiction to entertain an application for bail under Article 226 of the Constitution and pass orders either way, relating to the cases under the Act 1987, that power should be exercised sparingly, that too only in rare and appropriate cases in extreme circumstances. But the judicial discipline and comity of courts require that the High Courts should refrain from exercising the extraordinary jurisdiction in such matters;
>
> xxx xxx xxx"

15. The High Court of Allahabad has also taken the same

view in several judgments. Reference may be made to the judgments in *Satya Pal v. State of U.P.* (2000 Cri.L.J. 569), *Ajeet Singh v. State of U.P.* (2007 Cri.L.J. 170), *Lalji Yadav & Others v. State of U.P. & Another* (1998 Cri.L.J. 2366), *Kamlesh Singh v. State of U.P. & Another* (1997 Cri.L.J. 2705) and *Natho Mal v. State of U.P.* (1994 Cri.L.J. 1919).

16. We have, therefore, no concept of "anticipatory bail" as understood in Section 438 of the Code in the State of Uttar Pradesh. In *Balchand Jain v. State of M.P.* (1976) 4 SCC 572, this Court observed that "anticipatory bail" is a misnomer. Bail, by itself, cannot be claimed as a matter of right under the Code of Criminal Procedure, 1973, except for bailable offences (Section 436 Cr.P.C., 1973). For non-bailable offences, conditions are prescribed under Sections 437 and 439 Cr.P.C. The discretion to grant bail in non-bailable offences remains with the Court and hence, it cannot be claimed as a matter of right, but the aggrieved party can only seek a remedy and it is on the discretion of the Court to grant it or not. In this connection reference may also be made to the Judgment of the seven-Judge Bench of the Allahabad High Court in *Smt. Amarawati and Ors. V. State of U.P.* (2005) Cri.L.J. 755, wherein the Court, while interpreting the provisions of Sections 41, 2(c) and 157(1) CrPC as well as the scope of Sections 437 and 439, held as follows:

> "47. In view of the above we answer the questions referred to the Full Bench as follows:
>
> (1) Even if cognizable offence is disclosed, in the FIR or complaint the arrest of the accused is not a must, rather the police officer should be guided by the decision of the Supreme Court in *Joginder Kumar v. State of U.P.,* 1994 Cr LJ 1981 before deciding whether to make an arrest or not.
>
> (2) The High Court should ordinarily not direct any Subordinate Court to decide the bail application the same day, as that would be interfering with the judicial discretion of the Court hearing the bail application. However, as stated above, when the bail application is under Section 437 Cr.P.C. ordinarily the Magistrate should himself decide the bail application the same day, and if he decides in a rare and exceptional case not to decide it on the same day, he must record his reasons in writing. As regards the application under Section 439 Cr.P.C. it is in the discretion of the learned Sessions Judge considering the facts and circumstances whether to decide the bail application the same day or not, and it is also in his discretion to grant interim bail the same day subject to the final decision on the bail application later.
>
> (3) The decision in *Dr. Vinod Narain v. State of UP* is incorrect and is substituted accordingly by this judgment."

17. This Court in *Lal Kamlendra Pratap Singh v. State of Uttar Pradesh and Others* (2009) 4 SCC 437, while affirming the judgment in *Amarawati* (supra), held as follows:

> "6. Learned counsel for the appellant apprehends that the appellant will be arrested as there is no provision for anticipatory bail in the State of U.P. He placed reliance on a decision of the Allahabad High Court in *Amarawati* v. *State of U.P.* in which a seven-Judge Full Bench of the Allahabad High Court held that the court, if it deems fit in the facts and circumstances of the case, may grant interim bail pending final disposal of the bail application. The Full Bench also observed that arrest is not a must whenever an FIR of a cognizable offence is lodged. The Full Bench placed reliance on the decision of this Court in *Joginder Kumar* v. *State of U.P.* (1994) 4 SCC 260.

7. We fully agree with the view of the High Court in *Amarawati case* and we direct that the said decision be followed by all courts in U.P. in letter and spirit, particularly since the provision for anticipatory bail does not exist in U.P.

8. In appropriate cases interim bail should be granted pending disposal of the final bail application, since arrest and detention of a person can cause irreparable loss to a person's reputation, as held by this Court in *Joginder Kumar case*. Also, arrest is not a must in all cases of cognizable offences, and in deciding whether to arrest or not the police officer must be guided and act according to the principles laid down in *Joginder Kumar case*."

18. Later, a two-Judge Bench of this Court in *Som Mittal v. State of Karnataka* (2008) 3 SCC 753, while dealing with an order of the Karnataka High Court under Section 482 CrPC, one of the Judges made some strong observations as well as recommendations to restore Section 438 in the State of U.P. Learned Judges constituting the Bench also expressed contrary views on certain legal issues, hence, the matter was later placed before a three-Judge Bench, the judgment of which is reported in same caption (2008) 3 SCC 574, wherein this Court opined that insofar as the observations, recommendations and directions in paras 17 to 39 of the concurrent judgment is concerned, they did not relate to the subject matter of the criminal appeal and the directions given were held to be obiter and were set aside.

19. I notice in this case FIR was lodged for offences, under Sections 419 and 420 IPC which carry a sentence of maximum of three years and seven years respectively with or without fine. Benefit of Section 41(a) Cr.P.C. must be available in a given case, which provides that an investigating officer shall not arrest the accused of such offences in a routine manner and the arrest be made, only after following the restrictions imposed under

Section 41(b). The relevant provisions, as it stands now reads as follow:

"**41. When police may arrest without warrant.-** (1) Any police officer may without an order from a Magistrate and without a warrant, arrest any person–

(a) who commits, in the presence of a police officer, a cognizable offence;

(b) against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence punishable with imprisonment for a term which may be less than seven years or which may extend to seven years whether with or without fine, if the following conditions are satisfied, namely:-

(i) the police officer has reason to believe on the basis of such complaint, information, or suspicion that such person has committed the said offence;

(ii) the police officer is satisfied that such arrest is necessary –

(a) to prevent such person from committing any further offence; or

(b) for proper investigation of the offence; or

(c) to prevent such person from causing the evidence of the offence to disappear or tampering with such evidence in any manner, or

(d) to prevent such person from making any inducement, threat or promise to any person

acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to the police officer; or

(e) as unless such person is arrested, his presence in the Court whenever required cannot be ensured,

and the police officer shall record while making such arrest, his reasons in writing:

Provided that a police officer shall, in all cases where the arrest of a person is not required under the provisions of this sub-section; record the reasons in writing for not making the arrest."

20. Amended provisions make it compulsory for the police to record the reasons for making arrest as well as for not making an arrest in respect of a cognizable offence for which the maximum sentence is upto seven years. Reference in this connection may also be made to Section 41A inserted vide Act 5 of 2009 w.e.f. 01.11.2010, which reads as follows:

"**41A. Notice of appearance before police officer** – (1) The police officer shall, in all cases where the arrest of a person is not required under the provisions of sub-section (1) of section 41, issue a notice directing the person against whom a reasonable complaint has been made, or credible information has been received, or a reasonable suspicion exists that he has committed a cognizable offence, to appear before him or at such other place as may be specified in the notice.

(2) Where such a notice is issued to any person, it shall be the duty of that person to comply with the terms of the notice.

(3) Where such person complies and continues to comply with the notice, he shall not be arrested in respect of the

offence referred to in the notice unless, for reasons to be recorded, the police officer is of the opinion that he ought to be arrested.

(4) Where such person, at any time, fails to comply with the terms of the notice or is unwilling to identify himself, the police officer may, subject to such orders as may have been passed by a competent Court in this behalf, arrest him for the offence mentioned in the notice."

21. Above mentioned provisions make it compulsory for the police to issue a notice in all such cases where arrest is not required to be made under Clause (b) of sub-section (1) of the amended Section 41. But, all the same, unwillingness of a person who has not been arrested to identify himself and to whom a notice has been issued under Section 41A, could be a ground for his arrest. Legislation has laid down various parameters, warranting arrest of a person, which itself is a check on arbitrary or unwarranted arrest and the right to personal liberty guaranteed under Article 21 of the Constitution of India.

22. I may, however, point out that there is unanimity in the view that in spite of the fact that Section 438 has been specifically omitted and made inapplicable in the State of Uttar Pradesh, still a party aggrieved can invoke the jurisdiction of the High Court under Article 226 of the Constitution of India, being extraordinary jurisdiction and the vastness of the powers naturally impose considerable responsibility in its application. All the same, the High Court has got the power and sometimes duty in appropriate cases to grant reliefs, though it is not possible to pin-point what are the appropriate cases, which have to be left to the wisdom of the Court exercising powers under Article 226 of the Constitution of India.

23. I am also faced with the situation that on dismissal of the writ by the High Court under Article 226 of the Constitution of India, while examining the challenge for quashing the FIR or

a charge-sheet, whether the High Court could grant further relief against arrest for a specific period or till the completion of the trial. This Court in *State of Orissa v. Madan Gopal Rungta* reported in AIR 1952 SC 12, while dealing with the scope of Article 226 of the Constitution, held as follows :-

> "Article 226 cannot be used for the purpose of giving interim relief as the only and final relief on the application. The directions had been given here only to circumvent the provisions of Section 80 of the Civil Procedure Code, and that was not within the scope of Article 226. An interim relief can be granted only in aid of and as ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding. If the Court was of opinion that there was no other convenient or adequate remedy open to the petitioners, it might have proceeded to investigate the case on its merits and come to a decision as to whether the petitioners succeeded in establishing that there was an infringement of any of their legal rights which entitled them to a writ of *mandamus* or any other directions of a like nature; and pending such determination it might have made a suitable interim order for maintaining the *status quo ante*. But when the Court declined to decide on the rights of the parties and expressly held that they should be investigated more properly in a civil suit, it could not, for the purpose of facilitating the institution of such suit, issue directions in the nature of temporary injunctions, under Article 226 of the Constitution. The language of Article 226 does not permit such an action."

24. The language of Article 226 does not permit such an action and once the Court finds no merits in the challenge, writ petition will have to be dismissed and the question of granting further relief after dismissal of the writ, does not arise. Consequently, once a writ is dismissed, all the interim reliefs granted would also go.

25. This Court has already passed an interim order on 1.3.2013 granting bail to the appellant on certain conditions. The said order will continue till the completion of the trial. However, if the appellant is not co-operating with the investigation, the State can always move for vacating the order. The appeal is accordingly dismissed as above.

A.K. SIKRI, J. 1. I have carefully gone through the judgment authored by my esteemed brother, Justice Radhakrishnan. I entirely agree with the conclusions arrived at by my learned brother in the said judgment. At the same time, I would also like to make some observations pertaining to the powers of High Court under Article 226 of the Constitution of India to grant relief against pre-arrest (commonly called as anticipatory bail), even when Section 438,Cr.P.C. authorizing the Court to grant such a relief is specifically omitted and made inapplicable in so far as State of Uttar Pradesh is concerned. I would like to start with reproducing the following observations in the opinion of my brother, on this aspect which are contained in paragraph 21 of the judgment. It reads as under:

> "We may, however, point out that there is unanimity in the view that in spite of the fact that Section 438 has been specifically omitted and made inapplicable in the State of Uttar Pradesh, still a party aggrieved can invoke the jurisdiction of the High Court under Article 226 of the Constitution of India, being extraordinary jurisdiction and the vastness of the powers naturally impose considerable responsibility in its application. All the same, the High Court has got the power and sometimes duty in appropriate cases to grant reliefs, though it is not possible to pin-point what are the appropriate cases, which we have to leave to the wisdom of the Court exercising powers under Article 226 of the Constitution of India."

2. Another aspect which is highlighted in the judgment rendered by Justice Radhakrishnan is that many times in the Writ Petition filed under Article 226 of the Constitution of India

seeking quashing of the FIR or the charge-sheet, the petitioners pray for interim relief against arrest. While entertaining the Writ Petition the High Court invariably grants such an interim relief. It is rightly pointed out that once the Writ Petition claiming main relief for quashing of FIR or the charge-sheet itself is dismissed, the question of granting further relief after dismissal of the Writ Petition, does not arise. It is so explained in para 22 and 23 of the judgment of my learned brother.

3. I would like to remark that in the absence of any provisions like Section 438 of Cr.P.C. applicable in the State of Uttar Pradesh, there is a tendency on the part of the accused persons, against whom FIR is lodged and/or charge-sheet is filed in the Court to file Writ Petition for quashing of those proceedings so that they are able to get protection against the arrest in the interregnum which is the primary motive for filing such petitions. It is for this reason that invariably after the lodging of FIR, Writ Petition under Article 226 is filed with main prayer to quash those proceedings and to claim interim relief against pre-arrest in the meantime or till the completion of the trial. However, the considerations which have to weigh with the High Court to decide as to whether such proceedings are to be quashed or not are entirely different than that of granting interim protection against the arrest. Since the grounds on which such an FIR or charge sheet can be quashed are limited, once the Writ Petition challenging the validity of FIR or charge-sheet is dismissed, the grant of relief, incidental in nature, against arrest would obviously not arise, even when a justifiable case for grant of anticipatory bail is made out .

4. It is for this reason, we are of the opinion that in appropriate cases the High Court is empowered to entertain the petition under Article 226 of the Constitution of India where the main relief itself is against arrest. Obviously, when provisions of Section 438 of Cr.P.C. are not available to the accused persons in the State of Uttar Pradesh, under the normal circumstances such an accused persons would not be

entitled to claim such a relief under Art. 226 of the Constitution. It cannot be converted into a second window for the relief which is consciously denied statutorily making it a case of casus omissus. At the same time, as rightly observed in para 21 extracted above, the High Court cannot be completely denuded of its powers under Article 226 of the Constitution, to grant such a relief in appropriate and deserving cases; albeit this power is to be exercised with extreme caution and sparingly in those cases where arrest of a person would lead to total miscarriage of justice. There may be cases where pre-arrest may be entirely unwarranted and lead to disastrous consequences. Whenever the High Court is convinced of such a situation, it would be appropriate to grant the relief against pre-arrest in such cases. What would be those cases will have to be left to the wisdom of the High Court. What is emphasized is that the High Court is not bereft of its powers to grant this relief under Art. 226 of the Constitution.

A Bench of this Court, headed by the then Chief Justice Y.V.Chandrachud, laid down first principles of granting anticipatory bail in the *Gurbaksh Singh v. State of Punjab* 1980 Crl.L.J. 417 (P&H), reemphasizing that liberty… - 'A person who has yet to lose his freedom by being arrested asks for freedom in the event of arrest. That is the stage at which it is imperative to protect his freedom, in so far as one may, and to give full play to the presumption that he is innocent.

5. In *Joginder Kumar v. State of U.P. and Others,* 1994 Cr L.J. 1981, the Supreme Court observed:

"No arrest can be made because it is lawful for the police officer to do so. The existence of the power to arrest is one thing. The justification for the exercise of it is quite another. The police officer must be able to justify the arrest apart from his power to do so. Arrest and detention in police lock-up of a person can cause incalculable harm to the reputation and self esteem of a person. No arrest can

be made in a routine manner on a mere allegation of commission of an offence made against a person. It would be prudent for a police officer in the interest of protection of the constitutional rights of a citizen and perhaps in his own interest that no arrest should be made without a reasonable satisfaction reached after some investigation as to the genuineness of a complaint and a reasonable belief both as to the person's complicity and even so as to the need to effect arrest."

6. It is pertinent to explain there may be imminent need to grant protection against pre-arrest. The object of this provision is to relieve a person from being disgraced by trumped up charges so that liberty of the subject is not put in jeopardy on frivolous grounds at the instance of the unscrupulous or irresponsible persons who may be in charge of the prosecution. An order of anticipatory bail does not in any way, directly or indirectly; take away for the police their right to investigate into charges made or to be made against the person released on bail.

7. The purposes for which the provisions of anticipatory bail are made are quite obvious. One of the purposes of the arrest is that the accused should be available to the investigating machinery for further investigation and questioning whenever he is required. Another purpose is that the trial should not be jeopardized and for this purpose the restrictions on the movements of the accused are necessary. The genuineness of the alleged need for police custody has to be examined and it must be balanced against the duty of courts to uphold the dignity of every man and to vigilantly guard the right to liberty without jeopardizing the state objective of maintenance of law and order.

8. I would also like to reproduce certain paragraphs from *Kartar Singh and Ors. V. State of Punjab* (1994) 3 SCC 569, wherein Justice K.Ramaswamy, speaking for the Court,

discussed the importance of life and liberty in the following words.

"The foundation of Indian political and social democracy, as envisioned in the preamble of the Constitution, rests on justice, equality, liberty and fraternity in secular and socialist republic in which every individual has equal opportunity to strive towards excellence and of his dignity of person in an integrated egalitarian Bharat. Right to justice and equality and stated liberties which include freedom of expression, belief and movement are the means for excellence. The right to life with human dignity of person is a fundamental right of every citizen for pursuit of happiness and excellence. Personal freedom is a basic condition for full development of human personality. Art.21 of the Constitution protects right to life which is the most precious right in a civilized society. The trinity i.e. liberty, equality and fraternity always blossoms and enlivens the flower of human dignity. One of the gifts of democracy to mankind is the right to personal liberty. Life and personal freedom are the prized jewels under Art.19 conjointly assured by Art.20(3), 21 and 22 of the Constitution and Art.19 ensures freedom of movement. Liberty aims at freedom not only from arbitrary restraint but also to secure such conditions which are essential for the full development of human personality. Liberty is the essential concomitant for other rights without which a man cannot be at his best. The essence of all civil liberties is to keep alive the freedom of the individual subject to the limitations of social control envisaged in diverse articles in the chapter of Fundamental Rights Part III in harmony with social good envisaged in the Directive Principles in Part IV of the Constitution. Freedom cannot last long unless it is coupled with order. Freedom can never exist without order. Freedom and order may coexist. It is essential that freedom should be exercised under authority and order should be enforced by authority which is vested solely in

the executive. Fundamental rights are the means and directive principles are essential ends in a welfare State. The evolution of the State from police State to a welfare State is the ultimate measure and accepted standard of democratic society which is an avowed constitutional mandate. Though one of the main functions of the democratic Government is to safeguard liberty of the individual, unless its exercise is subject to social control, it becomes anti-social or undermines the security of the State. The Indian democracy wedded to rule of law aims not only to protect the fundamental rights of its citizens but also to establish an egalitarian social order. The individual has to grow within the social confines preventing his unsocial or unbridled growth which could be done by reconciling individual liberty with social control. Liberty must be controlled in the interest of the society but the social interest must never be overbearing to justify total deprivation of individual liberty. Liberty cannot stand alone but must be paired with a companion virtue; liberty and morality; liberty and law; liberty and justice; liberty and common good; liberty and responsibility which are concomitants for orderly progress and social stability. Man being a rational individual has to life in harmony with equal rights of others and more differently for the attainment of antithetic desires. This intertwined network is difficult to delineate within defined spheres of conduct within which freedom of action may be confined. Therefore, liberty would not always be an absolute license but must arm itself within the confines of law. In other words, here can be no liberty without social restraint. Liberty, therefore, as a social conception is a right to be assured to all members of a society. Unless restraint is enforced on and accepted by all members of the society, the liberty of some must involve the oppression of others. If liberty be regarded a social order, the problem of establishing liberty must be a problem of organizing restraint which society controls over the individual. Therefore, liberty of each citizen is borne of

and must be subordinated to the liberty of the greatest number, in other words common happiness as an end of the society, lest lawlessness and anarchy will tamper social weal and harmony and powerful courses or forces would be at work to undermine social welfare and order. Thus the essence of civil liberty is to keep alive the freedom of the individual subject to the limitation of social control which could be adjusted according to the needs of the dynamic social evolution.

