BISWANATH BHATTACHARYA
v.
UNION OF INDIA & OTHERS
(Civil Appeal Nos. 772-773 of 2014)

JANUARY 21, 2014

[H.L. GOKHALE AND J. CHELAMESWAR, JJ.]

SMUGGLERS AND FOREIGN EXCHANGE MANIPULATORS (FORFEITURE OF PROPERTY) ACT, 1976:

s.6(1) - Notice under - Requirement of recording reasons in the notice -Plea of appellant that notice issued u/s.6 was defective as it did not contain reasons which made competent authority believe that notice scheduled properties were illegal acquired property - Held: Plea not sustainable - There is no express statutory requirement to communicate the reasons issuance of notice u/s.6 of the Act - Secondly, the reasons, though not initially supplied alongwith the notice were subsequently supplied thereby enabling the appellant to effectively meet the case of the respondents - The appellant not only filed a rejoinder to the said notice but he was also given a hearing before an order of forfeiture u/s.7 was passed - Further, an order of forfeiture is an appealable order where the correctness of the decision u/s.7 to forfeit the properties could be examined.

ss.7, 2(2) - Forfeiture of properties - If violative of Article 20 of Constitution - Held: The application of the Act is limited to persons who have either suffered a conviction under one of the acts specified in s.2(2)(a) of the Act or detained under the COFEPOSA subsequent to the commencement of the Act in question - Apart from that there are other categories of persons to whom the Act applies - Of all the five categories of persons to whom the Act is made applicable, only one

category specified u/s.2(2)(a) happens to be of persons who are found guilty of an offence under one of the enactments mentioned therein and convicted - The other four categories of persons to whom the Act is applicable are persons unconnected with any crime or conviction under any law while the category of persons falling u/s.2(2)(b) are persons who are believed by the State to be violators of law - The other three categories are simply persons who are associated with either of the two categories mentioned in s.2(2)(a) and (b) - At least with reference to the four categories other than the one covered by s.2(2)(a), the forfeiture/deprivation of the property is not a consequence of any conviction for an offence - Therefore, with reference to these four categories, the question of violation of Article 20 does not arise - In case of first category, Article 20 would have no application for the reason, conviction is only a factor by which the Parliament chose to identify the persons to whom the Act be made applicable - The Act does not provide for the confiscation of the properties of all the convicts falling u/s.2(2)(a) or detenues falling u/s.2(2)(b).

s.2(2) - Forfeiture of illegally acquired property - Legality of - Held: There is a public interest in ensuring that persons who cannot establish that they have legitimate sources to acquire the assets held by them do not enjoy such wealth - Such a deprivation would certainly be consistent with the requirement of Article 300A and 14 of the Constitution which prevent the State from arbitrarily depriving a subject of his property - Even otherwise, in view of its inclusion in the IXth Schedule, the Act is immune from attack on the ground that it violates any of the rights guaranteed under Part III of the Constitution by virtue of the declaration under Article 31-B - Constitution of India, 1950 - Articles 14, 31-B, 300A.

LEGISLATION: Retrospective operation - Held: It is a well settled principle of constitutional law that sovereign legislative bodies can make laws with retrospective operation;

and can make laws whose operation is dependent upon facts or events anterior to the making of the law - However, criminal law is excepted from such general Rule, under another equally well settled principle of constitutional law, i.e. no ex post facto legislation is permissible with respect to criminal law - Article 20 contains such exception to the general authority of the sovereign legislature functioning under the Constitution to make retrospective or retroactive laws - Criminal law - Constitution of India, 1950 - Article 20.

WRIT PETITION: Re-appreciation of evidence - Scope of - Plea that in view of the failure of High Court to examine the tenability of the order of the forfeiture as confirmed by the appellate tribunal the matter is required to be remitted to High Court for appropriate consideration - Held: Plea is rejected - In the writ petition, except challenging order of forfeiture on the two legal grounds, there was no other ground on which correctness of the order of forfeiture was assailed - For the first time in the instant appeal, an attempt was made to argue that conclusions drawn by competent authority that the properties forfeited were illegally acquired - Appellant sought re-appreciation of the evidence without even an appropriate pleading in the writ petition - Therefore, no reason to remit the matter to the High Court.

The appellant was once detained in 1974 under MISA, 1971 and then under COFEPOSA, 1974 for the reason that he with his brother in London was indulging in prejudicial activities. He was eventually released in 1977. He was given notice under Section 6(1) of SAFEMA on 4.3.1977 asking him to explain sources of income for acquiring certain properties. Then on 27.11.1989, respondent 2 ordered forfeiture of some of the properties of the appellant. His appeal was partly allowed. He then filed writ petition in High Court challenging the validity of the SAFEMA and legality of his detention under COFEPOSA. The Single judge of the High Court partly allowed it on the ground of defective notice. The appeal filed against

it was, however, allowed by the Division Bench of the High Court.

In the instant appeals, the appellant contended that the notice issued under Section 6 of the SAFEMA Act was defective as it did not contain the reasons which made the competent authority believe that the notice scheduled properties were illegally acquired properties; that the forfeiture, such as the one provided under the Act, is violative of Article 20 of the Constitution of India; and in the alternative, he contended that matter should be remitted to the High Court for an appropriate consideration of the legality of order of forfeiture as it has failed to consider the question whether the decision of the competent authority as confirmed by the appellate authority was sustainable.

Dismissing the appeals, the Court

HELD: 1.1. Initially notice under Section 6(1) of SAFEMA was issued at a point of time when the appellant was under preventive detention. Subsequently, by a communication dated 1st June, 1988, the recorded reasons for the belief which led to the issuance of notice under Section 6(1) of the Act was served on the appellant. The appellant not only filed a rejoinder to the said notice but he was also given a hearing before an order of forfeiture under Section 7 was passed. In support of the submission that the Division Bench of the High Court has erred in coming to the conclusion that notice under Section 6(1) did not vitiate the subsequent proceedings, the appellant relied upon a judgment of this Court in *Ajantha Industries. It was a case where this court had to consider the legality of the order under Section 127 of the Income Tax Act, 1961 transferring the 'case' of the Ajantha Industries. Dealing with the legality of such an order, it was held that there is a requirement of not only

recording the reasons for the decision to transfer the case but also such reasons are required to be communicated to the assessee. Though section 127 expressly provided for recording of reasons, it did not expressly provide communicating the same to the assessee. Still, it was held that such a communication is mandatory. Such a conclusion must be understood in the light of the observation of the Court that there was no provision of appeal or revision under the Income Tax Act against an order of transfer. For the same reason, this Court distinguished and declined to follow an earlier judgment in **S. Narayanappa where this Court on an interpretation of Section 34 of the Income Tax Act, 1922, opined to the contra. Section 34 provided for re-opening of the assessment with the prior sanction of the Commissioner, if the income tax officer has 'reasons to believe' that taxable income had been under-assessed. Dealing with the question whether the reasons which led the Commissioner to accord sanction for the initiation of proceedings under section 34 are required to be communicated to the assessee, it was held that there is no requirement in any of the provisions of the Act or any section laying down as a condition for the initiation of the proceedings that the reasons which induced the Commissioner to accord sanction to proceed under S.34 must be communicated to the assessee. [Para 13-17] [900-E-G; 901-A-B, E-F; 902-G-H]

1.2. The submission of the appellant is rejected on the ground that firstly, there is no express statutory requirement to communicate the reasons which led to the issuance of notice under Section 6 of the Act. Secondly, the reasons, though not initially supplied alongwith the notice dated 4.3.1977, were subsequently supplied thereby enabling the appellant to effectively meet the case of the respondents. Thirdly, the case on hand is squarely covered by the ratio of **Narayanappa case. The

appellant could have effectively convinced the respondents by producing the appropriate material that further steps in furtherance to the notice under Section 6 need not be taken. Apart from that, an order of forfeiture is an appealable order where the correctness of the decision under Section 7 to forfeit the properties could be examined. The ratio of *Ajantha Industries case does not lay down a universal principle that whenever a statute requires some reasons to be recorded before initiating action, the reasons must necessarily be communicated. [Para 19] [903-D-G]

Ajantha Industries and others v. Central Board of Direct Taxes and others,* **(1976) 1 SCC 1001 : 1976 (2) SCR 884 - held inapplicable.

***S. Narayanappa v. The Commissioner of Income-tax* **AIR 1967 SC 523 : 1967 SCR 590 - relied on.**

2.1. The SAFEMA Act enables the Government of India to forfeit "illegally acquired property" of any person to whom the Act is made applicable. The Act is made applicable to the persons specified in section 2(2). Five categories of persons covered are: Clause (a) - persons who have been convicted under various enactments referred to therein; clause (b) - persons in respect of whom an order of detention has been made under the COFEPOSA; clause (c) - persons who are relatives of persons referred to in clause (a) or clause (b). Clause (d) - every associate of persons referred to in clause (a) or clause (b). Clause (e) - subsequent holders of property which at some point of time belonged to persons referred to either in clause (a) or clause (b). Expression "illegally acquired property" is defined in elaborate terms under the Act. The definition covers two types of properties: acquired by the income or earnings; and assets derived or obtained from or attributable to any activity which is prohibited by or under a law in force. Such law must be

a law with respect to which parliament has the power to make law. The language and the scheme of the Act show that the application of the Act is limited to persons who have either suffered a conviction under one of the acts specified in section 2(2)(a) of the Act or detained under the COFEPOSA subsequent to the commencement of the Act in question. Apart from that there are other categories of persons to whom the Act applies. The appellant happens to be a person to whom the Act applies. He was detained under the provisions of the COFEPOSA. However, such a detention was anterior to the commencement of the Act, which came into force on 25th January 1976, while the detention order was passed on 19th December 1974. The appellant was eventually set at liberty in 1977. [Paras 20, 22-24] [903-H; 904-A; 905-A; 906-A-B; 907-E; 908-A-B, C; 909-B-C]

2.2. Section 7(3) of the Act provides for forfeiture of the illegally acquired property of the persons to whom the Act is made applicable after an appropriate enquiry contemplated under Sections 6 and 7 of the Act. In other words, the Act provides for the deprivation of the (illegally acquired) property of the persons to whom the Act applies. The question whether such a deprivation is consistent with Article 20 of the Constitution of India in the specific factual setting of the case coupled with the explanation 4 to section 2 depends upon whether such deprivation is a penalty within the meaning of the said expression occurring in Article 20. Article 20 contains one of the most basic guarantees to the subjects of the Republic of India. The relevant portion of Article stipulates two things:- that no person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence; and that no person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. [Paras

25, 26] [909-D-E; 910-B-E]

2.3. It is a well settled principle of constitutional law that sovereign legislative bodies can make laws with retrospective operation; and can make laws whose operation is dependent upon facts or events anterior to the making of the law. However, criminal law is excepted from such general Rule, under another equally well settled principle of constitutional law, i.e. no ex post facto legislation is permissible with respect to criminal law. Article 20 contains such exception to the general authority of the sovereign legislature functioning under the Constitution to make retrospective or retroactive laws. [Para 27] [910-E-G]

2.4. The regime of forfeiture of property contemplated under the Act is not new. At least from 1944 such a regime (though not identical but similar to the impugned one) is prevalent in this country. Two ordinances were made in 1943 and 1944, subsequently amended by another ordinance in 1945, all called Criminal Law Amendment Ordinances, which continued to be in force in this country by virtue of operation of Article 372 and some anterior laws. Under the 1943 Ordinance, two special Tribunals were constituted to try cases allotted to them "in the first Schedule in respect of such charges of offence prescribed under the second Schedule etc.". Essentially, such cases were cases either of charge of receipt of illegal gratification by a public servant or embezzlement of public money etc. The 1944 Ordinance provided for the attachment of the money or other property which is believed to have been procured by means of one of the above stated scheduled offences by the offender. Such attached property is required to be disposed of as provided under section 13 of the said Ordinance. Under Section 12 of the Ordinance, the Criminal Court trying a scheduled offence is obliged to

ascertain the amount or value of the property procured by the accused by means of the offence. Under section 13(3), it is provided that so much of the attached property referred to earlier equivalent to the value ascertained by the Criminal Court under section 12 is required to be forfeited to the State. [Para 34] [915-A-E; 916-A]

Attorney General for India & Others v. Amratlal Prajivandas and others **(1994) 5 SCC 54 : 1994 (1) Suppl. SCR 1;** *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and another* **(1973) 4 SCC 225 : 1973 (0) Suppl. SCR 1 - referred to.**

Bidie v. General Accident, Fire and Life Assurance Corporation **(1948) 2 All ER 995 - referred to.**

2.5. To understand the exact nature of the forfeiture contemplated under the (SAFEMA) Act it is necessary to examine the nature of the property which is sought to be forfeited and also the persons from whom such forfeiture is sought to be made. The Act is made applicable to five classes of persons specified under section 2. In other words, the properties of persons belonging to any one of the said five categories only could be forfeited under the Act. Even with reference to the properties held by any one falling under any of the five categories, their entire property cannot be forfeited except the property which is determined to be illegally acquired property as defined under section 3(c) of the Act. Of all the five categories of persons to whom the Act is made applicable, only one category specified under section 2(2)(a) happens to be of persons who are found guilty of an offence under one of the enactments mentioned therein and convicted. The other four categories of persons to whom the Act is applicable are persons unconnected with any crime or conviction under any law while the category of persons falling under section 2(2)(b) are persons who are believed by the State to be violators of law. The other three

categories are simply persons who are associated with either of the two categories mentioned in section 2(2)(a) and (b). At least with reference to the four categories other than the one covered by section 2(2)(a), the forfeiture/deprivation of the property is not a consequence of any conviction for an offence. Therefore, with reference to these four categories, the question of violation of Article 20 does not arise. Insofar as first category, Article 20 would have no application for the reason, conviction is only a factor by which the Parliament chose to identify the persons to whom the Act be made applicable. The Act does not provide for the confiscation of the properties of all the convicts falling under Section 2(2)(a) or detenues falling under Section 2(2)(b). Section 6 of the Act authorises the competent authority to initiate proceedings of forfeiture only if it has reasons to believe (such reasons for belief are required to be recorded in writing) that all or some of the properties of the persons to whom the Act is applicable are illegally acquired properties. The conviction or the preventive detention contemplated under Section 2 is not the basis or cause of the confiscation but the factual basis for a rebuttable presumption to enable the State to initiate proceedings to examine whether the properties held by such persons are illegally acquired properties. It is notorious that people carrying on activities such as smuggling to make money are very clandestine in their activity. Direct proof is difficult if not impossible. The nature of the activity and the harm it does to the community provide a sufficiently rational basis for the legislature to make such an assumption. More particularly, Section 6 specifically stipulates the parameters which should guide the competent authority in forming an opinion, they are; the value of the property and the known sources of the income, earnings etc. of the person who is sought to be proceeded against. Even in the case of such persons, the Act does not mandate

such an enquiry against all the assets of such persons. An enquiry is limited to such of the assets which the competent authority believes (to start with) are beyond the financial ability of the holder having regard to his known and legitimate sources of income, earnings etc. Connection with the conviction is too remote and, therefore, would not be hit by the prohibition contained under Article 20 of the Constitution of India. [Paras 39-40] [918-B-E; 919-A-H; 920-A-B]

R.S. Joshi, Sales Tax Officer, Gujarat and Others v. Ajit Mills Ltd. and Another, **(1977) 4 SCC 98 : 1978 (1) SCR 338 - Distinguished.**

R. Abdul Quader & Co. v. STO, **AIR 1964 SC 922 : 1964 SCR 867 - referred to.**

2.6. If a subject acquires property by means which are not legally approved, sovereign would be perfectly justified to deprive such persons of the enjoyment of such ill-gotten wealth. There is a public interest in ensuring that persons who cannot establish that they have legitimate sources to acquire the assets held by them do not enjoy such wealth. Such a deprivation would certainly be consistent with the requirement of Article 300A and 14 of the Constitution which prevent the State from arbitrarily depriving a subject of his property. Whether there is a right to hold property which is the product of crime is a question examined in many jurisdictions. Non-conviction based asset forfeiture model also known as Civil Forfeiture Legislation gained currency in various countries: United States of America, Italy, Ireland, South Africa, UK, Australia and certain provinces of Canada. The Act is not violative of Article 20 of the Constitution. Even otherwise, in view of its inclusion in the IXth Schedule, the Act is immune from attack on the ground that it violates any of the rights

guaranteed under Part III of the Constitution by virtue of the declaration under Article 31-B. [Paras 41-42, 43, 45] [920-C-D; 921-G-H; 922-D-E]

Article published in the Journal of Financial Crime, **2004 by Anthony Kennedy - referred to.**

3. The last submission i.e., in view of the failure of the High Court to examine the tenability of the order of the forfeiture as confirmed by the appellate tribunal the matter is required to be remitted to the High Court for appropriate consideration is rejected. In the writ petition, except challenging the order of forfeiture on the two legal grounds, there is no other ground on which correctness of the order of forfeiture is assailed in the writ petition. For the first time in this appeal, an attempt was made to argue that the conclusions drawn by the competent authority that the properties forfeited were illegally acquired - is not justified on an appropriate appreciation of defence of the appellant. In other words, the appellant seeks reappreciation of the evidence without even an appropriate pleading in the writ petition. It is a different matter that the High Court in exercise of its writ jurisdiction does not normally re-appreciate evidence. Looked at any angle, there is no reason to remit the matter to the High Court. [Paras 46-47] [922-F-H; 923-A-B]

State of West Bengal v. S.K. Ghosh, **[AIR 1963 SC 255] : 1963 SCR 111 - Referred to.**

Case Law Reference:

1976 (2) SCR 884	**held inapplicable**	**Para 14**
1967 SCR 590	**Relied on**	**Para 17**
1978 (1) SCR 338	**Distinguished**	**Para 30**
1963 SCR 111	**Referred to**	**Para 31**

1994 (1) Suppl. SCR 1	**Referred to**	**Para 31**
(1948) 2 All ER 995 at 998	**Referred to**	**Para 32**
1973 (0) Suppl. SCR 1	**Referred to**	**Para 33**
1964 SCR 867	**Referred to**	**Para 37**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 772-773 of 2014.

From the Judgment and Order dated 09.08.2007 and order dated 30.08.2007 of the High Court at Calcutta in FMA No. 206 of 2003 and RVW No. 2372 of 2007.

C.A. Sundaram, Puneet Jain, Christie Jain (for Pratibha Jain) for the Appellant.

A.S. Chandhiok, ASG, Rashmi Malhotra, Ritesh Kumar, Vidit Gupta, Harleen Singh, Vishnu Kant, Gurpreet S. Parwanda, Hayank Baamniyal, Tanushree Sinha, Anil Katiyar (for B.V. Balaram Das) for the Respondents.

The Judgment of the Court was delivered by

CHELAMESWAR, J. 1. Leave granted.

2. These two appeals are preferred against the final judgment dated 9th August 2007 passed by the Calcutta High Court in FMA No.206 of 2003 and order dated 30th August 2007 in Review Application bearing RVW No.2372 of 2007 dismissing the said review application filed by the appellant herein.

3. The facts leading to the instant litigation are as follows:

4. The appellant was initially detained by order dated 19.12.1974 under the provisions of the Maintenance of Internal Security Act, 1971 (since repealed) and later under the provisions of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (hereinafter

referred to as the "COFEPOSA") on the ground that he in collaboration with his brother, who was living in London at that point of time, was indulging in activities which are prejudicial to the conservation of foreign exchange. The appellant unsuccessfully challenged the detention order. He was eventually released in 1977.

5. While he was in custody, the second respondent issued a notice dated 4th March 1977 under section 6(1) of the Smugglers and Foreign Exchange Manipulators (Forefeiture of Property) Act, 1976 (hereinafter referred to as "the Act") calling upon the appellant to explain the sources of his income out of which he had acquired the assets described in the schedule to the notice. Some correspondence ensued between the second respondent on one hand and the wife of the appellant and the appellant on the other hand, the details of which may not be necessary for the time being.

6. Eventually on 27th November 1989, the second respondent passed an order under section 7(1) of the Act forfeiting the properties mentioned in the schedule to the said order.

7. Aggrieved by the said order, an appeal was carried to the Appellate Tribunal constituted under section 12 of the Act. The appeal was partly allowed setting aside the forfeiture of two items of the properties.

8. Not satisfied with the Appellate Authority's conclusion, the appellant challenged the same in writ petition No. C.O. No.10543 (W) of 1991 before the High Court of Calcutta. In the said writ petition, the appellant also prayed for two declarations - (1) that the Act is illegal and ultra vires the Constitution and (2) that the detention of the appellant under the COFEPOSA by the order dated 19th December 1974 was illegal and void - a collateral and second round of attack.

9. Learned Single Judge of the Calcutta High Court by an

order dated 10th May 2002 partly allowed the writ petition holding that the forfeiture of the property by the second respondent as confirmed by the Appellate Tribunal was illegal on the ground that the notice under section 6(1) of the Act dated 4th March 1977 was not in accordance with the law as the notice did not contain the reasons which constituted the basis for the belief of the competent authority that the appellant illegally acquired the scheduled properties.

10. Aggrieved by the order of the learned Single Judge, the respondents herein carried the matter in appeal to the Division Bench. By the judgment under appeal, the appeal was allowed.

11. It appears from the judgment under appeal that though the appellant sought a declaration that the Act (SAFEMA) is unconstitutional, such a plea was not pressed before the learned Single Judge.[1]

12. Before us, the appellant made three submissions - (1) that the notice issued under Section 6 of the Act is defective and therefore illegal as the notice did not contain the reasons which made the competent authority believe that the notice scheduled properties are illegally acquired properties. In other words, the reasons were not communicated to the appellant; (2) that the forfeiture, such as the one provided under the Act, is violative of Article 20 of the Constitution of India; and (3) in the alternative, it is argued - that the High Court failed to consider the question whether the decision of the competent authority as confirmed by the appellate authority is sustainable and therefore, the matter is required to be remitted to the High

1. On perusal of the judgment and order of the Learned Single Judge it appears that although the vires of the said Act was under challenge the respondent No. 1 only asked for cancellation of the order of detention issued under Section 3 of the COFEPOSA and the orders passed by the competent authority so merged in the appellate authority under section 6(1) of the SAFEMA as well as prayed for release of the properties confiscated by the appellate authority in terms of the order impugned therein.

Court for an appropriate consideration of the legality of order of forfeiture.

13. Regarding the non communication of the reasons, the judgment under appeal recorded as follows:

> "The matter may be looked into from another angle. In 1976 he was under detention. His wife replied to the said notice without complaining of non-supply of reasoning. After his release the respondent No.1 gave a further rejoinder by adopting what had been said by his wife. The authority did not proceed against him until he was served with the reasoning in 1988. The respondent No.1 was also afforded opportunity to deal with the reasonings in his rejoinder. The competent authority after affording him opportunity of hearing passed a detailed reasoned order. He preferred an appeal. The appeal was allowed in part that too by a detailed reasoned order. Hence, we do not find any reason to hold that the fundamental right of the respondent No.1 was infringed."

It appears from the record that initially notice dated 4.3.1977 under Section 6(1) was issued at a point of time when the appellant was under preventive detention. Subsequently, by a communication dated 1st June, 1988, the recorded reasons for the belief which led to the issuance of notice under Section 6(1) of the Act was served on the appellant. The appellant not only filed a rejoinder to the said notice but he was also given a hearing before an order of forfeiture under Section 7 was passed. It is in the background of the abovementioned facts we are required to consider the submission that the High Court erred in coming to the conclusion that notice under Section 6(1) did not vitiate[2] the subsequent proceedings.

2. The respondent No. 1 for the first time in the wirt petition contended that the notice under Section 6(1) was bad due to non-supply of reasons whereas it would appear that the reasons were supplied as and when asked for. Delayed supply of reasons, in our view, did not vitiate the subsequent orders of the competent authority as well as appellate authority.

14. In support of the submission, learned counsel for the appellant very heavily relied upon a judgment of this Court in *Ajantha Industries and others v. Central Board of Direct Taxes and others,* (1976) 1 SCC 1001. It was a case where this court had to consider the legality of the order under Section 127 transferring the 'case' of the *Ajantha Industries*.

15. Section 127 of the Income Tax Act, 1961 empowers the authorities (mentioned therein) to transfer "any case" (explained in the said section) from one Income Tax Officer to another. Further, the section stipulates that before such an order of transfer is made, two conditions are required to be complied with - (1) that the assessee must be given a reasonable opportunity to explain why his case should not be transferred; and (2) the authority transferring the case is required to record the reasons which led him to initiate the proceedings. It appears from the judgment that though first of the abovementioned two requirements was complied with, it was found that no reasons were recorded much less communicated. Dealing with the legality of such an order, this Court held that there is a requirement of not only recording the reasons for the decision to transfer the case but also such reasons are required to be communicated to the assessee.

16. Though section 127 expressly provided for recording of reasons it did not expressly provide communicating the same to the assessee. Still, this Court held that such a communication is mandatory.

"10. The reason for recording of reasons in the order and

Show cause notice was served in 1976. It was not proceeded with till 1988 wnen reasons were supplied. Order was passed by the competent authority upon affording adequate opportunity of hearing. The respondent No.1 availed the remedy of appeal where his appeal was partly allowed. With deepest regard we have for the learned single Judge, His Lordship was perhaps not right in interfering with the show cause notice at the stage when the respondent No.1 availed of the remedies in law and became partly succesful before the appellate authority.

making these reasons known to the assessee is to enable an opportunity to the assessee to approach the High Court under its writ jurisdiction under Article 226 of the Constitution or even this Court under Article 136 of the Constitution in an appropriate case for challenging the order, inter alia, either on the ground that it is mala fide or arbitrary or that it is based on irrelevant and extraneous considerations. Whether such a writ or special leave application ultimately fails is not relevant for a decision of the question.

11. We are clearly of opinion that the requirement of recording reasons under Section 127(1) is a mandatory direction under the law."

17. In our view, such a conclusion must be understood in the light of the observation of the Court that there was no provision of appeal or revision under the Income Tax Act against an order of transfer. For the same reason, this Court distinguished and declined to follow an earlier judgment in *S. Narayanappa v. The Commissioner of Income-tax* AIR 1967 SC 523 where this Court on an interpretation of Section 34 of the Income Tax Act, 1922, opined to the contra. Section 34 provided for re-opening of the assessment with the prior sanction of the Commissioner, if the income tax officer has 'reasons to believe' that taxable income had been under-assessed. Dealing with the question whether the reasons which led the Commissioner to accord sanction for the initiation of proceedings under section 34 are required to be communicated to the assessee, this Court held -

"There is no requirement in any of the provisions of the Act or any section laying down as a condition for the initiation of the proceedings that the reasons which induced the Commissioner to accord sanction to proceed under S.34 must be communicated to the assessee."

18. In *Ajantha Industries* case, Narayanappa's case was distinguished on the ground -

> "When an order under Section 34 is made the aggrieved assessee can agitate the matter in appeal against the assessment order, but an assessee against whom an order of transfer is made has no such remedy under the Act to question the order of transfer. Besides, the aggrieved assessee on receipt of the notice under Section 34 may even satisfy the Income-tax Offier that there were no reasons for reopening the assessment. Such an opportunity is not available to an assessee under Section 127(1) of the Act. The above decision is, therefore, clearly distinguishable."

19. We reject the submission of the appellant for the following reasons. Firstly, there is no express statutory requirement to communicate the reasons which led to the issuance of notice under Section 6 of the Act. Secondly, the reasons, though not initially supplied alongwith the notice dated 4.3.1977, were subsequently supplied thereby enabling the appellant to effectively meet the case of the respondents. Thirdly, we are of the opinion that the case on hand is squarely covered by the ratio of *Narayanappa* case. The appellant could have effectively convinced the respondents by producing the appropriate material that further steps in furtherance to the notice under Section 6 need not be taken. Apart from that, an order of forfeiture is an appealable order where the correctness of the decision under Section 7 to forfeit the properties could be examined. We do not see anything in the ratio of *Ajantha Industries* case which lays down a universal principle that whenever a statute requires some reasons to be recorded before initiating action, the reasons must necessarily be communicated.

20. Now, we deal with the second submission. The Act enables the Government of India to forfeit "illegally acquired property" of any person to whom the Act is made applicable.

The Act is made applicable to the persons specified in section 2(2)[3]. Five categories of persons are covered thereunder. Clause (a) - persons who have been convicted under various enactments referred to therein; clause (b) - persons in respect

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3. Section 2. Application—(1) The provisions of this Act shall apply only to the persons specified in sub-section (2).