The modem social evolution is the growing need to keep individual to be as free as possible, consistent with his correlative obligation to the society. According to Dr. Ambedkar in his closing speech in the Constituent Assembly, the principles of liberty, equality and fraternity are not to be treated as separate entities but in a trinity. They form the union or trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality. Equality cannot be divorced from liberty. Nor can equality and liberty be divorced from fraternity. Without equality, liberty would produce supremacy of law. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality would not become a natural course of things. Courts, as sentinel on the qui vive, therefore, must strike a balance between the changing needs of the society for peaceful transformation with orders and protection of the rights of the citizen.(Para 374)

9. It was also held in that judgment that the High Courts under Art.226 had the right to entertain writ petitions for quashing of FIR and granting of interim protection from arrest. This position, in the context of contours of Art.226, is stated as follows in the same judgment:

"From this scenario, the question emerges whether the High Court under Art.226 would be right in entertaining proceedings to quash the charge-sheet or to grant bail to

a person accused of an offence under the Act or other offences committed during the course of the same transaction exclusively triable by the Designated Court. Nothing is more striking than the failure of law to evolve a consistent jurisdictional doctrine or even elementary principles, if it is subject to conflicting or inconceivable or inconsistent result which lead to uncertainty, incongruity and disbelief in the efficacy of law. The jurisdiction and power of the High Court under Art.226 of the Constitution is undoubtedly constituent power and the High Court has untrammeled powers and jurisdiction to issue any writ or order or direction to any person or authority within its territorial jurisdiction for enforcement of any of the fundamental rights or for any other purpose. The legislature has no power to divest the court of the constituent power engrafted under Art.226. A superior court is deemed to have general jurisdiction and the law presumes that the court has acted within its jurisdiction. This presumption is denied to the inferior courts. The judgment of a superior court unreservedly is conclusive as to all relevant matters thereby decided, while the judgment of the inferior court involving a question of jurisdiction is not final. The superior court, therefore, has jurisdiction to determine its own jurisdiction, may be rightly or wrongly. Therefore, the court in an appropriate proceeding may erroneously exercise jurisdiction. It does not constitute want of jurisdiction, but it impinges upon its propriety in the exercise of the jurisdiction. Want of jurisdiction can be established solely by a superior court and that in practice no decision can be impeached collaterally by an inferior court. However, acts done by a superior court are always deemed valid wherever they are relied upon. The exclusion thereof from the rule of validity is indispensable in its finality. The superior courts, therefore, are the final arbiters of the validity of the acts done not only by other inferior courts or authorities, but also their own decisions. Though they are immune from collateral attack, but to avoid confusion the

superior court's decisions lay down the rules of validity; are not governed by those rules. The valid decision is not only conclusive, it may affect, but it is also conclusive in proceedings where it is sought to be collaterally impeached. However, the term conclusiveness may acquire other specific meanings. It may mean that the finding upon which the decision is founded as distinct or it is the operative part or has to be conclusive or these findings bind only parties on litigated disputes or that the organ which has made the decision is itself precluded from revoking, rescinding or otherwise altering it."

10. It would be pertinent to mention here that in light of above mentioned statements and cases, the High Court would not be incorrect or acting out of jurisdiction if it exercises its power under Art.226 to issue appropriate writ or direction or order in exceptional cases at the behest of a person accused of an offence triable under the Act or offence jointly triable with the offences under the Act.

11. It is pertinent to mention that though the High Courts have very wide powers under Art.226, the very vastness of the powers imposes on it the responsibility to use them with circumspection and in accordance with the judicial consideration and well established principles, so much so that while entertaining writ petitions for granting interim protection from arrest, the Court would not go on to the extent of including the provision of anticipatory bail as a blanket provision.

12. Thus, such a power has to be exercised very cautiously keeping in view, at the same time, that the provisions of Article 226 are a devise to advance justice and not to frustrate it. The powers are, therefore, to be exercised to prevent miscarriage of justice and to prevent abuse of process of law by authorities indiscriminately making pre-arrest of the accused persons. In entertaining such a petition under Art.226, the High Court is supposed to balance the two interests. On the one hand, the Court is to ensure that such a power under Art.226 is not to be

exercised liberally so as to convert it into Section 438,Cr.P.C. proceedings, keeping in mind that when this provision is specifically omitted in the State of Uttar Pradesh, it cannot be resorted to as to back door entry via Art.226. On the other hand, wherever the High Court finds that in a given case if the protection against pre-arrest is not given, it would amount to gross miscarriage of justice and no case, at all, is made for arrest pending trial, the High Court would be free to grant the relief in the nature of anticipatory bail in exercise of its power under Art. 226 of the Constitution. It is again clarified that this power has to be exercised sparingly in those cases where it is absolutely warranted and justified.

D.G. Appeal dismissed.

VARINDER SINGH

v.

STATE OF PUNJAB & ANR.

(Criminal Appeal No. 147 of 2014)

JANUARY 16, 2014.

[SUDHANSU JYOTI MUKHOPADHAYA AND V. GOPALA GOWDA, JJ.]

Code of Criminal Procedure, 1973:

s.482 – Petition seeking to quash FIR and criminal proceedings – Petitioner, a visitor to prison – On search, mobile phone and charger recovered from him – FIR for offences punishable u/ss 42 and 45 of the Prisons Act – High Court rejecting the petition – Held: Case of appellant clearly falls under category (1) of the grounds of quashing of FIR mentioned in the case of Bhajan Lal — On the date of alleged offence, mobile phone or charger was not listed as one of the prohibited articles under Punjab Prison Manual — Thus, no offence is made out u/s 42 of the Act, as there was no communication which was done or was attempted to being done contrary to the rules — Further, the appellant was not a prisoner on the date of the offence — Therefore, he could not have committed a prison offence as defined u/s 45 of the Act — The judgment of High Court is set aside — FIR and the proceedings against appellant are quashed –Prisoners Act, 1894 — ss.42,45 and 52-A.

Prisons Act, 1894:

s.52-A – Visitor to prison – On search found in possession of a mobile phone and its charger – FIR dated 24.9.2009 – Section enforced by Notification dated 8.3.2011 – Held: Notification will not apply to the case in hand, as the alleged offence was committed in 2009, and retrospective

effect will not apply in the case of criminal laws — Therefore, there is no offence made out against appellant – Code of Criminal Procedure, 1973 – s.482.

ss. 42 and 45 – Offences under the two provisions – Explained.

A mobile phone and its charger were recovered, on search, from the appellant, who was a visitor to a Central Prison in Punjab. An FIR for offences u/ss 42 and 45 was registered against him on 24.9.2009. His petition u/s 482 CrPC seeking to quash the FIR and the criminal proceedings was dismissed by the High Court.

In the instant appeal, the questions for consideration before the Court were: (i) Whether an offence was made out u/ss 42 and 45 (12) of the Prisons Act? and (ii) Whether the High Court was justified in rejecting the petition to quash the FIR?

Allowing the appeal, the Court

HELD: 1.1. Section 45 of the Prisons Act, 1894 provides for acts which are declared to be prison offences when committed by a prisoner. Clause (12) makes *receiving, possessing or transferring any prohibited article* a prison offence. The appellant was not a prisoner on the date of the commission of the offence. He could thus, not have committed a 'prison offence' as defined u/ss 45 of the Act. Therefore, no offence is made out u/s 45 of the Act. [para 8-9] [501-D-F]

1.2. Insofar as s.42 of the Act is concerned, it provides that only that communication, which is contrary to the rules made u/s 59 of the Act is prohibited. The Punjab Jail Manual lists the prohibited articles in Punjab prisons. This list does not mention Mobile phone or charger as one of the prohibited articles. Thus, the communication, even if it was attempted to being done, was not contrary

to the prison rules and, thus, is not an offence u/s 42 of the Act. [para 9-10] [501-F; 502-D; 503-C-D]

1.3. Section 52-A makes possession of mobile phone by the prisoner and its supply to him by any person an offence. The notification by the Punjab Government to bring the Section in force is dated 08.03.2011. The FIR for the offence was dated 24.09.2009. This notification will obviously not apply to the case in hand as the alleged offence was committed in 2009, and retrospective effect will not apply in the case of criminal laws. Therefore, there is no offence made out against the appellant. [para 11] [503-F-H]

2.1. In light of the settled legal principles, the High Court has erred in dismissing the petition to quash the FIR.Under s.482 CrPC, the High Court has the power to quash an FIR. This court in the case of *Bhajan Lal* has laid down the categories of cases in which the High Court can exercise its power u/s 482 and quash the FIR. [para 12-13] [504-B, D-E]

State of Haryana v. Bhajan Lal **1990 (3) Suppl. SCR 259 =1992 Supp (1) SCC 335 – relied on**

Sunder Babu v. State of Tamil Nadu **(2009) 14 SCC 244 – referred to.**

2.2. The case of the appellant clearly falls under category (1) of the grounds of quashing of FIR mentioned in the case of *Bhajan Lal* i.e. where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not prima-facie constitute any offence or make out a case against the accused. The appellant was not a prisoner and as there was no communication which was done or was attempted to being done contrary to the rules on 24.9.2009, he cannot be said to have committed any prison

offence. The judgment of the High Court is set aside. FIR dated 24.09.2009 and the proceedings against the appellant are quashed. [para 13, 15-16] [504-E-F; 505-G; 506-A-C]

Case Law Reference:

1990 (3) Suppl. SCR 259	**relied on**	**para 13**
(2009) 14 SCC 244	**referred to**	**para14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 147 of 2014.

From the Judgment and Order dated 19.07.2013 of the High Court of Punjab & Haryana at Chandigarh in Crl. Misc. No. M - 13296 of 2011 (O&M).

R.K. Dhind, Surinder Singh, Balbir Singh Gupta, for the Appellant.

V. Madhukar, AAG, Anvita, Kuldip Singh, Naresh Bakshi, for the Respondents.

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. Leave granted.

2. This appeal is filed by the appellant questioning the correctness of the judgment and final order passed by the High Court of Punjab and Haryana at Chandigarh in petition Crl. Misc. No. M-13296 of 2011 (O & M) urging various facts and legal contentions in support of his case.

3. Necessary relevant facts are stated hereunder to appreciate the case of the appellant and also to find out whether the appellant is entitled to the relief prayed for in this appeal.

The appellant had gone as a visitor to the Central Jail, Ferozepur on 17.09.2009. There, on being searched, a mobile phone was recovered from his turban and a charger was recovered from his shoes. An FIR dated 24.09.2009 was filed

at the Police Station Ferozepur, under Sections 42 and 45 (12) of the Prisons Act, 1894 (in short "the Act"). The Chief Judicial Magistrate of Ferozepur charged him on 01.05.2010 under Sections 42 and 45 of the Act. The appellant approached the High Court of Punjab and Haryana by way of a petition under Section 482 of the Code of Criminal Procedure, 1973, praying that the FIR be quashed. The High Court of Punjab and Haryana by way of impugned judgment and final order dated 19.07.2013 dismissed the petition, and *inter alia* held that "….*the accused is at liberty to take all pleas available to him during the trial"*

4. The High Court in its impugned order has interpreted Section 42 of the Act, and held that whoever communicates or attempts to communicate with any prisoner is liable for punishment. It said that the appellant herein was entering the jail with a mobile phone and its charger, apparently to enable communication with a prisoner. It was held that " *After presentation of challan, charges have already been framed against the petitioner. In these circumstances, at this stage*, *no ground for quashing of the FIR in question is made out.*"

5. The learned counsel for the appellant contended that the High Court had not appreciated the contention that the offence under Sections 42 and 45 of the Act is not made out, and that mobile phone and charger are not included in the list of the prohibited articles. It was also contended that section 52-A, which prohibited the carrying of a mobile phone, has not been notified yet, and that it is still a Bill. It was further contended that even if the notification were to be taken as implementable, it was dated 08.03.2011. The offence is admittedly of 2009, and thus, this notification will not apply to the case as the same is prospective in nature.

6. The learned counsel for the respondents contended that the appellant was hiding a mobile phone in his turban and a charger in his shoe, thus, *prima facie*, the case under Section 42 of the Act has been made out against him. The counsel also contended that the sections mentioned in the charge sheet are

attracted, and that there is no reason for the courts to interfere at this stage.

7. We have heard the rival legal contentions and perused the documents produced on record. Two issues arise for our consideration:

(1) Whether an offence is made out under Sections 42 and 45 (12) of the Prisons Act?

(2) Whether the High Court was justified in rejecting the petition to quash the FIR?

Answer to Point no.1

8. We have to examine Sections 42 and 45 of the Act in detail in order to understand the issue at hand. Section 45 of the Act provides for acts which are declared to be prison offences when committed by a prisoner. Clause (12) makes *receiving, possessing or transferring any prohibited article* a prison offence.

9. The appellant was not a prisoner at the date of the commission of the offence. He could thus, not have committed a 'prison offence' as defined under Section 45 of the Act. Hence, no offence is made out under Section 45 of the Act. Insofar as Section 42 of the Act is concerned, it provides that only that communication, which is contrary to the rules made under Section 59 of the Act is prohibited. Section 42 of the Act reads as under :

"42. **Penalty for introduction or removal of prohibited articles into or from prison and communication with prisoners.**— Whoever, contrary to any rule under section [59] introduces or removes, or attempts by any means whatever to introduce or remove, into or from any prison, or supplies or attempts to supply to any prisoner outside the limits of a prison, any prohibited article,

and every officer of a prison who, contrary to any such rule, knowingly suffers any such article to be introduced into or removed from any prison, to be possessed by any prisoner, or to be supplied to any prisoner outside the limits of a prison,

and whoever, contrary to any such rules, communicates or attempts to communicate with any prisoner,

and whoever abets any offence made punishable by this section,

shall, on conviction before a Magistrate, be liable to imprisonment for a term not exceeding six months, or to fine not exceeding two hundred rupees, or to both."

10. The Punjab Jail Manual lists the prohibited articles in Punjab prisons. Para 606 of the Manual lists the following Prohibited Articles:

"…..

(1) Spirituous liquors of every description

(2) Tobacco and all other substances whatsoever which are or may be intended to be used for the purpose of smoking, chewing or snuffing, and all instruments and appliances whatsoever, which may be used for or in connection with smoking, chewing or snuffing,

(3) All explosive, intoxicating or poisonous substances, and chemicals whether fluid or solid of whatever description.

(4) All arms and weapons, and articles which are capable of being used as weapons of whatever description.

(5) All bullion, metal, coin, jewellery, ornaments,

currency notes, securities and articles of value of every description.

(6) All books, paper and printed or written matter and materials and appliances for printing or writing of whatever description.

(7) String, rope, chains and all materials, which are capable of being converted into string or rope or chains, of whatever description.

(8) Wood, bricks, stones and earth of every description."

This list does not mention Mobile phone or charger as one of the prohibited articles. Thus, the communication, even if it was attempted to being done, was not contrary to the prison rules, and thus, is not an offence under Section 42 of the Act.

11. The Prisons (Punjab Amendment) Bill, 2011 provides for the addition of section 52-A to the Act. This Section reads thus :

"52-A. (1)-Notwithstanding anything contained in this Act, if any prisoner is found guilty of possessing, operating or using a mobile phone or their component parts as like SIM card, memory card, battery or charger or if the prisoner or any other person assists or abets or instigates in the supply thereof, he shall be punished with imprisonment for a term, not exceeding one year or with fine not exceeding Rs 25,000 or with both……"

This Section, thus, makes the possession of the mobile phone by the prisoner and supplying the phone by any person an offence. The notification by the Punjab Government that this section is in force is dated 08.03.2011. The FIR for the offence was dated 24.09.2009. This notification will obviously not apply to the case in hand as the alleged offence was committed in 2009, and retrospective effect will not apply in the case of criminal laws. Hence, there is no offence made out against the appellant and we cannot accept the reasoning of the High Court in the impugned judgment. We hereby hold that this section cannot be made applicable to the facts of the present case.

Answer to point no.2

12. It is our view that in light of the settled legal principles, the High Court has erred in dismissing the petition to quash the FIR.

13. Section 482 of the Code of Criminal Procedure reads as under :-

"482. **Saving of inherent powers of High Court**: Nothing in this Code shall be deemed to limit or affect the inherent powers of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice."

Under this Section, the High Court has the power to quash an FIR. This court in the case of *State of Haryana v. Bhajan Lal*[1] has laid down the following categories of cases in which the High Court can exercise its power under Section 482 and quash the FIR:-

"1. Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima-facie constitute any offence or make out a case against the accused.

2. Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an investigation by police officers Under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

3. Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the

1. 1992 Supp (1) SCC 335.

same do not disclose the commission of any offence and make out a case against the accused.

4. Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated Under Section 155(2) of the Code.

5. Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

6. Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

7. Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."[2]

14. These principles were further reiterated by a three judge bench of this Court in the case of *Sunder Babu v. State of Tamil Nadu*[3].

15. The case of the appellant clearly falls under category (1) of the grounds of quashing of FIR mentioned in the case of

2. Ibid/Para 102.

3. (2009) 14 SCC at para 7.

Bhajan Lal (supra). On the date of the offence, mobile phone was not listed as one of the prohibited articles under the Punjab Prison Manual. Thus, no offence is made out under Section 42 of the Act, as there was no communication which was done or was attempted to being done contrary to the rules. Further, the appellant was not a prisoner on the date of the offence. Hence, he could not have committed a prison offence as defined under Section 45 of the Act.

16. In view of the foregoing reasons, the appeal is allowed and the impugned judgment of the High Court is set aside. The FIR dated 24.09.2009 and the proceedings against the appellant are quashed. There will be no order as to costs.

R.P. Appeal allowed.

EXECUTIVE ENGINEER, ROAD DEVELOPMENT DIVISION NO.III, PANVEL & ANR.

v.

ATLANTA LIMITED

(Civil Appeal No. 673 of 2014)

JANUARY 16, 2014

[A.K. PATNAIK AND JAGDISH SINGH KHEHAR, JJ.]

Arbitration and Conciliation Act, 1996: ss.2(1)(e), 42 – Jurisdiction to determine the controversy emerging out of the award of the arbitral tribunal – Division of litigation between High Court exercising 'ordinary original civil jurisdiction' and the 'Principal Civil Court of original jurisdiction' in a District – Held: s.42 mandates, that the court wherein the first application arising out of such a challenge is filed, shall alone have the jurisdiction to adjudicate upon the dispute(s), which are filed later in point of time – This legislative intent must also be understood as mandating, that disputes arising out of the same arbitration agreement, arbitral proceeding or arbitral award, would not be adjudicated upon by more than one court, even though jurisdiction to raise such disputes may legitimately lie before two or more courts – s.42 is not of any assistance in the instant case as the challenge was made in different court on the same day – In view of facts and circumstances of the case, reliance placed on ss.15 and 16 CPC was also misplaced – By virtue of s.2(1)(e), if choice is between the High Court (in exercise of its "ordinary original civil jurisdiction") on the one hand, and the "principal civil court of original jurisdiction" in the District i.e. the District Judge on the other, choice is made in favour of the High Court – Code of Civil Procedure, 1908 – ss.15, 16.

A contract was awarded on 12.07.2007 by the respondent-State to the respondent for the construction

of Mumbra Byepass. Dispute arose between the parties and matter was referred to arbitration and an award was passed on 12.5.2012.On 7.8.2012, the respondent as also the appellant both questioned the award of the arbitral tribunal. While the appellant questioned the same before the District Judge, Thane, the respondent filed Arbitration Petition before the High Court for setting aside some of the directions issued by the arbitral tribunal in its award dated 12.5.2012.

Since the same award was subject matter of challenge before the two different courts, the respondent prayed for transfer of the applications filed by appellant before the District Court to the original side of the High Court for being heard along with its Arbitration Petition.

The High Court while noticing that the State-appellant had not raised objection as to consolidation of the proceedings so as to avoid conflicting decisions or simultaneous trial held that since Arbitration Petition has already been placed before the Single Judge, it is proper if proceedings before the District Court, Thane are brought and are heard along with the Arbitration Petition. The said order has been challenged in the instant appeal. The appellants had placed reliance on Section 2(1)(e) of the Arbitration Act read with the provisions of Code of Civil Procedure to contend, that the District Judge, Thane, alone would have the jurisdiction in the matter.

Disposing of the appeal, the Court

HELD: 1. The appellants had in the reply affidavit filed before the High Court, clearly acknowledged the legal position, that both the High Court as also the District Judge, Thane, in so far as the instant controversy is concerned, fall within the definition of the term "Court" under Section 2(1)(e) of the Arbitration Act. The High Court in impugned expressly noticed that it was admitted

by the rival parties that the High Court on the original side, as also the District Judge, Thane, had the jurisdiction in respect of the subject matter. It was, therefore, not open to the appellants to canvass that the High Court of Bombay in exercise of its "ordinary original civil jurisdiction" could not adjudicate upon the instant controversy, on account of lack of jurisdiction. [Paras 12 and 13] [525-C-D & G-H; 526-D]

Bharat Aluminium Company and Ors. vs. Kaiser AluminiumTechnical Services Inc and Ors. **(2012) 9 SCC 559 – referred to.**

2. In terms of the mandate of Section 15 of the Code of Civil Procedure, the initiation of action within the jurisdiction of Greater Mumbai had to be "in the Court of lowest grade competent to try it". However, within the area of jurisdiction of Principal District Judge, Greater Mumbai, only the High Court of Bombay was exclusively the competent Court (under its "ordinary original civil jurisdiction") to adjudicate upon the matter. This conclusion is imperative from the definition of the term "Court" in Section 2(1)(e) of the Arbitration Act. Firstly, the very inclusion of the High Court "in exercise of its ordinary original civil jurisdiction, within the definition of the term "Court", will be rendered nugatory, if the above conclusion was not to be accepted. Because, the "principal Civil Court of original jurisdiction in a district" namely the District Judge concerned, being a court lower in grade than the High Court, the District Judge concerned would always exclude the High Court from adjudicating upon the matter. Accordingly, the principle enshrined in Section 15 of the Code of Civil Procedure cannot be invoked whilst interpreting Section 2(1)(e) of the Arbitration Act. Secondly, the provisions of the Arbitration Act, leave no room for any doubt, that it is the superior most court exercising original civil jurisdiction,

which had been chosen to adjudicate disputes arising out of arbitration agreements, arbitral proceedings and arbitral awards. Undoubtedly, a "principal Civil Court of original jurisdiction in a district", is the superior most court exercising original civil jurisdiction in the district over which its jurisdiction extends. It is clear, that Section 2(1)(e) of the Arbitration Act having vested jurisdiction in the "principal Civil Court of original jurisdiction in a district", did not rest the choice of jurisdiction on courts subordinate to that of the District Judge. Likewise, "the High Court in exercise of its ordinary original jurisdiction", is the superior most court exercising original civil jurisdiction, within the ambit of its original civil jurisdiction. On the same analogy and for the same reasons, the choice of jurisdiction, will clearly fall in the realm of the High Court, wherever a High Court exercises "ordinary original civil jurisdiction". Under the Arbitration Act, therefore, the legislature has clearly expressed a legislative intent, different from the one expressed in Section 15 of the Code of Civil Procedure. The respondent had chosen to initiate proceedings within the area of Greater Mumbai, it could have done so only before the High Court of Bombay. There was no other court within the jurisdiction of Greater Mumbai, where the respondent could have raised their challenge. Consequently, the respondent by initiating proceedings under Section 34 of the Arbitration Act, before the original side of the High Court of Bombay, had not violated the mandate of Section 2(1)(e) of the Arbitration Act. Thus viewed, reliance on Section 15 of the Code of Civil Procedure was wholly irrelevant. [Para 18] [530-G-H; 531-A-G]

3. Reliance placed on Section 16 of the Code of Civil Procedure, by the appellants, for the ouster the jurisdiction of the High Court of Bombay is equally misplaced. The controversy between the parties did not

pertain to recovery of immoveable property, partition of immoveable property, foreclosure sale or redemption of immoveable property, determination of any other right to immoveable property, for determination of compensation for wrong to immoveable property and/or for the recovery of moveable property under distraint or attachment. It is only in the said exigencies that Section 16 of the Code of Civil Procedure could have been invoked. The construction of the Mumbra byepass, would only entitle the respondent to payments contemplated under the contract dated 12.7.2007, and no more. Since none of the above exigencies contemplated in Section 16 prevailed in the dispute between the rival parties, reliance on Section 16 of the Code of Civil Procedure was clearly misplaced. [Para 19] [531-G-H; 532-A-D]

4. Insofar as the jurisdiction within the District Thane, is concerned, the "principal Civil Court of original jurisdiction" is the court of the District Judge, Thane. Consequently, within the territorial jurisdiction of District Thane, in terms of Section 2(1)(e) of the Arbitration Act, the challenge could have only been raised before the "principal Civil Court of original jurisdiction" of the district, namely, before the District Judge, Thane. There was no other court within the jurisdiction of District Thane, wherein the instant matters could have been agitated. Therefore, the appellants having chosen to initiate the proceedings before the District Judge, Thane, i.e., in respect of a cause of action falling in the territorial jurisdiction of the District Thane, they too must be deemed to have chosen the rightful court i.e., the District Judge, Thane. [Para 20] [532-E-G]

5. A perusal of Section 42 of Arbitration Act reveals a clear acknowledgment by the legislature, that the jurisdiction for raising a challenge to the same arbitration agreement, arbitral proceeding or arbitral award, could

most definitely arise in more than one court simultaneously. To remedy such a situation Section 42 of the Arbitration Act mandates, that the court wherein the first application arising out of such a challenge is filed, shall alone have the jurisdiction to adjudicate upon the dispute(s), which are filed later in point of time. This legislative intent must also be understood as mandating, that disputes arising out of the same arbitration agreement, arbitral proceeding or arbitral award, would not be adjudicated upon by more than one court, even though jurisdiction to raise such disputes may legitimately lie before two or more courts. Ordinarily Section 42 of the Arbitration Act would be sufficient to resolve such a controversy. For the determination of the instant controversy, however, reliance is not placed on Section 42 of the Arbitration Act, because the State of Maharashtra had moved applications under Section 34 of the Arbitration Act before the District Judge, Thane, on the same day as the respondent had filed Arbitration Petition before the High Court. Both the parties had approached the courts on 7.8.2012. The answer to the jurisdictional question, arising out in the facts and circumstances of this case, will therefore not emerge from Section 42 of the Arbitration Act. There can be no doubt, that adjudication of a controversy by different courts, can easily give rise to different conclusions and determinations. Therefore, logic and common sense also require, the determination of all such matters, by one jurisdictional court alone. [Paras 22 to 24] [534-D-H; 535-A-B and D-E]

6. The High Court of Bombay is vested with "ordinary original civil jurisdiction" over the same area, over which jurisdiction is also exercised by the "principal Civil Court of original jurisdiction" for the District of Greater Mumbai (i.e. the Principal District Judge, Greater Mumbai). Jurisdiction of the above two courts on the

"ordinary original civil side" is over the area of Greater Mumbai. The choice of jurisdiction has been expressed in Section 2(1)(e) of the Arbitration Act, without any fetters whatsoever. It is not the case of the appellants that because of pecuniary dimensions, and/or any other consideration(s), jurisdiction in the two alternatives mentioned above, would lie with the Principal District Judge, Greater Mumbai. Under the scheme of the provisions of the Arbitration Act therefore, if the choice is between the High Court (in exercise of its "ordinary original civil jurisdiction") on the one hand, and the "principal civil court of original jurisdiction" in the District i.e. the District Judge on the other; Section 2(1)(e) of the Arbitration Act has made the choice in favour of the High Court. This in fact impliedly discloses a legislative intent. Therefore, it makes no difference, if the "principal civil court of original jurisdiction", is in the same district over which the High Court exercises original jurisdiction, or some other district. In case an option is to be exercised between a High Court (under its "ordinary original civil jurisdiction") on the one hand, and a District Court (as "principal Civil Court of original jurisdiction") on the other, the choice under the Arbitration Act has to be exercised in favour of the High Court. Legislative choice is clearly in favour of the High Court. The matters in hand would have to be adjudicated upon by the High Court of Bombay alone. [Para 25 and 26] [536-B-H; 537-A and C]

7.The order passed by the High Court requiring the matters to be adjudicated on the "ordinary original civil side" by the High Court of Bombay is upheld however the reasons recorded by the High Court, for the conclusion, were different. The Arbitration Petition filed by the respondent before the High Court of Judicature at Bombay, and Applications filed by the appellants before the District Judge, Thane, shall be heard and disposed of by the High Court of Bombay. The District Judge, Thane is directed to transfer the files of Miscellaneous Applications to the High Court, for disposal in accordance with law. [Para 27] [537-D-G]

Case law reference:

(2012) 9 SCC 559 referred to Para 10

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 673 of 2014.

From the Judgment and Order dated 15.03.2013 the High Court of Judicature at Bombay in Miscellaneous Civil Application No. 162 of 2012.

Uday U. Lalit, Vinay Navare, Styajeet Kumar Keshav Ranjan, Ms. Abha R. Sharma for the Appellants.

Dushyant A. Dave, Chirag M. Shroff, Abhishek Singh, Aniruddha Deshmukh for the Respondent.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. State of Maharashtra, through its Public Works Department, awarded a contract dated 12.7.2000 to the respondent-Atlanta Limited (a public limited company) for the construction of the Mumbra byepass. On 11.5.2005, a supplementary agreement for additional work was executed between the parties. It would be relevant to mention, that the Mumbra byepass falls on National highway no. 4. The construction envisaged in the contract awarded to the respondent-Atlanta Limited was, from kilometer 133/800 to kilometer 138/200. The contract under reference envisaged, settlement of disputes between the parties, through arbitration. Atlanta Limited raised some disputes through a communication dated 1.10.2009. It also invoked the arbitration clause for resolution of the said disputes. The State of Maharashtra as also Atlanta Limited nominated their respective arbitrators, who in turn, appointed the presiding arbitrator. On the culmination

of proceedings before the arbitral tribunal, an award was rendered on 12.5.2012. Almost all the claims raised by Atlanta Limited were granted. In sum and substance, Atlanta Limited was awarded a sum of Rs.58,59,31,595/- along with the contracted rate of interest (of 20 per cent per annum), with effect from 1.10.2009. Atlanta Limited was also awarded a sum of Rs.41,00,000/- towards costs. All the counter claims raised by the State of Maharashtra, before the arbitral tribunal, were simultaneously rejected.

2. On 7.8.2012, the State of Maharashtra moved Miscellaneous Application no. 229 of 2012 and Miscellaneous Application no. 230 of 2012 under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the 'Arbitration Act') before the District Judge, Thane. The State of Maharashtra through the aforesaid Miscellaneous Applications sought quashing and setting aside of the arbitral award dated 12.5.2012.

3. On the same day, i.e., 7.8.2012, Atlanta Limited filed Arbitration Petition no.1158 of 2012 before the High Court of Judicature at Bombay (hereinafter referred to as the 'High Court'), for the setting aside of some of the directions issued by the arbitral tribunal (in its award dated 12.5.2012). Atlanta Limited also claimed further compensation, which according to the respondent, had wrongfully not been considered by the arbitral tribunal.

4. A perusal of the averments made in the foregoing two paragraphs reveal, that on the same day i.e., on 7.8.2012, the State of Maharashtra as also Atlanta Limited questioned the award of the arbitral tribunal dated 12.5.2012. Whilst the State of Maharashtra questioned the same before the District Judge, Thane; Atlanta Limited raised its challenge before the High Court. Since the same award dated 12.5.2012 was subject matter of challenge before two different courts, Atlanta Limited preferred Miscellaneous Civil Application no. 162 of 2012 under Section 24 of the Code of Civil Procedure, 1908 praying

for transfer of Miscellaneous Application no. 229 of 2012, as also, Miscellaneous Application No.230 of 2012 (both filed by the State of Maharashtra) before the District Court, Thane, to the original side of the High Court, for being heard along with Arbitration Petition No.1158 of 2012. The aforestated Miscellaneous Civil Application No.162 of 2012 was allowed by the High Court on 15.3.2013. The operative part of the order passed by the High Court is being extracted hereunder:

> "32. In the light of the above conclusion, the argument that this Court can only direct consolidation of both Petitions without passing any order with regard to their transfer, need not be considered in this case. Apart therefrom, once I find that the Respondents have no objection to consolidation of the proceedings so as to avoid conflicting decisions or simultaneous trial/hearing, then, all the more, the powers to transfer needs to be exercised in this case. It is undisputed that the parties are common to both matters. In both matters the same Award is under scrutiny. In such circumstances, the argument that both Petitions need to be consolidated but before the District Court at Thane cannot be accepted. That would mean two Courts render decisions and more or less on the same issue and may be at the same time. The arbitration petition filed by the Petitioners in this Court is already placed before the Single Judge of this Court and is now adjourned. It would be proper if the proceedings before the District Court, Thane are brought and are heard along with the Petition filed by the Petitioners in this Court.
>
> 33. As a result of the above discussion, this application succeeds. It is made absolute in terms of prayer clause (a) with no order as to costs."

The above determination by the High Court, vide its order dated 15.3.2013, is the subject matter of challenge through Special leave Petition (C) No.18980 of 2013.

5. Leave granted.

6. The contention advanced at the hands of the learned counsel for the State of Maharashtra, while assailing the impugned order of the High Court dated 15.3.2013 was, that it was improper for the High Court to transfer the proceedings initiated by the appellant through Miscellaneous Application No.229 of 2012 and Miscellaneous Application No.230 of 2012 under Section 34 of the Arbitration Act before the Court of the District Judge, Thane to the High Court. In this behalf, the pointed submission of the learned counsel for the appellant was, that only the District Judge, Thane, had the jurisdiction to determine the controversy emerging out of the award of the arbitral tribunal dated 12.5.2012. It was also submitted, that the proceedings initiated by Atlanta Limited through Arbitration Petition no. 1158 of 2012, ought to have been transferred from the High Court to the District Judge, Thane. In order to make good the aforesaid submission, learned counsel for the appellant placed reliance on the definition of the term "Court" expressed in Section 2(1)(e) of the Arbitration Act. Section 2(1)(e) aforementioned is being reproduced hereunder :

> "**2 – Definitions**— (1) In this Part, unless the context otherwise requires,—
>
> (e) "Court" means 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 the arbitration if the same had 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."

Drawing the court's pointed attention to the definition of the term "Court", it was the vehement contention of the learned counsel for the appellant, that to determine which court would have jurisdiction to decide the subject matter of an arbitral

dispute, it was essential to find out the particular court which would have had jurisdiction in the matter, had the dispute been agitated through a civil suit. According to learned counsel, the latter determination, would answer the jurisdictional avenue of the arbitral dispute, in terms of Section 2(1)(e) extracted above. In this behalf it was submitted, that in the absence of any express exclusion clause between the parties, on the subject matter under reference, in order to settle the dispute inter-parties, it would have been imperative for the parties to raise their respective challenges only before the District Judge, Thane.

7. For the above submission, learned counsel also placed reliance on Section 16 of the Code of Civil Procedure. Section 16, according to learned counsel, would be relevant to determine the jurisdictional court, if the dispute had been agitated through a civil suit. Section 16 aforementioned is being extracted hereunder:

> "**16. Suits to be instituted where subject-matter situate**.—Subject to the pecuniary or other limitations prescribed by any law, suits,—
>
> (a) for the recovery of immovable property with or without rent or profits,
>
> (b) for the partition of immovable property,
>
> (c) for foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property,
>
> (d) for the determination of any other right to or interest in immovable property,
>
> (e) for compensation for wrong to immovable property,
>
> (f) for the recovery of movable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate:

Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable properly held by or on behalf of the defendant may, where the relief sought can be entirely obtained through hi s personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation .—In this section "property" means property situate in India."

Relying on Section 16 extracted above, it was asserted by learned counsel, that the original agreement between the parties dated 12.7.2000, and the supplementary agreement dated 11.5.2005, related to the construction of the Mumbra byepass. The said construction is from Kilometer 133/800 to Kilometer 138/200. The aforesaid location of construction, according to the undisputed position between the parties, is within Thane District, and as such, within the territorial jurisdiction of the Sessions Division, Thane. Therefore, according to learned counsel for the appellant, only the "principal civil court of original jurisdiction" in District Thane i.e., the District Judge, Thane, would have jurisdiction in the matter. It was also the submission of the learned counsel for the appellant, that the toll stations for collecting toll constructed by the respondent-Atlanta Limited, are also located at the venue of the Mumbra byepass. Thus viewed, according to the learned counsel for the appellant, the collection of toll (which inter alia constitutes the subject of dispute, between the parties) is also carried on by the respondents within District Thane, i.e., within the territorial jurisdiction of the District Judge, Thane. Based on Section 16 of the Code of Civil Procedure, and more particularly of clause (d) thereof, it was the pointed submission

of the learned counsel for the appellant, that only the District Judge, Thane has the jurisdiction to entertain an arbitral dispute, arising between the rival parties to the present appeal.

8. In order to further support his contention, that the District Judge, Thane alone would have jurisdiction in the matter, learned counsel for the appellant, also placed emphatic reliance on Section 20 of the Code of Civil Procedure which is being reproduced hereunder:

"20. Other suits to be instituted where defendants reside or cause of action arises.—Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction —

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry or business, or personally work for gain, as aforesaid, acquiesce in such institution ; or

(c) the cause of action, wholly or in part, arises.

Explanation .—A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Illustrations

(a) A is a tradesman in Calcutta, B carries on business in

Delhi. B , by his agent in Calcutta, buys goods of A and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen or in Delhi, where B carries on business.

(b) A resides at Simla, B at Calcutta and C at Delhi, A, B and C being together at Benaras, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Benaras, where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Delhi, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court."

Relying on the above provision, it was asserted, that a reading of Section 20 of the Code of Civil Procedure shows, that a preference has been postulated for certain provisions including Section 16 of the Code of Civil Procedure, which was evident from the opening words of Section 20 of the Code of Civil Procedure, which clearly denoted, that the issue of jurisdiction expressed in Section 20 of the Code of Civil Procedure, would be subject to the overriding effect in the matter of jurisdiction, expressed in the provisions preceding Section 20 (i.e. including Section 16).

9. Learned counsel for the respondent-Atlanta Limited, however, strongly opposed the submissions advanced at the hands of the learned counsel for the appellant, on the issue of jurisdiction. In this behalf, learned counsel for the respondent invited our attention to the reply affidavit filed on behalf of the State of Maharashtra, to Miscellaneous Civil Application No.162 of 2012 (filed by Atlanta Limited before the High Court), para 8 of the reply affidavit which was pointedly brought to our notice is being extracted hereunder :

"8. In fact it is an admitted position and common ground

that both; this Hon'ble Court and the District Court at Thane have jurisdiction in respect of the subject-matter in issue. Peculiarly this Hon'ble Court falls within the definition of the term "Court" under Section 2(e) of the Arbitration Act by virtue of being a High Court in the Mumbai District having Original Jurisdiction, and on the other hand the District Court at Thane being the Principal Civil Court of original jurisdiction in the Thane District also falls within the same definition."

(emphasis is ours)

In view of the stand adopted in writing by the appellants, in response Miscellaneous Civil Application no. 162 of 2012, it was sought to be asserted, that the appellants had no right to raise the issue of jurisdiction before this Court.

10. Despite the objection noticed in the aforegoing paragraphs, it was the vehement contention of the learned counsel for the respondent, that the High Court and not the District Judge, Thane, had the jurisdiction to adjudicate the controversy raised by the rival parties with reference to the award of the arbitral tribunal dated 12.5.2012. In order to make good the aforesaid submission, it was asserted, that the contractual agreement dated 12.7.2000, as also, the supplementary agreement dated 11.5.2005, were executed at Mumbai. Additionally, it was submitted that the parties had mutually agreed, that the seat of arbitration in case of any disputes arising between the parties, would be at Mumbai. Relying on the aforesaid undisputed factual position, learned counsel for the respondent invited our attention to the determination rendered by this Court in Bharat Aluminium Company & Ors. vs. Kaiser Aluminium Technical Services Inc & Ors. (2012) 9 SCC 559, and made pointed reliance to the following observations recorded therein:

"96. xxx xxx xxx xxx

We are of the opinion, the term "subject matter of the arbitration" cannot be confused with "*subject matter of the suit*". The term "*subject matter*" in Section 2(1)(e) is confined to Part I. It has a reference and connection with the process of dispute resolution. Its purpose is to identify the courts having supervisory control over the arbitration proceedings. Hence, it refers to a court which would essentially be a court of the seat of the arbitration process. In our opinion, the provision in Section 2(1)(e) has to be construed keeping in view the provisions in Section 20 which give recognition to party autonomy. Accepting the narrow construction as projected by the Learned Counsel for the Appellants would, in fact, render Section 20 nugatory. In our view, the legislature has intentionally given jurisdiction to two courts i.e. the court which would have jurisdiction where the cause of action is located and the courts where the arbitration takes place. This was necessary as on many occasions the agreement may provide for a seat of arbitration at a place which would be neutral to both the parties. Therefore, the courts where the arbitration takes place would be required to exercise supervisory control over the arbitral process. For example, if the arbitration is held in Delhi, where neither of the parties are from Delhi, (Delhi having been chosen as a neutral place as between a party from Mumbai and the other from Kolkata) and the tribunal sitting in Delhi passes an interim order Under Section 17 of the Arbitration Act, 1996, the appeal against such an interim order under Section 37 must lie to the Courts of Delhi being the Courts having supervisory jurisdiction over the arbitration proceedings and the tribunal. This would be irrespective of the fact that the obligations to be performed under the contract were to be performed either at Mumbai or at Kolkata, and only arbitration is to take place in Delhi. In such circumstances, both the Courts would have jurisdiction, i.e., the Court within whose jurisdiction the subject matter of the suit is situated and the courts within

the jurisdiction of which the dispute resolution, i.e., arbitration is located.