(2) The persons referred to in sub-section (1) are the following, namely:-

(a) every person—

(i) who has been convicted under the Sea Customs Act, 1878 (8 of 1878), or the Customs Act, 1962 (52 of 1962), of an offence in relation to goods of a value exceeding one lakh of ruppes; or

(ii) who has been convicted under the Foreign Exchange Regulation Act, 1947 (7 of 1947), or the Foreign Exchange Regulation Act, 1973 (46 of 1973), of an offence, the amount of value involved in which exceeds one lakh of rupees; or

(iii) who have been convicted under the Sea Customs Act, 1878 (8 of 1878), or the Customs Act, 1962 (52 of 1962), has been convicted subsequently under either of those, Acts; or

(iv) who having been convicted under the Foreign Exchange Regulation Act, 1947 (7 of 1947), or the Foreign Exchange Regulation Act, 1973 (46 of 1973), has been convicted subeqeuntly under either of those Acts;

(b) every person in respect of whom an order of detention has been made under the Conservation of Foreign Exchange and prevention of Smuggling Activities Act, 1974 (52 of 1974):

Provided that—

(i) such order of detention being an order to which the provisions of section 9 or section 12A of the said Act do not apply, has not been revoked on the report of the Advisory Board under section 8 of the said Act or before the receipt of the Advisory Board or before making a reference to the Advisory Board: or

(ii) such order of detention being an order to which the provisions of section 9 of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the review under sub-section (3) of section 9 or on the report of the Advisory Board under section 8, read with sub-section (2) of section 9 of the said Act; or

(iii) such order of detention, being an order to which the provisions of section 12A of the said Act apply, has not been revoked before the expiry of the time for, or on the basis of, the first review under sub-section (3) of that section, or on the basis of the report of the Advisory Board under section 8, read with sub-section (6) of section 12A, of that Act; or

of whom an order of detention has been made under the

(iv) such order of detention has not been set aside by a court of competent jurisdiction;

(c) every person who is a relative of a person referred to in clause (a) or clause (a) or clase (b);

(d) every associate of person referred to in clause (a) or clause (b);

(c) any holder of any property which was at any time previously held by a person referred to in clause (a) or clause (b) unless the present holder or, as the case may be, any one who held such property after such person and before the present holder, is or was a transferee in good faith for adequate consideration.

Explanation 1.—For the purposes of sub-clause (i) of clause (a), the value of any goods in relation to which a person has been convicted of an offence shall be the wholesale price of the goods in the ordinary course of trade in India as on the date of the comission of the offence.

Explanation 2.—For the purpose of clause, “relative” in relation to a person, menas—

(i) spouse of the person;

(ii) brother or sister of the person;

(iii) brother or sister of the spouse of person;

(iv) any lineal ascendant or descendant of the person;

(v) any lineal ascendant or desendant of the spouse of the person;

(vi) spouse of a person referred to in clause (ii), clause (iii), clause (iv) or clause (v);

(vii) any lineal descendant of a person referred to in clause (ii) or clause (iii).

Explanation 3.—For the purposes of clause (d), “associate”, in relation to a person, means—

(i) any individual who had been or is residing in the residential premises (including out houses) of such person;

(ii) any individual who had been or in managing the affaris or keeping the accounts of such person;

(iii) any association or person, body of individuals, partnership firms, or private company within the meaning of the Companies Act, 1956 (1 of 1956), of which such person had been or is a member, partner or director.

(iv) any individual who had been or is a member, partner or director of an association of persons, body of indivduals, partnership firm, or private company within the meaning of the Companies when such person had been or is a member, partner or director of such association, body, partnership firm of a private company;

COFEPOSA (subject to certain conditions/exceptions the details of which are not necessary for our purpose); clause (c) - persons who are relatives of persons referred to in clause (a) or clause (b). Expression "relative" is itself explained in explanation 2. Clause (d) - every associate of persons referred to in clause (a) or clause (b). Once again the expression "associate" is explained under explanation 3 to sub-section (2). Clause (e) - subsequent holders of property which at some point of time belonged to persons referred to either in clause (a) or clause (b).

21. Section 4 makes it unlawful (for any person to whom the Act applies) to hold any illegally acquired property and it further declares that such property shall be liable to be forfeited to the Central Government (following the procedure prescribed under the Act). The procedure is contained under sections 6 and 7 of the Act. Section 8 prescribes the special rule of evidence which shifts the burden of proving that any property specified in the notice under section 6 is not illegally acquired property of the noticee. Section 6 inter alia postulates that

(v) any person who had been or is managing the affiars, or keeping the accounts, of any association of persons, body of indivduals, partnership firm or private company referred to in clause (iii).

(vi) the trustee of any trust, where,—

(a) the trust has been created by such person; or

(b) the value of the assets contributed by such person (including the value of the assets, if any, contributed by him earlier) to the trust amounts, on the date on which thecontribution is made, to not less than twenty per cent, of the value of the assets of the trust on that date;

(vii) where the competent authority, for reasons to be recorded in writing considers that any properties of such person are held on his behalf by any other person, such other person.

Explanation 4.— For the avoidance of doubt, it is herebyprovided that the question whether any person is a person to whom theprovisions of this Act apply may be determined with reference to any facts,circumstances or events including any conviction or detention which occurred or took place before the commencement of this Act.

having regard to the value of the property held by any person (to whom the Act applies) and his known sources of income, if the "competent authority" (notified under section 5) has reason to believe that such properties are "illegally acquired properties", the competent authority is authorized to call upon the holder of the property to 'indicate' the source of his income etc. which enabled the acquisition of such property along with necessary evidence. It also authorizes the competent authority to call upon the noticee to show cause as to why all or any of such properties mentioned in the notice should not be declared illegally acquired properties and be forfeited to the Central Government. Section 7 provides for a reasonable opportunity of being heard after the receipt of response to the notice under section 6 to the noticee and requires the competent authority to record a finding whether all or any of the properties in question are illegally acquired properties. Section 7 also provides for certain incidental matters the details of which are not necessary for the present purpose.

22. Expression "illegally acquired property" is defined in elaborate terms under the Act[4]. Broadly speaking the definition covers two types of properties:

4. Section 3(c) "illegally acquired property", in relation to any person to whom this Act applies, means,—

(i) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets derived or obtained from or attributable to any activity prohibited by or under any law for the time being in force relating to any matter in respect of which Parliament has power to make laws; or

(ii) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets in respect of which any such law has been contravened; or

(iii) any property acquired by such person, whether before or after the commencement of this Act, wholly or partly out of or by means of any income, earnings or assets the source of which cannot be proved and which cannot be shown to be attributable to any act or thing done in respect of any matter in relation to which Parliament has no power to make laws; or

1) acquired by the income or earnings; and

2) assets derived or obtained

from or attributable to any activity which is prohibited by or under a law in force. Such law must be a law with respect to which parliament has the power to make law. A complete analysis of the definition in all its facets may not be necessary for our purpose.

23. From the language and the scheme of the Act it does not appear that the application of the Act is limited to persons who either suffered a conviction under one of the acts specified in section 2(2)(a) the Act or detained under the COFEPOSA subsequent to the commencement of the Act in question. On the other hand, explanation 4 to section 2 expressly declares as follows:

"Explanation 4.-For the avoidance of doubt, it is hereby provided that the question whether any person is a person to whom the provisions of this Act apply may be determined with reference to any facts, circumstances or events (including any conviction or detention which

(iv) any property acquired by such person, whether before or after commencement of this Act, for a consideration, or by any means, wholly or partly traceable to any property referred to in sub- clauses (i) to (ii) or the income or earnings from such property; and includes—t

(A) any property held by such person which would have been, in relation to any previous holder thereof, illegally acquired property under this clause if such previous holder had not ceased to hold it, unless such person or any other person who held the property at any time after such previous holder or, where there are two or more such previous holders, the last of such previous holders is or was a transferee in good faith for adequate consideration;

(B) any property acquired by such person, whether before or after the commencement of this Act, for a consideration, or by any means, wholly or partly traceable to any property falling under item (A), or the income or earnings therefrom.

occurred or took place before the commencement of this Act)."

Apart from that we have already taken note of the fact that there are other categories of persons to whom the Act applies.

24. The appellant happens to be a person to whom the Act applies. He was detained under the provisions of the COFEPOSA. However, such a detention was anterior to the commencement of the Act, which came into force on 25th January 1976, while the detention order was passed on 19th December 1974. It appears from the judgment under appeal that the appellant was eventually set at liberty in 1977.

25. Section 7(3) of the Act provides for forfeiture of the illegally acquired property of the persons to whom the Act is made applicable after an appropriate enquiry contemplated under Sections 6 and 7 of the Act. In other words, the Act provides for the deprivation of the (illegally acquired) property of the persons to whom the Act applies. The question which we were called upon to deal with is whether such a deprivation is consistent with Article 20[5] of the Constitution of India in the specific factual setting of the case coupled with the explanation 4 to section 2 which reads as follows:

"Explanation 4.-For the avoidance of doubt, it is hereby provided that the question whether any person is a person to whom the provisions of this Act apply may be

5. 20. Protection in respect of conviction for offences.—(1) No person shall be convicted of any offence except for violation of a law in force atthe time of the commission of the Act charged as an offence, nor besubjected to a penalty greater than that which might have been inflictedunder the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself.

determined with reference to any facts, circumstances or events (including any conviction or detention which occurred or took place before the commencement of this Act)."

The answer to the question depends upon whether such deprivation is a penalty within the meaning of the said expression occurring in Article 20.

26. Article 20 contains one of the most basic guarantees to the subjects of the Republic of India. The Article in so far as is relevant for our purpose stipulates two things:-

- That no person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence; and
- That no person shall be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

27. It is a well settled principle of constitutional law that sovereign legislative bodies can make laws with retrospective operation; and can make laws whose operation is dependent upon facts or events anterior to the making of the law. However, criminal law is excepted from such general Rule, under another equally well settled principle of constitutional law, i.e. no ex post facto legislation is permissible with respect to criminal law. Article 20 contains such exception to the general authority of the sovereign legislature functioning under the Constitution to make retrospective or retroactive laws.

28. The submission of the appellant is that since the Act provides for a forfeiture of the property of the appellant on the ground that the appellant was detained under the COFEPOSA, the proposed forfeiture is nothing but a penalty within the

meaning of the expression under Article 20 of the Constitution. Such an inference is inevitable in the light of the definition of "illegally acquired property" which by definition (under the Act) is property acquired either "out of" or by means "of any income, earnings ..." "obtained from or attributable to any activity prohibited by or under any law ...". On the other hand, if the forfeiture contemplated by the Act is not treated as a penalty for the alleged violation of law on the part of the appellant, it would be plain confiscation of the property of the appellant by the State without any factual justification or the constitutional authority.

29. The learned counsel for the appellant further argued that the forfeiture contemplated under the Act whether based on proven guilt or suspicion of involvement in a certain specified activity prohibited by the Customs Act can only be a 'penalty' attracting the prohibition of Article 20 of the Constitution of India. It is submitted that under Section 53[6] of the Indian Penal Code, forfeiture of property is one of the prescribed punishments for some of the offences covered under the Indian Penal Code.

30. Learned counsel for the appellant placing reliance on *R.S. Joshi, Sales Tax Officer, Gujarat and Others v. Ajit Mills Ltd. and Another,* (1977) 4 SCC 98 submitted that a Constitution Bench of this Court also opined the expression

6. Section 53. Punishments.—The punishments to which offenders are liable under the provisions of this Code are—

First—Death;

Secondly.—Imprisonment for life;

Thirdly.— Omitted

Fourthly.—Imprisonment, which is of two descriptions, namely.—

(1) Rigorous, that is, with hard labour;

(2) Simple;

Fifthly.—Forfeiture of property;

Sixthly.—Fine.

"forfeiture" to mean "a penalty for breach of a prohibitory direction".[7]

7. 18. Coming to “forfeiture’, what is the true character of a “forfeiture’? Is it punitive in infliction, or merely another form of exaction of money by one from another? If it is penal, it falls within implied powers. If it is an act of mere transference of money from thedealer to the State, then it falls outside the legislative entry. Such isthe essence of the decisions which we will presently consider. There was acontention that the expression “forfeiture” did not denote a penalty. This,perhaps, may have to be decided in the specific setting of a statute. But,speaking generally, and having in mind the object of Section 37 read withSection 46, we are inclined to the view that forfeiture has a punitiveimpact. Black’s Legal Dictionary states that “to forfeit” is “to lose, orlose the right to, by, some error, fault, offence or crime’, “to incur apenalty’. “Forfeiture’, as judicially annotated, is “a punishment annexedby law to some illegal act or negligence . . .’. “something imposed as apunishment for an offence or delinquency’. The word, in this sense, isfrequently associated with the word “penalty’. According to Black’s LegalDictionary,

> The terms “fine”, “forfeiture”, and “penalty”, are often used loosely, and even confusedly : but when a discrimination is made, the word “penalty” is found to be generic in its character, including both fine and forfeiture. A “fine” is a pecuniary penalty, and is commonly (perhaps always) to be collected by suit in some form. A “forfeiture” is a penalty by which one loses his rights and interest in his property.

More explicitly, the U.S. Supreme Court has explained the concept of “forfeiture” in the context of statutory construction. Chief Justice Taney, in the State of Maryland v. Baltimore & Ohio RR Co., 11 L.Ed. 714, 722 observed :

> “And a provision, as in this case, that the party shall forfeit a particular sum, in case he does not perform an act required by law, has always, in the construction of statutes, been regarded not as a contract with the delinquent party, but as the punishment for an offence. Undoubtedly, in the case of individuals, the word forfeit is construed to be the language of contract, because contract is the only mode in which one person can become liable to pay a penalty to another for breach of duty, or the failure to perform an obligation. In legislative proceedings, however, the construction is otherwise, and a forfeiture is always to be regarded as a punishment inflicted for a violation of some duty enjoined upon the party by law ; and such, very clearly, is the meaning of the word in the act in question.”

19. The same connotation has been imparted by our Court too. A Bench has held [Bankura Municipality v.Lalji Raja & Sons, 1953 Cri LJ 1101]:

> “According to the dictionary meaning of the word ‘forfeiture’ the loss or the deprivation of goods has got to be in consequence of a crime, offence or breach of engagement or has to be by way of penalty of the transgression or a punishment for an offence. Unless the loss or deprivation of the goods

31. On the other hand, the learned Addl. Solicitor General appearing for the respondent submitted that the forfeiture contemplated under the Act is not a 'penalty' within the meaning of that expression occurring in Article 20 but only a deprivation of property of a legislatively identified class of persons - in the event of their inability to explain (to the satisfaction of the State) that they had legitimate sources of funds for the acquisition of such property. The learned Addl. Solicitor General further submitted that while in the case of that class of persons covered under Section 2(2)(a) of the Act, the forfeiture though has a remote connection with the commission of a crime and conviction; with reference to the other four classes of persons to whom the Act is made applicable under Section 2(2) (b) to (e), the forfeiture has nothing to do with any crime or conviction. Therefore, to say that the forfeiture under the Act is hit by the prohibition under Article 20 is without any basis in law. The learned Addl. Solicitor General also relied upon *The State of*

is by way of a penalty or punishment for a crime, offence or breach of engagement it would not come within the definition of forfeiture."

This word "forfeiture" must bear the same meaning of a penalty for breach of a prohibitory direction. The fact that there is arithmetical identity, assuming it to be so, between the figures of the illegalcollections made by the dealers and the amounts forfeited to the Statecannot create a conceptual confusion that what is provided is notpunishment but a transference of funds. If this view be correct, and wehold so, the legislature, by inflicting the forfeiture, does not go outsidethe crease when it hits out against the dealer and deprives him, by thepenalty of the law, of the amount illegally gathered from the customers. The Criminal Procedure Code, Customs & Excise Laws and several other penal statutes in India have used diction which accepts forfeiture as a kind of penalty. When discussing the rulings of this Court we will explore whetherthis true nature of "forfeiture" is contradicted by anything we can find inSections 37(1), 46 or 63. Even here we may reject the notion that a penaltyor a punishment cannot be cast in the form of an absolute or no-faultliability but must be preceded by mens rea. The classical view that "nomens rea, no crime" has long ago been eroded and several laws in India andabroad, especially regarding economic crimes and departmental penalties,have created severe punishments even where the offences have been definedto exclude mens rea. Therefore, the contention that Section 37(1) fastens aheavy liability regardless of fault has no force in depriving the forfeiture of the character

West Bengal v. S.K. Ghosh, [AIR 1963 SC 255] and *R.S. Joshi* (supra) in support of his submission. Alternatively, the learned Addl. Solicitor General submitted that in view of the fact that the Act is included in the Ninth Schedule, the Act is immune from any attack on the ground that it violates any one of the fundamental rights contained in Part III of the Constitution of India, as was held by a Constitution Bench of this Court in *Attorney General for India & Others v. Amratlal Prajivandas and others* (1994) 5 SCC 54.

32. Lord Green in *Bidie v. General Accident, Fire and Life Assurance Corporation* [(1948) 2 All ER 995 at 998] said in the context of ascertaining the meaning of an expression in any statute that "Few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context".

33. Chief Justice Sikri in *His Holiness Kesavananda Bharati Sripadagalvaru v. State of Kerala and another* (1973) 4 SCC 225 dwelt on this subject referring to two English decisions and one American decision stating in substance that the meaning of a word occurring in a statute cannot be ascertained without examining the context and also the scheme of the Act in which the expression occurs.[8]

8. 56. In construing the expression "amendment of this Constitution" I must look at the whole scheme of the Constitution. It is not right to construe words in vacuum and then insert the meaning into an article. Lord Green observed in Bidie v. General Accident, Fire and Life Assurance Corporation (1948) 2 All ER 995, 998.

"The first thing one has to do, I venture to think, in construing words in a Section of an Act of Parliament is not to take those words in vacuo, so to speak, and attribute to them what is sometimes called their natural or ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context. The method of construing statutes that I prefer is not to take particular words and attribute to them a sort of prima facie meaning which you may have to displace or modify. It is to read the statute as a whole and ask oneself the question : 'In this state, in this context, relating to this subject-matter, what is the true meaning of that words'."

34. The regime of forfeiture of property contemplated under the Act is not new. At least from 1944 such a regime (though not identical but similar to the impugned one) is prevalent in this country. Two ordinances were made in 1943 and 1944, subsequently amended by another ordinance in 1945, all called Criminal Law Amendment Ordinances, which continued to be in force in this country by virtue of operation of Article 372 and some anterior laws - the details of which may not be necessary for the present purpose. Under the 1943 Ordinance, two special Tribunals were constituted to try cases allotted to them "in the first Schedule in respect of such charges of offence prescribed under the second Schedule etc.". Essentially, such cases were cases either of charge of receipt of illegal gratification by a public servant or embezzlement of public money etc. The 1944 Ordinance provided for the attachment of the money or other property which is believed to have been procured by means of one of the above mentioned scheduled offences by the offender. Such attached property is required to be disposed of as provided under section 13 of the said Ordinance. Under Section 12 of the Ordinance, the Criminal Court trying a scheduled offence is obliged to ascertain the amount or value of the property procured by the accused by means of the

57. I respectfully adopt the reasoning of Lord Green in construing the expression "the amendment of the Constitution."

58. Lord Green is not alone in this approach. In Bourne v. Norwich Crematorium, (1967) 2 ALL ER 576, 578 it is observed:

"English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence defined separately by reference to the dictionary or decided cases, and then put back again into the sentence with the meaning which you have assigned to them as separate words, so as to give the sentence or phrase a meaning which as a sentence or phrase it cannot bear without distortion of the English language."

59. Holmes, J., in Towne v. Eisner, 245 US 418, 425 had the same thought. He observed :

"A word is not a crystal, transparent and unchanged; it is the skin of living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used."

offence. Under section 13(3), it is provided that so much of the attached property referred to earlier equivalent to the value ascertained by the Criminal Court under section 12 is required to be forfeited to the State.

35. Dealing with the question - whether such forfeiture (in the factual setting of the case) violated Article 20 of the Constitution of India?, a Constitution Bench of this Court held that the forfeiture contemplated in the Ordinance was not a penalty within the meaning of Article 20 but it is only a speedier mode of recovery of the money embezzled by the accused.[9]

36. In R.S. Joshi case, the question was whether it was permissible for the State Legislature to enact that sums collected by dealers by way of sales tax but are not exigible under the State Law - indeed prohibited by it - shall be forfeited to the exchequer.

37. The question - whether such a forfeiture was a penalty violating Article 20 did not arise in the facts of that case. The discussion revolved around the question - whether such a forfeiture is a penalty for the violation of a prohibition contained under section 46 of the relevant Sales Tax Act? The contravention of section 46 is made punishable with imprisonment and fine under section 63 of the said Act. Apart from that, section 37 of the said Act provided for a departmental proceeding against the dealers who violated the prohibition under section 46. The said departmental proceeding could result in the forfeiture of ".. any sums collected by any person

9. The State of West Bengal v. S.K. Ghosh, AIR 1963 SC 255

Para 15. .. We are therefore of opinion that forfeiture provided in S. 13(3) in case of offences which involve the embezzlement etc. of Government money or property is really a speedier method of realizing government money or property as compared to a suit which it is not disputed the Government could bring for realizing the money or property and is not punishment or penalty within the meaning of Article 20(1). Such a suit could ordinarily be brought without in any way affecting the right to realize the fine that may have been imposed by a criminal Court in connection with the offence.

by way of tax in contravention of section 46 ..". The legal issue before this Court was - whether the State Legislature had necessary competence to provide for such forfeiture? The answer to the query depended upon whether such a forfeiture is a penalty for the violation of law made by the State for the levy and collection of sales tax. If it is not a penalty but a plain transfer of money (illegally collected by the dealer) to the State it would be incompetent for the legislature to make such a provision in the light of an earlier Constitution Bench decision of this Court in *R. Abdul Quader & Co. v. STO,* AIR 1964 SC 922.[10]

10. The first question therefore that falls for consideration is whether it was open to the State legislature under its powers under Entry 54 of List II to make a provision to the effect that money collected by way of tax, even though it was not due as a tax under the Act, shall be made over to Government. Now it is clear that the sums so collected by way of tax are not in fact tax exigible under the Act. So it cannot be said that the State legislature was directly legislating for the imposition of sales or purchase tax under Entry 54 of List II when it made such a provision, for on the face of the provision, the amount, though collected by way of tax, was not exigible as tax under the law. The provision however is attempted to be justified on the ground that though it may not be open to a State legislature to make provision for the recovery of an amount which is not a tax under Entry 54 of List II in a law made for that purpose, it would still be open to the legislature to provide for paying over all the amounts collected by way of tax by persons, even though they really are not exigible as tax, as part of the incidental and ancillary power to make provision for the levy and collection of such tax. Now there is no dispute that the heads of legislation in the various Lists in the Seventh Schedule should be interpreted widely so as to take in all matters which are of a character incidental to the topics mentioned therein. Even so, there is a limit to such incidental or ancillary power flowing from the legislative entries in the various Lists in the Seventh Schedule. These incidental and ancillary powers have to be exercised in aid of the main topic of legislation, which, in the present case, is a tax on sale or purchase of goods. All powers necessary for the levy and collection of the tax concerned and for seeing that the tax is not evaded are comprised within the ambit of the legislative entry as ancillary or incidental. But where the legislation under the relevant entry proceeds on the basis that the amount concerned is not a tax exigible under the law made under that entry, but even so lays down that though it is not exigible under the law, it shall be paid over to Government, merely because some dealers by mistake or otherwise have collected it as tax, it is difficult to see how such provision can be ancillary or incidental to the collection of tax legitimately due under a law made under the relevant taxing entry. We do not think that the ambit of ancillary or incidental power goes to the extent of permitting the legislature to provide that though the amount collected — may be wrongly — by way of tax is not exigible under the law as made under the relevant taxing entry, it shall still be paid over to Government, as if it were tax. The legislature cannot under Entry 54 of List II make a provision to the effect that even though a certain amount collected is not a tax on the sale or purchase of goods as laid down by the law, it will still be collected as if it was such a tax. This is what Section 11(2) has provided. Such a provision cannot in our opinion be treated as coming within incidental or ancillary powers which the legislature has got under the relevant taxing entry to ensure that the tax is levied and collected and that its evasion becomes impossible. We are therefore of opinion that the provision contained in Section 11(2) cannot be made under Entry 54 of List II and cannot be justified even as an incidental or ancillary provision permitted under that entry.

38. As explained above, the issue and the ratio decidendi of *R.S. Joshi* case is entirely different and has nothing to do with the application of Article 20 of the Constitution of India.

39. To understand the exact nature of the forfeiture contemplated under the (SAFEMA) Act it is necessary to examine the nature of the property which is sought to be forfeited and also the persons from whom such forfeiture is sought to be made. As already noticed, the Act is made applicable to five classes of persons specified under section 2. In other words, the properties of persons belonging to any one of the said five categories only could be forfeited under the Act. Even with reference to the properties held by any one falling under any of the abovementioned five categories, their entire property cannot be forfeited except the property which is determined to be illegally acquired property as defined under section 3(c) of the Act. Of all the five categories of persons to whom the Act is made applicable, only one category specified under section 2(2)(a) happens to be of persons who are found guilty of an offence under one of the enactments mentioned therein and convicted. The other four categories of persons to whom the Act is applicable are persons unconnected with any crime or conviction under any law while the category of persons

falling under section 2(2)(b) are persons who are believed by the State to be violators of law. The other three categories are simply persons who are associated with either of the two categories mentioned in section 2(2)(a) and (b). At least with reference to the four categories other than the one covered by section 2(2)(a), the forfeiture/deprivation of the property is not a consequence of any conviction for an offence.

40. Therefore, with reference to these four categories, the question of violation of Article 20 does not arise. Insofar as first category mentioned above, in our opinion, Article 20 would have no application for the reason, conviction is only a factor by which the Parliament chose to identify the persons to whom the Act be made applicable. The Act does not provide for the confiscation of the properties of all the convicts falling under Section 2(2)(a) or detenues falling under Section 2(2)(b). Section 6 of the Act authorises the competent authority to initiate proceedings of forfeiture only if it has reasons to believe (such reasons for belief are required to be recorded in writing) that all or some of the properties of the persons to whom the Act is applicable are illegally acquired properties. The conviction or the preventive detention contemplated under Section 2 is not the basis or cause of the confiscation but the factual basis for a rebuttable presumption to enable the State to initiate proceedings to examine whether the properties held by such persons are illegally acquired properties. It is notorious that people carrying on activities such as smuggling to make money are very clandestine in their activity. Direct proof is difficult if not impossible. The nature of the activity and the harm it does to the community provide a sufficiently rational basis for the legislature to make such an assumption. More particularly, Section 6 specifically stipulates the parameters which should guide the competent authority in forming an opinion, they are; the value of the property and the known sources of the income, earnings etc. of the person who is sought to be proceeded against. Even in the case of such persons, the Act does not mandate such an enquiry against all the assets of such persons.

An enquiry is limited to such of the assets which the competent authority believes (to start with) are beyond the financial ability of the holder having regard to his known and legitimate sources of income, earnings etc. Connection with the conviction is too remote and, therefore, in our opinion, would not be hit by the prohibition contained under Article 20 of the Constitution of India.

41. If a subject acquires property by means which are not legally approved, sovereign would be perfectly justified to deprive such persons of the enjoyment of such ill-gotten wealth. There is a public interest in ensuring that persons who cannot establish that they have legitimate sources to acquire the assets held by them do not enjoy such wealth. Such a deprivation, in our opinion, would certainly be consistent with the requirement of Article 300A and 14 of the Constitution which prevent the State from arbitrarily depriving a subject of his property.

42. Whether there is a right to hold property which is the product of crime is a question examined in many jurisdictions. To understand the substance of such examination, we can profitably extract from an article published in the Journal of Financial Crime, 2004 by Anthony Kennedy.[11]

> "..It has been suggested that a logical interpretation of Art. 1 of the First Protocol of the European Convention on Human Rights is:
>
> > 'Everyone is entitled to own whatever property they have (lawfully) acquired …..'
> >
> > hence implying that they do not have a right under Art. 1 to own property which has been unlawfully acquired. This point was argued in the Irish High

11. Head of Legal Casework, Northern Ireland for the Assets Recovery Agency in his Article 'Justifying the civil recovery of criminal proceeds' published in the Journal of Financial Crime, 2004 Vol.12, Iss.1.

Court in Gilligan v The Criminal Assets Bureau, namely that where a defendant is in possession or control over assets which directly or indirectly constitute the proceeds of crime, he has no property rights in those assets and no valid title to them, whether protected by the Irish Constitution or by any other law. A similar view seems to have been expressed earlier in a dissenting opinion in Welch v United Kingdom : 'in my opinion, the confiscation of property acquired by crime, even without express prior legislation is not contrary to Article 7 of the Convention, nor to Article 1 of the First Protocol.' This principle has also been explored in US jurisprudence. In United States v. Vanhorn a defendant convicted of fraud and money laundering was not entitled to the return of the seized proceeds since they amounted to contraband which he had no right to possess. In United States v Dusenbery the court held that, because the respondent conceded that he used drug proceeds to purchase a car and other personal property, he had no ownership interest in the property and thus could not seek a remedy against the government's decision to destroy the property without recourse to formal forfeiture proceedings. The UK government has impliedly adopted this perspective, stating that:

'…. It is important to bear in mind the purpose of civil recovery, namely to establish as a matter of civil law that there is no right to enjoy property that derives from unlawful conduct."

43. Non-conviction based asset forfeiture model also known as Civil Forfeiture Legislation gained currency in various countries: United States of America, Italy, Ireland, South Africa, UK, Australia and certain provinces of Canada.

44. Anthony Kennedy conceptualised the civil forfeiture regime in the following words:-

Civil forfeiture represents a move from a crime and punishment model of justice to a preventive model of justice. It seeks to take illegally obtained property out of the possession of organised crime figures so as to prevent them, first, from using it as working capital for future crimes and, secondly, from flaunting it in such a way as they become role models for others to follow into a lifestyle of acquisitive crime. Civil recovery is therefore not aimed at punishing behaviour but at removing the 'trophies' of past criminal behaviour and the means to commit future criminal behaviour. While it would clearly be more desirable if successful criminal proceedings could be instituted, the operative theory is that 'half a loaf is better than no bread'."

45. For all the above-mentioned reasons, we are of the opinion that the Act is not violative of Article 20 of the Constitution. Even otherwise as was rightly pointed out by the learned Addl. Solicitor General, in view of its inclusion in the IXth Schedule, the Act is immune from attack on the ground that it violates any of the rights guaranteed under Part III of the Constitution by virtue of the declaration under Article 31-B.

46. Now we are required to consider the alternative and last submission i.e., in view of the failure of the High Court to examine the tenability of the order of the forfeiture as confirmed by the appellate tribunal the matter is required to be remitted to the High Court for appropriate consideration. This submission is required to be rejected. We have carefully gone through the copy of the writ petition (a copy of which is available on record) from which the instant appeal arises.

47. Except challenging the order of forfeiture on the two legal grounds discussed earlier in this judgement, there is no other ground on which correctness of the order of forfeiture is assailed in the writ petition. For the first time in this appeal, an

attempt is made to argue that the conclusions drawn by the competent authority that the properties forfeited are illegally acquired - is not justified on an appropriate appreciation of defence of the appellant. In other words, the appellant seeks reappreciation of the evidence without even an appropriate pleading in the writ petition. It is a different matter that the High Court in exercise of its writ jurisdiction does not normally reappreciate evidence. Looked at any angle, we see no reason to remit the matter to the High Court.

48. In the result, the appeals, being devoid of merit, are dismissed.

D.G. Appeals dismissed.

SANJAY VERMA

v.

HARYANA ROADWAYS

(Civil Appeal No. 5256 of 2008)

JANUARY 29, 2014

[P. SATHASIVAM, CJI. RANJAN GOGOI AND SHIVA KIRTI SINGH, JJ.]

Motor Vehicles Act, 1988: s.166 - Just compensation - Accident victim suffered paralysis below waist and could not perform his day to day needs such as latrine and urination on his own and required one person throughout his life to look after him - Tribunal awarded Rs. 3 Lacs under the heads "loss of income", "reimbursement of medical expenses" and "pain and suffering" - On appeal, High Court adopted multiplier of 15 and quantified the amount towards "loss of income" at Rs.6,19,500/- considering that he was self employed person and at the time of accident his annual income as per ITR was Rs.41,300; Rs.1,38,552/- on account of "medical expenses" and Rs.50,000/- "for future treatment" and "pain and suffering" - On appeal, held: High court was right in taking annual income of claimant at Rs.41,300 - Considering the age of the claimant (25 years) and the fact that he had a steady income, an addition of 50% to the income that he was earning at the time of accident would be justified for determining loss of income - Further, appropriate multiplier would be 17 - The two heads of compensation "future treatment" and "pain and suffering" are distinct and different and cannot be clubbed together, therefore, the two heads are to be severed - Considering that claimant is likely to suffer considerable pain throughout his life, he is awarded a sum of Rs. 3,00,000/- on account of "pain and suffering" - As regards "future treatment", the claim made before the Tribunal for an amount of

Rs.2,00,000/- being the cost of attendant from the date of accident till he remains alive is justified - High Court's finding as regards compensation under the head 'medical expenses' is maintained - Thus, claimant is awarded enhanced compensation of Rs.19.91 lacs in all.

The appellant-claimant was travelling in a bus belonging to the respondent. The bus met with an accident as the driver lost control of the bus resulting in multiple injuries to the appellant including fracture of spinal cord which resulted in paralysis of his whole body. The appellant filed a claim petition before the MACT claiming compensation of Rs.53 lacs. The Tribunal awarded Rs.3 Lacs under the heads "loss of income", "reimbursement of medical expenses" and "pain and suffering" and interest @ 9% from the date of claim petition. On appeal, the High Court quantified the amount towards "loss of income" at Rs.6,19,500/-; Rs.1,38,552/- on account of "medical expenses" and an amount of Rs.50,000/- "for future treatment" and "pain and suffering". The High Court, however, reduced the interest payable to 6% per annum. Aggrieved, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1. The evidence tendered by the doctor PW-1 was to the effect that the appellant had become cent percent paralyzed and was unable to perform his day to day needs such as latrine and urination on his own. A tube was inserted into his urinary tract along with a bag which he had to use entire life and there would be no control over his toilet and urine which he might have been doing on his bed. He would not be able to move throughout his life due to the paralysis below waist. The materials on record established that the age of the claimant at the time of the accident was 25 years and he

was married. The age of his wife was 22 years at that time. The claimant had one son who was 1½ years of age. Apart from that the deposition of the claimant himself (PW-2) showed that after the accident he was not able to do any work and one person was always needed to look after him. [Para 8, 9] [931-H; 932-C-D; 933-B-C]

2. The appellant was a self employed person. Though he had claimed a monthly income of Rs.5,000/-, the Income Tax Returns filed by him demonstrated that he had paid income tax on an annual income of Rs.41,300. No fault, therefore, is found in the order of the High Court which proceeded on the basis that the annual income of the claimant at the time of the accident was Rs.41,300/-. [Para 11] [933-E-F]

3. A person who is on a fixed salary without provision for annual increments or who is self-employed the actual income at the time of death should be taken into account for determining the loss of income unless there are extraordinary and exceptional circumstances. Undoubtedly, the same principle will apply for determination of loss of income on account of an accident resulting in the total disability of the victim as in the instant case. Therefore, taking into account the age of the claimant (25 years) and the fact that he had a steady income, as evidenced by the income-tax returns, an addition of 50% to the income that the claimant was earning at the time of the accident would be justified. [Paras 14, 15] [935-E-F; 936-B-C]

Sarla Verma (Smt.) and Ors. vs. Delhi Transport Corporation and Anr. **(2009) 6 SCC 121: 2009 (5) SCR 1098;** *Santosh Devi vs. National Insurance Company Ltd. and Ors.* **(2012) 6 SCC 421: 2012 (3) SCR 1178;** *Rajesh and Ors. vs. Rajbir Singh and Ors.* **(2013) 9 SCC 54;** *Reshma Kumari and Ors. vs. Madan Mohan and Anr.* **(2009) 13 SCC 422: 2009 (11) SCR 305;** *Reshma Kumari and Ors. vs. Madan Mohan*

and Anr. **(2013) 9 SCC 65: 2013 (2) SCR 706;** *Shakti Devi vs. New India Insurance Company Limited and Anr.* **(2010) 14 SCC 575: 2010 (13) SCR 574 - relied on.**

4. Insofar as the multiplier is concerned, as prescribed under the Second Schedule to the Act, the correct multiplier in the instant case cannot be 15 as held by the High Court. The adoption of the multiplier of 17 would be appropriate. Accordingly, taking into account the addition to the income and the higher multiplier the total amount of compensation payable to the claimant under the head "loss of income" is Rs. 10,53,150/- (Rs. 41300 + Rs. 20650= Rs. 61,950 x 17). The finding of the High Court as regards the compensation under the head 'medical expenses is maintained. [paras 16, 17] [936-C-E, F]

5. The two heads of compensation "future treatment" and "pain and suffering" are distinct and different and cannot be clubbed together. The two heads are to be severed which have been clubbed together by the High Court. In so far as "future treatment" is concerned the claimant will be required to take treatment from time to time even to maintain the present condition of his health. In fact, the claimant in his deposition has stated that he is undergoing treatment at the Apollo Hospital at Delhi. In the facts of the instant case, grant of full compensation, as claimed in the claim petition i.e. Rs.3,00,000/- under the head "future treatment", would meet the ends of justice. The claimant had claimed an amount of Rs.20,00,000/- under the head "pain and suffering and mental agony". Considering the injuries sustained by the claimant which had left him paralyzed for life and the evidence of the doctor PW-1 to the effect that the claimant is likely to suffer considerable pain throughout his life, the claimant should be awarded a further sum of Rs. 3,00,000/- on account of "pain and

suffering". The monetary compensation for pain and suffering is at best a palliative, the correct dose of which, in the last analysis, will have to be determined on a case to case basis. [Paras 18, 19] [936-H; 937-A-F]

6. In the claim petition filed before the Motor Accident Claim Tribunal the claimant has prayed for an amount of Rs.2,00,000/- being the cost of attendant from the date of accident till he remains alive. The claimant in his deposition had stated that "he needs one person to be with him all the time". The said statement of the claimant was duly supported by the evidence of PW-1 who has described the medical condition of the claimant in detail. Thus, the claim made on this count was justified and the amount of Rs.2,00,000/- claimed by the claimant under the aforesaid head should be awarded in full. However, in view of the enhancement the rate of interest awarded by the High Court i.e. 6% from the date of the application is not modified. [paras 20, 22] [937-F-H; 938-A-B, F-G]

Raj Kumar vs. Ajay Kumar and Anr. **(2011) 1 SCC 343: 2010 (13) SCR 179;** *Sanjay Batham vs. Munnalal Parihar and Ors.* **(2011) 10 SCC 665: 2012 AIR 459;** *Nagappa vs. Gurudayal Singh and Ors.* **(2003) 2 SCC 274: 2002 (4) Suppl. SCR 499 - relied on.**

Case Law Reference:

2009 (5) SCR 1098	**Relied on**	**Para 11**
2012 (3) SCR 1178	**Relied on**	**Para 11**
2009 (11) SCR 305	**Relied on**	**Para 12**
2013 (2) SCR 706	**Relied on**	**Para 13**
2010 (13) SCR 574	**Relied on**	**Para 14**
2010 (13) SCR 179	**Relied on**	**Para 18**
2012 AIR 459	**Relied on**	**Para 18**

2002 (4) Suppl. SCR 499 Relied on Para 18

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5256 of 2008.

From the Judgment and Order dated 27.03.2006 of the Division Bench of the High Court of Uttaranchal at Nainital in appeal from order No. 121 of 2006.

Dr. Manish Singhvi, Dharmendra Kumar Sinha for the Appellant.

Narender Hooda, AAG, Dr. Monika Gusain, Bano D., Chaitali Y. Dhingra, Kamal Mohan Gupta for the Respondent.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. This quantum appeal is by the claimant seeking further enhancement of the compensation awarded by the High Court of Uttaranchal at Nainital by its Order dated 27.03.2006.

2. The facts relevant for the purpose of the present adjudication may be noticed at the outset.

On 12.08.1998 the appellant-claimant was travelling from Ambala to Kurukshetra in a bus belonging to the Haryana Roadways and bearing registration No. HR-07PA-0197. On the way the driver of the bus lost control over the vehicle resulting in an accident in the course of which the claimant suffered multiple injuries. He was initially treated in the civil hospital Pehwa and thereafter transferred to the PGIMER, Chandigarh on 14.08.1998. The appellant underwent surgery on 16.09.1998 and eventually he was released from the hospital and referred to the Rehabilitation Centre, Jawaharlal Nehru Hospital, Aligarh. According to the claimant, apart from other injuries, he had suffered a fracture of the spinal cord resulting in paralysis of his whole body. In these circumstances the claimant filed an application before the Motor Accident Claim Tribunal claiming

compensation of a total sum of Rs. 53,00,000/- under different heads enumerated below:

(i)	Pecuniary loss	Rs. 24,00,000.00
(ii)	Expenditure incurred in treatment till now	Rs. 2,00,000.00
(iii)	Expenses which shall be incurred in future in treatment	Rs. 3,00,000.00
(iv)	Cost of attendant from the date of accident till he remains alive	Rs. 2,00,000.00
(v)	Passage and diet money	Rs. 2,00,000.00
(vi)	Pain and suffering and mental agony	Rs. 20,00,000.00
	Total	**Rs.53,00,000.00**

3. The learned Tribunal by its Award dated 12.06.2000 held that the accident occurred due to the rash and negligent driving of the bus and that the claimant is entitled to compensation. The total amount due to the claimant was quantified at Rs. 3,00,000/- under the heads "Loss of Income", "reimbursement of medical expenses" and "pain and suffering". The learned Tribunal also awarded interest at the rate of 9% from 24.08.1999 i.e. the date of filing of the claim application till date of payment.

4. Aggrieved, the claimant filed an appeal before the High Court which enhanced the compensation to Rs.8,08,052/-. The High Court quantified the amount due to the claimant towards "loss of income" at Rs.6,19,500/-; Rs.1,38,552/- on account of "medical expenses" and an amount of Rs.50,000/- "for future treatment" and "pain and suffering". The High Court, however, reduced the interest payable to 6% per annum from the date

of the filing of the application. Aggrieved, this appeal has been filed.

5. We have heard Dr. Manish Singhvi, learned counsel for the appellant-claimant and Dr. Monika Gusain, learned counsel for the respondent.

6. Learned counsel for the appellant has contended that in computing the amount due to the appellant on account of loss of income, future prospects of increase of income had not been taken into account by the High Court; the multiplier adopted by the courts below is 15 whereas the correct multiplier should have been 18. In so far as the amount awarded for "future treatment" and "pain and suffering" is concerned, learned counsel has submitted that not only the amount of Rs.50,000/- is grossly inadequate but High Court has committed an error in clubbing the two heads together for award of compensation. In this regard the learned counsel has drawn the attention of the Court to the amounts claimed in the claim petition under the aforesaid two heads, as already noticed hereinabove. It is submitted by the learned counsel that the amount of compensation is liable to be enhanced.

7. Controverting the submissions advanced on behalf of the appellant, Dr. Monika Gusain learned counsel for the respondent-Haryana Roadways has submitted that the enhancement made by the High Court to the extent of over Rs.5,00,000/- is more than an adequate measure of the "just compensation" that the Motor Vehicles Act, 1988 (hereinafter for short the "Act") contemplate. It is also the submission of the learned counsel for the respondent that in awarding the enhanced amount the High Court has taken into account all the relevant circumstances for due computation of the amount of compensation payable under the Act.

8. Before proceeding any further it would be appropriate to take note of the evidence tendered by PW-1, Dr. Shailendra Kumar Mishra, who was examined in the case on behalf of the

claimant. The relevant part of the evidence of PW-1 is extracted below:

> "……..Medical Board granted 80% disability of Sanjay Verma during the course of examination. Today I re-examined Mr. Sanjay Verma in the Court, at the time of issuance of certificate, it was the opinion that his condition may improve, but even after such a long duration his condition has deteriorated, in place of improvement.
>
> Today he has become cent percent paralyzed. Now Sanjay Verma is unable to perform his day to day needs such as latrine and urination could not be done of his own. A tube has been inserted into his urinary tract along with a bag which he has to use entire life. There will be no control over his toilet and urine which he might have been doing on his bed.
>
> He will not be able to move throughout his life due to the paralysis below waist and he is now not been able to do any work. The Spinal chord will be pressurized due to the facture of back bone and he will have to bear the pain throughout his life. Sanjay Verma will not be able to lead his normal life and will have remain in the same condition throughout his life. Due to his laying position he will be effected by bed sores which will be excessive painful. Due to lack of urination in normal course his kidney may be damaged and this possibility will always remain."
>
> "……At the time of issuance of handicapped certificate I had also given 100% disability certificate but thinking that he might improve, I had given a certificate 80% disability. The cutting over the certificate No.16 G has been done by me which bears my signature. This cutting was also done at the time of issuance of the certificate. As per the prescribed standard, at the time when patient was examined by the medical board, he was also suffering from the total paralysis and 100% disability but because

patient's toe was having slight movement, therefore, it was unanimously decided that for the time being his disability is 80%."

9. It is also established by the materials on record that the age of the claimant at the time of the accident was 25 years and he was married. The age of his wife was 22 years and at the time of the accident the claimant had one son who was 1½ years of age. Apart from the above, from the deposition of the claimant himself (PW-2) it transpires that after the accident he is not able to do any work and "one person is always needed to look after him".

10. Having noticed the evidence of PW-1 Dr. Shailendra Kumar Mishra and the other facts and circumstances of the case we may now proceed to determine as to whether the compensation awarded by the High Court under the different heads noticed above is just and fair compensation within the meaning of Section 168 of the Act.

11. The appellant was a self employed person. Though he had claimed a monthly income of Rs.5,000/-, the Income Tax Returns filed by him demonstrate that he had paid income tax on an annual income of Rs.41,300/-. No fault, therefore, can be found in the order of the High Court which proceeds on the basis that the annual income of the claimant at the time of the accident was Rs.41,300/-. Though in *Sarla Verma (Smt.) and Others vs. Delhi Transport Corporation and Another*[1] this Court had held that in case of a self employed person, unless there are special and exceptional circumstances, the annual income at the time of death is to be taken into account, a Coordinate Bench in *Santosh Devi vs. National Insurance Company Ltd. and Others*[2] has taken a different view which is to the following effect:

1. (2009) 6 SCC 121.
2. (2012) 6 SCC 421.

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

12. The view taken in *Santosh Devi* (supra) has been reiterated by a Bench of three Judges in *Rajesh and Others vs. Rajbir Singh and Others*[3] by holding as follows :

> "8. Since, the Court in Santosh Devi case actually intended to follow the principle in the case of salaried persons as laid down in Sarla Verma case and to make it applicable also to the self-employed and persons on fixed wages, it is clarified that the increase in the case of those groups is not 30% always; it will also have a reference to the age. In other words, in the case of self-employed or persons with fixed wages, in case, the deceased victim was below 40 years, there must be an addition of 50% to the actual income of the deceased while computing future prospects. Needless to say that the actual income should be income after paying the tax, if any. Addition should be 30% in case the deceased was in the age group of 40 to 50 years.
>
> 9. In Sarla Verma case, it has been stated that in the case of those above 50 years, there shall be no addition. Having regard to the fact that in the case of those self-employed or on fixed wages, where there is normally no age of superannuation, we are of the view that it will only be just

3. (2013) 9 SCC 54.

and equitable to provide an addition of 15% in the case where the victim is between the age group of 50 to 60 years so as to make the compensation just, equitable, fair and reasonable. There shall normally be no addition thereafter."

13. Certain parallel developments will now have to be taken note of. In *Reshma Kumari and Others vs. Madan Mohan and Another*[4], a two Judge Bench of this Court while considering the following questions took the view that the issue(s) needed resolution by a larger Bench

"(1) Whether the multiplier specified in the Second Schedule appended to the Act should be scrupulously applied in all the cases?

(2) Whether for determination of the multiplicand, the Act provides for any criterion, particularly as regards determination of future prospects?"

14. Answering the above reference a three Judge Bench of this Court in *Reshma Kumari and Ors. vs. Madan Mohan and Anr.*[5] reiterated the view taken in *Sarla Verma* (supra) to the effect that in respect of a person who was on a fixed salary without provision for annual increments or who was self-employed the actual income at the time of death should be taken into account for determining the loss of income unless there are extraordinary and exceptional circumstances. Though the expression "exceptional and extraordinary circumstances" is not capable of any precise definition, in *Shakti Devi vs. New India Insurance Company Limited and Another*[6] there is a practical application of the aforesaid principle. The near certainty of the regular employment of the deceased in a government department following the retirement of his father was held to be a valid ground to compute the loss of income

4. (2009) 13 SCC 422.

5. (2013) 9 SCC 65 (para 36)

6. (2010) 14 SCC 575.

by taking into account the possible future earnings. The said loss of income, accordingly, was quantified at double the amount that the deceased was earning at the time of his death.

15. Undoubtedly, the same principle will apply for determination of loss of income on account of an accident resulting in the total disability of the victim as in the present case. Therefore, taking into account the age of the claimant (25 years) and the fact that he had a steady income, as evidenced by the income-tax returns, we are of the view that an addition of 50% to the income that the claimant was earning at the time of the accident would be justified.

16. Insofar as the multiplier is concerned, as held in *Sarla Verma* (supra) (para 42) or as prescribed under the Second Schedule to the Act, the correct multiplier in the present case cannot be 15 as held by the High Court. We are of the view that the adoption of the multiplier of 17 would be appropriate. Accordingly, taking into account the addition to the income and the higher multiplier the total amount of compensation payable to the claimant under the head "loss of income" is Rs. 10,53,150/- (Rs. 41300 + Rs. 20650= Rs. 61,950 x 17).

17. In so far as the medical expenses is concerned as the awarded amount of Rs.1,38,552/- has been found payable on the basis of the bills/vouchers etc. brought on record by the claimant we will have no occasion to cause any alteration of the amount of compensation payable under the head "medical expenses". Accordingly, the finding of the High Court in this regard is maintained.

18. This will bring us to the grievance of the appellant-claimant with regard to award of compensation of Rs. 50,000/- under the head "future treatment" and "pain and suffering". In view of the decisions of this Court in *Raj Kumar vs. Ajay Kumar and Another*[7] and *Sanjay Batham vs.*

7. (2011) 1 SCC 343.

Munnalal Parihar and Others[8] there can be no manner of doubt that the above two heads of compensation are distinct and different and cannot be clubbed together. We will, therefore, have to severe the two heads which have been clubbed together by the High Court.

In so far as "future treatment" is concerned we have no doubt that the claimant will be required to take treatment from time to time even to maintain the present condition of his health. In fact, the claimant in his deposition has stated that he is undergoing treatment at the Apollo Hospital at Delhi. Though it is not beyond our powers to award compensation beyond what has been claimed [*Nagappa vs. Gurudayal Singh and others*[9]], in the facts of the present case we are of the view that the grant of full compensation, as claimed in the claim petition i.e. Rs.3,00,000/- under the head "future treatment", would meet the ends of justice. We, therefore, order accordingly.

19. The claimant had claimed an amount of Rs.20,00,000/- under the head "pain and suffering and mental agony". Considering the injuries sustained by the claimant which had left him paralyzed for life and the evidence of PW-1 to the effect that the claimant is likely to suffer considerable pain throughout his life, we are of the view that the claimant should be awarded a further sum of Rs. 3,00,000/- on account of "pain and suffering". We must, however, acknowledge that monetary compensation for pain and suffering is at best a palliative, the correct dose of which, in the last analysis, will have to be determined on a case to case basis.

20. In the claim petition filed before the Motor Accident Claim Tribunal the claimant has prayed for an amount of Rs.2,00,000/- being the cost of attendant from the date of accident till he remains alive. The claimant in his deposition had stated that "he needs one person to be with him all the time". The aforesaid statement of the claimant is duly supported by the evidence of PW-1 who has described the medical condition

8. (2011) 1 SCC 343.
9. (2003) 2 SCC 274.

of the claimant in detail. From the aforesaid materials, we are satisfied that the claim made on this count is justified and the amount of Rs.2,00,000/- claimed by the claimant under the aforesaid head should be awarded in full. We order accordingly.

21. In view of the discussions that have preceded, we hold that the claimant is entitled to enhanced compensation as set out in the table below:

Sl. No.	Head	Amt. as per High Court (in Rs.)	Amt. as per this Court (in Rs.)
(i)	Loss of Income	6,19,500.00	10,53,150.00
(ii)	Medical Expenses	1,38,552.00	1,38,552.00
(iii)	Future Treatment		3,00,000.00
(iv)	Pain and suffering and mental agony	50,000.00	3,00,000.00
(v)	Cost of attendant from the date of accident till he remains alive		2,00,000.00
	Total=	**8,08,052.00**	**19,91,702.00**

22. In view of the enhancement made by us, we do not consider it necessary to modify the rate of interest awarded by the High Court i.e. 6% from the date of the application i.e. 24.08.1999 to the date of payment which will also be payable on the enhanced amount of compensation.

23. The appeal filed by the claimant is allowed as indicated above.

D.G. Appeal allowed.

OM PRAKASH CHAUTALA
v.
KANWAR BHAN AND OTHERS
(Civil Appeal No. 1785 of 2014)

JANUARY 31, 2014

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

CONSTITUTION OF INDIA, 1950: Art. 21 - Reputation of a person is a noble asset - When it is hurt, man is half dead - It is very dear to life and deserves protection u/Art. 21 - In courts, it must be safely guarded - When a court deals with a matter that has something likely to affect a person's reputation, the normative principles of law are to be cautiously and carefully adhered to - A person who is not a party in a case, his conduct cannot be commented upon - If he asks for expunction of remarks, same should not be denied.

PARTY: Non-impleadment - Disparaging remarks against a person not party in a case - Held: When a person is not a party in a case and it is not necessary to decide his conduct in that case then no adverse remark should be made against him - In the instant case, the appellant was CM of the State of Haryana - On the basis of complaint from a person in crowd in public meeting, he suspended first respondent from service - In a writ petition by first respondent challenging his suspension, High Court dropped the charges and further, criticized the action of the appellant and held that there has been arbitrary exercise of power which was amenable to judicial review - The writ petition could have been decided without making series of comments on the appellant, who, at the relevant time, was the Chief Minister - The observations made by High Court were really not necessary as an integral part for the decision of the case - Therefore, adverse remarks are expunged - Doctrine of audi alteram partem.

JUDGES: Role of Judges and judicial approach - Held: Judges must not unduly criticize conduct of parties and others - They should not be guided by any kind of notion - They must realize that they are not infallible and their unjust criticism may do harm - Judges must show judicial restraint - They must not do anything which blindens thinking process - They must show humility and chastity of thought which are bed rock of a Civilized Society - Judicial restraint.

JUDGMENT/ORDER: Reasoned judgment - Held: A judgment may have rhetoric but the said rhetoric has to be dressed with reason and must be in accordance with the legal principles, otherwise a mere rhetoric in a judgment, may likely to cause prejudice to a person and courts are not expected to give any kind of prejudicial remarks against a person, especially so, when he is not a party before it.