97. The definition of Section 2(1)(e) includes "*subject matter of the arbitration*" to give jurisdiction to the courts where the arbitration takes place, which otherwise would not exist. On the other hand, Section 47 which is in Part II of the Arbitration Act, 1996 dealing with enforcement of certain foreign awards has defined the term "*court*" as a court having jurisdiction *over the subject-matter of the award*. This has a clear reference to a court within whose jurisdiction the asset/person is located, against which/whom the enforcement of the international arbitral award is sought. The provisions contained in Section 2(1)(e) being purely jurisdictional in nature can have no relevance to the question whether Part I applies to arbitrations which take place outside India.

98. We now come to Section 20, which is as under:

"20. Place of arbitration—(1) The parties are free to agree on the place of arbitration.

(2) Failing any agreement referred to in Sub-section (1), the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding Sub-section (1) or Sub-section (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of documents, good or other property."

A plain reading of Section 20 leaves no room for doubt that where the place of arbitration is in India, the parties are free to agree to any "place" or "seat" within India, be it Delhi, Mumbai etc. In the absence of the parties'

agreement thereto, Section 20(2) authorizes the tribunal to determine the place/seat of such arbitration. Section 20(3) enables the tribunal to meet at any place for conducting hearings at a place of convenience in matters such as consultations among its members for hearing witnesses, experts or the parties."

(emphasis is ours)

11. We have heard learned counsel for the parties.

12. We have recorded hereinabove the foundation, on the basis whereof, the present controversy was adjudicated before the High Court. As noticed above, the challenge to the impugned order passed by the High Court, is based on the question of jurisdiction. While the learned counsel for the appellants has placed reliance on Section 2(1)(e) of the Arbitration Act read with the provisions of Code of Civil Procedure to contend, that the District Judge, Thane, alone would have the jurisdiction in the matter; the contention raised on behalf of the respondent is, that the High Court alone in exercise of its "ordinary original civil jurisdiction", has the jurisdiction to determine the controversy arising out of the impugned award dated 12.5.2012.

13. In our view, it is not open to the appellants to advance such submission before this Court. Firstly, because the appellants had in paragraph 8 of the reply affidavit filed before the High Court, clearly acknowledged the legal position, that both the High Court as also the District Judge, Thane, in so far as the present controversy is concerned, fall within the definition of the term "Court" under Section 2(1)(e) of the Arbitration Act. And secondly, because the impugned order passed by the High Court expressly notices in paragraph 10, that it was admitted by the rival parties before the High Court, that the High Court on the original side, as also the District Judge, Thane, had the jurisdiction in respect of the subject matter. Relevant part of para 10 of the impugned judgment of the High Court is being

extracted hereunder:-

"10. Mr. Vashi, learned counsel appearing on behalf of the Petitioner submitted that in the Affidavit-in-Reply which has been filed in this petition, it is admitted by the Respondents that the place of arbitration in terms of the arbitration clause in the contract was Mumbai. It is also admitted that both, this Court on the Original Side and the District Court at Thane have jurisdiction in respect of the subject matter in issue."

(emphasis is ours)

It was therefore not open to the appellants to canvass before this Court that the High Court of Bombay in exercise of its "ordinary original civil jurisdiction" could not adjudicate upon the present controversy, on account of lack of jurisdiction. We shall therefore proceed in the first instance, on the premise that both the courts referred to above had jurisdiction in the matter. We shall independently record our reasons for the same, while dealing with the submissions advanced before us. We have chosen to do so, because we are of the view, that an important jurisdictional issue has been raised, which needs to be settled, one way or the other. We shall therefore, decide the controversy on merits, irrespective of the position expressed by the appellant, on the issue of jurisdiction.

14. During the course of hearing before us, learned counsel for the appellant had highlighted for our consideration, the factual/legal controversy which was agitated by the rival parties before the High Court. In this behalf it was further pointed out, firstly, that the respondent's case before the High Court was, that since the arbitral tribunal had its seat at Mumbai, and the works contract was executed at Mumbai, the original side of the High Court of Bombay was competent to entertain the controversy. On the other hand, the appellants before the High Court had pointed out, that since the works contract relating to the construction and maintenance of the Mumbra byepass on

the Mumbai-Pune road (located on national highway no. 4), and the toll collection site were situated within Thane District, the District Judge, Thane, was the "more suitable" court for determining the controversies raised by the rival parties. Secondly, it was pointed out, that before the High Court an application under Section 24 of the Code of Civil Procedure was filed in the matter pending before the High Court, for transfer of proceedings filed by the respondents. It was submitted, that through the above application, it was not open to the High Court to have transferred the proceedings pending before the District Judge, Thane. It was further pointed out, that before the High Court the appellants had orally submitted, that if the High Court was inclined to invoke its jurisdiction under Section 24 of the Code of Civil Procedure, the proceedings filed by the respondent before the High Court should have been transferred to the District Judge, Thane, and not the other way around. According to the learned counsel, the instant submission has been duly noticed in the impugned judgment. Lastly, it was contended, that Section 24 of the Code of Civil Procedure could not be invoked in a petition filed under Section 34 of the Arbitration Act, and therefore, Section 24 of the Code of Civil Procedure ought not to have been relied upon by the High Court for transferring the proceedings from the Court of District Judge, Thane, to the High Court of Bombay.

15. The following submissions were advanced before us. Firstly, considering clause (c) of the operative part of the award, according to learned counsel it was clear, that enforcement of such a clause in the award was site-specific, since Mumbra byepass is located on the Mumbai-Pune road (on national highway no. 4) and falls in Thane District, the District Judge, Thane, ought to be "natural choice" for consideration of the issues advanced by the appellants, as also the respondent. Secondly, according to the learned counsel for the appellants, the definition of the term "Court" expressed in Section 2(1)(e) of the Arbitration Act uses the expression "subject matter" and not "cause of action". While "cause of action" can be referable

to places where the works contract is executed, or where arbitration proceedings were conducted; the term "subject matter" used in Section 2(1)(e) of the Arbitration Act is only referable to the subject matter of the works contract, with respect to which the dispute is raised (with respect to which, there was a direction for extension of the concession period, under the award). Accordingly it was submitted, that although the High Court may also have jurisdiction, the District Court Thane is "more natural", "more suitable" and "more appropriate" for the adjudication of the claims, raised by the rival parties. Thirdly it was contended, that the original side of the High Court of Bombay, vis-à-vis, the District Judge, Thane, is a "superior" Court. According to the learned counsel for the appellants, even if it is acknowledged that the "ordinary original civil side" of the High Court of Bombay as also the "principal Civil Court of original jurisdiction" for the District Thane i.e., the District Judge, Thane, both have jurisdiction in the matter, there were many attributes on the basis of which it could be clearly established, that the original side of the High Court of Bombay, is superior to the Court of the District Judge, Thane. In this behalf it was sought to be pointed out, that the High Court could take cognizance of contempt of its own orders, and furthermore, a judgment delivered by the original side of a High Court operated as a binding precedent. It was submitted, that the District Court, Thane, does not have any such attributes. In the above view of the matter it was submitted, that reliance could be placed on Section 15 of the Code of Civil Procedure, to determine which of the two courts should adjudicate upon the matter. Section 15 is being extracted hereunder:-

"**15. Court in which suits to be instituted-**

Every suit shall be instituted in the Court of the lowest grade competent to try it."

Based on Section 15 extracted above it was submitted, that in case jurisdiction could be exercised by two Courts, it was imperative to choose the Court of the lowest grade

competent to try the suit. Accordingly, it was contended, that from amongst the original side of the High Court of Bombay and the District Court, Thane, in terms of the mandate of Section 15 of the Code of Civil Procedure, the District Court, Thane, being the Court lower in grade than the original side of the High Court of Bombay, ought to have been chosen to adjudicate upon the matters. It was also pointed out, that the choice of District Court, Thane, would even otherwise be beneficial to the rival parties on account of the fact, that the determination by the said Court, would be open for re-examination before the High Court of Bombay, which exercises supervisory jurisdiction over it.

16. Additionally, it was contended, that the choice would fall in favour of the District Judge, Thane, even on account of the likely expeditious disposal of the matter by the District Judge, Thane, in comparison with the "original side of the High Court of Bombay". In this behalf it was submitted, that there were only 42 petitions filed under Section 34 of the Arbitration Act before the District Judge, Thane, during the entire year 2012, whereas, there were 1317 petitions filed under Section 34 before the High Court of Bombay, under its "ordinary original civil jurisdiction", during the year 2012. Referring to the preceding three years, namely, 2009, 2010 and 2011 it was submitted, whereas a very few petitions were filed under Section 34 of the Arbitration Act before the District Judge, Thane, as many as, 1033, 1443 and 1081 petitions respectively (were filed under Section 34 of the Arbitration Act) were filed during the three years before the High Court of Bombay. Based on the above factual position it was submitted, that it could be expected that the District Judge, Thane, would dispose of the matters under reference within a short period of about five years, whereas it was likely that the disposal of the said matters will take more than two decades if the matters are required to be adjudicated by the original side of the High Court of Bombay. On the instant aspect of the matter also, referring to available data it was submitted, that it takes more than 20

years for a suit to be heard and decided by the High Court of Bombay under its "ordinary original civil jurisdiction", whereas, it does not take more than 5 years for a suit filed before the District Judge, Thane, to be disposed of. Accordingly it was contended, that keeping in view the burden of litigation, the "natural choice" for adjudication of the matters under reference ought to be the District Judge, Thane, rather than the High Court of Bombay.

17. Besides the above submissions, no other contention was advanced before us.

18. We shall first endeavour to address the submissions advanced at the hands of the learned counsel for the appellants, with reference to Section 15 of the Code of Civil Procedure. In terms of the mandate of Section 15 of the Code of Civil Procedure, the initiation of action within the jurisdiction of Greater Mumbai had to be "in the Court of lowest grade competent to try it". We are, however, satisfied, that within the area of jurisdiction of Principal District Judge, Greater Mumbai, only the High Court of Bombay was exclusively the competent Court (under its "ordinary original civil jurisdiction") to adjudicate upon the matter. The above conclusion is imperative from the definition of the term "Court" in Section 2(1)(e) of the Arbitration Act. Firstly, the very inclusion of the High Court "in exercise of its ordinary original civil jurisdiction, within the definition of the term "Court", will be rendered nugatory, if the above conclusion was not to be accepted. Because, the "principal Civil Court of original jurisdiction in a district" namely the District Judge concerned, being a court lower in grade than the High Court, the District Judge concerned would always exclude the High Court from adjudicating upon the matter. The submission advanced by the learned counsel for the appellant cannot therefore be accepted, also to ensure the inclusion of "the High Court in exercise of its ordinary original civil jurisdiction" is given its due meaning. Accordingly, the principle enshrined in Section 15 of the Code of Civil Procedure cannot be invoked whilst interpreting Section 2(1)(e) of the Arbitration Act. Secondly, the

provisions of the Arbitration Act, leave no room for any doubt, that it is the superior most court exercising original civil jurisdiction, which had been chosen to adjudicate disputes arising out of arbitration agreements, arbitral proceedings and arbitral awards. Undoubtedly, a "principal Civil Court of original jurisdiction in a district", is the superior most court exercising original civil jurisdiction in the district over which its jurisdiction extends. It is clear, that Section 2(1)(e) of the Arbitration Act having vested jurisdiction in the "principal Civil Court of original jurisdiction in a district", did not rest the choice of jurisdiction on courts subordinate to that of the District Judge. Likewise, "the High Court in exercise of its ordinary original jurisdiction", is the superior most court exercising original civil jurisdiction, within the ambit of its original civil jurisdiction. On the same analogy and for the same reasons, the choice of jurisdiction, will clearly fall in the realm of the High Court, wherever a High Court exercises "ordinary original civil jurisdiction". Under the Arbitration Act, therefore, the legislature has clearly expressed a legislative intent, different from the one expressed in Section 15 of the Code of Civil Procedure. The respondent had chosen to initiate proceedings within the area of Greater Mumbai, it could have done so only before the High Court of Bombay. There was no other court within the jurisdiction of Greater Mumbai, where the respondent could have raised their challenge. Consequently, we have no hesitation in concluding, that the respondent by initiating proceedings under Section 34 of the Arbitration Act, before the original side of the High Court of Bombay, had not violated the mandate of Section 2(1)(e) of the Arbitration Act. Thus viewed, we find the submission advanced at the hands of the learned counsel for the appellants, by placing reliance on Section 15 of the Code of Civil Procedure, wholly irrelevant.

19. Reliance placed on Section 16 of the Code of Civil Procedure, by the learned counsel for the appellants, for the ouster the jurisdiction of the High Court of Bombay is equally misplaced. All that needs to be stated while dealing with the

aforesaid contention is, that the controversy between the parties does not pertain to recovery of immoveable property, partition of immoveable property, foreclosure sale or redemption of immoveable property, determination of any other right to immoveable property, for determination of compensation for wrong to immoveable property and/or for the recovery of moveable property under distraint or attachment. It is only in the aforesaid exigencies that Section 16 of the Code of Civil Procedure could have been invoked. The construction of the Mumbra byepass, would only entitle Atlanta Limited to payments contemplated under the contract dated 12.7.2007, and no more. A brief description of the reliefs sought by the rival parties, in the separate proceedings initiated by them, does not indicate that either of the parties were claiming any right to or interest in any immovable property. Since none of the above exigencies contemplated in Section 16 prevail in the dispute between the rival parties, reliance on Section 16 of the Code of Civil Procedure is clearly misplaced.

20. Insofar as the jurisdiction within the District Thane, is concerned, the "principal Civil Court of original jurisdiction" is the court of the District Judge, Thane. Consequently, within the territorial jurisdiction of District Thane, in terms of Section 2(1)(e) of the Arbitration Act, the challenge could have only been raised before the "principal Civil Court of original jurisdiction" of the district, namely, before the District Judge, Thane. There was no other court within the jurisdiction of District Thane, wherein the instant matters could have been agitated. Therefore, the appellants having chosen to initiate the proceedings before the District Judge, Thane, i.e., in respect of a cause of action falling in the territorial jurisdiction of the District Thane, they too must be deemed to have chosen the rightful court i.e., the District Judge, Thane.

21. Shorn of the aforesaid determination, our only understanding of the submission advanced at the hands of the learned counsel for the appellants would be, that as a matter of "natural choice", as a matter of "suitable choice", as also, as

a matter of "more appropriate choice", the controversies raised by the rival parties ought to be collectively determined by the District Court, Thane, and not by the High Court of Bombay (in exercise of its "ordinary original civil jurisdiction"). In order to supplement the aforesaid contention, learned counsel for the appellant had depicted the quantum of filing of similar petitions before the High Court, as also, before the District Court Thane, and the time likely to be taken for the disposal of such matters by the Courts under reference. There is no statutory provision to our knowledge, wherein the determination of jurisdiction, is based on such considerations. No such provision was brought to our notice by learned counsel. The question of jurisdiction, is a pure question of law, and needs to be adjudicated only on the basis of statutory provisions. In view of the deliberations recorded hereinabove, it may not be wrong to observe, that the submissions advanced at the behest of the learned counsel for the appellants on the issue of jurisdiction, are submissions without reference to any principles known to law. To the credit of the learned counsel for the appellants, it may however be observed, that the above considerations may constitute a relevant basis for transfer of proceedings from one court to the other. Before the above considerations can be examined, there would be one pre-condition, namely, that the above considerations could be applied for transfer of a case, where statutory provisions (express or implied) do not provide for the exercise of a definite choice. As a matter of expressing ourselves clearly, it may be stated, that inference of legislative intent from statutory provisions, would exclude from the realm of consideration, submissions of the nature relied upon by the learned counsel for the appellant.

22. The first issue which needs to be examined is, whether a challenge to an arbitration award (or arbitral agreement, or arbitral proceeding), wherein jurisdiction lies with more than one court, can be permitted to proceed simultaneously in two different courts**.** For the above determination, it is necessary

to make a reference to Section 42 of the Arbitration Act. The aforesaid provision accordingly is being extracted hereunder:

> **"42. Jurisdiction -** Notwithstanding anything contained elsewhere in this Part or in any other law for the time being in force, where with respect to an arbitration agreement any application under this Part has been made in a Court, that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of that agreement and the arbitral proceedings shall be made in that Court and in no other Court."

A perusal of Section 42 of Arbitration Act reveals a clear acknowledgment by the legislature, that the jurisdiction for raising a challenge to the same arbitration agreement, arbitral proceeding or arbitral award, could most definitely arise in more than one court simultaneously. To remedy such a situation Section 42 of the Arbitration Act mandates, that the court wherein the first application arising out of such a challenge is filed, shall alone have the jurisdiction to adjudicate upon the dispute(s), which are filed later in point of time. The above legislative intent must also be understood as mandating, that disputes arising out of the same arbitration agreement, arbitral proceeding or arbitral award, would not be adjudicated upon by more than one court, even though jurisdiction to raise such disputes may legitimately lie before two or more courts.

23. Ordinarily Section 42 of the Arbitration Act would be sufficient to resolve such a controversy. For the determination of the present controversy, however, reliance cannot be placed on Section 42 of the Arbitration Act, because the State of Maharashtra had moved Miscellaneous Civil Application No. 229 and Miscellaneous Civil Application No 230 of 2012 under Section 34 of the Arbitration Act before the District Judge, Thane, on the same day as Atlanta Limited had filed Arbitration Petition No. 1158 of 2012 before the High Court. In this behalf it may be mentioned, that both the parties had approached the courts referred to hereinabove on 7.8.2012. The answer to the

jurisdictional question, arising out in the facts and circumstances of this case, will therefore not emerge from Section 42 of the Arbitration Act. All the same it is imperative for us to give effect to the legislative intent recorded under Section 42 aforementioned, namely, that all disputes arising out of a common arbitration agreement, arbitral proceeding or arbitral award, would lie only before one court.

24. The very fact that the appellants before this Court, have chosen to initiate proceedings against the arbitral award before "principal Civil Court of original jurisdiction in a district" i.e., before the District Judge, Thane, and the respondent before this Court, has raised a challenge to the same arbitral award before the "ordinary original civil side" of the High Court of Bombay, clearly demonstrates, that the underlying principle contained in Section 42 of the Arbitration Act would stand breached, if two different courts would adjudicate upon disputes arising out of the same arbitral award. There can be no doubt, that adjudication of a controversy by different courts, can easily give rise to different conclusions and determinations. Therefore, logic and common sense also require, the determination of all such matters, by one jurisdictional court alone. In the present case, the complication in the matter has arisen only because, the proceedings initiated by the appellants before the District Judge, Thane, and proceedings initiated by the respondent on the "ordinary original civil side" of the High Court of Bombay, were filed on the same day (i.e. on 7.8.2012). Therefore, Section 42 of the Arbitration Act, cannot be of any assistance in the matter in hand.

25. All the same, it is imperative for us to determine, which of the above two courts which have been approached by the rival parties, should be the one, to adjudicate upon the disputes raised. For an answer to the controversy in hand, recourse ought to be made first of all to the provisions of the Arbitration Act. On the failure to reach a positive conclusion, other principles of law, may have to be relied upon. Having given out thoughtful

consideration to the issue in hand, we are of the view, that the rightful answer can be determined from Section 2(1)(e) of the Arbitration Act, which defines the term "Court". We shall endeavour to determine this issue, by examining how litigation is divided between a High Court exercising "ordinary original civil jurisdiction", and the "principal civil court of original jurisdiction" in a district. What needs to be kept in mind is, that the High Court of Bombay is vested with "ordinary original civil jurisdiction" over the same area, over which jurisdiction is also exercised by the "principal Civil Court of original jurisdiction" for the District of Greater Mumbai (i.e. the Principal District Judge, Greater Mumbai). Jurisdiction of the above two courts on the "ordinary original civil side" is over the area of Greater Mumbai. Whilst examining the submissions advanced by the learned counsel for the appellant under Section 15 of the Code of Civil Procedure, we have already concluded, that in the above situation, jurisdiction will vest with the High Court and not with the District Judge. The aforesaid choice of jurisdiction has been expressed in Section 2(1)(e) of the Arbitration Act, without any fetters whatsoever. It is not the case of the appellants before us, that because of pecuniary dimensions, and/or any other consideration(s), jurisdiction in the two alternatives mentioned above, would lie with the Principal District Judge, Greater Mumbai. Under the scheme of the provisions of the Arbitration Act therefore, if the choice is between the High Court (in exercise of its "ordinary original civil jurisdiction") on the one hand, and the "principal civil court of original jurisdiction" in the District i.e. the District Judge on the other; Section 2(1)(e) of the Arbitration Act has made the choice in favour of the High Court. This in fact impliedly discloses a legislative intent. To our mind therefore, it makes no difference, if the "principal civil court of original jurisdiction", is in the same district over which the High Court exercises original jurisdiction, or some other district. In case an option is to be exercised between a High Court (under its "ordinary original civil jurisdiction") on the one hand, and a District Court (as "principal Civil Court of original

jurisdiction") on the other, the choice under the Arbitration Act has to be exercised in favour of the High Court.