The first respondent was State Government employee. The appellant was Chief Minister of Haryana. He was attending a function on 4.2.2001 when he received some complaint against the first respondent from the crowd. On the basis of complaint, the appellant placed the first respondent under suspension. In due course, the first respondent was suspended. He questioned it by writ petition. A single judge of the High Court allowed it and also criticized the action of the appellant by which he ordered suspension. Aggrieved, the appellant filed LPA on the ground that the adverse remarks were not at all necessary to adjudicate upon the issue involved in the matter and further when he was not impleaded as a party to the writ petition recording of such observations was totally impermissible as it fundamentally violated the principles of natural justice. The Division Bench of the High Court rejected his plea. Aggrieved, the appellant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1. Reputation is fundamentally a glorious amalgam and unification of virtues which makes a man feel proud of his ancestry and satisfies him to bequeath it as a part of inheritance on the posterity. It is a nobility in itself for which a conscientious man would never barter it with all the tea of China or for that matter all the pearls of the sea. The said virtue has both horizontal and vertical qualities. When reputation is hurt, a man is half-dead. It is an honour which deserves to be equally preserved by the down trodden and the privileged. The aroma of reputation is an excellence which cannot be allowed to be sullied with the passage of time. The memory of nobility no one would like to lose; none would conceive of it being atrophied. It is dear to life and on some occasions it is dearer than life. And that is why it has become an inseparable facet of Article 21 of the Constitution. No one would like to have his reputation dented. One would like to perceive it as an honour rather than popularity. When a court deals with a matter that has something likely to affect a person's reputation, the normative principles of law are to be cautiously and carefully adhered to. The advertence has to be sans emotion and sans populist perception, and absolutely in accord with the doctrine of audi alteram partem before anything adverse is said. [para 1] [945-G-H; 946-A-D]

2. On the principle of natural justice, the disparaging remarks and directions deserve to be annulled. From the order of the Division Bench, it is clear that the appellant was not before the single judge, and (ii) by no stretch of logic the observations and the directions were required to decide the lis. The single Judge had opined that the order of suspension was unjustified and that is why it was revoked. He had also ruled that there has been arbitrary exercise of power which was amenable to judicial review and, more so, when the charges were dropped against the employee. The conclusion could

have been arrived at without making series of comments on the appellant, who, at the relevant time, was the Chief Minister of the State. The observations made by single judge were really not necessary as an integral part for the decision of the case as stated in *Mohammad Naim's case. Once the observations are not justified, as a natural corollary, the directions have to be treated as sensitively susceptible. [Paras 12, 13, 15] [950-F; 951-E-G; 952-A-B; 953-F-G]

State of Uttar Pradesh v. Mohammad Naim* **AIR 1964 SC 703: 1964 SCR 363; *State of Andhra Pradesh v. N. Radhakishan* **(1998) 4 SCC 154: 1998 (2) SCR 693;** *State of Punjab and others v. Chaman Lal Goyal* **(1995) 2 SCC 570: 1995 (1) SCR 695;** *The State of Madhya Pradesh v. Bani Singh and another* **JT 1990 (2) SC 54;** *P.V. Mahadevan v. M.D. T.N. Housing Board* **(2005) 6 SCC 636: 2005 (2) Suppl. SCR 474;** *State of M.P. v. Nandlal Jaiswal* **(1986) 4 SCC 566: 1987 (1) SCR 1;** *A.M. Mathur v. Pramod Kumar Gupta and Ors.* **(1990) 2 SCC 533: 1990 (2) SCR 110;** *Amar Pal Singh v. State of Uttar Pradesh and Anr.* **(2012) 6 SCC 491: 2012 (5) SCR 1154 - relied on.**

State of Bihar and Anr. v. P.P. Sharma, IAS and Anr. **1992 Supp (1) SCC 222: 1991 (2) SCR 1 ;** *Testa Setalvad and Anr. v. State of Gujarat and Ors.* **(2004) 10 SCC 88: 2004 (3) SCR 1042;** *State of W.B. and Ors. v. Babu Chakraborthy* **(2004) 12 SCC 201: 2004 (4) Suppl. SCR 17;** *Dr. Dilip Kumar Deka and Anr. v. State of Assam and Anr.* **(1996) 6 SCC 234: 1996 (5) Suppl. SCR 763;** *Jage Ram v. Hans Raj Midha* **(1972) 1 SCC 181: 1972 (2) SCR 409;** *R.K. Lakshmanan v. A.K. Srinivasan* **(1975) 2 SCC 466: 1976 (1) SCR 204;** *Niranjan Patnaik v. Sashibhusan Kar* **(1986) 2 SCC 569: 1986 (2) SCR 470 - referred to.**

3. A Judge is not to be guided by any kind of notion. The decision making process expects a Judge or an adjudicator to apply restraint, ostracise perceptual

subjectivity, make one's emotions subservient to one's reasoning and think dispassionately. He is expected to be guided by the established norms of judicial process and decorum. A judgment may have rhetorics but the said rhetoric has to be dressed with reason and must be in accord with the legal principles. Otherwise a mere rhetoric, especially in a judgment, may likely to cause prejudice to a person and courts are not expected to give any kind of prejudicial remarks against a person, especially so, when he is not a party before it. In that context, the rhetoric becomes sans reason, and without root. It is likely to blinden the thinking process. A Judge is required to remember that humility and respect for temperance and chastity of thought are at the bedrock of apposite expression. Thus, a Judge should abandon his passion. He must constantly remind himself that he has a singular master "duty to truth" and such truth is to be arrived at within the legal parameters. No heroism, no rehtorics. [Para 19, 21] [955-A-E; 956-B]

4. Another facet gaining significance and is adverted to is when caustic observations are made which are not necessary as an integral part of adjudication it affects the person's reputation - a cherished right under Article 21 of the Constitution. Disparaging remarks, as recorded by the single Judge, were not necessary for arriving at the decision which he has rendered, the same being not an integral part and further that could not have been done when the appellant was not a party before the court and also he was never afforded an opportunity to explain his conduct, and the affirmation of the same by the Division Bench on the foundation that it has not caused any prejudice and he can fully defend himself when a subsequent litigation is instituted, are legally unacceptable. Accordingly, the extracted remarks and also any remarks which have been made that are likely

to affect the reputation of the appellant are expunged. [paras 22, 28] [956-B-C; 958-C-F]

Umesh Kumar v. State of Andhra Pradesh and Anr. **(2013) 10 SCC 591;** Kiran Bedi v. Committee of Inquiry and Anr. **(1989) 1 SCC 494: 1989 (1) SCR 20;** *Vishwanath Agrawal v. Sarla Vishwanath Agrawal* **(2012) 7 SCC 288: 2012 (7) SCR 607;** *Mehmood Nayyar Azam v. State of Chhattisgarh and Ors.* **(2012) 8 SCC 1: 2012 (8) SCR 651;** *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni and Ors.* **(1983) 1 SCC 124: 1983 (1) SCR 828;** *State of Maharashtra v. Public Concern for Governance Trust and Ors.* **(2007) 3 SCC 587: 2007 (1) SCR 87 - Relied on.**

D.F. Marion v. Davis **217 Ala 16 : 114 So 357 : 55 ALR 171 (1927) - referred to.**

Case Law Reference:

1991 (2) SCR 1	**Referred to**	**Para 8**
2004 (3) SCR 1042	**Referred to**	**Para 9**
2004 (4) Suppl. SCR 17	**Referred to**	**Para 10**
1996 (5) Suppl. SCR 763	**Referred to**	**Para 11**
1964 SCR 363	**Relied on**	**Para 11**
1972 (2) SCR 409	**Referred to**	**Para 11**
1976 (1) SCR 204	**Referred to**	**Para 11**
1986 (2) SCR 470	**Referred to**	**Para 11**
1998 (2) SCR 693	**Relied on**	**Para 13**
1995 (1) SCR 695	**Relied on**	**Para 13**
JT 1990 (2) SC 54	**Relied on**	**Para 13**

2005 (2) Suppl. SCR 474	**Relied on**	**Para 13**
1987 (1) SCR 1	**Relied on**	**Para 16**
1990 (2) SCR 110	**Relied on**	**Para 17**
2012 (5) SCR 1154	**Relied on**	**Para 18**
(2013) 10 SCC 591	**Relied on**	**Para 22**
1989 (1) SCR 20	**Relied on**	**Para 23**
2012 (7) SCR 607	**Relied on**	**Para 24**
2012 (8) SCR 651	**Relied on**	**Para 25**
1983 (1) SCR 828	**Relied on**	**Para 26**
2007 (1) SCR 87	**Relied on**	**Para 27**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. : 1785 of 2014.

From the Judgment, order dated 19.01.2010 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 12384 of 2008, LPA No. 1456 of 2009.

P.P. Rao and Neeraj Kr. Jain, Aditya Kr. Chaudhary, Dharmendra Kumar Sinha for the Appellant.

Hitesh Malik, AAG, Kamal Mohan Gupta, Mridula Ray Bhardwaj for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. Leave granted.

1. Reputation is fundamentally a glorious amalgam and unification of virtues which makes a man feel proud of his ancestry and satisfies him to bequeath it as a part of inheritance on the posterity. It is a nobility in itself for which a conscientious man would never barter it with all the tea of China or for that matter all the pearls of the sea. The said virtue has both

horizontal and vertical qualities. When reputation is hurt, a man is half-dead. It is an honour which deserves to be equally preserved by the down trodden and the privileged. The aroma of reputation is an excellence which cannot be allowed to be sullied with the passage of time. The memory of nobility no one would like to lose; none would conceive of it being atrophied. It is dear to life and on some occasions it is dearer than life. And that is why it has become an inseparable facet of Article 21 of the Constitution. No one would like to have his reputation dented. One would like to perceive it as an honour rather than popularity. When a court deals with a matter that has something likely to affect a person's reputation, the normative principles of law are to be cautiously and carefully adhered to. The advertence has to be sans emotion and sans populist perception, and absolutely in accord with the doctrine of audi alteram partem before anything adverse is said.

2. We have commenced with aforesaid prefatory note because the centripodal question that has eminently emanated for consideration in this appeal, by special leave, is whether the judgment and order passed by the learned single Judge of the High Court of Punjab and Haryana at Chandigarh in CWP No. 12384 of 2008 commenting on the conduct of the appellant and further directing recovery of interest component awarded to the employee, the first respondent herein, from the present appellant and also to realize the cost and seek compensation in appropriate legal forum, including civil court, though the appellant was not arrayed as a party to the writ petition, and denial of expunction of the aforesaid observations and directions by the Division Bench in L.P.A. No. 1456 of 2009 on the foundation that the same are based on the material available on record and, in any case, grant of liberty to claim compensation or interest could not be held to be a stricture causing prejudice to the appellant who would have full opportunity of defending himself in any proceeding which may be brought by the respondent for damages or recovery of interest, is legally defensible or bound to founder on the ground

that the appellant was not impleaded as a respondent to the proceeding. Be it noted, the Division Bench has also opined that the observations made by the learned single Judge are not conclusive and no prejudice has been caused to the appellant, the then Chief Minister of the State of Haryana.

3. Filtering the unnecessary details, the facts which are to be exposited are that the first respondent was working as Assistant Registrar of Cooperative Societies in the State of Haryana. On 4.2.2001 during a state function "Sarkar Apke Dwar" at Jagadhari constituency the appellant received a complaint from some person in the public, including the elected representative, about the working of the respondent No.1. The appellant after considering the verbal complaint announced the suspension of the first respondent during the press conference on the same day. On 06.02.2001 the first respondent was placed under suspension by the letter of the Financial Commissioner & Secretary to Govt. of Haryana, Cooperation Department, Chandigarh which was followed by charge sheet dated 27.03.2002. The first respondent filed CWP No. 16025 of 2001 against the suspension order which was disposed of on 20.03.2002 with direction to the Government. On 28.03.2002 the 1st respondent was reinstated pending inquiry. After issuance of charge sheet and revocation of the suspension order, the first respondent submitted his reply on 5.6.2002.

4. As the facts would undrape, nothing happened thereafter and he stood superannuated on 31.01.2005 and was granted provisional pension, provident fund and amount of Group Insurance Claim but pension as due and other retiral benefits like gratuity, leave encashment, commutation of other leaves, etc. were withheld due to pendency of disciplinary proceedings. On 6.2.2007 the first respondent filed CWP No. 2243 of 2007 which was disposed of by the High Court directing the government to complete the enquiry within a period of six months from the date of receipt of copy of the order. As the enquiry was not concluded within the stipulated time, the

employee preferred CWP No. 12384 of 2008. The learned single Judge vide judgment and order dated 20.10.2009 allowed the writ petition and set aside the charge-sheet and the punishment with further directions to release all the pension and pensionary benefits due to the first respondent within a period of one month with interest @ 10 % p.a. from the due date to the date of payment. In course of judgment the learned single Judge made certain observations against the appellant herein.

5. Grieved by the observations and inclusive directions made in the judgment the appellant preferred LPA No. 1456 of 2009. The contentions raised by the appellant in the intra-court appeal that the adverse remarks were not at all necessary to adjudicate upon the issue involved in the matter, and further when he was not impleaded as a party to the writ petition recording of such observations was totally impermissible, as it fundamentally violated the principles of natural justice, were not accepted by the Division Bench as a consequence of which the appeal did not meet with success.

6. We have heard Mr. P.P. Rao, learned senior counsel for the appellant and Mr. Hitesh Malik, Additional Advocate General appearing for the State. Despite service of notice there is no appearance on behalf of the private respondent, that is, respondent No. 1.

7. As has been indicated earlier, the appellant was not a party to the proceeding. It is manifest that the learned single Judge has made certain disparaging remarks against the appellant and, in fact, he has been also visited with certain adverse consequences. Submission of Mr. P.P. Rao, learned senior counsel, is that the observations and the directions are wholly unsustainable when the appellant was not impleaded as a party to the proceeding and further they are totally unwarranted for the adjudication of the controversy that travelled to the Court.

8. In *State of Bihar and another v. P.P. Sharma, IAS and another*[1], this Court has laid down that the person against whom mala fides or bias is imputed should be impleaded as a party respondent to the proceeding and be given an opportunity to meet the allegations. In his absence no enquiry into the allegations should be made, for such an enquiry would tantamount to violative of the principles of natural justice as it amounts to condemning a person without affording an opportunity of hearing.

9. In *Testa Setalvad and another v. State of Gujarat and others*[2] the High Court had made certain caustic observations casting serious aspersions on the appellants therein, though they were not parties before the High Court. Verifying the record that the appellants therein were not parties before the High Court, this Court observed: -

> "It is beyond comprehension as to how the learned Judges in the High Court could afford to overlook such a basic and vitally essential tenet of the "rule of law", that no one should be condemned unheard, and risk themselves to be criticized for injudicious approach and/or render their decisions vulnerable for challenge on account of violating judicial norms and ethics."

And again: -

> "Time and again this Court has deprecated the practice of making observations in judgments, unless the persons in respect of whom comments and criticisms were being made were parties to the proceedings, and further were granted an opportunity of having their say in the matter, unmindful of the serious repercussions they may entail on such persons."

1. 1992 Supp (1) SCC 222.
2. (2004) 10 SCC 88.

10. In *State of W.B. and others v. Babu Chakraborthy*[3] the principle was reiterated by stating that the High Court was not justified and correct in passing observations and strictures against the appellants 2 and 3 therein without affording an opportunity of being heard.

11. In *Dr. Dilip Kumar Deka and another v. State of Assam and another*[4], after referring to the authorities in *State of Uttar Pradesh v. Mohammad Naim*[5], *Jage Ram v. Hans Raj Midha*[6], *R.K. Lakshmanan v. A.K. Srinivasan*[7] and *Niranjan Patnaik v. Sashibhusan Kar*[8], this Court opined thus:-

> "7. We are surprised to find that in spite of the above catena of decisions of this Court, the learned Judge did not, before making the remarks, give any opportunity to the appellants, who were admittedly not parties to the revision petition, to defend themselves. It cannot be gainsaid that the nature of remarks the learned Judge has made, has cast a serious aspersion on the appellants affecting their character and reputation and may, ultimately affect their career also. Condemnation of the appellants without giving them an opportunity of being heard was a complete negation of the fundamental principle of natural justice."

12. At this juncture, it may be clearly stated that singularly on the basis of the aforesaid principle the disparaging remarks and directions, which are going to be referred to hereinafter, deserve to be annulled but we also think it seemly to advert to the facet whether the remarks were really necessary to render the decision by the learned single Judge and the finding

3. (2004) 12 SCC 201.
4. (1996) 6 SCC 234.
5. AIR 1964 SC 703.
6. (1972) 1 SCC 181.
7. (1975) 2 SCC 466.
8. (1986) 2 SCC 569.

recorded by the Division Bench that the observations are based on the material on record and they do not cause any prejudice, are legally sustainable. As far as finding of the Division Bench is concerned that they are based on materials brought on record is absolutely unjustified in view of the following principles laid down in *Mohammad Naim* (supra): -

> "It has been judicially recognized that in the matter of making disparaging remarks against persons or authorities whose conduct comes into consideration before courts of law in cases to be decided by them, it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct."

13. On a perusal of the order we find that two aspects are clear, namely, (i) that the appellant was not before the court, and (ii) by no stretch of logic the observations and the directions were required to decide the lis. We are disposed to think so as we find that the learned single Judge has opined that the order of suspension was unjustified and that is why it was revoked. He has also ruled that there has been arbitrary exercise of power which was amenable to judicial review and, more so, when the charges were dropped against the employee. Commenting on the second charge-sheet dated 15.3.2004 the learned single Judge, referring to the decisions in *State of Andhra Pradesh v. N. Radhakishan*[9], *State of Punjab and others v. Chaman Lal Goyal*[10], *The State of Madhya Pradesh v. Bani Singh and another*[11] and *P.V.*

9. (1988) 4 SCC 154.
10. (1995) 2 SCC 570.
11. JT 1990 (2) SC 54.

Mahadevan v. M.D. T.N. Housing Board[12], thought it appropriate to quash the same on the ground of delay. The conclusion could have been arrived at without making series of comments on the appellant, who, at the relevant time, was the Chief Minister of the State.

14. At this juncture, we think it apt to point out some of the observations made against the appellant: -

> "Arrogance of power by the Chief Minister seems to be at play in this case"
>
> xxx xxx xxx
>
> "The petitioner is also justified in making a grievance that first the Chief Minister had suspended him on the basis of a loose talk in the press conference and thereafter the officials of the Government have attempted to justify their own mistakes on the one pretext or the other. The petitioner would term this case to be "a proof of worst ugly look of Indian democracy". He may be an aggrieved person but his anger is justified to refer this treatment to be an ugly face of democracy. Is not it dictatorial display of power in democratic set up? Final order is yet to be passed regarding this charge sheet. It is orally pointed out that the charge sheet is finalized on 16.9.2009. It is done without holding any enquiry or associating the petitioner in any manner. How can this be sustained in this background?"
>
> xxx xxx xxx
>
> "Chief Minister was bound to inform himself of the well known maxim "be you ever so high, the law is above you".
>
> xxx xxx xxx
>
> "The respondents, thus, have made themselves fully

12. (2005) 6 SCC 636.

responsible for this plight of the petitioner on account of the illegalities that have been pointed out and which the respondents have failed to justify in any cogent or reasonable manner. They all are to be held accountable for this. This would include even the then Chief Minister, who initiated this illegal process and did not intervene to correct the illegality ever thereafter."

xxx xxx xxx

"The interest awardable shall be recovered from all the officers and including the Chief Minister, who were either responsible for placing the petitioner under suspension or in perpetuating the illegality and had unnecessarily charged and harassed the petitioner."

xxx xxx xxx

"Liberty is, therefore, given to the petitioner to seek compensation for the harassment caused to him by approaching any appropriate Forum, including Civil Court, where he can seek this compensation even from the then Chief Minister."

15. On a studied scrutiny of the judgment in entirety we have no hesitation in holding that the observations made by the learned single Judge were really not necessary as an integral part for the decision of the case as stated in Mohammad Naim's case. Needless to say, once the observations are not justified, as a natural corollary, the directions have to be treated as sensitively susceptible.

16. In this context, it is necessary to state about the role of a Judge and the judicial approach. In *State of M.P. v. Nandlal Jaiswal*[13], Bhagwati, CJ, speaking for the court expressed strong disapproval of the strictures made by the

13. (1986) 4 SCC 566.

learned Judge in these terms: -

"We may observe in conclusion that judges should not use strong and carping language while criticising the conduct of parties or their witnesses. They must act with sobriety, moderation and restraint. They must have the humility to recognise that they are not infallible and any harsh and disparaging strictures passed by them against any party may be mistaken and unjustified and if so, they may do considerable harm and mischief and result in injustice."

17. In *A.M. Mathur v. Pramod Kumar Gupta and others*[14] the Court observed that judicial restraint and discipline are necessary to the orderly administration of justice. The duty of restraint and the humility of function has to be the constant theme for a Judge, for the said quality in decision making is as much necessary for Judges to command respect as to protect the independence of the judiciary. Further proceeding the two-Judge Bench stated thus: -

"Judicial restraint in this regard might better be called judicial respect, that is, respect by the judiciary. Respect to those who come before the court as well to other co-ordinate branches of the State, the executive and the legislature. There must be mutual respect. When these qualities fail or when litigants and public believe that the judge has failed in these qualities, it will be neither good for the judge nor for the judicial process."

18. In *Amar Pal Singh v. State of Uttar Pradesh and another*[15], it has been emphasized that intemperate language should be avoided in the judgments and while penning down the same the control over the language should not be forgotten and a committed comprehensive endeavour has to be made to put the concept to practice so that as a conception it gets

14. (1990) 2 SCC 533.

15. (2012) 6 SCC 491.

concretized and fructified.

19. It needs no special emphasis to state that a Judge is not to be guided by any kind of notion. The decision making process expects a Judge or an adjudicator to apply restraint, ostracise perceptual subjectivity, make one's emotions subservient to one's reasoning and think dispassionately. He is expected to be guided by the established norms of judicial process and decorum. A judgment may have rhetorics but the said rhetoric has to be dressed with reason and must be in accord with the legal principles. Otherwise a mere rhetoric, especially in a judgment, may likely to cause prejudice to a person and courts are not expected to give any kind of prejudicial remarks against a person, especially so, when he is not a party before it. In that context, the rhetoric becomes sans reason, and without root. It is likely to blinden the thinking process. A Judge is required to remember that humility and respect for temperance and chastity of thought are at the bedrock of apposite expression. In this regard, we may profitably refer to a passage from Frankfurter, Felix, in Clark, Tom C.,[16]:

> "For the highest exercise of judicial duty is to subordinate one's personal pulls and one's private views to the law of which we are all guardians - those impersonal convictions that make a society a civilized community, and not the victims of personal rule,"

20. The said learned Judge had said: -

> "What becomes decisive to a Justice's functioning on the Court in the large area within which his individuality moves is his general attitude towards law, the habits of mind that he has formed or is capable of unforming, his capacity for detachment, his temperament or training for putting his

16. Mr. Justice Frankfurter : 'A Heritage for all who Love the Law,' 51 A.B.A.J. 330, 332 (1965).

> passion behind his judgment instead of in front of it.[17]"

21. Thus, a Judge should abandon his passion. He must constantly remind himself that he has a singular master "duty to truth" and such truth is to be arrived at within the legal parameters. No heroism, no rehtorics.

22. Another facet gaining significance and deserves to be adverted to, when caustic observations are made which are not necessary as an integral part of adjudication and it affects the person's reputation - a cherished right under Article 21 of the Constitution. In *Umesh Kumar v. State of Andhra Pradesh and another*[18] this Court has observed: -

> "Personal rights of a human being include the right of reputation. A good reputation is an element of personal security and is protected by the Constitution equally with the right to the enjoyment of life, liberty and property. Therefore, it has been held to be a necessary element in regard to right to life of a citizen under Article 21 of the Constitution. The International Covenant on Civil and Political Rights, 1966 recognises the right to have opinions and the right to freedom of expression under Article 19 is subject to the right of reputation of others."

23. In *Kiran Bedi v. Committee of Inquiry and another*[19] this Court reproduced the following observations from the decision in *D.F. Marion v. Davis*[20]:

> "25. … 'The right to the enjoyment of a private reputation, unassailed by malicious slander is of ancient origin, and is necessary to human society. A good reputation is an

17. FRANKURTER, Felix, Foreword, to Memorial issue for Robert H. Jackson, 55 Columbia Law Review (April, 1955) p.436.

18. (2013) 10 SCC 591.

19. (1989) 1 SCC 494.

20. 217 Ala 16 : 114 So 357 : 55 ALR 171 (1927).

element of personal security, and is protected by the Constitution equally with the right to the enjoyment of life, liberty, and property."

24. In *Vishwanath Agrawal v. Sarla Vishwanath Agrawal*[21], although in a different context, while dealing with the aspect of reputation, this Court has observed that reputation is not only the salt of life, but also the purest treasure and the most precious perfume of life. It is extremely delicate and a cherished value this side of the grave. It is a revenue generator for the present as well as for the posterity."

25. In *Mehmood Nayyar Azam v. State of Chhattisgarh and others*[22] this Court has ruled that the reverence of life is insegregably associated with the dignity of a human being who is basically divine, not servile. A human personality is endowed with potential infinity and it blossoms when dignity is sustained. The sustenance of such dignity has to be the superlative concern of every sensitive soul. The essence of dignity can never be treated as a momentary spark of light or, for that matter, "a brief candle", or "a hollow bubble". The spark of life gets more resplendent when man is treated with dignity sans humiliation, for every man is expected to lead an honourable life which is a splendid gift of "creative intelligence". When a dent is created in the reputation, humanism is paralysed.

26. In *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni and others*[23], while dealing with the value of reputation, a two-Judge Bench expressed thus: -

"The expression 'life' has a much wider meaning. Where therefore the outcome of a departmental enquiry is likely to adversely affect reputation or livelihood of a person,

21. (2012) 7 SCC 288.

22. (2012) 8 SCC 1.

23. (1983) 1 SCC 124.

some of the finer graces of human civilization which make life worth living would be jeopardized and the same can be put in jeopardy only by law which inheres fair procedures. In this context one can recall the famous words of Chapter II of Bhagwad-Gita :

Sambhavitasya Cha Kirti Marnadati Richyate"

27. The aforesaid principle has been reiterated in *State of Maharashtra v. Public Concern for Governance Trust and others*[24].

28. In view of the aforesaid analysis, we have no hesitation in holding that disparaging remarks, as recorded by the learned single Judge, are not necessary for arriving at the decision which he has rendered, the same being not an integral part and further that could not have been done when the appellant was not a party before the court and also he was never afforded an opportunity to explain his conduct, and the affirmation of the same by the Division Bench on the foundation that it has not caused any prejudice and he can fully defend himself when a subsequent litigation is instituted, are legally unacceptable. Accordingly, we expunge the extracted remarks hereinbefore and also any remarks which have been made that are likely to affect the reputation of the appellant. Since, the appeal is confined only to expunging of adverse remarks, the same is allowed. There shall be no order as to costs.

D.G. Appeal allowed.

24. (2007) 3 SCC 587.

SANJAY KUMAR SHUKLA

v.

M/S BHARAT PETROLEUM CORPORATION LTD. & ORS.

(Civil Appeal Nos. 1871-1872 of 2014)

FEBRUARY 07, 2014

[P. SATHASIVAM, CJI. AND RANJAN GOGOI, J.]

Constitution of India, 1950: Article 226 - Writ jurisdiction in contractual matter - Advertisement for award of dealership of retail outlets - Selection held and appellant placed at Sl.No.1 and respondent No.7 at Sl.No.2 - No Letter of Intent granted at that stage - Aggrieved by selection, respondent No.7 filed writ petition alleging that land offered by appellant was under litigation and was not immediately available for use of the retail outlet - A Single Judge of High Court directed that selection process be redone as respondent No.7 did not produce any document of title in respect of assets mentioned by him and appellant was not granted requisite NOC from District Magistrate in respect of land offered by him - On appeal, Division Bench of High Court took the view that once appellant was found to be disentitled, the dealership should have been awarded to respondent No.7, he being, at serial No.2 of merit list - On appeal, held: Initially, District Authority had taken stand that NOC in respect of land offered by appellant cannot be issued as the same was found to be involved in a litigation i.e. Partition Suit - While writ petition was pending, Partition suit was withdrawn and so there was a change in stand of District Authority regarding grant of NOC - Yet, same was not brought to the notice of Single Judge - That apart, relevant facts were ignored at different stages by High Court and in light of totality of facts there was a deliberate and not bona fide attempt on part of respondent No.7 to deny fruit of selection made in favour of appellant - Corporation is directed, if it is of view that operation of the retail outlet is still

justified by the exigencies, to award the same to appellant by completing the requisite formalities in accordance with the procedure laid down by the Corporation itself.

The first respondent-Corporation issued an advertisement calling applications for award of dealership of retail outlets. On receipt of applications, selection was held and the appellant was placed at Sl.No.1 with 78.04 marks and respondent No.7 who had secured 77.75 marks was placed at Sl.No.2. Aggrieved by the selection, respondent No.7 filed a complaint before the Corporation challenging the award of 'zero' marks to respondent no.7, against a maximum of 'four' awardable under the head "Fixed and Moveable Assets" and alleging that the land offered by the appellant was under litigation and was not immediately available for use of the retail outlet. The said complaint was rejected on the ground that the Technical Evaluation Committee in its report had found the land offered by the appellant suitable for development of the retail outlet and that the issue raised by the respondent in the complaint would be dealt with in the process of grant of No Objection Certificate (NOC) by the District Magistrate to whom a reference of the matter would be made. As regards the claim of respondent No.7 with respect to award of marks was concerned, the same was rejected on the ground that he had not furnished any document in support of his title to the assets mentioned by him in his application. Aggrieved, respondent No.7 filed a writ petition before the High Court. No Letter of Intent was granted to the appellant at that stage. A Single Judge of the High Court took the view that there was no fault in the decision of the Corporation in so far as award of marks to respondent No.7 was concerned inasmuch as the respondent No.7 did not produce any document of title in respect of assets mentioned by him and such failure on the part of respondent No.7 amounted to suppression/concealment of relevant facts. In so far as

the appellant was concerned, the Single Judge held that the requisite NOC from the District Magistrate in respect of the land offered by the appellant not having been granted, the Corporation cannot be expected to wait indefinitely and directed that the selection process be redone. Aggrieved by the order passed by the Single Judge both the appellant and respondent No.7 filed LPAs. The Division Bench of the High Court took the view that once the appellant was found to be disentitled, the dealership should have been awarded to respondent No.7, he being, at serial No.2 of the merit list.

Aggrieved, the appellant filed instant appeals. Respondent no.7 also filed SLPs challenging the findings of the Single Judge with regard to suppression/ concealment which was not set aside by the Division Bench of the High Court. The said SLP was dismissed.

Allowing the appeals, the Court

HELD: 1. After the selection for the dealership was finalized by the Corporation, a reference was made to the District Authority on 24.01.2011 for grant of NOC. The District Authority informed the Corporation that NOC would not be granted on account of the fact that the land, on which outlet was proposed, was involved in Partition Suit. The appellant was impleaded as defendant in the said suit on 04.02.2011 i.e. after 5 years of its institution and that too after the finalization of the select list/merit panel by the Corporation. An order of injunction to restrain the District Authority from issuing NOC was sought by the plaintiff in Partition Suit which was refused by the trial court on 19.07.2011. Taking note of this fact i.e. refusal of injunction, the District Authority, once again, sought for a report from the Sub-Divisional Officer whether NOC can be granted. This was on 04.08.2011. The Sub-Divisional Officer sought the opinion of the Government Advocate and submitted a report

recommending grant of NOC. These documents, though vital, were not before the High Court. After the Single Judge had decided the writ petition by ordering a fresh selection, an amendment application was filed in the said Partition Suit for deletion of the land offered for the dealership from the purview of the suit. The said amendment was allowed by the trial court. In the L.P.A. filed by the appellant, the amendment application for deletion of the land in question as well as the order of the trial court allowing the said amendment application were enclosed. The High Court overlooked the same and did not consider the effect thereof on the rights and entitlements of the respective parties. A reminder was issued to the District Authority for grant of the NOC applied for by the Corporation. The Partition Suit was dismissed as withdrawn on 7.1.2014 on an application filed by the plaintiff. No other pending litigation involving the land was brought to the notice of the Court. [Para 9] [968-F-H; 969-A-G; 970-C]

2. In the instant case, even before the Letter of Intent in respect of the dealership could be issued to the appellant the proposed grant came to be challenged before the High Court by respondent No.7 who had impugned the decision of the Corporation rejecting the complaint filed by him against the selection made. Initially, the District Authority had taken the stand that the NOC in respect of the land offered by the appellant cannot be issued as the same was found to be involved in a litigation i.e. Partition Suit. While the writ petition was pending there was a change in the stand of the District Authority in the matter of grant of NOC. Yet, the same was not brought to the notice of the Single Judge. A vital fact, therefore, escaped notice. The fact that the appellant was impleaded in the suit nearly 5 years after the institution thereof and after the selection was finalized by the Corporation on 30.12.2010 was before the High Court; yet

the same was overlooked by the Single Judge. The Division Bench hearing the L.P.A.s also overlooked the fact that the trial court by order dated 19.10.2011 had allowed the deletion of the land in question from the purview of the said partition suit on an application filed by the plaintiff. This was, notwithstanding, the fact that the amendment application as well as the order thereon was brought on the record of the L.P.A. by the appellant. That apart, the facts brought on record of the instant appeal by the parties were of considerable significance. The subsequent report of the Sub-Divisional Officer recommending grant of NOC; the reminder of the Corporation to the District Authority for grant of NOC; the institution of title suit in respect of the land in question and the dismissal thereof on the ground of maintainability as well as the dismissal of Partition Suit (on withdrawal) were too significant to be ignored, as already held. Relevant facts were ignored at different stages of consideration of the matter by the High Court and in the light of the totality of the facts there was a deliberate and not very bona fide attempt on the part of respondent No.7 to deny the fruit of the selection made in favour of the appellant by the Corporation as far back as on 30.12.2010. The situation, therefore, has to be remedied and it is the precise manner thereof which must now engage the attention of the Court. [para 10] [970-D-H; 971-A-E]

3. In the instant case, exercise of the extraordinary jurisdiction vested in the High Court by Article 226 of the Constitution has been with a somewhat free hand oblivious of the note of caution struck by this Court with regard to such exercise, particularly, in contractual matters. The entertainment of a writ petition in contractual matters, unless justified by public interest, can entail. Delay in the judicial process that seems to have become inevitable could work in different ways. Deprivation of the benefit of a service or facility to the public; escalating

costs burdening the public exchequer and abandonment of half completed works and projects due to the ground realities in a fast changing economic/market scenario are some of the pitfalls that may occur. In the instant case, fortunately, the litigation has not been very time consuming. Nothing has been suggested on behalf of the Corporation that the establishment of a retail outlet at site in question was not required as on date. It can, therefore, be safely understood that in the instant case the public of the locality have been deprived of the benefit of the service that the outlet could have generated. The present litigation initiated by respondent No. 7 does not constitute a very bonafide exercise on the part of the said Respondent and the entire litigation appears to have been driven by desire to deny the fruits of the selection in which the appellant was found to be the most eligible candidate. Whether the outlet is operated by the appellant or Respondent No. 7 is of no consequence to the ultimate beneficiaries of the service to be offered by the said outlet. This highlights the need of caution that was imperative on the part of the High Court while entertaining the writ petition and in passing orders therein. Be that as it may, in the totality of the facts of the present case, it would be just and proper to direct the Corporation, if it is of the view that the operation of the retail outlet is still justified by the exigencies, to award the same to the appellant by completing the requisite formalities in accordance with the procedure laid down by the Corporation itself. [paras 11, 14, 15] [971-E-F; 975-G-H; 976-A-F]

Raunaq International Ltd. vs. I.V.R. Construction Ltd. & Ors. **(1999) 1 SCC 492: 1998 (3) Suppl. SCR 421;** *Air India Ltd. Vs. Cochin International Airport Ltd. & Ors.* **(2000) 2 SCC 617: 2000 (1) SCR 505;** *Master Marine Services (P) Ltd. vs. Metcalfe & Hodgkinson (P) Ltd. & Anr.* **(2005) 6 SCC 138: 2005 (3) SCR 666;** *Tejas Constructions and Infrastructure*

Private Limited vs. Municipal Council, Sendhwa and Anr. **(2012) 6 SCC 464: 2012 (4) SCR 190 - relied on.**

Case Law Reference:

1998 (3) Suppl. SCR 421	**relied on**	**Para 11**
2000 (1) SCR 505	**relied on**	**para 12**
2005 (3) SCR 666	**relied on**	**para 13**
2012 (4) SCR 190	**relied on**	**para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1871-1872 of 2014.

From the Judgment and order dated 16.05.2012 of the High Court of Patna in LPA No. 1845, 1916 of 2011 and CWJC No. 6125 of 2011.

P.S. Patwalia, U.U. Lalit, S.B. Sanyal, Amit Pawan, Subhro Sanyal, Bhavna Arora, Sunil Murarka, Parijat Sinha, Reshmi Rea Sinha, S.C. Ghosh, Abhinav Mukerji, Binu Sharma, Purnima Krishna for the appearing parties.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. Leave granted.

2. These appeals are directed against the common judgment and order dated 16.05.2012 passed by the High Court of Judicature at Patna in Letters Patent Appeal Nos.1845 and 1916 of 2011. By the aforesaid impugned order, the High Court has directed that the respondent No.7 herein who was placed at serial No.2 of the select list/merit panel for award of dealership of retail outlet under the respondent No.1, i.e. M/s. Bharat Petroleum Corporation Ltd., be offered the said dealership after completing the process contemplated under the selection procedure in force in the Corporation.

3. A summary of the essential facts is delineated hereinbelow:-

The first respondent Corporation issued an advertisement dated 30.05.2010 for award of dealership of retail outlets in different locations including Areraj, East Champaran District in the State of Bihar. The selection was to be made in accordance with the norms laid down by the Corporation and available in a booklet published on 15.09.2008 under the caption "procedure for selection of petrol/diesel retail outlet dealers" (hereinafter referred to as the "Norms"). On the basis of the applications received for grant of the dealership in question, a selection was held wherein the appellant was placed at Sl.No.1 with 78.04 marks whereas the respondent No.7 who had secured 77.75 marks was placed at Sl.No.2. The dealership was to be offered to the most meritorious candidate after necessary field verification. The norms contemplated issuance of a Letter of Intent (LoI) on the expiry of 30 days from the date of publication of the select list/merit panel or till disposal of complaints, if any, with regard to the selection made by the Corporation. A grievance redressal mechanism is expressly laid down in the 'Norms'.

4. Aggrieved by the selection, the respondent No.7 filed a complaint dated 25.01.2011 before the Corporation raising a two-fold grievance. The first was with regard to award of 'zero' marks to the Respondent, against a maximum of 'four' awardable under the head "Fixed and Moveable Assets". The second grievance raised was that the land offered by the appellant was under litigation and was not immediately available for use of the retail outlet. The complaint filed by the respondent No.7 was promptly answered by an order of rejection dated 28.01.2011 on the ground that the Technical Evaluation Committee in its report had found the land offered by the appellant suitable for development of the retail outlet and that the issue raised by the respondent in the objection/ complaint would be dealt with in the process of grant of No

Objection Certificate (NOC) by the District Magistrate to whom a reference of the matter is required to be made. In so far as the claim of the respondent No.7 with regard to award of marks is concerned, the same was rejected on the ground that the respondent had not furnished any document in support of his title to the assets mentioned by him in his application.

5. Aggrieved by the rejection of his complaint, the respondent No.7 moved the High Court by means of a writ petition registered and numbered as C.W.J.C. No.6125 of 2011. No Letter of Intent had been granted to the appellant at that stage. A learned Single Judge of the High Court by order dated 29.09.2011 took the view that in so far as award of marks to the respondent No.7 is concerned no fault can be found in the decision of the Corporation inasmuch as the respondent No.7 did not produce any document of title in respect of assets mentioned by him in his application for the dealership. In fact, the learned Single Judge came to the further conclusion that such failure on the part of the respondent No.7 amounted to suppression/concealment of relevant facts. In so far as the present appellant is concerned, the learned Single Judge came to the conclusion that the requisite NOC from the District Magistrate in respect of the land offered by the appellant not having been granted, the Corporation cannot be expected to wait indefinitely. Consequently, the learned Single Judge directed that the selection process be redone.

6. Aggrieved by the order dated 29.09.2011 passed by the learned Single Judge both the appellant and the respondent No.7 filed their respective Letters Patent Appeals. The Division Bench of the High Court by the impugned order dated 16.05.2012 substantially agreed with the findings recorded by the learned Single Judge in so far as both the parties are concerned. However, taking note of Clause 16 of the Norms i.e. "Procedure For Selection Of Petrol/Diesel Retail Outlet Dealers", the Bench took the view that once the appellant was found to be disentitled, the dealership should have been

awarded to respondent No.7, he being, at serial No.2 of the merit list. Consequential directions were issued by the Division Bench of the High Court. Aggrieved, the present appeals have been filed.

7. Contending that the findings of the learned Single Judge with regard to suppression/concealment had not been set aside by the Division Bench of the High Court in its order dated 16.05.2012, the respondent No.7 had moved SLP (C) No.28324 of 2012 against the aforesaid part of the order dated 16.05.2012. The SLP filed by the respondent No.7 was dismissed by this Court by order dated 05.10.2012.

8. An effective resolution of the contentious issues that have emerged from the arguments made on behalf of the rival parties would require specific notice of the relevant documents brought on record by the parties at different stages of the proceedings before the High Court as well as this Court. As none of the said documents are disputed and the authenticity/genuineness thereof is not questioned, considering the relevance of the same to the subject matter, we are of the view that the facts unfolded by the said documents can be ignored only at the cost of a fair adjudication of the lis between the parties. We, therefore, proceed to take note of the said facts in proper sequential order.

9. After the selection for the dealership was finalized by the Corporation on 30.12.2010, a reference was made to the District Authority on 24.01.2011 for grant of NOC to enable the Corporation to apply for the necessary licence under the Petroleum Rules, 2002. By communications dated 11.07.2011 and 16.07.2011 the District Authority informed the Corporation that NOC cannot be granted on account of the fact that the land, on which outlet was proposed, was involved in Partition Suit No.7 of 2006. It would be of some significance that the appellant was impleaded as defendant in the said suit on 04.02.2011 i.e. after 5 years of its institution and that too after the finalization of the select list/merit panel by the Corporation. An order of

injunction to restrain the District Authority from issuing NOC was sought by the plaintiff in Partition Suit No.7 of 2006 which was refused by the learned Trial Court on 19.07.2011. Taking note of the aforesaid fact i.e. refusal of injunction, the District Authority, once again, sought for a report from the Sub-Divisional Officer whether NOC can be granted. This was on 04.08.2011. The Sub-Divisional Officer sought the opinion of the Government Advocate and submitted a report dated 18.08.2011 recommending grant of NOC. These documents, though vital, were not before the High Court but have been placed before us. After the learned Single Judge had decided the writ petition by ordering a fresh selection, an amendment application dated 17.10.2011 was filed in Partition Suit No.7 of 2006 for deletion of the land offered for the dealership from the purview of the suit. The said amendment was allowed by the learned Trial Court on 19.10.2011. In the L.P.A. filed by the appellant, i.e. L.P.A. No.1845 of 2011 the amendment application for deletion of the land in question as well as the order dated 19.10.2011 of the learned Trial Court allowing the said amendment application were enclosed. The High Court overlooked the same and did not consider the effect thereof on the rights and entitlements of the respective parties. It also appears that on 26.12.2011, on behalf of the Corporation, a reminder was issued to the District Authority for grant of the NOC applied for by the Corporation on 24.01.2011. There is another letter on record dated 30.12.2011 from the District Magistrate to the Territory Manager (Retail) Bharat Petroleum Corporation Limited in the matter of grant of NOC. In the said letter reference has been made to the order of the learned Single Judge in the C.W.J.C. No.6125 of 2011 dated 29.09.2011. In the ultimate paragraph of the said letter it is stated that:-

> "Thus, in view of the present context, kindly inform about your final decision regarding issuance of NOC whether issuance of NOC can be considered or not."

The aforesaid letter dated 30.12.2011 is an English translation of the original. The contents of the last paragraph quoted hereinabove has left the true meaning thereof clouded though the appellant contends that the said paragraph should be read as containing a query from the Corporation as to whether in view of the learned Single Judge's order passed in the writ petition, NOC can be issued or not. Be that as it may, another suit i.e. T.S.No.638 of 2011 involving land in question had been instituted though the same has been dismissed on 6.1.2014 as not maintainable. Above all, Partition Suit No.7 of 2006 has been dismissed as withdrawn on 7.1.2014 on an application filed by the plaintiff. No other pending litigation involving the land has been brought to the notice of the Court.

10. In the present case even before the Letter of Intent in respect of the dealership could be issued to the appellant the proposed grant came to be challenged before the High Court by the respondent No.7 who had impugned the decision of the Corporation dated 28.01.2011 rejecting the complaint filed by him against the selection made. Initially, the District Authority had taken the stand that the NOC in respect of the land offered by the appellant cannot be issued as the same was found to be involved in a litigation i.e. Partition Suit No.7 of 2006. While the writ petition was pending there was a change in the stand of the District Authority in the matter of grant of NOC. Yet, the same was not brought to the notice of the learned Single Judge. A vital fact, therefore, escaped notice. The fact that the appellant was impleaded in the suit on 04.02.2011, i.e. nearly 5 years after the institution thereof and after the selection was finalized by the Corporation on 30.12.2010 was before the High Court; yet the same had been overlooked by the learned Single Judge. The Division Bench hearing the Letters Patent Appeals also overlooked the fact that the learned Trial Court by order dated 19.10.2011 had allowed the deletion of the land in question from the purview of the said partition suit on an application filed by the plaintiff. This is, notwithstanding, the fact that the amendment application dated 17.10.2011 as well as

the order thereon dated 19.10.2011 was brought on the record of the L.P.A. by the appellant. That apart, the facts brought on record of the present appeal by the parties is of considerable significance. The subsequent report of the Sub-Divisional Officer dated 18.8.2011 recommending grant of NOC; the reminder of the Corporation dated 26.12.2011 to the District Authority for grant of NOC; the institution of Title Suit No.638 of 2011 in respect of the land in question and the dismissal thereof by order dated 06.01.2014 on the ground of maintainability as well as the dismissal of Partition Suit No.7 of 2006 on 07.01.2014 (on withdrawal) are too significant to be ignored, as already held. Relevant facts have been ignored at different stages of consideration of the matter by the High Court and in the light of the totality of the facts now placed before us, we unhesitatingly come to the conclusion that in the present case there was a deliberate and not very bona fide attempt on the part of the respondent No.7 to deny the fruit of the selection made in favour of the appellant by the Corporation as far back as on 30.12.2010. The situation, therefore, has to be remedied and it is the precise manner thereof which must now engage the attention of the Court.

11. We cannot help observing that in the present case exercise of the extraordinary jurisdiction vested in the High Court by Article 226 of the Constitution has been with a somewhat free hand oblivious of the note of caution struck by this Court with regard to such exercise, particularly, in contractual matters. The present, therefore, may be an appropriate occasion to recall some of the observations of this Court in the above context. In *Raunaq International Ltd. Vs. I.V.R. Construction Ltd. & Ors.*[1], (paragraphs 9, 10 and 11) this Court had held as follows :-

> "9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:
>
> (1) the price at which the other side is willing to do the work;
>
> (2) whether the goods or services offered are of the requisite specifications;
>
> (3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;
>
> (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
>
> (5) past experience of the tenderer and whether he has successfully completed similar work earlier;
>
> (6) time which will be taken to deliver the goods or services; and often
>
> (7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.
>
> Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

1. (1999) 1 SCC 492.

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work - thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction

is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers."

12. In *Air India Ltd. Vs. Cochin International Airport Ltd. & Ors.*[2], there was a further reiteration of the said principle in the following terms:-

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority of India*[3], *Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India*[4], *CCE v. Dunlop India Ltd.*[5], *Tata Cellular v. Union of India*[6], *Ramniklal N. Bhutta v. State of Maharashtra*[7] and *Raunaq International Ltd. v. I.V.R. Construction Ltd.*[8] The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations,

2. (2000) 2 SCC 617.
3. (1979) 3 SCC 489.
4. (1981) 1 SCC 568.
5. (1985) 1 SCC 260.
6. (1994) 6 SCC 651.
7. (1997) 1 SCC 134.
8. (1999) 1 SCC 492.

instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

(Emphasis is ours)

13. Similar reiteration is to be found in *Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd. & Anr.*[9]*; Tejas Constructions and Infrastructure Private Limited Vs. Municipal Council, Sendhwa and Another*[10] and several other pronouncements reference to which would only be repetitive and, therefore, is best avoided.

14. We have felt it necessary to reiterate the need of caution sounded by this Court in the decisions referred to hereinabove in view of the serious consequences that the entertainment of a writ petition in contractual matters, unless justified by public interest, can entail. Delay in the judicial process that seems to have become inevitable could work in different ways. Deprivation of the benefit of a service or facility to the public; escalating costs burdening the public exchequer

9. (2005) 6 SCC 138.

10. (2012) 6 SCC 464.

and abandonment of half completed works and projects due to the ground realities in a fast changing economic/market scenario are some of the pitfalls that may occur.

15. In the present case, fortunately, the litigation has not been very time consuming. Nothing has been suggested on behalf of the Corporation that the establishment of a retail outlet at Areraj, East Champaran District in the State of Bihar is not required as on date. It can, therefore, be safely understood that in the instant case the public of the locality have been deprived of the benefit of the service that the outlet could have generated. We have already indicated that the present litigation initiated by Respondent No. 7 does not constitute a very bonafide exercise on the part of the said Respondent and the entire litigation appears to have been driven by desire to deny the fruits of the selection in which the appellant was found to be the most eligible candidate. Whether the outlet is operated by the appellant or the Respondent No. 7 is of no consequence to the ultimate beneficiaries of the service to be offered by the said outlet. The above highlights the need of caution that was imperative on the part of the High Court while entertaining the writ petition and in passing orders therein. Be that as it may, in the totality of the facts of the present case, we are of the view that it would be just and proper to direct the Corporation, if it is of the view that the operation of the retail outlet is still justified by the exigencies, to award the same to the appellant by completing the requisite formalities in accordance with the procedure laid down by the Corporation itself.

16. Consequently, these appeals are allowed and the impugned order dated 16.05.2012 passed by the Division Bench of the High Court in L.P.A. Nos.1845 and 1916 of 2011 as well as the order dated 29.09.2011 passed by learned Single Judge in C.W.J.C. No.6125 of 2011 are set aside.

D.G. Appeals allowed.

M/S ENGINEER BUILDER & ASSOCIATES
v.
UNION OF INDIA & ORS.
(Civil Appeal Nos. 1932-1934 of 2014)

FEBRUARY 10, 2014

[A.K. PATNAIK AND JAGDISH SINGH KHEHAR, JJ.]

JAMMU AND KASHMIR ARBITRATION ACT, 1945: s.49(2); Fourth schedule - Application for setting aside award - Limitation and condonation of delay - Held: s.49(2) prescribes a limitation of 30 days for filing an application for setting aside the award - Under s.5 of the Jammu and Kashmir Limitation Act, period of limitation can be extended by the Court in respect of any application if the Court is satisfied that the applicant had sufficient cause for not making the application within the period of limitation - However, s.5 of the Jammu and Kashmir Limitation Act do not apply to any application under any special or local law - The Act of 1945 does not provide anywhere that s.5 of the Jammu and Kashmir Limitation Act will apply to an application for setting aside an award u/ss.30 and 33 of the Act of 1945 - Thus, the Court has no powers to condone the delay in filing an application for setting aside an award u/ss.30 and 33 of the Act of 1945 - Jammu and Kashmir Limitation Act - s.5.

INTERPRETATION OF STATUTES: Conflict between the provisions of the Act and provisions of the Schedule of the Act - Held: The provisions of the Act will prevail over the provisions of the Schedule.

Dispute arose between the parties and matter was referred to arbitration. The arbitrator passed an award on 4.9.2007 in favour of the appellant. In December, 2007, the appellant filed an execution petition. The respondent then filed an arbitration application under Section 34 of the

Jammu and Kashmir Arbitration and Conciliation Act, 1997 before the High Court for setting aside the award. The single judge of the High Court dismissed the application on the ground that application ought to have been filed under the Jammu and Kashmir Arbitration Act of 1945. On appeal, the Division Bench of the High Court while upholding the decision of the single judge observed that it would be open to the respondent to take steps as required under Section 30 and 33 of Act of 1945 in relation to the award and if so advised to file an application for condonation of delay. The grievance of the appellant in the instant appeals was the observation of the High Court regarding filing of application under Section 30 and 33 of Act of 1945 along with application for condonation of delay.

Allowing the appeals, the Court

HELD: 1. Sections 30 and 33 of the Jammu and Kashmir Arbitration Act of 1945, which provide for setting aside an award on certain grounds, do not prescribe any period of limitation for filing an application for setting aside an award, but Section 49(2) read with Fourth Schedule of the Act of 1945 prescribes a limitation of thirty days from the date of service of the notice of filing of the award for filing the application for setting aside an award or to get an award remitted for reconsideration. Section 49(2) of the Act of 1945 makes an amendment to the First Schedule of the Jammu and Kashmir Limitation Act and provides in Article 153 of the First Schedule of the said Limitation Act that the period of limitation for filing an application for setting aside the award will be 30 days. The principle laid down by this Court in M/s. Aphali Pharmaceuticals Ltd. vs. State of Maharashtra & Ors. is that in case there is conflict between the provisions of the Act and provisions of the Schedule of the Act, the provisions of the Act will prevail over the provisions of

the Schedule. As Sections 30 and 33 do not prescribe a different period of limitation, there is no conflict between Sections 30 and 33 of the Act of 1945 and the Fourth Schedule of the Act of 1945. Rather, Sections 30 and 33 of the Act of 1945, which do not prescribe any period of limitation for filing an application for setting aside an award will have to be read along with Section 49(2) and Fourth Schedule of the said Act and so read, the period of limitation prescribed for filing an application for setting aside an award is 30 days from the service of notice of filing of the award. [Para 7] [983-B-C; 984-B-E]

2. It is only under Section 5 of the Jammu and Kashmir Limitation Act that any time beyond the period of limitation can be extended by the Court in respect of any application if the Court is satisfied that the applicant had sufficient cause for not making the application within the period of limitation. It will, however, be clear from clauses (a) and (b) of Section 29(2) of the Jammu and Kashmir Limitation Act extracted above that the provisions of Section 5 of the Jammu and Kashmir Limitation Act do not apply to any application under any special or local law. Section 5 also states that any other application to which Section 5 may be made applicable by or under any enactment for the time being in force may be admitted if the applicant satisfies the Court that he had sufficient cause for not making the application within the period of limitation. The Act of 1945 does not provide anywhere that the provisions of Section 5 of the Jammu and Kashmir Limitation Act will apply to an application for setting aside an award under Sections 30 and 33 of the Act of 1945. Thus, the Court has no powers to condone the delay in filing an application for setting aside an award under Sections 30 and 33 of the Act of 1945. The Division Bench of the High Court was not right in giving liberty to the respondents to file an application for condonation of delay in filing the application for setting aside the award under Sections 30 and 33 of the Act of 1945. [Paras 9, 10] [986-A-E]

M/s. Aphali Pharmaceuticals Ltd. vs. State of Maharashtra & Ors. **(1989) 4 SCC 378: 1989 (1) Suppl. SCR 129 - relied on.**

Case Law Reference:

1989 (1) Suppl. SCR 129 relied on Paras 6, 7

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1932-1934 of 2014.

From the Judgment and order dated 30.03.2010 of the High Court of Jammu & Kashmir at Jammu in CIMA No. 91 of 2010 with Caveat No. 1259 of 2009 and CMP No. 125 of 2010.

S.B. Upadhyay, Sharmila Upadhyay, Pawan Upadhyay, S.S. Shastri, Rishi Manchanda, Param Mishra for the Appellant.

Mohan Jain, ASG, D.K. Thakur, Anil Katiyar for the Respondents.

The Judgment of the Court was delivered by

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

2. These are appeals by way of Special Leave under Article 136 of the Constitution against the order dated 30.03.2010 of the High Court of Jammu and Kashmir in CIMA No.91 of 2010 with CMP No.125 of 2010 with Caveat No.1259 of 2009.

3. The facts very briefly are that the appellant was awarded a contract by the respondent for constructing accommodation for married JCOs/Hav/Ors. at Srinagar in Kashmir. Clause 70 of the agreement between the appellant and the respondents provided that all disputes between the parties to the contract shall be referred to the sole arbitration of an Engineer Officer

to be appointed by the Authority mentioned in the tender-documents. The disputes raised by the appellant were referred to an arbitrator and the arbitrator made an award dated 04.09.2007 to the effect that the appellant would be entitled to recover Rs.65,78,450/- together with litigation expenses and Arbitrator's fee fixed at Rs.1,00,000/-. The arbitrator further directed in the award that the respondents shall make the payment within three months from the date they receive the copy of the award, failing which the entire awarded amount shall be recoverable with interest at the rate of 18% per annum from the date of the award. In December 2007, the appellant filed an Execution Petition in the Court of District Judge, Jammu, for execution of the award.

4. The respondents then filed an Arbitration Application No.8 of 2008 under Section 34 of the Jammu and Kashmir Arbitration and Conciliation Act, 1997 (for short 'the Act of 1997') before the High Court of Jammu and Kashmir for setting aside the award. The learned Single Judge of the High Court dismissed the application by order dated 07.12.2009 saying that the application for setting aside the award ought to have been filed under the Jammu and Kashmir Arbitration Act of the year 1945 (for short 'the Act of 1945'). The respondents carried an appeal before the Division Bench of the High Court which was registered as CIMA No.91 of 2010 and by the impugned order dated 30.03.2010 passed in the said appeal, the Division Bench of the High Court held that the learned Single Judge was right in coming to the conclusion that the Act of 1945 was applicable to the facts of the present case in view of the provisions of Section 68 of the Act of 1997. The Division Bench of the High Court, therefore, refused to interfere with the order passed by the learned Single Judge, but observed that it shall be open to the respondents to take such steps as are required to be taken under Sections 30 and 33 of the Act of 1945 in relation to the award, and if so advised, to file an application for condonation of delay. The appellant is aggrieved by this observation of the High Court that it will be open to the

respondents to file an application under Sections 30 and 33 of the Act of 1945 along with an application for condonation of delay and has, therefore, filed this appeal.

5. Mr. S.B. Upadhyay, learned senior counsel appearing for the appellant, submitted that the Fourth Schedule to the Act of 1945 has incorporated an amendment in Article 153 of the First Schedule to the Jammu and Kashmir Limitation Act, which would make it clear that for setting aside an award or to get an award remitted for reconsideration, the period of limitation is thirty days from the date of the service of the notice of filing of the award. He submitted that the Jammu and Kashmir Limitation Act provides in Section 29(2)(a) that the provisions contained in Sections 4, 9 to 18 and 22 shall apply to any application under any local or special law and further clarifies in Section 29(2(b) that the remaining provisions of the Jammu and Kashmir Limitation Act shall not apply. He submitted that, therefore, the provisions of Section 5 of the Jammu and Kashmir Limitation Act, which empower the court to condone the delay in filing an application, will not apply. He submitted that the Division Bench of the High Court is, therefore, not correct in giving liberty to the respondents to apply for setting aside the award under Sections 30 and 33 of the Act of 1945 along with an application for condonation of delay.

6. Mr. Mohan Jain, learned Additional Solicitor General, on the other hand, submitted that Section 30 of the Act of 1945 does not prescribe a period of limitation for an application for setting aside an award. He cited the decision of this Court in *M/s. Aphali Pharmaceuticals Ltd. vs. State of Maharashtra & Ors.* [(1989) 4 SCC 378] to contend that the Fourth Schedule of the Act of 1945 cannot override the main provisions of the Act. He submitted that since there is no period of limitation prescribed, the award could be challenged within the time extended by the Court under Section 5 of the Jammu and Kashmir Limitation Act and, therefore, the liberty granted by the Division Bench of the High Court in the impugned order to the

respondents to apply for setting aside the award under Section 30 of the Act of 1945 along with an application for condonation of delay cannot be faulted.

7. We have considered the submissions made by the learned counsel for the parties and we find that Sections 30 and 33 of the Act of 1945, which provide for setting aside an award on certain grounds, do not prescribe any period of limitation for filing an application for setting aside an award, but Section 49(2) read with Fourth Schedule of the Act of 1945 prescribes a limitation of thirty days from the date of service of the notice of filing of the award for filing the application for setting aside an award or to get an award remitted for reconsideration. This will be clear from Section 49(2) and the relevant portion of the Fourth Schedule of the Act of 1945 extracted hereinbelow:

> "49(2). The enactments specified in the Fourth Schedule are amended to the extent and in the manner mentioned therein."

"THE FOURTH SCHEDULE

[See Section 49(2)]

ENACTMENTS AMENDED

Year	No.	Short title	Amendments
1995	IX	The Jammu and Kashmir Limitation Act, 1995	In the First Schedule - (i) for Article 153, the following shall be substituted, namely:-- "158. Under the Jammu and Kashmir Arbitration Act to set aside an award or to get an award remitted for re-consideration.

			-Thirty days. The date of service of the notice of filing of the award."

Thus, Section 49(2) of the Act of 1945 makes an amendment to the First Schedule of the Jammu and Kashmir Limitation Act and provides in Article 153 of the First Schedule of the said Limitation Act that the period of limitation for filing an application for setting aside the award will be 30 days. The principle laid down by this Court in *M/s. Aphali Pharmaceuticals Ltd. vs. State of Maharashtra & Ors.* (supra) is that in case there is conflict between the provisions of the Act and provisions of the Schedule of the Act, the provisions of the Act will prevail over the provisions of the Schedule. As Sections 30 and 33 do not prescribe a different period of limitation, there is no conflict between Sections 30 and 33 of the Act of 1945 and the Fourth Schedule of the Act of 1945. Rather, Sections 30 and 33 of the Act of 1945, which do not prescribe any period of limitation for filing an application for setting aside an award will have to be read along with Section 49(2) and Fourth Schedule of the said Act and so read, the period of limitation prescribed for filing an application for setting aside an award is 30 days from the service of notice of filing of the award.