26. In the present controversy also, we must choose the jurisdiction of one of two courts i.e. either the "ordinary original civil jurisdiction" of the High Court of Bombay; or the "principal civil court of original jurisdiction" in District Thane i.e. the District Judge, Thane. In view of the inferences drawn by us, based on the legislative intent emerging out of Section 2(1)(e) of the Arbitration Act, we are of the considered view, that legislative choice is clearly in favour of the High Court. We are, therefore of the view, that the matters in hand would have to be adjudicated upon by the High Court of Bombay alone.

27. In view of the conclusions drawn by us above, we uphold the order passed by the High Court requiring the matters to be adjudicated on the "ordinary original civil side" by the High Court of Bombay. The reasons recorded by the High Court, for the above conclusion, were different. The reasons for our consideration have already been notice above. In view of the above, we dispose of the instant appeal, with a direction that Arbitration Petition No. 1158 of 2012 filed by the Atlanta Limited (the respondent herein) before the High Court of Judicature at Bombay, and Miscellaneous Application No. 229 of 2012 and Miscellaneous Application No. 230 of 2012 filed by the appellants before the District Judge, Thane, shall be heard and disposed of by the High Court of Bombay. We accordingly hereby direct the District Judge, Thane, to transfer the files of Miscellaneous Application No. 229 of 2012 and Miscellaneous Application No. 230 of 2012 to the High Court, for disposal in accordance with law.

D.G. Appeal disposed of.

RAM KISHAN

v.

SH. TARUN BAJAJ & ORS.

Contempt Petition No. 336 of 2013

IN

Civil Appeal No. 4985 of 2012

JANUARY 17, 2014

[DR. B.S. CHAUHAN AND J. CHELAMESWAR, JJ.]

Contempt of Court

Disobedience of court's orders – Court directing reinstatement with consequential benefits as also back wages – Contempt petition alleging non-compliance of order as petitioner was denied benefit of re-designated post on a higher pay scale after his compulsory retirement – Held: Contempt proceedings are quasi-criminal in nature and, therefore, standard of proof required is beyond all reasonable doubt — If two interpretations are possible, and if the action is not contumacious, a contempt proceeding would not be maintainable – In order to punish a contemnor, it has to be established that disobedience of the order is 'wilful' – Even if there is a disobedience of an order, but such disobedience is the result of some compelling circumstances under which it was not possible for alleged contemnor to comply with the order, he cannot be punished – In the absence of any provision, the statutory authority cannot be asked to pay the salary to two persons for one post, particularly in view of the fact that the person appointed to the post had never been a party to the lis, nor her re-designation/promotion had ever been challenged — No case is made out to initiate contempt proceedings against respondents.

WORDS AND PHRASES:

Word 'wilful' – Connotation of in the content of proceedings for contempt of court.

In a writ petition filed by the applicant challenging his compulsory retirement, the single Judge of the High Court directed his reinstatement with all consequential benefits, but without back wages for the period he was out of job. In the appeal filed by the writ petitioner, the Supreme Court allowed him back wages. The Department denied him the benefit of re-designated pay/ post and the pay-scale of a higher post wherein after his compulsory retirement another person had been appointed. Aggrieved, the appellant filed the contempt petition alleging disobedience of the Court's order.

Dismissing the petition, the Court

HELD: 1.1. Contempt jurisdiction conferred onto the law courts power to punish an offender for his wilful disobedience/contumacious conduct or obstruction to the majesty of law. Contempt proceedings are quasi-criminal in nature, and therefore, standard of proof required in these proceedings is beyond all reasonable doubt. It would rather be hazardous to impose sentence for contempt on the authorities in exercise of contempt jurisdiction on mere probabilities. [para 9] [545-B-C, E]

V.G. Nigam & Ors. v. Kedar Nath Gupta & Anr., **AIR 1992 SC 2153;** *Chhotu Ram v. Urvashi Gulati & Anr.,* **AIR 2001 SC 3468;** *Anil Ratan Sarkar & Ors. v. Hirak Ghosh & Ors.* **2002 (2) SCR 346 = AIR 2002 SC 1405;** *Bank of Baroda v. Sadruddin Hasan Daya & Anr*. **2003 (6) Suppl. SCR 764 = AIR 2004 SC 942;** *Sahdeo alias Sahdeo Singh v. State of U.P*. & Ors. **2010 (2) SCR 1086 = (2010) 3 SCC 705; and** *National Fertilizers Ltd. v. Tuncay Alankus & Anr*. **AIR 2013 SC 1299 - referred to.**

1.2. In order to punish a contemnor, it has to be established that disobedience of the order is 'wilful'. The act has to be done with a "bad purpose or without justifiable excuse or stubbornly, obstinately or perversely". Even if there is a disobedience of an order, but such disobedience is the result of some compelling circumstances under which it was not possible for the contemnor to comply with the order, the contemnor cannot be punished. "Committal or sequestration will not be ordered unless contempt involves a degree of default or misconduct". [para 10] [545-G; 546-B, C-D]

S. Sundaram Pillai etc. v V.R. Pattabiraman **1985 (2) SCR 643 = AIR 1985 SC 582;** *Rakapalli Raja Rama Gopala Rao v. Naragani Govinda Seharara & Anr*. **1989 (1) Suppl. SCR 115 = AIR 1989 SC 2185;** *Niaz Mohammad & Ors. etc.etc. v. State of Haryana & Ors.* **1994 (3) Suppl. SCR 720 = AIR 1995 SC 308;** *Chordia Automobiles v. S. Moosa* **2000 (2) SCR 13 = AIR 2000 SC 1880;** *M/s. Ashok Paper Kamgar Union & Ors. v. Dharam Godha & Ors.* **AIR 2004 SC 105;** *State of Orissa & Ors. v. Md. Illiyas,* **2005 (5) Suppl. SCR 395 = AIR 2006 SC 258; and** *Uniworth Textiles Ltd. v. CCE, Raipur* **2013 (3) SCR 27 = (2013) 9 SCC 753;** *Lt. Col. K.D. Gupta v. Union of India & Anr*., **AIR 1989 SC 2071;** *Mrityunjoy Das & Anr. v. Sayed Hasibur Rahaman & Ors.* **2001 (2) SCR 471 = AIR 2001 SC 1293- relied on.**

1.3. It is well settled principle of law that if two interpretations are possible, and if the action is not contumacious, a contempt proceeding would not be maintainable. The effect and purport of the order is to be taken into consideration and the same must be read in its entirety. Therefore, the element of willingness is an indispensable requirement to bring home the charge within the meaning of the Act. [para 13] [547-C-D]

Sushila Raje Holkar v. Anil Kak (Retd.), **AIR 2008**

(Supp-2) SC 1837; and *Three Cheers Entertainment Pvt. Ltd. & Ors. v. C.E.S.C. Ltd.*, **AIR 2009 SC 735 - relied on.**

1.4. In the instant case, in the absence of any provision, the statutory authority cannot be asked to pay the salary to two persons for one post, particularly, in view of the fact that the person appointed to the post had never been a party to the lis, nor her re-designation/ promotion had ever been challenged by the applicant or someone else. In such a fact-situation, leaving the issue of entitlement of the applicant, this Court is of the considered opinion that no case is made out to initiate the contempt proceedings against the respondents. [para14-15] [547-E-F, G]

Case Law Reference:

AIR 1992 SC 2153	**referred to**	**para 9**
AIR 2001 SC 3468	**referred to**	**para 9**
2002 (2) SCR 346	**referred to**	**para 9**
2003 (6) Suppl. SCR 764	**referred to**	**para 9**
2010 (2) SCR 1086	**referred to**	**para 9**
AIR 2013 SC 1299	**referred to**	**para 9**
1985 (2) SCR 643	**relied on**	**para 10**
1989 (1) Suppl. SCR 115	**relied on**	**para 10**
1994 (3) Suppl. SCR 720	**relied on**	**para 10**
2000 (2) SCR 13	**relied on**	**para 10**
AIR 2004 SC 105	**relied on**	**para 10**
2005 (5) Suppl. SCR 395	**relied on**	**para 10**
2013 (3) SCR 27	**relied on**	**para 10**

AIR 1989 SC 2071	**relied on**	**para 11**
2001 (2) SCR 471	**relied on**	**para 12**
AIR 2008 (Supp-2) SC 1837	**relied on**	**para 13**
AIR 2009 SC 735	**relied on**	**para 13**

CIVIL ORIGINAL JURISDICTION : Contempt Petition (Civil) No. 336 of 2013.

IN

CIVIL Appeal No. 4985 of 2012

From the Judgment and Order dated 10.08.2009 of the High Court of Punjab & Haryana at Chandigarh in Letters Patent Appeal No. 542 of 2009.

Rajat, Vikas Mehta for the Appellant.

Narender Hooda, AAG, S.S. Hooda, Kamal Mohan Gupta for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This Contempt Petition has been filed by the applicant that the respondents, who are alleged contemnors herein, have wilfully violated the judgment and order dated 5.7.2012 passed by this Court in C.A. No. 4985 of 2012 as the respondents failed to pay all consequential benefits of service as directed and thus, the respondents should be dealt with under the provisions of Contempt of Courts Act, 1971 (hereinafter referred to as 'the Act') and further, to direct the contemnors to implement the order in its true spirit and fix his pension according to the post of Joint Secretary (Legal) and provide all its retirement benefits.

2. Facts and circumstances of this petition are that the applicant while working as an Under Secretary (Legal), Dakshin Haryana Bijli Vitran Nigam Ltd. (hereinafter referred to as 'Nigam') was compulsorily retired vide an order dated 19.11.2003. Aggrieved, he challenged the said order by filing

Writ Petition No. 3954 of 2004 and during its pendency, he reached the age of superannuation on 28.2.2006. The said writ petition was allowed by the learned Single Judge vide judgment and order dated 10.2.2009 quashing the impugned order dated 19.11.2003 but did not award the back wages to the applicant for the period he was out of job. The Nigam filed LPA No. 646 of 2009 challenging the order of the learned Single Judge. The applicant also filed LPA No. 542 of 2009 for claiming the arrears of pay. The LPA of Nigam was dismissed affirming the judgment and order of the Single Judge vide judgment and order dated 24.7.2009 and has attained finality. The appeal filed by the applicant was also dismissed vide judgment and order dated 10.8.2009.

3. Aggrieved, the applicant challenged the judgment and order dated 10.8.2009 of the Division Bench by filing the Special Leave Petition which was entertained as C.A. No. 4985 of 2012, which was disposed of by this Court vide judgment and order dated 5.7.2012 directing that the applicant shall be entitled to the back wages for the period during which he was out of job alongwith reinstatement. The applicant has not been given the benefit of re-designated pay/post and the pay-scale of a higher post wherein after the compulsory retirement of the applicant, one Smt. Pooman Bhasin had been appointed w.e.f. 16.3.2005 and has been extended the benefit which has been allegedly denied to the applicant.

Hence, this Contempt Petition.

4. Shri Vikas Mehta, learned counsel appearing on behalf of the applicant, has submitted that as the learned Single Judge of the High Court had allowed the writ petition filed by the applicant quashing the order of compulsory retirement with all consequential benefits except back wages and this Court allowed the appeal of the applicant and has given back wages also. The conjoint reading of both the orders tantamount to grant of all possible/permissible benefits to the applicant for his service. As the applicant was senior to Smt. Poonam Bhasin, he was entitled to the re-designated post as well as the salary

for the post of Joint Secretary (Legal), which has been denied by the respondents. Therefore, the applicant is entitled for the claim and the respondents should be prosecuted and punished for disobedience of the said judgments and orders.

5. On the contrary, Shri Narender Hooda, learned AAG appearing on behalf of the respondents, has vehemently opposed the application contending that there is neither any direction of any court to give benefit of the revised post to the applicant, nor his candidature has ever been considered for that post. The State authority cannot be forced to pay the salary to two persons for one post. The applicant has never challenged the re-designation of Smt. Poonam Bhasin. Thus, there is no wilful disobedience of any order passed by this Court. The application for initiating the contempt proceedings is totally misconceived and is liable to be rejected.

6. We have considered the rival contentions advanced by learned counsel for the parties and perused the records.

7. The judgment and order of the learned Single Judge granting the relief to the applicant reads:

> "Resultantly, this writ petition is allowed, the order dated 19.11.2003 (Annexure P-27) is set aside and the petitioner is ordered to be reinstated into service **with all consequential benefits**. It is, however, clarified that the petitioner will not be entitled to wages for the period he was out of job."
>
> (Emphasis added)

The judgment and order of this Court dated 5.7.2012 in Civil Appeal No. 4985/2012 reads:

> "Accordingly, we allow the appeal and modify the order of the learned Single Judge, as also of the Division Bench, by directing that the appellant will also be entitled to back-wages for the period during the termination of his services and reinstatement in terms of the High Court's order."

8. Both the judgments referred to hereinabove speak of

back wages and the judgment of the learned Single Judge in the High Court referred to **all consequential benefits**. Therefore, the question does arise as to whether such an order would also mean that the applicant could claim post revision and benefits of the higher post without being considered for the said post.

9. Contempt jurisdiction conferred onto the law courts power to punish an offender for his wilful disobedience/ contumacious conduct or obstruction to the majesty of law, for the reason that respect and authority commanded by the courts of law are the greatest guarantee to an ordinary citizens that his rights shall be protected and the entire democratic fabric of the society will crumble down if the respect of the judiciary is undermined. Undoubtedly, the contempt jurisdiction is a powerful weapon in the hands of the courts of law but that by itself operates as a string of caution and unless, thus, otherwise satisfied beyond reasonable doubt, it would neither fair nor reasonable for the law courts to exercise jurisdiction under the Act. The proceedings are quasi- criminal in nature, and therefore, standard of proof required in these proceedings is beyond all reasonable doubt. It would rather be hazardous to impose sentence for contempt on the authorities in exercise of contempt jurisdiction on mere probabilities. (Vide: *V.G. Nigam & Ors. v. Kedar Nath Gupta & Anr.,* AIR 1992 SC 2153; *Chhotu Ram v. Urvashi Gulati & Anr.,* AIR 2001 SC 3468; *Anil Ratan Sarkar & Ors. v. Hirak Ghosh & Ors.,* AIR 2002 SC 1405; *Bank of Baroda v. Sadruddin Hasan Daya & Anr.,* AIR 2004 SC 942; *Sahdeo alias Sahdeo Singh v. State of U.P. & Ors.,* (2010) 3 SCC 705; and *National Fertilizers Ltd. v. Tuncay Alankus & Anr.,* AIR 2013 SC 1299).

10. Thus, in order to punish a contemnor, it has to be established that disobedience of the order is 'wilful'. The word 'wilful' introduces a mental element and hence, requires looking into the mind of person/contemnor by gauging his actions, which is an indication of one's state of mind. 'Wilful' means knowingly intentional, conscious, calculated and deliberate with full

knowledge of consequences flowing therefrom. It excludes casual, accidental, bonafide or unintentional acts or genuine inability. Wilful acts does not encompass involuntarily or negligent actions. The act has to be done with a "bad purpose or without justifiable excuse or stubbornly, obstinately or perversely". Wilful act is to be distinguished from an act done carelessly, thoughtlessly, heedlessly or inadvertently. It does not include any act done negligently or involuntarily. The deliberate conduct of a person means that he knows what he is doing and intends to do the same. Therefore, there has to be a calculated action with evil motive on his part. Even if there is a disobedience of an order, but such disobedience is the result of some compelling circumstances under which it was not possible for the contemnor to comply with the order, the contemnor cannot be punished. "Committal or sequestration will not be ordered unless contempt involves a degree of default or misconduct". (Vide: *S. Sundaram Pillai, etc. v. V.R. Pattabiraman;* AIR 1985 SC 582; *Rakapalli Raja Rama Gopala Rao v. Naragani Govinda Sehararao & Anr.,* AIR 1989 SC 2185; *Niaz Mohammad & Ors. etc.etc. v. State of Haryana & Ors.,* AIR 1995 SC 308; *Chordia Automobiles v. S. Moosa,* AIR 2000 SC 1880; *M/s. Ashok Paper Kamgar Union & Ors. v. Dharam Godha & Ors.,* AIR 2004 SC 105; *State of Orissa & Ors. v. Md. Illiyas,* AIR 2006 SC 258; and *Uniworth Textiles Ltd. v. CCE, Raipur,* (2013) 9 SCC 753).

11. In *Lt. Col. K.D. Gupta v. Union of India & Anr.,* AIR 1989 SC 2071, this Court dealt with a case wherein direction was issued to the Union of India to pay the amount of Rs. 4 lakhs to the applicant therein and release him from defence service. The said amount was paid to the applicant after deducting the income tax payable on the said amount. While dealing with the contempt application, this Court held that "withholding the amount cannot be held to be either malafide or was there any scope to impute that the respondents intended to violate the direction of this Court."

12. In *Mrityunjoy Das & Anr. v. Sayed Hasibur Rahaman*

& Ors., AIR 2001 SC 1293, the Court while dealing with the issue whether a doubt persisted as to the applicability of the order of this Court to complainants held that it would not give rise to a contempt petition. The court was dealing with a case wherein the statutory authorities had come to the conclusion that the order of this court was not applicable to the said complainants while dealing with the case under the provision of West Bengal Land Reforms Act, 1955.

13. It is well settled principle of law that if two interpretations are possible, and if the action is not contumacious, a contempt proceeding would not be maintainable. The effect and purport of the order is to be taken into consideration and the same must be read in its entirety. Therefore, the element of willingness is an indispensable requirement to bring home the charge within the meaning of the Act. (See: *Sushila Raje Holkar v. Anil Kak (Retd.),* AIR 2008 (Supp-2) SC 1837; and *Three Cheers Entertainment Pvt. Ltd. & Ors. v. C.E.S.C. Ltd.,* AIR 2009 SC 735).

14. In view of the aforesaid settled legal proposition, we have repeatedly asked the learned counsel appearing for the applicant under what circumstances this Court can ask the statutory authority to pay the salary to two persons for one post, particularly in view of the fact that Smt. Poonam Bhasin had never been a party to the lis, nor her re-designation/promotion had ever been challenged by the applicant or someone else. More so, learned counsel for the applicant could not point out the service rules applicable to the applicant to assess his eligibility etc.

15. In such a fact-situation, leaving the issue of entitlement of the applicant, we are of the considered opinion that no case is made out to initiate the contempt proceedings against the respondents. The petition is totally misconceived and devoid of merit, hence, it is dismissed. No order as to costs.

R.P. Petition dismissed.

STATE OF HARYANA & ORS.
v.
BHARTI TELETECH LTD.
(Civil Appeal No. 6791 of 2004)

JANUARY 20, 2014.

[H.L. DATTU, DIPAK MISRA AND S.A. BOBDE JJ.]

HARYANA GENERAL SALES TAX RULES, 1975:

r. 28-A (11) (a) (i) and (b) – Sales tax exemption allowed subject to assessee maintaining production for next five years on the average of preceding five years – Failure on part of assessee to comply with the condition – Held: Exemption being an exception has to be respected regard being had to its nature and purpose – Beneficiary unit having failed to fulfil the stipulation contained in r.28-A(11)(a)(i) and (b) is liable to pay full amount of tax benefit with interest.

s.28-A(11)(a)(i)(b) — Sales tax exemption – Held: Concept of exemption is required to be tested on a different anvil, for it grants freedom from liability — In the case at hand, it is 'unit' specific — Clubbing is not permissible — It amounts to violation of the conditions stipulated under sub-r. (11) (a)(i) of r. 28A and, therefore, the consequences have to follow.

The respondent -assessee was allowed sales tax exemption under r. 28A of the Haryana General Sales Tax Rules, 1975 for the period 13.12.1991 to 12.12.1998, subject to the condition that the industrial unit after availing of the benefit would continue its production at least for the next five years not below the level of average production for the preceding five years. After the expiry of the period of exemption, the Deputy Excise and Taxation Commissioner noticed that the respondent unit was not maintaining the level of production of the

preceding five years and, accordingly, initiated proceedings against it on the foundation that it had violated the condition stipulated under r. 28A (11) (a) (i) and was thereby liable to make full payment of tax exemption benefit already availed by it along with interest. The respondent-assessee stated that production of its another unit also required to be clubbed for the purpose of determining the level of production after 12.12.1998. The adjudicating authority rejected the said stand and ruled that the assessee, having failed to meet the production level, was liable to make full payment along with interest. The appeals of the assessee-respondent before the appellate authority as also the Sales Tax Tribunal were dismissed. However, the Division Bench of the High Court in the writ petition held in favour of the assessee.