8. The only other question which we have to decide is whether the Court is vested with any power to extend the time for filing the application for setting aside an award beyond the period of thirty days from the date of service of the notice of filing of the award as prescribed in Section 49(2) read with the Fourth Schedule of the Act of 1945. To answer this question, we have to refer to Sections 5 and 29 of the Jammu and Kashmir Limitation Act. These provisions of the Jammu and Kashmir Limitation Act are extracted hereinbelow:

> "5. An appeal or an application for a review of a judgment or for leave to appeal or an application to set aside an

order of dismissal of a suit for plaintiff's default or an application to set aside a decree passed ex-parte in an original suit or appeal or an application to bring the heirs of a deceased party on the record or an application to set aside an order of abatement of a suit or appeal or any other application to which this section may be made applicable by or under an enactment for the time being in force may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation. - The fact that the appellant or applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period of limitation may be sufficient cause within the meaning this section."

"29. (1) Nothing in this Act shall affect section 25 of the Contract Act (IX of 1997).

(2) Where any special or local law prescribes for any suit, appeal or application a period limitation different from the period prescribed therefor by the first schedule, the provisions of section 3 shall apply as if such period were prescribed therefor in that schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law-

(a) the provisions contained in section 4, sections 9 to 18 and section 22 shall apply only insofar as and the extent to which they are not expressly excluded by such special or local law and;

(b) the remaining provisions of this Act shall not apply.

9. It is only under Section 5 of the Jammu and Kashmir Limitation Act that any time beyond the period of limitation can be extended by the Court in respect of any application if the Court is satisfied that the applicant had sufficient cause for not making the application within the period of limitation. It will, however, be clear from clauses (a) and (b) of Section 29(2) of the Jammu and Kashmir Limitation Act extracted above that the provisions of Section 5 of the Jammu and Kashmir Limitation Act do not apply to any application under any special or local law. Section 5 also states that any other application to which Section 5 may be made applicable by or under any enactment for the time being in force may be admitted if the applicant satisfies the Court that he had sufficient cause for not making the application within the period of limitation. The Act of 1945 does not provide anywhere that the provisions of Section 5 of the Jammu and Kashmir Limitation Act will apply to an application for setting aside an award under Sections 30 and 33 of the Act of 1945. Thus, the Court has no powers to condone the delay in filing an application for setting aside an award under Sections 30 and 33 of the Act of 1945.

10. For the aforesaid reasons, we hold that the Division Bench of the High Court was not right in giving liberty to the respondents to file an application for condonation of delay in filing the application for setting aside the award under Sections 30 and 33 of the Act of 1945. We accordingly set aside the observations to this effect in the impugned order and allow the appeals, but order that the parties shall bear their own costs.

D.G. Appeals allowed.

CHENNAI METROPOLITAN WATER SUPPLY AND SEWERAGE BOARD AND OTHERS

v.

T.T. MURALI BABU

(Civil Appeal No. 1941 of 2014)

FEBRUARY 10, 2014

[H.L. GOKHALE AND DIPAK MISRA, JJ.]

SERVICE LAW:

Misconduct - Unauthorised long absence from duty - Dismissal from service -- Reinstatement directed by High Court without back wages - Held: Employee remained unauthorisedly absent for a long time - Medical certificate was filed belatedly - Charges were found proved - Single Judge and Division Bench of High Court did not advert to these issues - High Court has erred in giving emphasis on first time desertion and directing reinstatement - Plea of absence of "habitual absentecism" is unacceptable - Besides, respondent was a Junior Engineer. Regard being had to his official position, it was expected of him to maintain discipline, act with responsibility, perform his duty with sincerity and serve the institution with honesty - This kind of conduct cannot be countenanced as it creates a concavity in the work culture and ushers indiscipline in an organization --Chennai Metropolitan Water Supply And Sewerage Board Employees (Discipline And Appeal) Regulations, 1978 -- Regulations 6(1) and 6(2).

Proportionality of punishment - Long absence from duty - Dismissal - Held: Doctrine of proportionality in the context of imposition of punishment in service law gets attracted when the court on the analysis of material brought on record comes to the conclusion that punishment imposed by disciplinary authority or appellate authority shocks the conscience of court

-- Unauthorized absence by an employee, as misconduct, cannot be put into a straight-jacket formula for imposition of punishment - Respondent by remaining unauthorisedly absent for such a long period with inadequate reason and in not responding to the communications from the employer while he was unauthorisedly absent, had not only shown indiscipline but also made an attempt to get away with it - Such a conduct is not permissible -- Doctrine of proportionality does not get remotely attracted to such a case - The punishment is definitely not shockingly disproportionate.

DELAY/LACHES:

Misconduct - Dismissal from service - Four years delay in filing writ petition -Held: Doctrine of delay and laches should not be lightly brushed aside - A writ court is required to weigh the explanation offered and the acceptability of the same - It should bear in mind that it is exercising an extraordinary and equitable jurisdiction - It is the duty of the court to scrutinize whether such enormous delay is to be ignored without any justification - That apart, in the instant case, such belated approach gains more significance as the respondent-employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had remained unauthorisedly absent -- Such delay does not deserve any indulgence - Constitution of India, 1950 - Art. 226.

The respondent, who was working as a Junior Engineer in Chennai Metropolitan Water Supply and Sewerage Board, remained continuously absent from duty w.e.f.28.8.1995 without any intimation and did not respond to the repeated memoranda/reminders requiring him to explain his unauthorized absence from duty and to rejoin duty. A charge-sheet was issued to him on 11.9.1996 stating that he had failed to submit an explanation to the first charge memo dated 11.10.1995 inspite of reminders and that he deserted his post by

remaining unauthorisedly absent from duty from 28.8.1995, and thereby committed misconduct under Regulations 6(1) and 6(2) of the Chennai Metropolitan Water Supply and Sewerage Board Employees (Discipline and Appeal) Regulations, 1978. On 1.4.1997 he reported to duty with the medical certificate for the period 28.8.1995 to 31.3.1997. The enquiry officer found that the charges were proved. The disciplinary authority by order dated 16.4.1998 imposed the punishment of dismissal from service. The departmental appeal filed by the respondent was dismissed. However, the single Judge of the High Court allowed his writ petition, set aside the punishment of dismissal and directed his reinstatement with continuity of service but without back wages holding that the punishment of dismissal from service for the first time desertion/absenteeism was too harsh and disproportionate. The Division Bench of the High Court declined to interfere.

Allowing the appeal, the Court

HELD: 1.1 In the instant case, the medical certificate was belatedly submitted and the respondent had remained unauthorisedly absent from 28.08.1995. The Inquiry Officer found that both the charges had been proved. The disciplinary authority had ascribed reasons and passed an order of dismissal from service. Further, there has been delay of 4 years by the respondent in invoking the extraordinary jurisdiction of the High Court. From the decision rendered by the single Judge as well as that of the Division Bench of the High Court, it is clear that there has been no advertence with regard to the issue whether the charges levelled against the respondent had been proved or not. The only aspect which was really proponed before the High Court pertains to the nature of charges and proportionality of punishment. [para 10 and 12] [998-C-E; 999-C-D]

1.2 The doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. Delay does bring in hazard and causes injury to the lis. In the case at hand, though there has been four years' delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the court to scrutinize whether such enormous delay is to be ignored without any justification. That apart, in the instant case, such belated approach gains more significance as the respondent-employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had remained unauthorisedly absent on the pretext of some kind of ill health. In the considered opinion of this Court, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold. [para 16] [1001-C-H; 1002-B-C]

Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati and others, **1969 SCR 808 =AIR 1969 SC 329; and** *Lindsay Petroleum Co. v. Prosper Armstrong Hurd, Abram Farewall, and John Kemp,* **(1874) 5 PC 221,** *State of Maharashtra v. Digambar,* **1995 (1) Suppl. SCR 492 = (1995) 4 SCC 683; and** *State of M.P. and others etc. etc. v. Nandlal Jaiswal and others etc. etc.* **1987 (1) SCR 1 = AIR 1987 SC 251 - referred to.**

2.1 Doctrine of proportionality in the context of imposition of punishment in service law gets attracted when the court on the analysis of material brought on record comes to the conclusion that the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the court. [para 27] [1006-F-H]

Indian Oil Corporation Ltd. and another v. Ashok Kumar Arora, **1997 (1) SCR 980 = (1997) 3 SCC 72; and** *Union of India and another v. G. Ganayutham* **(1997) 7 SCC 463 - referred to**

Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn., **(1948) 1 KB 223 : (1947) 2 All ER 680; and** *Council of Civil Service Unions v. Minister for Civil Service,* **1985 AC 374 : (1984) 3 All ER 935 - referred to.**

2.2 It cannot be stated as an absolute proposition in law that whenever there is a long unauthorized absence, it is obligatory on the part of the disciplinary authority to record a finding that the said absence is willful even if the employee fails to show the compelling circumstances to remain absent. Unauthorized absence by an employee, as misconduct, cannot be put into a straight-jacket formula for imposition of punishment. It will depend upon many a factor. [para 22 and 26] [1005-B-C; 1006-E-F]

State of Punjab v. Dr. P.L. Singla **2008 (11) SCR 600 = (2008) 8 SCC 469; and** *Tushar D. Bhatt v. State of Gujarat and another* **2009 (3) SCR 229 = (2009) 11 SCC 678 - referred to.**

2.3 In the instant case, the High Court, has given emphasis on first time desertion and thereafter proceeded to apply the doctrine of proportionality. The said approach is obviously incorrect. The plea of absence of "habitual absenteeism" is absolutely unacceptable. The respondent by remaining

unauthorisedly absent for such a long period with inadequate reason and in not responding to the communications from the employer while he was unauthorisedly absent, had not only shown indiscipline but also made an attempt to get away with it. Such a conduct is not permissible and the High Court has erroneously placed reliance on the authorities where this Court had interfered with the punishment. The doctrine of proportionality does not get remotely attracted to such a case. The punishment is definitely not shockingly disproportionate. [para 30] [1009-C-H]

Krushnakant B. Parmar v. Union of India and another **2012 (3) SCR 484 = (2012) 3 SCC 178; and** *Chairman-cum-Managing Director, Coal India Limited and another v. Mukul Kumar Choudhuri and others,* **2009 (13) SCR 487 = (2009) 15 SCC 620;** *Shri Bhagwan Lal Arya v. Commissioner of Police, Delhi* **2004 (3) SCR 1 = (2004) 4 SCC 560; and** *Jagdish Singh v. Punjab Engineering College* **2009 (9) SCR 379 = (2009) 7 SCC 301;** *B. C. Chaturvedi v. Union of India* **1995 (4) Suppl. SCR 644 = (1995) 6 SCC 749;** *V. Ramana v. A.P.* **SRTC, 2005 (2) Suppl. SCR 1149 = 2005 (7) SCC 338; and** *V. Senthurvelan v. High Court of Judicature at Madras,* **(2009) 7 MLJ 1231 - distinguished.**

2.4 Besides, the respondent was a Junior Engineer. Regard being had to his official position, it was expected of him to maintain discipline, act with responsibility, perform his duty with sincerity and serve the institution with honesty. This kind of conduct cannot be countenanced as it creates a concavity in the work culture and ushers indiscipline in an organization. (Para 31) [1010-A-B]

Government of India and another v. George Philip **2006 (9) Suppl. SCR 108 = (2006) 13 SCC 1-relied on.**

2.5 The interference by the High Court with the punishment is totally unwarranted and unsustainable.

The High Court was also wholly unjustified in entertaining the writ petition after a lapse of four years. The judgments and orders passed by the single Judge and the Division Bench of the High Court are set aside. [para 33-34] [1011-A-C]

Case Law Reference:

2004 (3) SCR 1	**distinguished**	**para 7**
1995 (4) Suppl. SCR 644	**distinguished**	**para 7**
2005 (2) Suppl. SCR 1149	**distinguished**	**para 7**
(2009) 7 MLJ 1231	**distinguished**	**para 7**
2009 (9) SCR 379	**distinguished**	**para 7**
1969 SCR 808	**referred to**	**para 13**
(1874) 5 PC 221	**referred to**	**para 13**
1995 (1) Suppl. SCR 492	**referred to**	**para 14**
1987 (1) SCR 1	**referred to**	**para 15**
2012 (3) SCR 484	**distinguished**	**para 21**
2008 (11) SCR 600	**referred to**	**para 23**
2009 (3) SCR 229	**referred to**	**para 25**
1997 (1) SCR 980	**referred to**	**para 27**
(1948) 1 KB 223 : (1947) 2 All ER 680	**referrerd to**	**para 28**
1985 AC 374 : (1984) 3 All ER 935	**referrerd to**	**para 28**
(1997) 7 SCC 463	**referred to**	**para 28**
2009 (13) SCR 487	**distinguished**	**para 29**
2006 (9) Suppl. SCR 108	**relied on**	**para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1941 of 2014.

From the Judgment and Order dated 22.11.2012 of the High Court of Judicature at Madras in Writ Appeal No. 2531 of 2012.

S.S. Ray, Vaibhav Gulia, Rajan Tyagi, Dheeraj Gupta, Rakhi Ray for the Appellants.

Gautam Narayan, Mubashir Mushtaq, Swami Dharmendra Balyogi for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The present appeal, by special leave, is directed against the judgment and order dated 22.11.2012 passed by the High Court of Judicature at Madras in Writ Appeal No. 2531 of 2012 whereby the Division Bench has affirmed the judgment and order dated 21.7.2011 in W.P. No. 25673 of 2007 whereunder the learned single Judge had allowed the writ petition, and after setting aside the punishment of dismissal, directed reinstatement of the respondent with continuity of service but without back wages.

3. Bereft of unnecessary details, the expose' of facts that have been undraped are that the respondent was appointed as a Surveyor in Chennai Metropolitan Water Supply and Sewerage Board (for short, "CMWSSB") and subsequently promoted as Junior Engineer in 1989. From 28.8.1995 he remained continuously absent from duty without any intimation to the employer and did not respond to the repeated memoranda/reminders requiring him to explain his unauthorized absence from duty and to rejoin duty. On 1.4.1997 he reported to duty with the medical certificate for his absence from duty for the period commencing 28.8.1995 to 31.3.1997. As he had already remained unauthorisedly absent and did not respond

to the memos by offering an explanation, a charge-sheet had already been issued on 11.9.1996 under the Chennai Metropolitan Water Supply and Sewerage Board Employees (Discipline and Appeal) Regulations, 1978 (for brevity "the Regulations"). The charge memo contained two charges, namely, that the respondent-herein had failed to submit an explanation to the first charge memo dated 11.10.1995 inspite of reminders and second, he deserted his post by remaining unauthorisedly absent from duty from 28.8.1995, and thereby committed misconduct under Regulations 6(1) and 6(2) respectively of the Regulations. Be it noted, though the charge memo was duly acknowledged by the respondent on 19.11.1996, yet he chose not to submit his explanation till 6.1.1997, much after the charge-sheet was issued.

4. As the factual matrix would further uncurtain, an enquiry was conducted against the respondent and his explanation in the enquiry was that he could not attend to the duties and could not give explanation to the first charge memo because of ill health. The enquiry officer found charges were proved and, accordingly, submitted the enquiry report which was accepted by the disciplinary authority and after following the due procedure punishment of dismissal was passed on 16.4.1998. In the order of dismissal disciplinary authority observed that belated submission of medical certificate on 1.4.1997 irresistibly led to the conclusion that the respondent employee was unauthorisedly absent from 28.8.1995. A conclusion was also arrived at that the first charge, namely, that he had not responded to the letters and reminders, also stood proved. Being of this view, the disciplinary authority thought it apt to impose the punishment of dismissal from service and he did so.

5. On an appeal being preferred by the respondent the Board rejected the appeal dated 30.6.1998. Being dissatisfied by the order of dismissal and the affirmation thereof in appeal, the respondent preferred W.P. No. 15272 of 1998. The learned Single Judge, by order dated 12.3.2003, directed re-

consideration of the appeal solely on the ground that the Managing Director who was the disciplinary authority had taken part in the proceedings of the Board which decided the appeal. After the said order came to be passed, the matter was again placed before the Board and the appellate authority, considering the enquiry report, the evidence brought on record and after due discussion, affirmed the order of disciplinary authority and consequently dismissed the appeal on 1.7.2003.

6. The grievance of re-affirmation of the order of dismissal was agitated by the respondent in W.P. No. 25673 of 2007 which was preferred on 7.7.2007. The appellant-Board in the counter affidavit, defending the order of dismissal, stated that the only reason given by the employee was that he could not attend the duties as he was availing continuous treatment for tuberculosis and, further, he also met with an accident in September 1995 which was unacceptable. In addition, it was stated in the counter affidavit that bunch of medical certificates was produced by him on 1.4.1997 which mentioned that he was suffering from depressive psychosis and bronchitis and there was no mention about any accident and injury sustained by him in September 1995 and treatment availed by him.

7. The learned Single Judge, by the impugned judgment, after narrating the facts, noted the statement of the learned counsel for the respondent that even if the employee had absented from duty, there was no past misconduct of desertion/absence and, therefore, the punishment of dismissal from service for the first time desertion/absenteeism is too harsh and disproportionate and deserved to be interfered with. The learned Single Judge did not advert to any other facet and referred to the decisions in *Shri Bhagwan Lal Arya v. Commissioner of Police, Delhi*[1], *B. C. Chaturvedi v. Union of India*[2], *V. Ramana v. A.P. SRTC*[3], *Jagdish Singh v. Punjab*

1. (2004) 4 SCC 560.
2. (1995) 6 SCC 749.
3. (2005) 7 SCC 338.

Engineering College[4] and Division Bench judgment in *V. Senthurvelan v. High Court of Judicature at Madras*[5] and opined thus:-

"10. Applying the said judgment to the fact of this case and considering the counter filed by the respondents wherein it is not stated as to whether the petitioner has deserted / absented on any previous occasion, this Court is of the view that this writ petition deserves to be allowed.

11. This writ petition is allowed with a direction to the respondent to reinstate petitioner with continuity of service but without backwage, within a period of four weeks from the date of receipt of a copy of this order."

8. Grieved by the aforesaid order the CMWSSB preferred Writ Appeal No. 2531 of 2012 and the Division Bench accepted the conclusion of the learned single Judge by stating thus: -

"It is not in dispute that the respondent/ writ petitioner was unwell during the said period, though there might have been some discrepancies in the date of the certificate issued, it has not been controverted by the appellant that the respondent/writ petitioner was suffering from depressive psychosis and bronchitis. That apart it has also not been disputed that the respondent/ writ petitioner had not suffered any earlier punishment while in the services of the appellant Board from the date of his appointment. Therefore, in such circumstances, it would be very harsh and unreasonable to impose the punishment of removal from service for the charge of unauthorized absence, as such punishment is awarded for acts of grave nature or as cumulative effect of continued misconduct or for such other reasons, where the charges are very serious and in case where charge of corruption had been proved. Admittedly,

4. (2009) 7 SCC 301.

5. (2009) 7 MLJ 1231.

there has been no such allegation against the respondent/ writ petitioner. Further, the learned single Judge while setting aside the order of dismissal from service, rightly denied back wages to the respondent/writ petitioner as the respondent/writ petitioner failed to discharge duty during the relevant period."

[Underlining is ours]

9. We have heard the learned counsel for the parties and perused the material brought on record.

10. On a keen scrutiny of the decision rendered by the learned single Judge as well as that of the Division Bench it is clearly demonstrable that there has been no advertence with regard to the issue whether the charges levelled against the respondent had been proved or not. It is manifest that there had been no argument on the said score before the writ court or in intra-court appeal and hence, we are obliged to state that the only aspect which was really proponed before the High Court pertains to the nature of charges and proportionality of punishment. Therefore, we shall confine our analysis with regard to said limited sphere and an added facet which the learned counsel for the appellant has emphatically urged before us, that is, the belated approach by the respondent in invoking the extraordinary jurisdiction of the High Court.

11. The charges that were levelled against the respondent-employee read as follows: -

"CHARGE NO. 1:

That he has failed to offer his explanation to this office Memo dated 11.10.95 in spite of reminders thereon dated 20.01.96 and 23.04.96 which clearly shows his disobedience to the order of superior and it amounts to misconduct under Regulation 6(1) of the MMWSS Board Employees (Discipline and Appeal) Regulations 1978.

CHARGE NO. 2:

That he has deserted the post from 28.08.95 onwards and remains unauthorisedly absent from duty which amounts to misconduct under Regulation 6(2) of the MMWSS Board Employees (Discipline and Appeal) Regulations 1978."

12. It is not in dispute that the Inquiry Officer found that both the charges had been proved. The disciplinary authority had ascribed reasons and passed an order of dismissal from service. On a perusal of the order of dismissal it is vivid that the medical certificate was belatedly submitted and he had remained unauthorisedly absent from 28.08.1995. The question that arises is when the charges of unauthorized absence for a long period had been proven, was it justified on the part of the High Court to take resort to the doctrine of proportionality and direct reinstatement in service. That apart, one aspect which has not at all been addressed to by the High Court is that the respondent invoked the extraordinary jurisdiction of the High Court after four years.

13. First, we shall deal with the facet of delay. In *Maharashtra State Road Transport Corporation v. Balwant Regular Motor Service, Amravati and others*[6] the Court referred to the principle that has been stated by Sir Barnes Peacock in *Lindsay Petroleum Co. v. Prosper Armstrong Hurd, Abram Farewall, and John Kemp*[7], which is as follows:-

"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving

6. AIR 1969 SC 329.

7. (18740 5 PC 223.

that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

14. In *State of Maharashtra v. Digambar*[8], while dealing with exercise of power of the High Court under Article 226 of the Constitution, the Court observed that power of the High Court to be exercised under Article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable, admits of no controversy. It is for that reason, a person's entitlement for relief from a High Court under Article 226 of the Constitution, be it against the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to necessarily depend upon unblameworthy conduct of the person seeking relief, and the court refuses to grant the discretionary relief to such person in exercise of such power, when he approaches it with unclean hands or blameworthy conduct.

15. In *State of M.P. and others etc. etc. v. Nandlal Jaiswal and others etc. etc.*[9] the Court observed that it is well settled that power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the High Court in exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic. It

8. (1955) 4 SCC 683.

9. AIR 1987 SC 251.

has been further stated therein that if there is inordinate delay on the part of the petitioner in filing a petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant relief in the exercise of its writ jurisdiction. Emphasis was laid on the principle of delay and laches stating that resort to the extraordinary remedy under the writ jurisdiction at a belated stage is likely to cause confusion and public inconvenience and bring in injustice.

16. Thus, the doctrine of delay and laches should not be lightly brushed aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure, the Court would be under legal obligation to scrutinize whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster for the litigant who knocks at the doors of the Court. Delay reflects inactivity and inaction on the part of a litigant - a litigant who has forgotten the basic norms, namely, "procrastination is the greatest thief of time" and second, law does not permit one to sleep and rise like a phoenix. Delay does bring in hazard and causes injury to the lis. In the case at hand, though there has been four years' delay in approaching the court, yet the writ court chose not to address the same. It is the duty of the court to scrutinize whether such enormous delay is to be ignored without any justification. That apart, in the present case, such belated approach gains more significance as the respondent-employee being absolutely careless to his duty and nurturing a lackadaisical attitude to the responsibility had remained unauthorisedly absent on the pretext of some kind of ill health. We repeat at the cost of repetition that

remaining innocuously oblivious to such delay does not foster the cause of justice. On the contrary, it brings in injustice, for it is likely to affect others. Such delay may have impact on others' ripened rights and may unnecessarily drag others into litigation which in acceptable realm of probability, may have been treated to have attained finality. A court is not expected to give indulgence to such indolent persons - who compete with 'Kumbhakarna' or for that matter 'Rip Van Winkle'. In our considered opinion, such delay does not deserve any indulgence and on the said ground alone the writ court should have thrown the petition overboard at the very threshold.

17. Having dealt with the doctrine of delay and laches, we shall presently proceed to deal with the doctrine of proportionality which has been taken recourse to by the High Court regard being had to the obtaining factual matrix. We think it appropriate to refer to some of the authorities which have been placed reliance upon by the High Court.

18. In *Shri Bhagwan Lal Arya* (supra) this Court opined that the unauthorized absence was not a grave misconduct inasmuch as the employee had proceeded on leave under compulsion because of his grave condition of health. Be it noted, in the said case, it has also been observed that no reasonable disciplinary authority would term absence on medical grounds with proper medical certificate from Government doctors as a grave misconduct.

19. In *Jagdish Singh* (supra) the Court took note of the fact that the appellant therein was a sweeper and had remained absent on four spells totalling to fifteen days in all in two months. In that context, the Court observed thus: -

> "The instant case is not a case of habitual absenteeism. The appellant seems to have a good track record from the date he joined service as a sweeper. In his long career of service, he remained absent for fifteen days on four occasions in the months of February and March 2004. This

was primarily to sort out the problem of his daughter with her in-laws. The filial bondage and the emotional attachment might have come in his way to apply and obtain leave from the employer. The misconduct that is alleged, in our view, would definitely amount to violation of discipline that is expected of an employee to maintain in the establishment, but may not fit into the category of gross violation of discipline. We hasten to add, if it were to be habitual absenteeism, we would not have ventured to entertain this appeal."

20. If both the decisions are appositely understood, two aspects clearly emerge. In *Shri Bhagwan Lal Arya* (supra), the Court took note of the fact, that is, production of proper medical certificate from a Government medical doctor and opined about the nature of misconduct and in *Jagdish Singh* (supra) the period of absence, status of the employee and his track record and the explanation offered by him. In the case at hand, the factual score being different, to which we shall later on advert, the aforesaid authorities do not really assist the respondent.

21. Learned counsel for the respondent has commended us to the decision in *Krushnakant B. Parmar v. Union of India and another*[10] to highlight that in the absence of a finding returned by the Inquiry Officer or determination by the disciplinary authority that the unauthorized absence was willful, the charge could not be treated to have been proved. To appreciate the said submission we have carefully perused the said authority. In the said case, the question arose whether "unauthorized absence from duty" did tantamount to "failure of devotion to duty" or "behavior unbecoming of a Government servant" inasmuch as the appellant therein was charge-sheeted for failure to maintain devotion to duty and his behavior was unbecoming of a Government servant. After adverting to the rule position the two-Judge Bench expressed thus: -

10. (2012) 3 SCC 178.

"16. In the case of the appellant referring to unauthorized absence the disciplinary authority alleged that he failed to maintain devotion to duty and his behavior was unbecoming of a government servant. The question whether "unauthorized absence from duty" amounts to failure of devotion to duty or behavior unbecoming of a government servant cannot be decided without deciding the question whether absence is willful or because of compelling circumstances.

17. If the absence is the result of compelling circumstances under which it was not possible to report or perform duty, such absence cannot be held to be willful. Absence from duty without any application or prior permission may amount to unauthorized absence, but it does not always mean willful. There may be different eventualities due to which an employee may abstain from duty, including compelling circumstances beyond his control like illness, accident, hospitalization, etc., but in such case the employee cannot be held guilty of failure of devotion to duty or behavior unbecoming of a government servant.

18. In a departmental proceeding, if allegation of unauthorized absence from duty is made, the disciplinary authority is required to prove that the absence is willful, in the absence of such finding, the absence will not amount to misconduct."

22. We have quoted in extenso as we are disposed to think that the Court has, while dealing with the charge of failure of devotion to duty or behavior unbecoming of a Government servant, expressed the aforestated view and further the learned Judges have also opined that there may be compelling circumstances which are beyond the control of an employee. That apart, the facts in the said case were different as the appellant on certain occasions was prevented to sign the attendance register and the absence was intermittent. Quite apart from that, it has been stated therein that it is obligatory

on the part of the disciplinary authority to come to a conclusion that the absence is willful. On an apposite understanding of the judgment we are of the opinion that the view expressed in the said case has to be restricted to the facts of the said case regard being had to the rule position, the nature of the charge levelled against the employee and the material that had come on record during the enquiry. It cannot be stated as an absolute proposition in law that whenever there is a long unauthorized absence, it is obligatory on the part of the disciplinary authority to record a finding that the said absence is willful even if the employee fails to show the compelling circumstances to remain absent.

23. In this context, it is seemly to refer to certain other authorities relating to unauthorized absence and the view expressed by this Court. In *State of Punjab v. Dr. P.L. Singla*[11] the Court, dealing with unauthorized absence, has stated thus:-

> "Unauthorised absence (or overstaying leave), is an act of indiscipline. Whenever there is an unauthorized absence by an employee, two courses are open to the employer. The first is to condone the unauthorized absence by accepting the explanation and sanctioning leave for the period of the unauthorized absence in which event the misconduct stood condoned. The second is to treat the unauthorized absence as a misconduct, hold an enquiry and impose a punishment for the misconduct."

24. Again, while dealing with the concept of punishment the Court ruled as follows: -

> "Where the employee who is unauthorisedly absent does not report back to duty and offer any satisfactory explanation, or where the explanation offered by the employee is not satisfactory, the employer will take recourse to disciplinary action in regard to the unauthorized absence. Such disciplinary proceedings may lead to imposition of punishment ranging from a major penalty like dismissal or removal from service to a minor penalty like withholding of increments without cumulative effect. The extent of penalty will depend upon the nature of service, the position held by the employee, the period of absence and the cause/explanation for the absence."

11. (2008) 8 SCC 469.

25. In *Tushar D. Bhatt v. State of Gujarat and another*[12], the appellant therein had remained unauthorisedly absent for a period of six months and further had also written threatening letters and conducted some other acts of misconduct. Eventually, the employee was visited with order of dismissal and the High Court had given the stamp of approval to the same. Commenting on the conduct of the appellant the Court stated that he was not justified in remaining unauthorisedly absent from official duty for more than six months because in the interest of discipline of any institution or organization such an approach and attitude of the employee cannot be countenanced.

26. Thus, the unauthorized absence by an employee, as a misconduct, cannot be put into a straight-jacket formula for imposition of punishment. It will depend upon many a factor as has been laid down in *Dr. P.L. Singla* (supra).

27. Presently, we shall proceed to scrutinize whether the High Court is justified in applying the doctrine of proportionality. Doctrine of proportionality in the context of imposition of punishment in service law gets attracted when the court on the analysis of material brought on record comes to the conclusion that the punishment imposed by the Disciplinary Authority or the appellate authority shocks the conscience of the court. In this regard a passage from *Indian Oil Corporation Ltd. and another v. Ashok Kumar Arora*[13] is worth reproducing: -

12. (2009) 11 SCC 678.

13. (1997) 3 SCC 72

"At the outset, it needs to be mentioned that the High Court in such cases of departmental enquiries and the findings recorded therein does not exercise the powers of appellate court/authority. The jurisdiction of the High Court in such cases is very limited for instance where it is found that the domestic enquiry is vitiated because of non-observance of principles of natural justice, denial of reasonable opportunity; findings are based on no evidence, and/or the punishment is totally disproportionate to the proved misconduct of an employee."

28. In *Union of India and another v. G. Ganayutham*[14], the Court analysed the conception of proportionality in administrative law in England and India and thereafter addressed itself with regard to the punishment in disciplinary matters and opined that unless the court/tribunal opines in its secondary role that the administrator was, on the material before him, irrational according to *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.*[15] and *Council of Civil Service Unions v. Minister for Civil Service*[16] norms, the punishment cannot be quashed.

29. In *Chairman-cum-Managing Director, Coal India Limited and another v. Mukul Kumar Choudhuri and others*[17], the Court, after analyzing the doctrine of proportionality at length, ruled thus: -

"19. The doctrine of proportionality is, thus, well-recognised concept of judicial review in our jurisprudence. What is otherwise within the discretionary domain and sole power of the decision-maker to quantify punishment once the charge of misconduct stands proved, such discretionary power is exposed to judicial intervention if exercised in a

14. (1997) 7 SCC 463.

15. (1948) 1 KB 233 : (1947) 2 All ER 680.

16. 1985 AC 374 : (1984) 3 ALL ER 935.

17. (2009) 15 SCC 620.

manner which is out of proportion to the fault. Award of punishment which is grossly in excess to the allegations cannot claim immunity and remains open for interference under limited scope of judicial review.

20. One of the tests to be applied while dealing with the question of quantum of punishment would be: would any reasonable employer have imposed such punishment in like circumstances? Obviously, a reasonable employer is expected to take into consideration measure, magnitude and degree of misconduct and all other relevant circumstances and exclude irrelevant matters before imposing punishment.

21. In a case like the present one where the misconduct of the delinquent was unauthorized absence from duty for six months but upon being charged of such misconduct, he fairly admitted his guilt and explained the reason for his absence by stating that he did not have intention nor desired to disobey the order of higher authority or violate any of the Company's rules and regulations but the reason was purely personal and beyond his control and, as a matter of fact, he sent his resignation which was not accepted, the order of removal cannot be held to be justified, since in our judgment, no reasonable employer would have imposed extreme punishment of removal in like circumstances. The punishment is not only unduly harsh but grossly in excess to the allegations."

30. After so stating the two-Judge Bench proceeded to say that one of the tests to be applied while dealing with the question of quantum of punishment is whether any reasonable employer would have imposed such punishment in like circumstances taking into consideration the major, magnitude and degree of misconduct and all other relevant circumstances after excluding irrelevant matters before imposing punishment. It is apt to note here that in the said case the respondent had

remained unauthorisedly absent from duty for six months and admitted his guilt and explained the reasons for his absence by stating that he neither had any intention nor desire to disobey the order of superior authority or violated any of the rules or regulations but the reason was purely personal and beyond his control. Regard being had to the obtaining factual matrix, the Court interfered with the punishment on the ground of proportionality. The facts in the present case are quite different. As has been seen from the analysis made by the High Court, it has given emphasis on past misconduct of absence and first time desertion and thereafter proceeded to apply the doctrine of proportionality. The aforesaid approach is obviously incorrect. It is telltale that the respondent had remained absent for a considerable length of time. He had exhibited adamantine attitude in not responding to the communications from the employer while he was unauthorisedly absent. As it appears, he has chosen his way, possibly nurturing the idea that he can remain absent for any length of time, apply for grant of leave at any time and also knock at the doors of the court at his own will. Learned counsel for the respondent has endeavoured hard to impress upon us that he had not been a habitual absentee. We really fail to fathom the said submission when the respondent had remained absent for almost one year and seven months. The plea of absence of "habitual absenteeism" is absolutely unacceptable and, under the obtaining circumstances, does not commend acceptation. We are disposed to think that the respondent by remaining unauthorisedly absent for such a long period with inadequate reason had not only shown indiscipline but also made an attempt to get away with it. Such a conduct is not permissible and we are inclined to think that the High Court has erroneously placed reliance on the authorities where this Court had interfered with the punishment. We have no shadow of doubt that the doctrine of proportionality does not get remotely attracted to such a case. The punishment is definitely not shockingly disproportionate.

31. Another aspect needs to be noted. The respondent was a Junior Engineer. Regard being had to his official position, it was expected of him to maintain discipline, act with responsibility, perform his duty with sincerity and serve the institution with honesty. This kind of conduct cannot be countenanced as it creates a concavity in the work culture and ushers in indiscipline in an organization. In this context, we may fruitfully quote a passage from *Government of India and another v. George Philip*[18]: -

> "In a case involving overstay of leave and absence from duty, granting six months' time to join duty amounts to not only giving premium to indiscipline but is wholly subversive of the work culture in the organization. Article 51-A(j) of the Constitution lays down that it shall be the duty of every citizen to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement. This cannot be achieved unless the employees maintain discipline and devotion to duty. Courts should not pass such orders which instead of achieving the underlying spirit and objects of Part IV-A of the Constitution have the tendency to negate or destroy the same."

32. We respectfully reiterate the said feeling and re-state with the hope that employees in any organization should adhere to discipline for not only achieving personal excellence but for collective good of an organization. When we say this, we may not be understood to have stated that the employers should be harsh to impose grave punishment on any misconduct. An amiable atmosphere in an organization develops the work culture and the employer and the employees are expected to remember the same as a precious value for systemic development.

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18. (2006) 13 SCC 1.

33. Judged on the anvil of the aforesaid premises, the irresistible conclusion is that the interference by the High Court with the punishment is totally unwarranted and unsustainable, and further the High Court was wholly unjustified in entertaining the writ petition after a lapse of four years. The result of aforesaid analysis would entail overturning the judgments and orders passed by the learned single Judge and the Division Bench of the High Court and, accordingly, we so do.

34. Consequently, the appeal is allowed and the judgments and orders passed by the High Court are set aside leaving the parties to bear their respective costs.

R.P. Appeal allowed.

VIJAYANDER KUMAR & ORS.
v.
STATE OF RAJASTHAN & ANR.
(Criminal Appeal No. 1297 of 2004)

FEBRUARY 11, 2014

[P. SATHASIVAM, CJI, RANJAN GOGOI AND SHIVA KIRTI SINGH, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

s.482 - Power of High Court to quash criminal proceedings - FIR filed for offences punishable u/ss 420 and 120-B IPC - Final report by police stating the case to be of a civil nature - Rejected by Magistrate and cognizance taken - High Court declining to interfere - Held: A given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may also be available to informant/complainant that itself cannot be a ground to quash a criminal proceeding - The real test is whether the allegations in the complaint disclose a criminal offence or not - When informant and witnesses have supported the allegations made in the FIR, it would not be proper for the court to evaluate the merits of allegations on the basis of documents annexed with memo of appeal - There is no good ground to interfere with the criminal proceedings against appellants at this stage.

An FIR for offences punishable u/ss 420 and 120-B IPC was registered by police against the appellants and one 'SS' on a written report of respondent no. 2 stating that he as a supplier of cotton yarn to the appellants owed certain amounts from appellants' company; that the appellants without his knowledge transferred the management, assets and liabilities, to another concern of which 'SS' was one of the Directors; that on the

assurance of the appellants, respondent no. 2 accepted some post dated cheques from 'SS' which got dishonoured on the instruction of the said 'SS' to stop payment; that, thus, all the accused by conspiracy played a fraud on him and cheated him by making false statement and induced him to sign some papers. The appellants' petition seeking to quash the FIR was dismissed. The police then submitted the final report that the case was of a civil nature, which was rejected by the Magistrate and cognizance was taken. The petition u/s 482 CrPC seeking to quash the criminal proceedings was rejected by the High Court.

Dismissing the appeal, the Court

HELD: 1.1 A given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may also be available to the informant/ complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint discloses a criminal offence or not. [para 12] [1020-B-C]

Ravindra Kumar Madhanlal Goenka and Another vs. Rugmini Ram Raghav Spinners Private Limited **2009 (6) SCR 27 = 2009 (11) SCC 529 - relied on.**

Vijayander Kumar and Ors. Vs. State of Rajasthan and Another **1999 Criminal law Journal 1849 - referred to.**

1.2 When the informant and witnesses have supported the allegations made in the FIR, it would not be proper for this Court to evaluate the merits of the allegations on the basis of documents annexed with the memo of appeal. Such materials can be produced by the appellants in their defence in accordance with law for due consideration at appropriate stage. [para 11] [1019-H; 1020-A-B]

1.3 The facts were properly noticed by the High Court on earlier occasion while examining the petition preferred by the appellants for quashing of FIR of this case. The same view has been reiterated by the High Court in the order under appeal for not interfering with the order of cognizance by the Magistrate. There is no good ground to interfere with the criminal proceedings against the appellants at this stage. [para 13] [1020-D-F]

Thermax Limited and Others Vs. K.M.Johny and Others **2011 (14) SCR 154 =2011 (13) SCC 412;** *Dalip Kaur and Others vs. Jagnar Singh and another* **2009 (10) SCR 264 = 2009 (14) SCC 696;** *Anil Mahajan vs. Bhor Industries Limited (***2005) 10 SCC 228; and** *R.Kalyani vs. Janak C.Mehta* **2008 (14) SCR 1249 = 2009 (1) SCC 516;** *Devendra and Others vs. State of Uttar Pradesh and Another* **2009 (7) SCR 872 = 2009 (7) SCC 495 - cited.**

Case Law Reference:

1999 Criminal law Journal 1849	**referred to**	**para 4**
2011 (14) SCR 154	**cited**	**Para 8**
2009 (10) SCR 264	**cited**	**Para 8**
2008 (14) SCR 1249	**cited**	**Para 8**
2009 (7) SCR 872	**cited**	**para 9**
2009 (6) SCR 27	**relied on**	**para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1297 of 2004.

From the Judgment and order dated 19.03.2004 of the High Court of Rajasthan at Jodhpur in S.B. Criminal Misc. No. 433 of 2000.

Nidesh Gupta, J.C. Gupta, S.S. Shamshery, AAG, Rajesh Srivastava, Raghvendra Pratap Singh, Suresh Kumari, Tushar Bakshi, Naresh Bakshi, Dharm Singh, Bharat Sood, Varun Punia, Sandeep Singh, Ritesh Prakash Yadav, Pragati Neekhra for the appearing parties.

The Judgment of the Court was delivered by

SHIVA KIRTI SINGH, J. 1. The appellants have preferred this appeal against the dismissal of their petition under Section 482 of the Criminal Procedure Code (for brevity `Cr.P.C.') by the High Court of judicature for Rajasthan at Jodhpur. The High Court declined to interfere with the order of learned Chief Judicial Magistrate, Sriganganagar, dated 22.05.2000 in Case No. 63/2000, taking cognizance of offence under Section 420 read with Section 120-B of the Indian Penal Code.

2. Respondent No.2, Surendra Singhla, lodged a police case against the appellants as well as one Satish Singhla on 28.04.1998. According to the averments and allegations in the written report, the informant is a partner of the Firm M/s. Rajshree Cotton Corporation, Sriganganagar, working as broker as well as dealer in the sale and purchase of cotton. The appellants are Directors of M/s. R.P. Taxfab Limited, Modi Nagar, who purchased cotton through informant firm from time to time. As per the accounts, the informant firm was to receive a sum of Rs.47,28,115.80/-. The accused persons without taking the informant into confidence, entered into an agreement for transfer of management, assets and liabilities of M/s. R.P. Taxfab Limited in favour of accused Satish Singhla and two others who became the new Directors. The management of the Company was transferred on 24.02.1998 and on 27.02.1998 the informant was called by the appellants and told that the outstanding amount payable by the appellants shall be paid by the new Directors. The informant did not agree to this. On next date, the appellants through a demand draft for Rs.10,00,000/- (rupees ten lacs) and returned cotton yarn worth Rs.13,26,560/-

settled the dues in part and for the remaining dues they persuaded the informant to accept four post-dated cheques issued by the new Director Satish Singhla. The informant accepted the cheques on being assured by the accused persons that when presented on due dates the cheques shall be honoured. On such persuasion and trust, the informant signed some typed papers showing that he had agreed to receive the balance amount from the new Directors of the Company and had received draft and goods from the appellants.

3. Besides the aforesaid allegations and averments in the written information, the informant has also alleged that he would not have signed the said papers nor received the post-dated cheques but for the assurances given by the accused persons in presence of two witnesses. It is further alleged that when the informant presented cheque dated 25.03.1998 for a sum of Rs.5,00,000/- (rupees five lacs) through his bank, the said cheque was dishonoured because accused Satish Singhla had got the payment of the cheque stopped and that all the accused by mutual consent (conspiracy) have played a fraud and cheated him by making false statement and holding false assurances whereby they induced him to sign some papers. Allegedly, the accused had full knowledge even before issuing the cheques that these shall not be honoured and they had such dishonest intention from the beginning.

4. It is not in dispute that when the cheque bounced, the respondent no.2 gave a legal notice and initiated a separate complaint under Section 138 of the Negotiable Instruments Act, 1881, besides lodging of the present FIR on 28.4.1998. The complaint filed against the appellants under the Negotiable Instruments Act stands quashed by the High Court on the basis that they had not issued the cheques in question. The appellants' earlier petition under Section 482 of the Cr.P.C. for quashing of FIR vide Criminal Miscellaneous Petition No. 466 of 1998 was dismissed by the High Court by order dated 12.02.1999

which is reported in 1999 Criminal law Journal 1849 (*Vijayander Kumar and Ors. Vs. State of Rajasthan and Another*). A perusal of that judgment discloses that the High Court considered in detail the averments and allegations in the FIR and came to the conclusion that in view of allegations and attending circumstances, at that stage it was not possible to hold that the appellants cannot be liable for commission of any offence. The High Court held that there was a case worth investigation.

5. Subsequently, the police concluded investigation and submitted final report to the effect that the case is of civil nature. The learned Chief Judicial Magistrate, Sriganganagar, rejected the final report and after hearing the parties took cognizance of the offence under Section 420 read with Section 120-B of the IPC against all the five accused vide his order dated 22.05.2000.

6. The challenge to that order through a petition under Section 482 of the Cr.P.C. has been rejected by the High Court by the order under Appeal.

7. Learned senior counsel for the appellants drew our attention to some letters and communications such as annexure P.1 and P.2 both dated 27.02.1998 and annexure P.10 dated 24.02.1998 to support his contention that on 24.02.1998 itself the change in the management was brought to the notice of the informant with an intimation that a liability of Rs.23,00,000/- (rupees twenty three lacs) has been transferred to the new management which they shall pay and thereafter, on 27.02.1998 the informant received payment from the appellants as well as accepted the post-dated cheques on 27.02.1998 itself. On that basis it has been contended that wrong averments and allegations have been made in the FIR. It is further case of the appellants that the allegations and averments do not make out any criminal offence.

8. On behalf of the appellants reliance has been placed

upon judgments of this Court in the case of *Thermax Limited and Others Vs. K.M.Johny and Others*[1] and in case of *Dalip Kaur and Others vs. Jagnar Singh and another*[2]. There can be no dispute with the legal proposition laid down in the case of *Anil Mahajan vs. Bhor Industries Limited*[3] which has been discussed in paragraph 31 in the case of *Thermox Limited* (supra) that if the complaint discloses only a simple case of civil dispute between the parties and there is an absolute absence of requisite averment to make out a case of cheating, the criminal proceeding can be quashed. Similar is the law noticed in the case of *Dalip Kaur* (supra). In this case the matter was remanded back to the High Court because of non-consideration of relevant issues as noticed in paragraph 10, but the law was further clarified in paragraph 11 by placing reliance upon judgment of this Court in *R.Kalyani vs. Janak C.Mehta*[4]. It is relevant to extract paragraph 11 of the judgment which runs as follows:

> "11.There cannot furthermore be any doubt that the High Court would exercise its inherent jurisdiction only when one or the other propositions of law, as laid down in R. Kalyani v. Janak C. Mehta is attracted, which are as under:
>
> "(1) The High Court ordinarily would not exercise its inherent jurisdiction to quash a criminal proceeding and, in particular, a first information report unless the allegations contained therein, even if given face value and taken to be correct in their entirety, disclosed no cognizable offence.
>
> (2) For the said purpose the Court, save and except in very exceptional circumstances, would not look to any document relied upon by the defence.

1. (2011) 13 SCC 412.
2. (2009) 14 SCC 696.
3. (2005) 10 SCC 228.
4. (2009) 1 SCC 516.

(3) Such a power should be exercised very sparingly. If the allegations made in the FIR disclose commission of an offence, the court shall not go beyond the same and pass an order in favour of the accused to hold absence of any mens rea or actus reus.

(4) If the allegation discloses a civil dispute, the same by itself may not be ground to hold that the criminal proceedings should not be allowed to continue."

9. Learned senior counsel for the appellants also placed reliance upon judgment of this Court in the case of *Devendra and Others vs. State of Uttar Pradesh and Another*[5], only to highlight that a second petition under Section 482 of the Cr.P.C. can be entertained because order of Magistrate taking cognizance gives rise to a new cause of action. This issue does not require any deliberation because learned senior counsel for the respondent no.2, the informant, has not raised any objection to the maintainability of petition under Section 482 of the Cr.P.C.

10. Contra the submission advanced on behalf of the appellants, learned counsel for the respondent no.2 has submitted that there is no merit in the contention advanced on behalf of the appellants that the FIR discloses only a civil case or that there is no allegation or averment making out a criminal offence. For that purpose he relied upon judgment of the High Court rendered in the facts of this very case reported in 1999 Criminal Law Journal, 1849, already noted earlier.

11. No doubt, the views of the High Court in respect of averments and allegations in the FIR were in the context of a prayer to quash the FIR itself but in the facts of this case those findings and observations are still relevant and they do not support the contentions on behalf of the appellants. At the present stage when the informant and witnesses have

5. (2009) 7 SCC 495.

supported the allegations made in the FIR, it would not be proper for this Court to evaluate the merit of the allegations on the basis of documents annexed with the memo of appeal. Such materials can be produced by the appellants in their defence in accordance with law for due consideration at appropriate stage.

12. Learned counsel for the respondents is correct in contending that a given set of facts may make out a civil wrong as also a criminal offence and only because a civil remedy may also be available to the informant/complainant that itself cannot be a ground to quash a criminal proceeding. The real test is whether the allegations in the complaint discloses a criminal offence or not. This proposition is supported by several judgments of this Court as noted in paragraph 16 of judgment in the case of *Ravindra Kumar Madhanlal Goenka and Another vs. Rugmini Ram Raghav Spinners Private Limited*[6].

13. On considering the facts of the present case it is found that the facts were properly noticed by the High Court on earlier occasion while examining the petition preferred by the appellants for quashing of FIR of this case. The same view has been reiterated by the High Court in the order under appeal for not interfering with the order of cognizance by the learned Magistrate. Hence, we do not find any good ground to interfere with the criminal proceedings against the appellants at this stage. The appeal is, therefore, dismissed. No costs.

14. It is, however, made clear that observations in this order or in the order under appeal are only for deciding the issues raised at the present stage and shall not affect the defence of the appellants at a subsequent stage of the proceeding.

R.P. Appeal dismissed.

6. (2009) 11 SCC 529.

G. DHANASEKAR
v.
M.D., METROPOLITAN TRANSPORT CORPN. LTD.
(Civil Appeal Nos. 2008-2009 of 2014)

FEBRUARY 12, 2014

[SUDHANSU JYOTI MUKHOPADHAYA AND KURIAN JOSEPH, JJ.]

MOTOR VEHICLES ACT, 1988: s.166 - Compensation - Functional disability - Accident of victim's car with a bus resulting in fracture of victim's right arm and leg - Victim driver by profession - Tribunal held that negligence on part of driver of bus was root cause of accident, however, it further held that manner of accident showed that both the vehicles came in uncontrollable speed and dashed against each other and, therefore, drivers of both the vehicles were equally responsible - Tribunal fixed liability of appellant at 50% while High Court reduced the liability to 30% - On appeal, held: The findings of tribunal were intra contradictory - This aspect was not considered by the High Court also - Therefore, first finding of Tribunal that negligence on part of bus driver was root cause of accident is restored - Appellant was a driver operating a tourist taxi - On account of the physical disability suffered by him, he could not continue his avocation in the same manner as before - He was aged 46 years at the time of accident - Therefore, he ought to be given just and reasonable compensation for his functional disability as his income has been affected - Doctor assessed functional disability at 35% - Since the appellant is compensated for functional disablement, he will not be entitled to any other compensation on account of physical disability or loss of earning capacity, etc - Appellant awarded compensation of Rs.6,13,200/-.

The appellant-claimant was driver by profession and

operating a tourist taxi himself. While the appellant was driving Tata Sumo car a bus operated by the respondent came from opposite direction and dashed against his car. The appellant suffered fracture on right leg and right arm. He filed claim for compensation before the MACT.

The Tribunal awarded a total compensation of Rs.4,50,000/-. The Tribunal found that the appellant has contributed to the accident and, hence, the liability of the respondent was fixed at 50%. On appeal, the High Court held that the contributory negligence on the part of the appellant was only 30% and the compensation was also refixed to an amount of Rs.3,20,000/- and the appellant was held entitled to Rs.2,24,000/- with interest @ 7.5% per annum. The instant appeals were filed challenging the order of the High Court.

Allowing the appeals, the Court

HELD: 1. There is no dispute that the vehicles were coming in opposite direction. Also, the driver of the bus had filed a complaint before the police and the police had registered an FIR. Except the driver of both the vehicles and the doctor who treated the appellant, there was no other oral evidence. The FIR, disability certificate, medical bills, driving licence, RC book and permit were also marked. The Tribunal, having referred to the entire evidence, held that the bus came in a rash and negligent manner and dashed against the car driven by the appellant and, therefore negligence on the part of the driver of the bus was the root cause of the accident. Having arrived at such finding regarding negligence on the part of the driver of the bus, the Tribunal proceeded further in holding that the manner of the accident shows that both the vehicles came in an uncontrollable speed and dashed against each other and the impact of the accident was very heavy and both the vehicles damaged

heavily. It held that negligence on the part of the drivers of both vehicles was the root cause of the accident and they were equally responsible for the accident and fixed contributory negligence on the driver of both vehicles. These findings were intra contradictory. Unfortunately, despite specific ground taken before the High Court, this aspect of the matter was not considered properly. [Paras10, 11, 12] [1028-A-B, D-H; 1029-A-B]

2. PW1 has stated that a passenger in the bus was thrown out of the bus through the front windscreen and that the car took a u-turn on account of the impact of the accident. Apparently, it was this evidence which led to the first finding by the Tribunal that the negligence on the part of the driver of the bus was the root cause of the accident and it was the bus which dashed against the car. Having entered such a finding, another finding on contributory negligence was unsustainable. Unfortunately, without proper appreciation of the evidence, the High Court fixed 30% negligence on the part of the appellant. Therefore, in the light of evidence available in this case, first finding of the Tribunal that the negligence on the part of the bus driver is the root cause of the accident is restored. [para 13] [1029-E-G]

3. The appellant is a driver operating a tourist taxi. On account of the physical disability suffered by him, he would not be in a position to continue his avocation at the same rate, or in the same manner as before. He was aged 46 years at the time of accident. Therefore, it is a case where the appellant should be given just and reasonable compensation for his functional disability as his income has been affected. The court has to make a fair assessment on the impact of disability on the professional functions of the victim. In this case, the victim is not totally disabled to engage in driving. At the same time, it has to be seen that he cannot continue his

career as earlier. In such circumstances, the percentage of physical disability can be safely taken as the extent of functional disability. The doctor assessed it at 35%. Since the appellant is compensated for functional disablement, he will not be entitled to any other compensation on account of physical disability or loss of earning capacity, etc. However, he is entitled to reimbursement towards medical expenses, etc. The Tribunal has fixed income of Rs.10,000/-. There is no serious dispute on this aspect. Therefore, the appellant is entitled to compensation of Rs.6,13,200/-. [Para 14] [1029-H; 1030-A-E; 1031-F]

Rajesh and others v. Rajbir Singh and Others **(2013) 9 SCC 54;** *Rekha Jain v. National Insurance Company Limited and Others* **(2013) 8 SCC 389;** *National Insurance Company Limited v. Mubasir Ahmed and Another* **(2007) 2 SCC 349 = 2007 (2) SCR 117;** *Sarla Verma (Smt.) and Others v. Delhi Transport Corporation and Another* **(2009) 6 SCC 121 = 2009 (5) SCR 1098- relied on.**

Master Mallikarjun v. Divisional Manager, The National Insurance Company Limited **2013 (10) SCALE 668- referred to.**

Case Law Reference:

(2013) 9 SCC 54	**Relied on**	**Para 3**
2013 (10) SCALE 668	**Referred to**	**Para 3**
(2013) 8 SCC 389	**Relied on**	**Para 3**
2007 (2) SCR 117	**Relied on**	**Para 4**
2009 (5) SCR 1098	**Relied on**	**Para 4**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2008-2009 of 2014.

From the judgment and order dated 08.07.2011 of the High Court of Madras in CMA Nos. 1382 and 1420 of 2010.

Vipin Nair, Temple Law Firm for the Appellant.

R. Ayyam Perumal for the Respondent.

The Judgment of the Court was delivered by

KURIAN, J.: 1. Leave granted.

2. Whether an accident victim is entitled to get compensation for functional disability? If so, what is the method for computation of compensation? These are the two issues arising for considerations in this case.

3. Computation of just and reasonable compensation is the bounden duty of the Motor Accident Claims Tribunal. In view of the plethora of judgments rendered by this Court regarding the approach to be made in the award of compensation, we do not find it necessary to start with the first principles. In *Rajesh and Others v. Rajbir Singh and Others*[1], *Master Mallikarjun v. Divisional Manager, The National Insurance Company Limited*[2] and in *Rekha Jain v. National Insurance Company Limited and Others*[3], this Court recently has extensively dealt with the principles governing the fixation of compensation and the approach to be made by the courts in that regard.

4. In *Rekha Jain's* case (supra), this Court following the case of *National Insurance Company Limited v. Mubasir Ahmed and Another*[4], developed a very important principle on functional disability while fixing the compensation. Rekha Jain, a cine artist suffered an injury in a motor accident at the age of 24 years on account of which she suffered 30% permanent

1. (2013) 9 SCC 54.
2. 2013 (10) SCALE 668.
3. (2013) 8 SCC 389.
4. (2007) 2 SCC 349.

partial disability which included disfigurement of her face, change in the physical appearance, etc. It was found that on account of such development, she could no more continue her avocation as an actress and, hence, it was held that she had suffered 100% functional disability. Hence, this Court awarded compensation following the principles laid down in *Sarla Verma (Smt.) and Others v. Delhi Transport Corporation and Another*[5].

5. As far as compensation for functional disability is concerned, it has to be borne in mind that the principle cannot be uniformly applied. It would depend on the impact caused by the injury on the victim's profession/career. To what extent the career of the victim has been affected, thereby his regular income is reduced or dried up will depend on the facts and circumstances of each case. There may be even situations where the physical disability does not involve any functional disability at all.