In the appeal filed by the revenue, the question for consideration before the Court was: whether production of two different units can be combined together to meet the requirement of r. 28A(11).

Allowing the appeal, the Court

HELD: 1.1. The concept of exemption has been introduced for development of industrial activity and it is granted for a certain purpose to a unit for certain types of goods with certain conditions. The concept of exemption is required to be tested on a different anvil, for it grants freedom from liability. In the case at hand, it is 'unit' specific. [para 18] [562-H; 563-A-B]

Hansraj Gordhanadas v. H.H. Dave, Assistant Collector of Central Excise and Customs, Surat and others **1969 SCR 343 = AIR 1970 SC 755 – referred to.**

1.2. A statutory rule or an exemption notification which confers benefit to the assessee on certain

conditions should be liberally construed but the beneficiary should fall within the ambit of the rule or notification and further if there are conditions and violation thereof provided, then the concept of liberal construction would not arise. Exemption being an exception has to be respected regard being had to its nature and purpose. [Para 22] [564-E-G]

State of Haryana and others v. A.S. Fuels Private Limited and another **2008 (12) SCR 370 = (2008) 9 SCC 230 – relied on.**

Commissioner of Sales Tax v. Industrial Coal Enterprises **1999 (1) SCR 871 = (1999) 2 SCC 607, after referring to** *CIT v. Straw Board Mfg. Co. Ltd* **1989 (2) SCR 772 = (1989) Supp (2) SCC 523 and** *Bajaj Tempo Ltd. v. CIT* **(1992) 3 SCC 78;** *Tamil Nadu Electricity Board and Another v. Status Spinning Mills Limited and another* **2008 (9) SCR 870 = (2008) 7 SCC 353 – referred to.**

1.3. In the instant case, Clause (b) of sub-r. (11) of r. 28A of the Haryana General Sales Tax Rules, 1975 clearly stipulates that in case of violation of clause (a) (i) of sub-r. (11), the assessee shall be liable for making the full amount of tax-benefit availed of by it during the period of exemption/deferment with interest chargeable under the Act. [Para 15] [560-E-F]

R.K. Mittal Woolen Mills v. State of Haryana and others **(2001) 123 STC 248 – held inapplicable.**

1.4. The production of the beneficiary unit had failed to fulfil the stipulation incorporated in sub-r. (11) (a)(i) of r. 28A of the Rules. It is also the undisputed position that the production of the expanded unit has been computed and clubbed with the first unit to reflect the meeting of the criterion. The competent authority has come to a

definite conclusion that the expanded capacity had been created to show that the rate of production is maintained but it is fundamentally a subterfuge. The authority has also taken into consideration the different items produced and how there has been loss of production of EPBT in the first unit. The High Court has failed to appreciate the relevant facts and, without noticing that the respondent-assessee had clubbed the production of the units, lancinated the orders passed by the forums below. [Para 16] [560-G-H; 561-A-B]

1.5. In the case at hand, clubbing is not permissible. It amounts to violation of the conditions stipulated under sub-r. (11) (a)(i) of r. 28A and, therefore, the consequences have to follow and as a result, the assessee has to pay the full amount of tax benefit and interest. The approach of the High Court is absolutely erroneous. The judgment and order passed by the High Court is set aside and the orders of the tribunal and other authorities are restored. [para 24-45] [565-H; 566-A-C]

Case Law Reference:

(2001) 123 STC 248	**held inapplicable**	**para 10**
1969 SCR 343	**referred to**	**para 19**
2008 (12) SCR 370	**relied on**	**para 23**
1999 (1) SCR 871	**referred to**	**para 20**
1989 (2) SCR 772	**referred to**	**para 20**
(1992) 3 SCC 78	**referred to**	**para 20**
2008 (9) SCR 870	**referred to**	**para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6791 of 2004.

From the Judgment and Order dated 08.05.2003 of the High Court of Punjab & Haryana at Chandigarh in Civil Writ Petition No. 16336 of 2002.

Manjit Singh, Tarjit Singh, Anil Antil (For Kamal Mohan Gupta) for the Appellants.

Gopal Jain, Bina Gupta, Abhay Jena Ranjit Raut, Kaushik Laik for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Calling in question the legal acceptability and propriety of the judgment and order dated 08.05.2003 passed by the High Court of Punjab and Haryana at Chandigarh in C.W.P. No. 16336 of 2002 whereby the Division Bench has quashed the order dated 26.9.2002 passed by the Sales Tax Tribunal, Haryana which had affirmed the orders passed by the appellate authority, namely, Joint Excise and Taxation and that of the Deputy Excise and Taxation Commissioner (Gurgaon), the original authority who had, upon initiation of a proceeding under Rule 28 (11) (b) of the Haryana General Sales Tax Rules, 1975 (for short "the Rules"), come to hold that the respondent-assessee herein had violated the provisions of Rule 28A (11) (a) (i) as it had failed to maintain, without convincing reasons, the requisite production and was, therefore, liable to make full payment of tax exemption benefit availed by it during the concessional period, i.e., 13.12.1991 to 12.12.1998 of sale of Electronic Push Button Telephones (EPBT), the present appeal, by special leave, has been preferred by the State of Haryana and its functionaries.

2. The facts that are imperative to be stated are that the respondent assessee, namely, M/s. Bharti Teletech Limited, was allowed sales tax exemption under Rule 28A of the Rules for the period 13.12.1991 to 12.12.1998 for an amount of Rs.498.80 lakhs. This benefit was granted subject to the conditions laid down in the said sub-rule 11 of Rule 28A of the

Rules. The conditions postulated in sub-rule 11 (a) are that the industrial unit after availing of the benefit shall continue its production at least for the next five years not below the level of average production for the preceding five years. There is also stipulation in the sub-rule 11 that if the unit violates any of the conditions laid down in clause (a) of sub-rule 11, it shall be liable to make, in addition to the full amount of tax benefit availed of by it during the period of exemption, payment of interest chargeable under the Act as if no tax exemption was ever available to it. It is apt to note that there is a proviso that provides that the rigors of the said clause would not come into play if the loss of production is explained to the satisfaction of the Deputy Excise and Taxation Commissioner concerned as being due to reasons beyond the control of the unit.

3. As the facts would uncurtain, on 3.05.1997, the assessee submitted an application seeking amendment in the eligibility certificate so as to include certain other items but it was rejected vide order dated 22.7.1997 by the High Level Screening Committee. On an appeal being filed, the Commissioner of Industries accepted the same and remitted the matter to the High Level Screening Committee to revise the eligibility certificate allowing the benefit of sales tax exemption by inclusion of additional items. However, the period of exemption remained unaltered. Be it noted, the assessee was granted the full benefit of exemption for the entire period.

4. After the expiry of the period of exemption, the Deputy Excise and Taxation Commissioner (Gurgaon), the 2nd appellant herein, while monitoring the production level of the respondent unit, noticed that it was not maintaining the level of production of the preceding five years and, accordingly, initiated a proceeding against it on the foundation that it had violated the conditions enumerated under Rule 28A (11) (a) (i) and was thereby liable to make full payment of tax exemption benefit already availed by it along with interest. As required under the Rules, it issued a notice to show cause to explain non-

maintenance of average production after the expiry of the benefit period inasmuch as it had drastically come down to Rs.9.06 crores from 17.52 crores. In the course of adjudication, in reply to the show cause, the assessee explained that it had established another unit as an expansion unit which had come into commercial production w.e.f. 27.3.1998 and for the purpose of determining the level of production after 12.12.1998, the production figures of the expansion unit were also required to be taken into account. A contention was raised before the 2nd appellant that the notice to show cause was premature as it was given prior to the expiry of twelve months from 12.12.1998, that is, the date on which the period of benefit expired.

5. The adjudicating authority rejected the said contention and proceeded to delve into the facts that had emerged before it. It came to hold that the Gross Turn Over (GTO) during January 1999 and December 1999 was Rs.9.06 crores as against the average GTO of Rs.17.52 crores during the five years immediately preceding 12.12.1998. The said authority also considered the GTO for the assessment year 1999-2000 (1.4.1999 to 31.3.2000) which reflected the amount as Rs.4,48,05,695.00 for the year immediately preceding, i.e., assessment year 1998-1999.

6. It may be noted that a contention was advanced that the unit during the five years preceding 12.12.1998 had produced 40,83,246 pieces giving yearly average of 8,16,649 pieces against which the average production in the post benefit period is 1898961 pieces which would show that the production actually increased after the expiry of the benefit period. The competent authority, upon perusal of the production chart for the period 13.12.1993 to 12.12.1998, analysed the same and arrived at the average production. The tabular chart prepared by the adjudicating authority is as follows:-

Average Production				
Items	Before on period	Expiry benefit	After Expiry benefit period	Increase (+) Decrease (-)
ETBT	330431		163270	(-) 167161
Pagers	4405		Nil	(-) 4405
Spare Parts	481813		1735691	(+) 1253878

7. The reasoning adopted by the 2nd appellant basically was that the claim of the assessee that production had not come down in the post benefit period was wholly unacceptable because it could not be given the same weightage as its individual parts inasmuch as a complete telephone set could not, for the exemption purpose, be equated with its number of parts which constituted its assembly. Being of this view, the 2nd appellant came to hold that it was obligatory on the part of the assessee industrial unit, having availed the benefit of tax exemption for the specified period, to continue its business and to respect the conditions enumerated in the prescription in the rule. The said authority ruled that the assessee, having failed to meet the production level, was liable to be visited with the consequences and, accordingly, directed for making full payment along with interest.

8. Grieved by the aforesaid order, the assessee preferred an appeal before the appellate authority who came to hold that the explanation for loss in production was due to outdated machinery and, hence, the reasons for fall in production could not be held to be beyond the control of the assessee, for it was well within his control to replace the outdated machinery of the old unit instead of putting up a new unit. On the aforesaid bedrock, the appellate authority declined to interfere in appeal.

9. Failure in appeal led the assessee to file an appeal

before the Sales Tax Tribunal which, on reappreciation of the factual matrix in entirety, came to hold that the average manufacturing of EPBT in the subsequent three years was approximately of 9.32 lacs as against an average of 3.79 in the preceding five years. That apart, the appellant had not taken the plea that the lower production was because of factors beyond their control. The tribunal further observed that it was not a mere coincidence that the second unit (expansion) became operational soon after the expiry of benefit in the first unit from which it was evident that the assessee had a well thought out plan to deliberately reduce the manufacturing of EPBT drastically in the first unit and increase the production of the said item in the second unit. The tribunal also took note of the fact from the information provided by the assessee it was obvious that the turnover in the expanded unit had increased from Rs.65.49 lacs in 1998-1999 to Rs.31.36 crores in 1999 but on the other hand, the turnover in the first unit had gone down from Rs.13.27 crore during 1998-99 to Rs.4.48 crore during 1999-2000 and hence, it was clearly indicative that the expanded capacity had been created to coincide with the expiry of the benefit period in the first unit. Finally, the tribunal held:-

> "Though increase or decrease in the turnover by itself may not be of much consequence in the scheme but the turnover does have direct relationship with the production and since the production of higher value item i.e. EPBT was reduced, the total gross turnover in terms of value was also bound to decline and the spare capacity in the first unit was utilized by increasing the production of spare parts i.e. low value items. It is, therefore, obvious from the facts of the case that the production of EPBT was deliberately reduced in the first unit and increased in the second unit as the appellant company was hoped of getting the benefit of exemption again on the expanded capacity."

10. In view of the aforesaid analysis, the tribunal affirmed

the conclusion recorded by the forums below. The aforesaid order of the tribunal came to be assailed before the High Court in a writ petition. The Division Bench of the High Court referred to the rule position and quantity manufactured in lacs and turnover of goods and placed reliance on *R.K. Mittal Woolen Mills v. State of Haryana and others*[1] and came to hold that the tribunal ought to have set aside the orders of the Deputy Excise and Taxation Commissioner and Joint Excise and Taxation Commissioner instead of upholding their action on totally erroneous consideration. It opined that the approach of the tribunal was erroneous inasmuch as without pointing out to the violation of the rules, it had passed the order solely on the basis of conjecture. The High Court further observed that even if the factum of reduction of production as stated by the tribunal was accepted as correct, still the exemption on tax could not have been withdrawn as it was not a ground mentioned in sub-rule II (a) (i) of Rule 28A for withdrawal of exemption.

11. Questioning the defensibility of the order passed by the High Court, Mr. Manjit Singh, learned counsel appearing for the appellants, has contended that the High Court in a laconic manner has arrived at the conclusion that the authorities as well as the tribunal has fallen into error by opining that there has been a violation of the rule in question though on a bare reading of the said orders there can be no shadow of doubt that the increased production in respect of the second unit could not have been taken into account for the first unit since the second unit was an individual unit having no concern with the first unit. It is his further submission that the High Court failed to appreciate that the respondent had tried to take recourse to an innovative subterfuge by establishing a new unit producing the same items as the earlier ones and added the production of the second unit to the first unit to claim the benefit which is impermissible. Learned counsel would further submit that when the conditions enumerated under the rule had factually been

1. (2001) 123 STC 248.

violated, there was no justification on the part of the High Court to opine on the basis of the decision rendered in the *R.K. Mittal Woolen Mills'* case that the exemption could not have been withdrawn because there had been no violation of clauses (I) and (II) of sub-rule 11(a) of Rule 28A of the Rules.

12. Mr. Gopal Jain, learned counsel appearing for the respondent contended, in support of the impugned order, that the appreciation of facts by the High Court and the reasons ascribed by it for annulling the orders of the forums below are absolutely unimpeachable since the assessee was under an obligation to apply for exemption even in respect of expansion and in that background, there was no justification for the forums below not to take into consideration the production of the expanded unit. It is also urged by him that even assuming that there are two units, the same would be covered under the definition of Rule 28A (f) which defines "eligible industrial unit" and on a proper construction of the provision, the combined conclusion of the production of the units cannot really be found fault with. It is also put forth by him that the provisions relating to exemption and the exemption notifications are required to be liberally construed for industrial growth and the High Court, keeping in mind the said principle, has dislodged the orders passed by the forums below and, therefore, the order impugned should not be taken exception to.

13. To appreciate the rivalised contention raised at the bar, it is appropriate to refer to Rule 28A (11) which reads as follows:-

> "11(a) The benefit of tax-exemption/deferment under this rule shall be subject to the condition that the beneficiary/ industrial unit after having availed of the benefit, -
>
> (i) shall continue its production at least for the next five years not below the level of average production for the preceding five year; and

(ii) shall not make sales outside the State for next five years by way of transfer or consignment of goods manufactured by it.

(b) In case the unit violates any of the conditions laid down in clause (a), it shall be liable to make, in addition to the full amount of tax-benefit availed of by it during the period of exemption/deferment, payment of interest chargeable under the Act as if no tax exemption/ deferment was ever available to it;

PROVIDED that the provisions of this clause shall not come into play if the loss in production is explained to the satisfaction of the Deputy Excise and Taxation Commissioner concerned as being due to the reasons beyond the control of the units:

PROVIDED FURTHER that a unit shall not be called upon to pay any sum under this clause without having been given reasonable opportunity of being heard."

[Emphasis added]

14. On a bare reading of the said Rule, it is evincible that the conditions which are imposed have been enumerated in clause I (ii) of the said sub-rule 11 (a) of Rule 28A to the effect that in the event of non-maintenance of the quality of production after the expiry of the exemption, the assessee has to pay the tax benefit availed with interest. In the case at hand, the revenue has pressed clause I (ii) into service. The Division Bench has relied on the decision in *R.K. Mittal Woolen Mills (supra)* wherein the High Court was dealing with the withdrawal of eligibility of certificate as provided in sub-rules 8 and 9 of Rule 28A. After referring to sub-rule 8 of Rule 28A that deals with the withdrawal of eligibility certificate under certain circumstances. Analysing the said Rule, it was stated thus :-

"A perusal of the aforesaid sub-rule would show that the

grounds on which the eligibility certificate and be withdrawn are mentioned therein but the ground of non-production of the change of land use permission from the Town and Country Planning Department is not one of the grounds mentioned therein. Sub-rule (8) of Rule 28A being a part of a taxing statute has, in the nature of things, to be construed very strictly and, therefore, the eligibility certificate can be withdrawn only on the grounds mentioned therein and on no other grounds. The authorities cannot add any other ground to the said sub-rule. We are, therefore, satisfied that the eligibility certificate granted to the petitioner could not be withdrawn only on the ground of non-production of the change of land use permission by the Town and Country Planning Department"

15. The said decision, as we perceive, was rendered in a totally different context. In the present case, we are not concerned with the withdrawal of eligibility certificate. We are concerned with the consequences that have been enumerated in clause (b) of sub-rule 11 of Rule 28A which clearly stipulates that in case of violation of clause 11 (a) (i) of Rule 11, the assessee shall be liable for making, in addition to the full amount of tax-benefit availed of by it during the period of exemption/deferment, with interest chargeable under the Act. Thus, reliance placed by the High Court on the said decision is misconceived and inappropriate.

16. The hub of the matter is whether production of two different units can be combined together to meet the requirement of the postulate enshrined under the Rule. The production of the beneficiary unit had failed to fulfil the stipulation incorporated in sub-rule 11 (a)(i) of Rule 28A of the Rules. It is also the undisputed position that the production of the expanded unit has been computed and clubbed with the first unit to reflect the meeting of the criterion. The competent authority has come to a definite conclusion that the expanded capacity had been created to show that the rate of production is maintained but it

is fundamentally a subterfuge. The authority has also taken into consideration the different items produced and how there has been loss of production of EPBT in the first unit. The High Court has failed to appreciate the relevant facts and, without noticing that the respondent-assessee had clubbed the production of the units, lancinated the orders passed by the forums below.

17. Mr. Jain, learned counsel for the respondent has drawn our attention to clause (f) of sub-rule (2) of Rule 28A which defines 'eligible industrial unit'. The definition reads as follows:-

"(f) 'eligible industrial unit' means:-

(i) a new industrial unit or expansion or diversification of the existing unit, which-

(I) has obtained certificate of registration under the Act;

(II) is not a public sector undertaking where the Central Government held 51 per cent or more shares;

(III) is not availing incentive of interest free loan from the Industries Department for investment after the 1st day of April, 1988;

(IV) is not included in Schedule III appended to these rules except the tiny units set up in a rural area on or after 1-4-1992, in which capital investment in plant and machinery including market price of plant and machinery taken on base or otherwise, does not exceed rupees five lakhs, shall not form part of Schedule III;

(V) is not availing or has availed of exemption under Section 13 of the Act;

(ii) a sick industrial unit recommended by the High Powered Committee for the grant of fiscal relief either in

the form of exemption from the payment of sales tax or purchase tax or both or deferment of tax."

18. He has laid immense emphasis on the term 'expansion' of the existing unit. The term 'expansion' has been defined in clause (d) of sub-rule (2) of Rule 28A which reads thus:-

(d) "expansion/diversification of industrial unit" means a capacity set up or installed during the operative period which creates additional productions/manufacturing facilities for manufacture of the same product/products as of the existing unit (expansion) or different products (diversification) at the same or new location -

(i) in which the additional fixed -capital investment made during the operative period exceeds 25% of the fixed capital investment of the existing unit, and

(ii) which results into increase in annual production by 25% of the installed capacity of the Existing Unit in case of expansion.

On a careful reading of the aforesaid provisions, it is quite clear as day that they deal with the eligibility to get the benefit of exemption/deferment from the payment of tax. On a studied scrutiny of clause (f) (i) (I), it is manifest that it is incumbent on the unit to obtain certificate of registration under the Act. The submission of Mr. Jain is that the second unit has obtained the registration certificate under the Act and, hence, the production of the said unit, being eligible, is permitted to be included. Needless to say, obtainment of registration certificate is a condition precedent to become eligible but that does not mean that the production of the said unit will be taken into account for sustaining the benefit of the first unit. They are independent of each other as far as sub-rule 11 of the Rule 28A is concerned. We are disposed to think so as the grant of exemption has a sacrosanct purpose. The concept of exemption has been introduced for development of industrial

activity and it is granted for a certain purpose to a unit for certain types of good. Exemption can be granted under the Rules or under a notification with certain conditions and also ensure payment of taxes post the exemption period. The concept of exemption is required to be tested on a different anvil, for it grants freedom from liability. In the case at hand, as we understand, it is 'unit' specific. The term 'unit' has not been defined. The grant of exemption unit wise can be best understood by way of example. An entrepreneur can get an exemption of a unit and thereafter establish number of units and try to club together the production of all of them to get the benefit for all. It would be well nigh unacceptable, for what is required is that each unit must meet the condition to avail the benefit.

19. We will be failing in our duty if we do not address to a submission, albeit the last straw, of Mr. Jain that any provision relating to grant of exemption, be it under a rule or notification, should be considered liberally. In this regard, we may profitably refer to the decision in *Hansraj Gordhanadas v. H.H. Dave, Assistant Collector of Central Excise and Customs, Surat and others*[2] wherein it has been held as follows:-

> "...It is well established that in a taxing statute there is no room for any intendment but regard must be had to the clear meaning of the words. The entire matter is governed wholly by the language of the notification. If the tax-payer is within the plain terms of the exemption it cannot be denied its benefit by calling in aid any supposed intention of the exempting authority. If such intention can be gathered from the construction of the words of the notification or by necessary implication therefrom, the matter is different..."

20. In *Commissioner of Sales Tax v. Industrial Coal Enterprises,*[3] after referring to *CIT v. Straw Board Mfg. Co. Ltd*[4]

2. AIR 1970 SC 755.
3. (1999) 2 SCC 607.
4. (1989) Supp (2) SCC 523.

and *Bajaj Tempo Ltd. v. CIT,*[5] the Court ruled that an exemption notification, as is well known, should be construed liberally once it is found that the entrepreneur fulfills all the eligibility criteria. In reading an exemption notification, no condition should be read into it when there is none. If an entrepreneur is entitled to the benefit thereof, the same should not be denied.

21. In this context, reference to *Tamil Nadu Electricity Board and Another v. Status Spinning Mills Limited and another*[6] would be fruitful. It has been held therein :-

> "It may be true that the exemption notification should receive a strict construction as has been held by this Court in *Novopan India Ltd. v. CCE and Customs*[7], but it is also true that once it is found that the industry is entitled to the benefit of exemption notification, it would received a broad construction. (See *Tata Iron & Steel Co. Ltd. v. State of Jharkhand*[8] and *A.P. Steel Re-Rolling Mill Ltd. v. State of Kerala*[9]). A notification granting exemption can be withdrawn in public interest. What would be the public interest would, however, depend upon the facts of each case."

22. From the aforesaid authorities, it is clear as crystal that a statutory rule or an exemption notification which confers benefit to the assessee on certain conditions should be liberally construed but the beneficiary should fall within the ambit of the rule or notification and further if there are conditions and violation thereof are provided, then the concept of liberal construction would not arise. Exemption being an exception has to be respected regard being had to its nature and purpose. There can be cases where liberal interpretation or

5. (1992) 3 SCC 78.
6. (2008) 7 SCC 353.
7. 1994 Supp (3) SCC 606.
8. (2005) 4 SCC 272.
9. (2007) 2 SCC 725.

understanding would be permissible, but in the present case, the rule position being clear, the same does not arise.

23. At this juncture, it is apposite to refer to the pronouncement in *State of Haryana and others v. A.S. Fuels Private Limited and another.*[10] In the said case, the State of Haryana had approached this Court as the High Court had construed the effect of sub-rule 10 (v) of Rule 28A of the Rules which authorises the department to withdraw the tax exemption certificate but had granted liberty to the State to scrutinize if it was a case for withdrawal of the eligibility certificate under sub-rule (8) of Rule 28A of the Rules and, thereafter, to proceed in accordance with the law. This Court, scanning the anatomy of Rule 28A, opined that under sub-rule (8)(b), when the eligibility certificate is withdrawn, the exemption/entitlement certificate is also deemed to have been withdrawn from the first day of its validity and the unit shall be liable to payment of tax, interest or penalty under the Act as if no entitlement certificate had ever been granted to it. Thereafter, the Court adverted to sub-rule 11 (a) and, in that context, it observed thus:-

> "...there are several conditions which are relevant; firstly, there is a requirement of continuing the production for at least next five years; secondly, consequences flowing in case of violation of the conditions laid down in clause (a). In other words, in case of non continuance of production for next five years, the result is that it shall be deemed as if there was no tax exemption/entitlement available to it. The proviso permits to the dealers to explain satisfactorily to the DETC that the loss in production was because of the reasons beyond the control of the unit. The materials have to be placed in this regard by the party. The High Court seems to have completely lost sight of sub-rule (11)(b)."

24. In the case at hand, as we have already held, clubbing

10. (2008) 9 SCC 230.

is not permissible. It amounts to a violation of the conditions stipulated under Rule 11(a)(i) of Rule 28A and, therefore, the consequences have to follow and as a result, the assessee has to pay the full amount of tax benefit and interest. The approach of the High Court is absolutely erroneous and it really cannot withstand close scrutiny.

25. In view of our aforesaid analysis and prismatic reasoning, the appeal is allowed and the judgment and order passed by the High Court is set aside and those of the tribunal and other authorities are restored. There shall be no order as to costs.

R.P. Appeal allowed.

JOSHINDER YADAV
v.
STATE OF BIHAR
(Criminal Appeal No. 259 of 2009)

JANUARY 20, 2014.

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

Penal Code, 1860: s.302 r/w s.149, s.498A, s.201 – Dowry death – Allegation that victim-deceased was harassed by accused-in-laws for dowry and one day they poisoned her and threw her dead body in river – Conviction by courts below – Appeal by accused-brother-in-law on the ground that he had separated from his brothers and was not party to ill treatment meted out to the deceased and to the murder – Held: The evidence of PW-9 and 10, the father and the brother of the deceased, to effect that the deceased was subjected to cruelty and harassment did not suffer any dent and, therefore was reliable – Other attendant circumstances such as strong motive, the fact that on the fateful day, accused no.6 went to the house of PW-9 to inform that deceased was missing, but did not lodge report of missing; that when PW-9 and PW-10 went along with accused no.6 to the house of the accused, accused no.6 suddenly deserted them and the fact that all the accused absconded from their house with their belongings led to an irresistible conclusion that the accused were responsible for the death of the deceased – False explanation by accused that the deceased had gone for bath and slipped and got drowned further strengthened the prosecution case – The prosecution having established that the accused treated the deceased with cruelty/ harassment for dowry, the accused ought to have disclosed the facts which were in their personal and special knowledge to disprove the prosecution case – They failed to discharge the burden which had shifted to them

u/s.106 of the Evidence Act, therefore, adverse inference has to be drawn against the accused – Conviction order not interfered with – Evidence Act, 1872 – s.106.

Administration of Criminal Justice: Scientific test – Investigation – In case of poisoning – Held: Where poisoning is suspected, immediately after the post-mortem, the prosecuting agencies should ensure that the viscera is sent to the FSL for examination and the FSL should ensure that the viscera is examined immediately and report is sent to the investigating agencies/courts post haste – If the viscera report is not received, the concerned court must ask for explanation and must summon the concerned officer of the FSL to give an explanation as to why the viscera report is not forwarded to the investigating agency/court – These scientific tests are of vital importance to a criminal case, particularly when the witnesses are increasingly showing a tendency to turn hostile – In the instant case, all those witnesses who spoke about poisoning of the victim turned hostile – Had the viscera report been on record and the case of poisoning was true, the prosecution would have been on still firmer grounds – Directions passed to prosecuting agency/court.

The prosecution case was that all the accused use to treat the deceased with cruelty and harassed her for not bringing more dowry. The appellant was brother of the husband of the deceased. On the fateful day, accused no.6 came to the house of PW9 who was the father of the deceased and informed him that the deceased has run away from the house. PW-9 then proceeded to the house of the accused along with his brother-in-law and son, PW-10. Accused no.6 accompanied them for some distance and then left for some other place. They reached the house of the accused and found the house empty. All the accused had left the house with their belongings. On enquiry, the neighbours told him that because the deceased had refused to transfer her land in the name

of the accused, they administered poison to her and murdered her. PW-9 met Sub-Inspector by the river side who recorded his statement. A search was conducted and the dead body of the deceased was recovered from the river bed.

The trial court convicted the accused under Section 302, IPC r/w Section 149 IPC, Sections 498A and 201, IPC. The High Court upheld conviction. The instant appeal was filed challenging the order of the High Court.

Dismissing the appeal, the Court

HELD: 1.1. The father of the deceased (PW-9) had given a graphic account of the harassment and ill-treatment meted out to the deceased by the accused. The accused were not happy with a bullock, a cow and a buffalo which were given to them as dowry. They had asked for a watch and a cycle. That was also given. They asked for more. PW-9 had transferred 2 kathas of land to the deceased. The accused wanted to sell it or wanted it to be transferred in their names and since the deceased did not agree to that they continued to torture her. The child of the deceased was sent to PW-9 so that he would be brought up by him, but the deceased was kept in the matrimonial house to work. PW-10, the brother of the deceased had corroborated his father. All the other witnesses, that is PW-2 to PW-7 had turned hostile. In the facts of this case, it was indeed a pointer to the guilt of the accused. They won over the prosecution witnesses. PW-9 in his cross-examination had stated "*whenever my daughter visited my house, she used to complain that she is being tortured and assaulted there. Who else can be a witness to this fact*?" The evidence of PWs-9 and 10 showed that the deceased was subjected to cruelty and harassment for dowry by the accused. The evidence of these witnesses was straightforward and honest and there was no exaggeration. In the cross-examination,

their evidence did not suffer any dent and, therefore, implicit reliance is placed on them. [Para 8] [579-G; 580-A-E]

1.2. Though, PW-10 stated that Accused 1-husband had separated from his brothers after marriage, he has clarified that all the brothers have their houses in a common courtyard. PW-9 specifically named the appellant as a person who demanded cattle. He has stated that the accused were not satisfied with the cattle given by him. They demanded more dowry. They used to harass and assault the deceased. He stated that when he went to the house of the accused after receiving information that she had left their house, he found the house to be empty. All the accused had absconded alongwith their belongings with them. This was confirmed by PW-13 the Investigating Officer who stated that when he went to the house of the accused after receiving information about disappearance of the deceased he found the house completely empty. Even the household articles and food grains were missing. The accused were not present. No member of their family was present. The deceased was also not present. These circumstances would reject the claim that the appellant did not join the other accused in treating the deceased with cruelty. The conviction and sentence of the appellant under Section 498A of the IPC is therefore perfectly justified. [Para 9] [580-F-H; 581-A-C]

Balaram Prasad Agrawal v. State of Bihar & Ors **(1997) 9 SCC 338 = 1996(9) Suppl SCR 752;** *Shambhu Nath Mehra v. State of Ajmer* **AIR 1956 SC 404 = 1956 SCR 199 – relied on.**

2. PW-9 and PW-10 had stated that dead body of the deceased was recovered from the river bed. The Investigating Officer PW-13 had stated that after recording the FIR of PW-9, he inspected the house of Accused 1.

The dead body of the deceased was found lying 600 yards away from the house of the accused. It was lying in one foot deep water, close to the southern bank of the river, near a ferry. The ferry was situated adjacent to the maize field of Hazari Mandal. He took it out and prepared inquest report. He further stated that one 'V' stated that on 29/1/1989, the accused had a meeting. On 30/1/1989, they left for some other place and in the evening it was revealed that they had killed the deceased by poisoning her and had thrown her dead body at the ferry. The Investigating Officer had further stated that the other prosecution witnesses also confirmed this fact. However, all these persons turned hostile in the court. [Para 10] [581-D-F]

3.1. PW-12, the doctor who did the post-mortem on the dead body of the deceased had opined that the cause of death was asphaxia due to drowning. He had stated that in cases of drowning, if immediate death is caused, then, there will be negligible quantum of water in the stomach. He further stated that death may be caused even in one foot deep water if the victim is kept in water with her neck pressed in sleeping position. The report of the viscera examination is, however, not on record. PW-12 has admitted that he did not know the result of viscera examination. He added that there were no injuries on the person of the deceased. The evidence of the father and the brother of the deceased and other attendant circumstances such as strong motive; the fact that the accused did not lodge any complaint about missing of the deceased; that Accused 6 went to the house of PW-9 to enquire about the deceased and then suddenly deserted PWs 9 and 10 when they were going to the house of the accused, that all the accused absconded from their house with their belongings and that the house was completely empty led to an irresistible conclusion that the accused were responsible for the death of the

deceased. The prosecution having established that the accused treated the deceased with cruelty and that they subjected her to harassment for dowry, the accused ought to have disclosed the facts which were in their personal and special knowledge to disprove the prosecution case that they murdered the deceased. Section 106 of the Evidence Act covers such a situation. The burden which had shifted to the accused was not discharged by them. [paras 11, 12, 14] [581-G; 582-F-H; 583-A-C and E-F]

3.2. In the instant case, the deceased was admittedly in the custody of the accused. She disappeared from their house. As to how her dead body was found in the river was within their special and personal knowledge. They could have revealed the facts to disprove the prosecution case that they had killed the deceased. They failed to discharge the burden which had shifted to them under Section 106 of the Evidence Act. The prosecution is not expected to give the exact manner in which the deceased was killed. Adverse inference has to be drawn against the accused as they failed to explain how the deceased was found dead in the river in one foot deep water. [Para 16] [585-C-E]

3.3. Pertinently, the post-mortem notes did not indicate presence of huge amount of water in the dead body. According to PW-12, in a case of drowning, if immediate death is caused, then, there will be negligible quantum of water in the stomach. The evidence of PW-12 showed that the death of the deceased occurred immediately after she was drowned in the water because there was not much water in her stomach. The deceased was pregnant. Her uterus contained full term dead male baby. She could not have, therefore, offered any resistance. Therefore, there were no injuries on the dead body. The whole operation appeared to have been done swiftly and skillfully. But in any case, it is not for the

prosecution to explain in what manner the deceased was done to death by the accused because the deceased was staying in the house of the accused prior to the occurrence and she disappeared from that house. All the circumstances leading to her unnatural death were within the special and personal knowledge of the accused which they chose not to disclose. Instead, they gave a totally false explanation that when the deceased had gone for bath, she slipped, got drowned in the water and died. This story is palpably false. The false explanation offered by the accused further strengthened the prosecution case as it becomes an additional link in the chain of circumstances. It is true that in **Vithal Tukaram More* case, this Court has held that in a case where other members of the husband's family are charged with offences under Sections 304B, 302 and 498A of the IPC and the case rests on circumstantial evidence, the circumstantial evidence must be of required standard if conviction has to be based on it. The evidence adduced by the prosecution in this case is of required standard. No other inference, except that of the guilt of the accused, is possible on the basis of the evidence on record. The established facts are consistent only with the hypothesis of their guilt and inconsistent with their innocence. [Paras 17, 18] [585-E-H; 586-A-E]

Vithal Tukaram More & Ors. v. State of Maharashtra* **(2002) 7 SCC 20 = 2002 AIR 2715 – relied on.

4.1. PW-9, the father of the deceased stated that the neighbours told him that the deceased was poisoned by the accused. PW-10, brother of the deceased has also stated so. PW-13, the Investigating Officer went a step further. He stated that five of prosecution witnesses told him that the accused had killed the deceased by poisoning her; that they had concealed the dead body in the river and had run away. Unfortunately, these

witnesses turned hostile. But the fact remains that the prosecution had come out with a case of poisoning. It was, therefore, necessary for the prosecution to get the viscera examined from Forensic Science Laboratory ("the FSL"). The trial court has observed that the Investigating Officer had filed a petition on 19/4/1988 requesting the doctor to send the viscera for chemical analysis to the FSL, Patna. Post-mortem notes mention that viscera was protected for future needs. This was also stated by PW-12. PW-12 had, however, added that he did not know the result of viscera examination. The evidence of the Investigating Officer, PW-13 showed that the doctor did not send the viscera to the FSL. When he was questioned about the viscera report, the Investigating Officer stated in the cross-examination that a letter had been sent to the doctor about viscera examination. He further stated that he did not make any complaint against the doctor to the senior officers, but, informed his officer through diary. The doctor ought to have sent the viscera to the FSL when he was requested to do so. On his failure to do so, the Investigating Officer should have informed his superior officer and taken steps to ensure that viscera is sent to the FSL rather than just making a diary entry. Such a supine indifference has a disastrous effect on the criminal justice administration system. [Paras 19, 20] [586-F-H; 587-A-D]

4.2. This was the third case which this Court noticed in a short span of two months where, in a case of suspected poisoning, viscera report was not brought on record and expressed extreme displeasure about the way in which such serious cases are dealt with. Whether these lapses are the result of inadvertence or they are a calculated move to frustrate the prosecution is not known. Though the FSL report is not mandatory in all cases, in cases where poisoning is suspected, it would be advisable and in the interest of justice to ensure that

the viscera is sent to the FSL and the FSL report is obtained. This is because not in all cases there is adequate strong other evidence on record to prove that the deceased was administered poison by the accused. In a criminal trial, the Investigating Officer, the Prosecutor and the Court play a very important role. The court's prime duty is to find out the truth. The Investigating Officer, the Prosecutor and the Courts must work in sync and ensure that the guilty are punished by bringing on record adequate credible legal evidence. If the Investigating Officer stumbles, the Prosecutor must pull him up and take necessary steps to rectify the lacunae. The Criminal Court must be alert, it must oversee their actions and, in case, it suspects foul play, it must use its vast powers and frustrate any attempt to set at naught a genuine prosecution. Perhaps, the instant case would have been further strengthened had the viscera been sent to the FSL and the FSL report was on record. These scientific tests are of vital importance to a criminal case, particularly when the witnesses are increasingly showing a tendency to turn hostile. In the instant case all those witnesses who spoke about poisoning turned hostile. Had the viscera report been on record and the case of poisoning was true, the prosecution would have been on still firmer grounds. Therefore, where poisoning is suspected, the prosecuting agencies should ensure that the viscera is, in fact, sent to the FSL for examination and the FSL should ensure that the viscera is examined immediately and report is sent to the investigating agencies/courts post haste. If the viscera report is not received, the concerned court must ask for explanation and must summon the concerned officer of the FSL to give an explanation as to why the viscera report is not forwarded to the investigating agency/court. The criminal court must ensure that it is brought on record. [paras 23, 24] [589-D-H; 590-A-E]

Bhupendra v. State of Madhya Pradesh **2013 (13) SCALE 52;** *Chhotan Sao & Anr. v. State of Bihar* **2013 (15) SCALE 338 – relied on.**

Case Law Reference:

1996(9) Suppl SCR 752	**relied on**	**Paras 7, 15**
1956 SCR 199	**relied on**	**Paras 14, 15**
2013 (13) SCALE 52	**relied on**	**Paras 21, 22**
2013 (15) SCALE 338	**relied on**	**Para 22**
2002 AIR 2715	**relied on**	**Paras 6, 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 259 of 2009.

From the Judgment and Order dated 24.11.1999 of the High Court of Judicature at Patna in Criminal Appeal No. 154 of 1992.

Gaurav Agrawal, Shankar Narayanan for the Appellant.

Gopal Singh, Prerna Singh for the Respondent.

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. The appellant who was arraigned as Accused 2 was tried along with five other accused for offences punishable under Sections 498A and 302 read with Sections 149 and 201 of the IPC by the 1st Additional Sessions Judge, Madhepura. The allegations against the accused, inter alia, were that they subjected one Bindula Devi to cruelty and harassment with a view to coercing her and her other relatives to meet their unlawful demand of property and that on her failure to fulfill their unlawful demand, in furtherance of their common object, they committed her murder and that they caused disappearance of her dead body with an intention to screen themselves from legal punishment.

2. Bindula Devi was married to Accused 1 Jaipraksh Yadav. The appellant and Accused 3 Shakun Devo Yadav are the brothers of Accused 1 Jaiprakash Yadav. Accused 4 Dani Dutta Yadav is their father and Accused 5 Satya Bhama Devi is their mother. Accused 6 Fudai Yadav is brother-in-law of Accused 1 Jaiprakash Yadav.

3. The prosecution story is reflected in the evidence of Complainant PW-9 Debu Yadav, the father of Bindula Devi. He stated that his daughter Bindula Devi was married to Accused 1 Jaiprakash Yadav. He further stated that in the marriage one buffalo, one cow and one bullock were given as dowry to the accused as per their demand. However, the accused were not satisfied with that. They demanded a wrist watch and a cycle which were given to them. Even then they continued to harass and assault Bindula Devi. She gave birth to a male child. The accused kept Bindula Devi in their house and sent the child to his house so that he would rear the child. PW-9 Debu Yadav further stated that when in Ashwin month he brought Bindula Devi to his house she told him about the ill-treatment meted out to her at her matrimonial home. She did not want to go back. He tried to pacify her. He transferred two kathas of land in her name. She then went to her matrimonial home. The accused insisted that she should sell the land. As she did not agree to selling of the land, they subjected her to further torture. PW-9 Debu Yadav further stated that on a Monday at about 4.00 p.m. Accused 6 Fudai Yadav came to his house and enquired whether Bindula Devi had come there and told him that she had run away from the house. He told Accused 6 Fudai Yadav that Bindula Devi would not run away from her house. He then proceeded to the house of the accused situated in village Kolhua along with his son Sachindra Yadav and his brother-in-law. Accused 6 Fudai Yadav accompanied them for some distance and then left for some other place. They reached Kolhua village and found the house of the accused to be empty. All the accused had left the house with their belongings. Bindula Devi was also not present. On enquiry the neighbours told him

that because Bindula Devi had refused to transfer the land in the accused's name they had administered poison to her and murdered her. He met Sub-Inspector of Police by the river side who recorded his statement. A search was conducted. The dead body of Bindula Devi was recovered from the river bed. Formal FIR of PW-9 Debu Yadav was registered on 31/1/1989 and the investigation was started. The appellant, Accused 1 Jaiprakash Yadav and Accused 3 Shakun Devo Yadav surrendered before the court on 6/3/1989. Accused 4 Dani Dutta Yadav surrendered before the court on 26/8/1989.

4. At the trial, though, the prosecution examined 13 witnesses, it's case rested on the evidence of PW-9 Debu Yadav, father of the deceased and PW-10 Sachindra Yadav, brother of the deceased. PWs-2 to 7 turned hostile. The accused pleaded not guilty to the charge. They contended that when Bindula Devi went to take bath, she slipped in the water, got drowned and died.

5. The trial court convicted the accused under Section 302 read with Section 149 of the IPC and sentenced each of them to suffer life imprisonment. They were also convicted under Section 498A of the IPC and sentenced to undergo rigorous imprisonment for three years each. They were further convicted and sentenced to undergo rigorous imprisonment for seven years each under Section 201 of the IPC. All the substantive sentences were ordered to run concurrently. The High Court dismissed their appeal. Hence, this appeal, by special leave, by Accused 2.

6. Mr. Gaurav Agrawal, learned counsel for the appellant submitted that the instant case rests on circumstantial evidence. Counsel pointed out that the appellant is the brother of Accused 1 Jaiprakash Yadav, the husband of Bindula Devi. PW-10 Sachindra Yadav stated in his evidence that Accused 1 had separated from his other brothers. There is no evidence on record to establish that the appellant was party to any dowry demand or to any ill-treatment meted out to Bindula Devi.

Counsel submitted that in cases where apart from husband other members of his family are charged with offences under Sections 304B, 302 and 498A of the IPC and the case rests on circumstantial evidence, unless the circumstantial evidence is of required standard conviction cannot be based on it. In this connection he relied on *Vithal Tukaram More & Ors. v. State of Maharashtra.*[1] Counsel submitted that allegations about motive are vague. Medical evidence is inconclusive. The prosecution has, therefore, failed to establish its case. In any case, since the appellant was residing separately, in the absence of any clinching evidence establishing his complicity he cannot be convicted.

7. Mr. Gopal Singh, learned counsel for the State of Bihar on the other hand submitted that the evidence on record establishes that all the accused were staying in houses situated in the same courtyard. Counsel submitted that evidence of PW-9 Debu Yadav and PW-10 Sachindra Yadav establishes the prosecution case. Pertinently, the accused did not lodge any complaint to the police. The fact that they left the house with all their belongings suggests their complicity. Counsel submitted that Bindula Devi disappeared from the house of the accused. As to how she died in suspicious circumstances was within the knowledge of the accused. The burden was shifted to the accused which they have not discharged. Adverse inference must be drawn against the accused. In this connection, counsel relied on *Balaram Prasad Agrawal v. State of Bihar & Ors*[2]. Counsel submitted that appeal be, therefore, dismissed.

8. We have already referred to the evidence of father of Bindula Devi PW-9 Debu Yadav. He has given a graphic account of the harassment and ill-treatment meted out to the deceased by the accused. They were not happy with a bullock, a cow and a buffalo which were given as dowry. They asked for a watch and a cycle. That was also given. They asked for

1. (2002) 7 SCC 20.
2. (1997) 9 SCC 338.

more. PW-9 Debu Yadav transferred 2 kathas of land to Bindula Devi. The accused wanted to sell it or wanted it to be transferred in their names and since Bindula Devi did not agree to that they continued to torture her. Her son was sent to her father so that he would be brought up by him, but she was kept in the matrimonial house obviously to work. PW-10 Sachindra Yadav the brother of Bindula Devi has corroborated his father. It is distressing to note that all the other witnesses, that is PW-2 to PW-7 turned hostile. In the facts of this case, it is indeed a pointer to the guilt of the accused. They won over the prosecution witnesses. We note with some anguish the following sentences uttered by PW-9 Debu Yadav in his cross-examination probably as an answer to the usual question about there being no independent witness to depose about cruelty. He stated "*whenever my daughter visited my house, she used to complain that she is being tortured and assaulted there. Who else can be a witness to this fact*?" Having perused the evidence of PWs-9 and 10 we have no manner of doubt that Bindula Devi was subjected to cruelty and harassment for dowry by the accused. Evidence of these witnesses is straightforward and honest. There is no exaggeration. In the cross-examination their evidence has not suffered any dent. Implicit reliance can be placed on them.

9. It is submitted that the appellant had separated from Accused 1 Jaiprakash Yadav and, hence, he cannot be a party to the alleged acts of cruelty of the other accused. We find no substance in this submission. Though, PW-10 Sachindra Yadav stated that Accused 1 Jaiprakash Yadav had separated from his brothers after marriage, he has clarified that all the brothers have their houses in a common courtyard. PW-9 Debu Yadav has specifically named the appellant as a person who demanded cattle. He has stated that the accused were not satisfied with the cattle given by him. They demanded more dowry. They used to harass and assault Bindula Devi. He stated that when he went to the house of the accused after receiving information that she had left their house, he found the house to

be empty. All the accused had absconded. They had taken their belongings with them. This is confirmed by PW-13 Surendra Rai the Investigating Officer. He stated that when he went to the house of the accused after receiving information about disappearance of Bindula Devi he found the house completely empty. Even the household articles and food grains were missing. The accused were not present. No member of their family was present. Bindula Devi was also not present. These circumstances persuade us to reject the submission that the appellant did not join the other accused in treating Bindula Devi with cruelty. The conviction and sentence of the appellant under Section 498A of the IPC is therefore perfectly justified.

10. We now come to the death of Bindula Devi. PW-9 Debu Yadav and PW-10 Schindra Yadav stated that dead body of Bindula Devi was recovered from the river bed. The Investigating Officer PW-13 Surendra Rai stated that after recording the FIR of PW-9 Debu Yadav, he inspected the house of Accused 1 Jaiprakash Yadav. The dead body of Bindula Devi was found lying 600 yards away from the house of the accused. It was lying in one foot deep water, close to the southern bank of the river, near a ferry. The ferry was situated adjacent to the maize field of Hazari Mandal. He took it out and prepared inquest report. He further stated that one Vinod stated that on 29/1/1989, the accused had a meeting. On 30/1/1989, they left for some other place and in the evening it was revealed that they had killed Bindula Devi by poisoning her and had thrown her dead body at the ferry. The Investigating Officer further stated that Vinod, Parmeshvari Yadav, Brij Bihari Yadav also confirmed this fact. All these persons turned hostile in the court.

11. PW-12 Dr. Arun Kumar Mandal did the post-mortem on the dead body of Bindula Devi. Following are his observations:

"*1. (1) Epistaxis from both nostrils.*

(2) Blood mixed with froth from mouth.

(3) Both eye balls congested, cornea hazy.

(4) Face congested and cyanosed.

(5) Skin of both hands and feet were corrugated.

2. On opening of skull all the blood vessels were congested in the maninges and brain matter.

3. In the chest both the lungs were found congested, frothy and spongy and on cutting blood stains froth found in segments.

4. In the heart both chambers were found full.

5. In the stomach semi-digested food about 4 ounces with blood mixed.

6. In the small intestine-gas and solid facees.

7. In the large intestine-gas and solid facees.

8. In the case of kidneys both were found congested.

9. Liver an spleen were also found congested.

10. Uterus contained about full term dead male baby."

PW-12 Dr. Arun Kumar Mandal opined that the cause of death was asphaxia due to drowning. He stated that in cases of drowning, if immediate death is caused, then, there will be negligible quantum of water in the stomach. He further stated that death may be caused even in one foot deep water if the victim is kept in water with his neck pressed in sleeping position. It may be stated here that report of the viscera examination is not on record. Dr. Mandal has admitted that he did not know the result of viscera examination. He added that

there were no injuries on the person of the deceased.

12. In our opinion, the evidence of the father and the brother of Bindula Devi and other attendant circumstances such as strong motive; the fact that the accused did not lodge any complaint about missing of Bindula Devi; that Accused 6 Fudai Yadav went to the house of PW-9 Debu Yadav to enquire about Bindula Devi and then suddenly deserted PWs 9 and 10 when they were going to the house of the accused, that all the accused absconded from their house with their belongings and that the house was completely empty, lead to an irresistible conclusion that the accused were responsible for the death of Bindula Devi.

13. It is submitted that since there were no injuries on the dead body of Bindula Devi, it would be wrong to conclude that Bindula Devi was kept in water in a sleeping position with her neck pressed as suggested by the doctor. The prosecution story that the accused caused her death must therefore be rejected. Medical evidence, it is argued, does not support the prosecution case.

14. In our opinion, the prosecution having established that the accused treated the deceased with cruelty and that they subjected her to harassment for dowry, the accused ought to have disclosed the facts which were in their personal and special knowledge to disprove the prosecution case that they murdered Bindula Devi. Section 106 of the Evidence Act covers such a situation. The burden which had shifted to the accused was not discharged by them. In this connection, we may usefully refer to the judgment of this Court in *Shambhu Nath Mehra v. State of Ajmer*[3] where this Court explained how Section 101 and Section 106 of the Evidence Act operate. Relevant portion of the said judgment reads thus:

"(10) Section 106 is an exception to Section 101.

3. AIR 1956 SC 404.

Section 101 lays down the general rule about the burden of proof.

'Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist'.

Illustration (a) says –

'A desires a Court to give judgment that B shall be punished for a crime which A says B has committed.

A must prove that B has committed the crime'.

(11) This lays down the general rule that in a criminal case, the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience."

15. In *Balram Prasad Agrawal v. State of Bihar,*[4] the prosecution had established the cruel conduct of the accused i.e. her husband and members of his family and the sufferings undergone by the deceased at their hands. The unbearable conduct of the accused ultimately resulted in her death by drowning in the well in the courtyard of the accused's house. This Court observed that what happened on the fateful night and what led to the deceased's falling in the well was wholly within the personal and special knowledge of the accused. But they kept mum on this aspect. This Court observed that it is true that the burden is on the prosecution to prove the case beyond reasonable doubt. But once the prosecution is found to have shown that the accused were guilty of persistent conduct of

4. (1997) 9 SCC 338.

cruelty qua the deceased spread over years as was well established from the unshaken testimony of father of the deceased, the facts which were in the personal knowledge of the accused who were present in the house on that fateful night could have been revealed by them to disprove the prosecution case. This Court observed that the accused had not discharged the burden which had shifted to them under Section 106 of the Evidence Act. While coming to this conclusion, this Court relied on *Shambhu Nath Mehra*.

16. In the present case, the deceased was admittedly in the custody of the accused. She disappeared from their house. As to how her dead body was found in the river was within their special and personal knowledge. They could have revealed the facts to disprove the prosecution case that they had killed Bindula Devi. They failed to discharge the burden which had shifted to them under Section 106 of the Evidence Act. The prosecution is not expected to give the exact manner in which the deceased was killed. Adverse inference needs to be drawn against the accused as they failed to explain how the deceased was found dead in the river in one foot deep water.

17. Pertinently, the post-mortem notes do not indicate presence of huge amount of water in the dead body. According to PW-12 Dr. Mandal, in a case of drowning, if immediate death is caused, then, there will be negligible quantum of water in the stomach. From the evidence of PW-12 Dr. Mandal, it appears that the death of Bindula Devi occurred immediately after she was drowned in the water because there was not much water in her stomach. It is also pertinent to note that Bindula Devi was pregnant. Her uterus contained full term dead male baby. She could not have, therefore, offered any resistance. It appears that, therefore, there were no injuries on the dead body. The whole operation appears to have been done swiftly and skillfully. But in any case, as stated hereinabove, it is not for the prosecution to explain in what manner Bindula Devi was done to death by the accused because Bindula Devi was staying in the house

of the accused prior to the occurrence and she disappeared from that house. All the circumstances leading to her unnatural death were within the special and personal knowledge of the accused which they chose not to disclose. Instead, they gave a totally false explanation that when Bindula Devi had gone for bath, she slipped, got drowned in the water and died. This story is palpably false. The false explanation offered by the accused further strengthens the prosecution case as it becomes an additional link in the chain of circumstances.

18. It is true that in *Vithal Tukaram More* this Court has held that in a case where other members of the husband's family are charged with offences under Sections 304B, 302 and 498A of the IPC and the case rests on circumstantial evidence, the circumstantial evidence must be of required standard if conviction has to be based on it. We are of the considered opinion that the evidence adduced by the prosecution in this case is of required standard. No other inference, except that of the guilt of the accused, is possible on the basis of the evidence on record. The established facts are consistent only with the hypothesis of their guilt and inconsistent with their innocence. The appeal, therefore, deserves to be dismissed.

19. Before we part, we must refer to a very vital aspect of this case. PW-9 Debu Yadav, the father of Bindula Devi stated that the neighbours told him that Bindula Devi was poisoned by the accused. PW-10 Sachindra Yadav, brother of Bindula Devi has also stated so. PW-13 Surendra Rai, the Investigating Officer went a step further. He stated that Vinod Yadav, Shiv Pujan Ram, Vinod Kumar Mehta, Parmeshwar Yadav and Braj Bihari Yadav told him that the accused had killed Bindula Devi by poisoning her; that they had concealed the dead body in the river and had run away. Unfortunately, these witnesses turned hostile. But the fact remains that the prosecution had come out with a case of poisoning. It was, therefore, necessary for the prosecution to get the viscera examined from Forensic Science Laboratory ("**the FSL**").

20. The trial court has observed that the Investigating Officer had filed a petition on 19/4/1988 requesting the doctor to send the viscera for chemical analysis to the FSL, Patna. Post-mortem notes mention that viscera was protected for future needs. This is also stated by PW-12 Dr. Mandal. Dr. Mandal has, however, added that he did not know the result of viscera examination. From the evidence of the Investigating Officer, PW-13 Surendra Rai, it appears that the doctor did not send the viscera to the FSL. When he was questioned about the viscera report, the Investigating Officer stated in the cross-examination that a letter had been sent to the doctor about viscera examination. He further stated that he did not make any complaint against the doctor to the senior officers, but, informed his officer through diary. We are of the opinion that the doctor ought to have sent the viscera to the FSL when he was requested to do so. On his failure to do so, the Investigating Officer should have informed his superior officer and taken steps to ensure that viscera is sent to the FSL rather than just making a diary entry. Such a supine indifference has a disastrous effect on the criminal justice administration system.

21. We are aware that in some cases where there is other clinching evidence on record to establish the case of poisoning, this Court has proceeded to convict the accused even in the absence of viscera report. In *Bhupendra v. State of Madhya Pradesh,*[5] this Court was concerned with a case where the viscera report was not on record, but, there was enough evidence of poisoning. The accused was charged under Sections 304-B and 306 of the IPC. Drawing support from the presumptions under Sections 113B and 113A of the Evidence Act, 1872 and, after referring to relevant judgments on the point, this Court held that death of the deceased was caused by poisoning. The relevant observation of this Court could be quoted.

"26. These decisions clearly bring out that a chemical examination of the viscera is not mandatory in every case of a dowry death; even when a viscera report is sought for, its absence is not necessarily fatal to the case of the prosecution when an unnatural death punishable under Section 304-B of the IPC or under Section 306 of the IPC takes place; in a case of an unnatural death inviting Section 304-B of the IPC (read with the presumption under Section 113-B of the Evidence Act, 1872) or Section 306 of the IPC (read with the presumption under Section 113-A of the Evidence Act, 1872) as long as there is evidence of poisoning, identification of the poison may not be absolutely necessary."

5. 2013 (13) SCALE 52.

22. In *Chhotan Sao & Another v. State of Bihar,*[6] this Court was dealing with a case involving Sections 304-B and 498A of the IPC. The allegations were that the deceased was murdered by poisoning her. The viscera report was not on record. There was no other evidence on record to establish that the deceased was poisoned. This Court distinguished the case before it from the facts of *Bhupendra* and while acquitting the accused of the charge under Section 304-B of the IPC made the following pertinent observations:

"17. Before parting with the appeal, we wish to place on record our anguish regarding the inadequacy of investigation, the failure to discharge the responsibility on the part of the public prosecutor and the Magistrate who took cognizance of the offence under Section 304-B. The Investigating Officer who submitted the charge sheet ought not to have done it without securing the viscera report from the forensic lab and placing it before the Court. Having regard to the nature of the crime, it is a very vital document more particularly in the absence of any direct evidence regarding the consumption of poison by the deceased Babita Devi. Equally the public prosecutor failed in his responsibility to guide the

6. 2013 (15) SCALE 338.

investigating officer in that regard. Coming to the magistrate who committed the matter to the Sessions Court, he failed to apply his mind and mechanically committed the matter for trial. Public prosecutors and judicial officers owe a greater responsibility to ensure compliance with law in a criminal case. Any lapse on their part such as the one which occurred in the instant case is bound to jeopardize the prosecution case resulting in avoidable acquittals. Inefficiency and callousness on their part is bound to shake the faith of the society in the system of administration of criminal justice in this country which, in our opinion, has reached considerably lower level than desirable."

23. We must note that this is the third case which this Court has noticed in a short span of two months where, in a case of suspected poisoning, viscera report is not brought on record. We express our extreme displeasure about the way in which such serious cases are dealt with. We wonder whether these lapses are the result of inadvertence or they are a calculated move to frustrate the prosecution. Though the FSL report is not mandatory in all cases, in cases where poisoning is suspected, it would be advisable and in the interest of justice to ensure that the viscera is sent to the FSL and the FSL report is obtained. This is because not in all cases there is adequate strong other evidence on record to prove that the deceased was administered poison by the accused. In a criminal trial the Investigating Officer, the Prosecutor and the Court play a very important role. The court's prime duty is to find out the truth. The Investigating Officer, the Prosecutor and the Courts must work in sync and ensure that the guilty are punished by bringing on record adequate credible legal evidence. If the Investigating Officer stumbles, the Prosecutor must pull him up and take necessary steps to rectify the lacunae. The Criminal Court must be alert, it must oversee their actions and, in case, it suspects foul play, it must use its vast powers and frustrate any attempt to set at naught a genuine prosecution. Perhaps, the instant

case would have been further strengthened had the viscera been sent to the FSL and the FSL report was on record. These scientific tests are of vital importance to a criminal case, particularly when the witnesses are increasingly showing a tendency to turn hostile. In the instant case all those witnesses who spoke about poisoning turned hostile. Had the viscera report been on record and the case of poisoning was true, the prosecution would have been on still firmer grounds.

24. Having noticed that, in several cases where poisoning is suspected, the prosecuting agencies are not taking steps to obtain viscera report, we feel it necessary to issue certain directions in that behalf. We direct that in cases where poisoning is suspected, immediately after the post-mortem, the viscera should be sent to the FSL. The prosecuting agencies should ensure that the viscera is, in fact, sent to the FSL for examination and the FSL should ensure that the viscera is examined immediately and report is sent to the investigating agencies/courts post haste. If the viscera report is not received, the concerned court must ask for explanation and must summon the concerned officer of the FSL to give an explanation as to why the viscera report is not forwarded to the investigating agency/court. The criminal court must ensure that it is brought on record.

25. We have examined the merits of the case and held that the appeal deserves to be dismissed. In the circumstances, the appeal is dismissed.

26. A copy of this order be sent to the Registrar Generals of all the High Courts with a direction to circulate the same to all subordinate Criminal Courts; to the Director of Prosecution, to the Secretary, Ministry of Home Affairs, to the Secretary, Home Department and to the Director, Forensic Science Laboratory within the jurisdiction of the respective High Courts.

D.G. Appeal dismissed.