6. Now, we shall refer to the factual matrix. The appellant, driver by profession and operating a tourist taxi himself, met with a motor accident on 05.09.2008. While driving the Tata Sumo car, a bus operated by the respondent, came from the opposite direction and dashed against the car. The appellant suffered fracture on right leg and right arm. According to the doctor, on account of the injuries suffered by the appellant and the operations undergone by him to fix a thick plate in the tibia bone with five screws, the appellant will not be in a position to bend his right knee beyond 90 degrees. There is shortening of the leg by one centimeter on account of nerve injury. He would be limping while walking. He cannot lift weight over 3 kilograms. His right hand movement is restricted to 25 degrees. He will not be able to drive two wheelers and he can drive four wheelers with difficulty. To quote PW1(appellant):

"After the incident, I cannot bend my right knee beyond 90

5. (2009) 6 SCC 121.

deg. I cannot use my right hand for lifting any weighty objects. The movements in my right hand elbow and wrist has almost been restricted. I am not in a position to drive the vehicles as before. I cannot use Indian toilet or squat or carry weight. I am walking with limping. Walking and standing for some time is a painful one. Because of the dislocation of bone in the lower jaw, I am not able to open my mouth fully and speak coherently. I find it very difficult to eat hard objects. I am suffering from intermittent head ache and giddiness. I have completely lost my earning capacity. I am having severe pain and suffering."

7. The Tribunal awarded a total compensation of Rs.4,50,000/-. The Tribunal found that the appellant has contributed to the accident and, hence, the liability of the respondent was fixed at 50%. In appeal before the High Court, it was held that the contributory negligence on the part of the appellant is only 30%. The compensation was also refixed to an amount of Rs.3,20,000/-. Thus, the appellant was held entitled to Rs.2,24,000/- with interest @ 7.5% per annum.

8. Thus, aggrieved, the claimant has filed these appeals. There is no appeal by the respondent.

9. It is mainly contended by the learned counsel for the appellant that the Tribunal and the High Court erred in not taking into consideration the factor of his functional disability. Since, it is in evidence that the appellant cannot continue his avocation of driver as earlier, he should be reasonably compensated in that regard, it is submitted. Yet another strong submission is with regard to the finding on contributory negligence. It is contended that only the driver of the offending vehicle is negligent, he is wholly negligent and that there is no negligence on the part of the appellant.

10. We shall first deal with the aspect of contributory negligence. There is no dispute that the vehicles were coming in opposite direction. It has also come in evidence that the

driver of the bus has filed a complaint before the police and the police has registered an FIR. Except the driver of both the vehicles and the doctor who treated the appellant, there is no other oral evidence. The FIR, disability certificate, medical bills, driving licence, RC book and permit were also marked. The Tribunal, having referred to the entire evidence, held as follows:

"On perusal of Ex.R.1. FIR and from the evidence of the Petitioner and RW.1. driver of the bus, it is clear that both the vehicles came in a rash and negligent manner and with high speed and dashed against each other. In the above accident, the driver of the Tata Sumo was injured. Taking advantage of the situation, the driver of the bus gave complaint to Police. Hence the driver of the bus gave complaint accusing the driver of the Tata Sumo car. No other independent witnesses were examined.

Hence this Court comes to the conclusion that the bus came in a rash and negligent manner and dashed against the deceased (sic: car). Hence it is concluded that negligence on the part of the driver of the bus is the root cause of the accident. The evidence of RW.1 driver shows that he simply throws the blame on the injured."

(Emphasis supplied)

11. It is strange that having arrived at such finding regarding negligence on the part of the driver of the bus, the Tribunal proceeded further in holding that:

"The manner of the accident shows that both the vehicles came in an uncontrollable speed and dashed against each other. Hence the impact of the accident was very heavy and both the vehicles damaged heavily. Hence this court comes to the conclusion that both the vehicles came in a rash and negligent manner with high speed and dashed against each other. Hence it is concluded that contributory negligence is fixed on the driver of both

vehicles and negligence on the part of the drivers of both vehicles is the root cause of the accident and they are equally responsible for the accident."

(Emphasis supplied)

12. It needs no elaborate discussion to hold that the findings are intra contradictory. Unfortunately, despite specific ground taken before the High Court, this aspect of the matter was not considered properly. It was, however, held that:

> "… Considering the fact that no other eye witness has been examined and the respective drivers alone have been examined, we have to consider their evidence in the light of surrounding circumstances. If so considered, then it cannot be precisely decided that one of them was solely responsible for the accident. Considering the aforesaid facts, we fix 30% negligence on the part of the claimant and 70% negligence on the part of the driver of the bus. …"

13. PW1 has stated that a passenger in the bus was thrown out of the bus through the front windscreen and that the car took a u-turn on account of the impact of the accident. Apparently, it was this evidence which lead to the first finding by the Tribunal that the negligence on the part of the driver of the bus was the root cause of the accident and it was the bus which dashed against the car. Having entered such a finding, another finding on contributory negligence is unsustainable. Unfortunately, without proper appreciation of the evidence, the High Court has fixed 30% negligence on the part of the appellant, which we find it difficult to sustain. Therefore, in the light of evidence available in this case, we restore the first finding of the Tribunal that the negligence on the part of the bus driver is the root cause of the accident.

14. As noted above, appellant is a driver operating a tourist taxi. On account of the physical disability referred to

above, it needs no elaborate discussion to hold that he would not be in a position to continue his avocation at the same rate, or in the same manner as before. He was aged 46 years at the time of accident. Therefore, we are of the view that it is a case where the appellant should be given just and reasonable compensation for his functional disability as his income has been affected. The court has to make a fair assessment on the impact of disability on the professional functions of the victim. In this case, the victim is not totally disabled to engage in driving. At the same time, it has to be seen that he cannot continue his career as earlier. In such circumstances, the percentage of physical disability can be safely taken as the extent of functional disability. In the assessment of the doctor, it is 35%. Since the appellant is compensated for functional disablement, he will not be entitled to any other compensation on account of physical disability or loss of earning capacity, etc. However, he is entitled to reimbursement towards medical expenses, etc. The Tribunal has fixed income of Rs.10,000/-. There is no serious dispute on this aspect. Therefore, applying the principle laid down by this Court in *Rajesh's and Others* case (supra), the appellant is entitled to compensation as computed below:

Sl.	**HEADS**	**CALCULATION**
(i)	Annual Income = Rs.10,000 x 12 =	**Rs.1,20,000/-**
(ii)	After deducting 1/3rd of the total income for personal expenses, the balance will be = [Rs.1,20,000/- - Rs.40,000/-] =	**Rs.80,000/-**
(iii)	Add 30% towards increase in future income, as per **Sarla Verma and Rajesh and Others cases** (supra) =	**Rs.1,04,000/-**

(iv)	Compensation after multiplier of 13 is applied = [Rs.1,04,000/- x 13] =	**Rs.13,52,000/-**
(v)	Applying the 35% functional disability, the appellant will be entitled to the compensation of 35% of Rs. 13,52,000/- =	**Rs.4,73,200/-**
(vi)	Reimbursement towards medical expenses =	**Rs.60,000/-**
(vii)	Amount towards extra nourishment, etc.	**Rs.10,000/-**
(viii)	Damages to the vehicle (as awarded by the High Court) =	**Rs.10,000/-**
(ix)	Amount towards actual loss of earning during the period of hospitalization and thereafter during the period of rest =	**Rs.40,000/-**
(x)	Amount towards pain and sufferings =	**Rs.10,000/-**
(xi)	Amount towards expenses on attendant =	**Rs.40,000/-**
	TOTAL COMPENSATION AWARDED [(v)+(vi)+(vii)+(viii)+(ix)+(x)+(xi)]	**Rs.6,13,200/-**

15. The amount of total compensation awarded shall carry interest @ 7% per annum from the date of filing the petition before the Motor Accident Claims Tribunal till realization.

16. The appeals are allowed as above. There is no order as to costs.

D.G. Appeals allowed.

GAJANAN KAMLYA PATIL
v.
ADDL. COLLECTOR & COMP. AUTH. & ORS.
(Civil Appeal No. 2069 of 2014)

FEBRUARY 14, 2014

[K.S. RADHAKRISHNAN AND VIKRAMAJIT SEN, JJ.]

Urban Land (Ceiling and Regulation) Act, 1976: s.10(3), (4), (5), (6) - Notice issued under the ULC Act to the appellants-land owners to hand over possession of the land in question and in case of failure, authorities would take necessary action for taking possession by application of necessary force - Meanwhile, Act repealed - Notice challenged by land owners - Held: Nothing to show that land owners had voluntarily surrendered or authorities had taken peaceful or forcible possession of land in question - It was always open to the authorities to take forcible possession and, in fact, in the notice issued u/s.10(5) of the ULC Act, it was stated that if the possession is not surrendered, possession would be taken by application of necessary force - For taking forcible possession, certain procedure had to be followed - No case made out by authorities that such procedure was followed and forcible possession was taken - Further, there was nothing to show that the authorities had taken peaceful possession, nor there was anything to show that the land owners had given voluntary possession - Facts clearly indicated that only de jure possession was taken by the authorities and not de facto possession before coming into force of the repeal of the Act - Therefore, it cannot hold on to the land in question, which were legally owned and possessed by the land owners - Consequently, the notice and subsequent action taken therein in view of the repeal of the ULC Act quashed - Urban Land (Ceiling and Regulation) Repeal Act, 1999.

The appellant was issued a notice dated 17.2.2005

under Section 10(5) of the Urban Land (Ceiling and Regulation) Act, 1976 for taking possession of his land bearing Survey Nos.47/10 and 54/4. Aggrieved by the notice, the appellant filed a writ petition before the High Court to quash the notice dated 17.2.2005 and also for a declaration, inter alia, that the land bearing Survey No.54/4 admeasuring 1870 sq. meters was in the physical possession of the appellant and would continue to vest as such with the appellant as true and actual owner thereof. The appellant also sought a declaration that in view of the Urban Land (Ceiling and Regulation) Repeal Act, 1999, the proposed action of the authorities for taking possession of the land be declared as null and void and also prayed for other consequential reliefs.

The High Court after examining the provisions of the ULC Act as well as the provisions of the ULC Repeal Act and also taking note of the affidavit filed by the State Government and by the Mumbai Metropolitan Region Development Authority (MMRDA) noticed that so far as Survey No.47/10 was concerned, the possession was not taken over by MMRDA. However, as far as land in Survey No.54/4 was concerned, the appellant was granted liberty to move the civil court for establishing his claim over the property in question. The instant appeals were filed challenging the order of the High Court.

Allowing the appeals, the Court

HELD: 1. The Competent Authority published a notification dated 17.1.2000 under Section 10(1) of the Urban Land (Ceiling and Regulation) Act, 1976 (ULC Act) in the Gazette of Government of Maharashtra wherein the land held by the appellant was shown as the land to be acquired by the Government of Maharashtra. Following that, notification dated 14.3.2000 under Sub-Section (3) of Section 10 of the ULC Act was published notifying the

public that the land shown in the schedule therein was covered and the land in Survey No.54/4 as well would be considered to be acquired by the Government of Maharashtra w.e.f. 15.6.2000 and the said land would be vested with the Government of Maharashtra from the said date. The Competent Authority then issued yet another notification dated 2.8.2002 for information of the public that the land described in the schedule therein which included the land in Survey No.54/4 as well, have been considered to be acquired by the Government of Maharashtra w.e.f. 15.9.2002 and the said land would be vested for all purposes free from all charges to the Government of Maharashtra from the said date. The Competent Authority issued a show cause notice under Sub-Section (5) of Section 10 of the ULC Act to the appellant to hand over possession of the land in question within 30 days from the date of receipt of that notice. It was also indicated therein that if the appellant failed to give possession of the land, necessary action would be taken for taking possession by the application of necessary force. [paras 8, 9] [1038-G-H; 1039-A-E]

2. All the proceedings were initiated under the ULC Act, 1976, but the said Act was repealed by the Parliament by the Urban Land (Ceiling and Regulation) Repeal Act, 1999 on 22.3.1999 which came into force w.e.f. 11.1.1999. The State of Maharashtra by its notification dated 1.12.2007 adopted the Repeal Act, 1999 w.e.f. 1.12.2007. After adoption of the Repeal Act, 1999, on 1.12.2007, the Circle Office executed "possession receipt". No notice, admittedly, was given to the appellants before executing the possession receipt. An additional affidavit was filed by the Competent Authority stating that he could not find any document like Panchanama or possession receipt in respect of the land covered by Survey No.54/4 and few other Survey numbers. Another affidavit dated 2.7.2010 by the Principal Secretary, Urban Development

Department, Government of Maharashtra was to the effect that the possession had not been handed over by the landowner to the Competent Authority. Apart from the affidavits filed by the officials, no other document was made available either before the High Court or before this Court, either showing that the appellant had voluntarily surrendered or the Respondents had taken peaceful or forcible possession of the lands. [paras 10-12] [1039-E-H; 1040-A, D-E; 1041-E]

State of UP v. Hari Ram **(2013) 4 SCC 280:2013 (2) SCR 301 - relied on.**

3. It was always open to the authorities to take forcible possession and, in fact, in the notice issued under Section 10(5) of the ULC Act, it was stated that if the possession had not been surrendered, possession would be taken by application of necessary force. For taking forcible possession, certain procedures had to be followed. Respondents have no case that such procedures were followed and forcible possession was taken. Further, there was nothing to show that the respondents had taken peaceful possession, nor there was anything to show that the appellants had given voluntary possession. Facts would clearly indicate that only de jure possession had been taken by the respondents and not de facto possession before coming into force of the repeal of the Act. Since there was nothing to show that de facto possession was taken from the appellants prior to the execution of the possession receipt in favour of MRDA, it cannot hold on to the lands in question, which were legally owned and possessed by the appellants. Consequently, the notice dated 17.2.2005 and subsequent action taken therein in view of the repeal of the ULC Act are quashed. [para 13] [1045-D-H; 1046-A]

Case Law Reference:

2013 (2) SCR 301	**relied on**	**Para 6**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2069 of 2014.

From the Judgment and order dated 12.07.2010 of the High Court of Bombay in WP No. 1669 of 2000.

WITH

Civil Appeal No. 2070-71 of 2014.

Shekhar Naphade, Vinay Kumar Kankari, Sushil Karanjkar, Ratnakar Singh (for K.N. Rai) for the Appellant.

A.S. Bhasme, Pankaj Kr. Mishra, Manish Pitale, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

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

2. We are, in these appeals, concerned with the question whether the High Court was justified in relegating the parties to file Civil Suits to recover the lands covered by Survey No.54/4 and Survey No.53/3, both admeasuring 1870 sq. meters, situated at Village Kasarwadavli, Ghodbunder Road, Taluka and Distt. Thane, so as to get the benefit of Urban Land (Ceiling and Regulation) Repeal Act, 1999.

3. We may, for the disposal of these appeals, refer to the facts in Civil Appeal arising out of Special Leave Petition No.14690 of 2011, treating the same as the leading case. The Appellant herein was issued a notice dated 17.2.2005 under Section 10(5) of the Urban Land (Ceiling and Regulation) Act, 1976 (for short 'ULC Act') for taking possession of the Appellant's land bearing Survey Nos.47/10 and 54/4. It was stated in the notice that in accordance with the notification published in Part-I, Page No. - Konkan Division Supplementary, dated 12.12.2002, in the Gazette of Maharashtra, the land notified had been vested in the Government of Maharashtra

and that Additional Collector and Competent Authority, Thane (for short "Competent Authority"), had been authorized by the State Government to take possession of the land in question, details of which had been published in the notification under Section 10(3) and the land be handed over or possession be given within 30 days from the date of receipt of the notice. Further, it was also intimated that if the Appellant had failed to give possession of the land, necessary action would be taken for taking possession by application of necessary force.

4. The Appellant, aggrieved by the above-mentioned notice, filed Writ Petition No.1669 of 2010 before the Bombay High Court to quash the notice dated 17.2.2005 and also for a declaration, inter alia, that the land bearing Survey No.54/4 admeasuring 1870 sq. meters is in the physical possession of the Appellant and would continue to vest as such with the Appellant as true and actual owner thereof. The Appellant also sought a declaration that in view of the Urban Land (Ceiling and Regulation) Repeal Act, 1999, the proposed action of the Respondents or State or its authorities for taking possession of the land be declared as null and void and also prayed for other consequential reliefs.

5. The High Court after examining the provisions of the ULC Act as well as the provisions of the Urban Land (Ceiling and Regulation) Repeal Act, 1999, and also taking note of the affidavit filed by the State Government and by the Mumbai Metropolitan Region Development Authority (MMRDA) noticed that so far as Survey No.47/10 is concerned, the possession had not been taken over by MMRDA. However, as far as land in Survey No.54/4 was concerned, after noticing that possession had been taken over, the High Court disposed of the Petition granting relief to the Appellant in respect of Survey no.47/10, but so far as Survey No.54/4 is concerned, as already indicated, the Appellant was granted liberty to move the Civil Court for establishing his claim over the property in question.

6. Shri Shekhar Naphade, learned senior counsel

appearing for the Appellant, submitted that the issue raised in this case stands fully covered by the judgment of this Court in *State of UP v. Hari Ram* (2013) 4 SCC 280 and that the High Court has committed a grave error in holding that the MMRDA is in possession of the land in Survey No.54/4 and hence the question as to whether possession had been legally taken or not has to be decided by the Civil Court. Learned senior counsel also submitted that the State of Maharashtra has adopted the Repeal Act, 1999 on 1.12.2007 and that Respondent No.1 had executed the possession receipt in favour of Respondent No.3 on 2.7.2008 behind the back of the Appellant, without following the due process of law. Learned senior counsel submitted that since possession had not been taken in accordance with law, the Appellant is entitled to the benefit of the Repeal Act, 1999, as was rightly held in respect of Survey No.47/10.

7. Shri A.S. Bhasme, learned counsel appearing for the Respondents, on the other hand contended that the High Court has rightly come to the conclusion that the land in question had been taken over by MMRDA and being a disputed question of fact, the same cannot be decided by the High Court under Section 226 of the Constitution of India and the only remedy available to the Appellant is to file a Civil Suit to establish his right since the dispute is of a civil nature. Learned counsel, therefore, prayed for dismissal of the appeal.

8. We may, at the outset, point out that almost all the legal issues urged before us stand covered by the judgment of the this Court in *Hari Ram* (supra). However, reference to few facts is necessary for the disposal of these appeals. The Competent Authority published a notification dated 17.1.2000 under Section 10(1) of the ULC Act in the Gazette of Government of Maharashtra on 15.6.2000, wherein the land held by the Appellant was shown as the land to be acquired by the Government of Maharashtra. Following that, a notification dated 14.3.2000 under Sub-Section (3) of Section 10 of the ULC Act

was published notifying the public that the land shown in the schedule therein is covered and the land in Survey No.54/4 as well would be considered to be acquired by the Government of Maharashtra w.e.f. 15.6.2000 and the said land would be vested with the Government of Maharashtra from the said date.

9. The Competent Authority then issued yet another notification dated 2.8.2002 for information of the public that the land described in the schedule therein which included the land in Survey No.54/4 as well, have been considered to be acquired by the Government of Maharashtra w.e.f. 15.9.2002 and the said land would be vested for all purposes free from all charges to the Government of Maharashtra from the said date. The Competent Authority, as already indicated, issued a show cause notice dated 17.2.2005 under Sub-Section (5) of Section 10 of the ULC Act to the Appellant to hand over possession of the land in question within 30 days from the date of receipt of that notice. It was also indicated therein that if the Appellant failed to give possession of the land, necessary action would be taken for taking possession by the application of necessary force.

10. We may indicate that all the above-mentioned proceedings were initiated under the ULC Act, 1976, but the said Act was repealed by the Parliament by the Urban Land (Ceiling and Regulation) Repeal Act, 1999 on 22.3.1999 which came into force w.e.f. 11.1.1999. The State of Maharashtra vide its notification dated 1.12.2007 adopted the Repeal Act, 1999 w.e.f. 1.12.2007. After adoption of the Repeal Act, 1999, on 1.12.2007, the Circle Office Balkum, Taluka & District Thane, executed "possession receipt" on 2.7.2008 of the land bearing Survey No.54/4 belonging to the Appellant in favour of the Chief Surveyor of MMRDA, pursuant to the orders of the Collector, Thane dated 1.7.2008. No notice, admittedly, was given to the Appellants before executing the possession receipt. In this case, an additional affidavit dated 29.4.2010 was filed by the Competent Authority stating that he could not find any document

like Panchanama or possession receipt in respect of the land covered by Survey No.54/4 and few other Survey numbers. The operative portion of the affidavit reads as follows :-

> "I have stated in my affidavit in reply dated 20.3.2010 that on 2.7.2008 the Circle Officer has delivered the possession of the land bearing Survey No.103/3 area 3890 sq. mtrs., 3/10 area 3600 sq. mtrs., 98/6 area 1708 sq. mtrs., 53/3 area 2450 sq. mtrs., 54/4 area 1870 sq. mtrs to the MMRDA. I state that I have inspected my record, however, I could not find any document like panchanama or possession receipt in respect of aforesaid lands by which its possession was obtained from the land holder under Urban Land Ceiling Act."

11. We have another affidavit dated 2.7.2010 by the Principal Secretary, Urban Development Department, Government of Maharashtra, wherein he has categorically stated that the possession had not been handed over by the landowner to the Competent Authority. The operative portion of the same reads as under :-

> "The records of right of the said land have been mutated in favour of the Government on the basis of the notification issued under Section 10(3) of the ULC Act. I say and submit that on enquiry, it is revealed that, though the notice under Section 10(5) was issued on 17.02.2005 for handing over possession of the surplus vacant land, the possession of land has not been handed over by concerned landowner to the Competent Authority or to his representative."

The Affidavit also further reads as under :-

> "Therefore, Government was under impression that since the land has been vested into the Government as per the notification under Section 10(3) dated 02.08.2002, the Government has every right to use the said land for public purpose. I say that, in the aforesaid background, the

decision was taken to allot the land to Mumbai Metropolitan Region Development Authority, and therefore, as per the directions of the Government and subsequent directions of Collector, Thane, the Circle Officer, Balukm, Distt. Thane handed over the possession of the surplus land to the Mumbai Metropolitan Region Development Authority on 02.07.2008."

The affidavit also says that actual possession was not taken over as per the provisions of the ULC Act, 1976 before 29.11.2007. The operative portion of the same reads as under:-

"I say and submit that, even though the possession of the land has been handed over to the Mumbai Metropolitan Region Development Authority by Circle Officer, Balkum on 02.07.2008, the actual possession of said surplus land was not taken over as per the provisions of the ULC Act, 1976 before 29.11.2007."

12. We may indicate, apart from the affidavits filed by the officials in this case, no other document has been made available either before the High Court or before this Court, either showing that the Appellant had voluntarily surrendered or the Respondents had taken peaceful or forcible possession of the lands. In *Hari Ram* (supra) this Court examined the meaning and context of Sub-sections (3) to (6) of Section 10 of the ULC Act and held as follows :

"30. Vacant land, it may be noted, is not actually acquired but deemed to have been acquired, in that deeming things to be what they are not. Acquisition, therefore, does not take possession unless there is an indication to the contrary. It is trite law that in construing a deeming provision, it is necessary to bear in mind the legislative purpose. The purpose of the Act is to impose ceiling on vacant land, for the acquisition of land in excess of the ceiling limit thereby to regulate construction on such lands, to prevent concentration of urban lands in the hands of a

few persons, so as to bring about equitable distribution. For achieving that object, various procedures have to be followed for acquisition and vesting. When we look at those words in the above setting and the provisions to follow such as sub-sections (5) and (6) of Section 10, the words "acquired" and "vested" have different meaning and content. Under Section 10(3), what is vested is de jure possession not de facto, for more reasons than one because we are testing the expression on a statutory hypothesis and such an hypothesis can be carried only to the extent necessary to achieve the legislative intent.

Voluntary surrender

31. The "vesting" in sub-section (3) of Section 10, in our view, means vesting of title absolutely and not possession though nothing stands in the way of a person voluntarily surrendering or delivering possession. The Court in *Maharaj Singh v. State of U.P.* (1977 (1) SCC 155), while interpreting Section 117(1) of the U.P. Zamindari Abolition and Land Reforms Act, 1950 held that "vesting" is a word of slippery import and has many meanings and the context controls the text and the purpose and scheme project the particular semantic shade or nuance of meaning. The Court in *Rajendra Kumar v. Kalyan* (2000 (8) SCC 99) held as follows: (SCC p. 114, para 28)

"28. … We do find some contentious substance in the contextual facts, since vesting shall have to be a 'vesting' certain. 'To "vest", generally means to give a property in.' (*Per Brett, L.J. Coverdale v. Charlton* (1878) 4 QBD 104 (CA): Stroud's Judicial Dictionary, 5th Edn., Vol. VI.) Vesting in favour of the unborn person and in the contextual facts on the basis of a subsequent adoption after about 50 years without any authorisation cannot however but be termed to be a contingent event. To 'vest', cannot be termed to be an executory devise. Be it noted

however, that 'vested' does not necessarily and always mean 'vest in possession' but includes 'vest in interest' as well."

32. We are of the view that so far as the present case is concerned, the word "vesting" takes in every interest in the property including de jure possession and, not de facto but it is always open to a person to voluntarily surrender and deliver possession, under Section 10(3) of the Act.

33. Before we examine sub-section (5) and sub-section (6) of Section 10, let us examine the meaning of sub-section (4) of Section 10 of the Act, which says that during the period commencing on the date of publication under sub-section (1), ending with the day specified in the declaration made under sub-section (3), no person shall transfer by way of sale, mortgage, gift or otherwise, any excess vacant land, specified in the notification and any such transfer made in contravention of the Act shall be deemed to be null and void. Further, it also says that no person shall alter or cause to be altered the use of such excess vacant land. Therefore, from the date of publication of the notification under sub-section (1) and ending with the date specified in the declaration made in sub-section (3), there is no question of disturbing the possession of a person, the possession, therefore, continues to be with the holder of the land.

Peaceful dispossession

34. Sub-section (5) of Section 10, for the first time, speaks of "possession" which says that where any land is vested in the State Government under sub-section (3) of Section 10, the competent authority may, by notice in writing, order any person, who may be in possession of it to surrender or transfer possession to the State Government or to any other person, duly authorised by the State Government.

35. If de facto possession has already passed on to the State Government by the two deeming provisions under sub-section (3) of Section 10, there is no necessity of using the expression "where any land is vested" under sub-section (5) of Section 10. Surrendering or transfer of possession under sub-section (3) of Section 10 can be voluntary so that the person may get the compensation as provided under Section 11 of the Act early. Once there is no voluntary surrender or delivery of possession, necessarily the State Government has to issue notice in writing under sub-section (5) of Section 10 to surrender or deliver possession. Sub-section (5) of Section 10 visualises a situation of surrendering and delivering possession, peacefully while sub-section (6) of Section 10 contemplates a situation of forceful dispossession.

Forceful dispossession

36. The Act provides for forceful dispossession but only when a person refuses or fails to comply with an order under sub-section (5) of Section 10. Sub-section (6) of Section 10 again speaks of "possession" which says, if any person refuses or fails to comply with the order made under sub-section (5), the competent authority may take possession of the vacant land to be given to the State Government and for that purpose, force-as may be necessary-can be used. Sub-section (6), therefore, contemplates a situation of a person refusing or fails to comply with the order under sub-section (5), in the event of which the competent authority may take possession by use of force. Forcible dispossession of the land, therefore, is being resorted to only in a situation which falls under sub-section (6) and not under sub-section (5) of Section 10. Sub-sections (5) and (6), therefore, take care of both the situations i.e. taking possession by giving notice, that is, "peaceful dispossession" and on failure to surrender or give delivery of possession under Section 10(5), then

"forceful dispossession" under sub-section (6) of Section 10.

37. The requirement of giving notice under sub-sections (5) and (6) of Section 10 is mandatory. Though the word "may" has been used therein, the word "may" in both the sub-sections has to be understood as "shall" because a court charged with the task of enforcing the statute needs to decide the consequences that the legislature intended to follow from failure to implement the requirement. Effect of non-issue of notice under sub-section (5) or sub-section (6) of Section 11 is that it might result in the landholder being dispossessed without notice, therefore, the word "may" has to be read as "shall"."

13. We have, therefore, clearly indicated that it was always open to the authorities to take forcible possession and, in fact, in the notice issued under Section 10(5) of the ULC Act, it was stated that if the possession had not been surrendered, possession would be taken by application of necessary force. For taking forcible possession, certain procedures had to be followed. Respondents have no case that such procedures were followed and forcible possession was taken. Further, there is nothing to show that the Respondents had taken peaceful possession, nor there is anything to show that the Appellants had given voluntary possession. Facts would clearly indicate that only de jure possession had been taken by the Respondents and not de facto possession before coming into force of the repeal of the Act. Since there is nothing to show that de facto possession had been taken from the Appellants prior to the execution of the possession receipt in favour of MRDA, it cannot hold on to the lands in question, which are legally owned and possessed by the Appellants. Consequently, we are inclined to allow this appeal and quash the notice dated 17.2.2005 and subsequent action taken therein in view of the repeal of the ULC Act. The above reasoning would apply in

respect of other appeals as well and all proceedings initiated against the Appellants, therefore, would stand quashed.

14. The Appeals are, accordingly, allowed. However, there shall be no order as to costs.

D.G. Appeals allowed.

BIRJU

v.

STATE OF M.P.

(Criminal Appeal Nos.1352-1353 of 2012)

FEBRUARY 14, 2014

[K.S. RADHAKRISHNAN AND VIKRAMAJIT SEN, JJ.]

PENAL CODE, 1860:

s.302 IPC and s.27 of the Arms Act - Murder of a child aged 1 year - Conviction - Death sentence awarded by courts below, keeping in view a large number of criminal cases pending against accused - Held: Prosecution, by evidence of eye witness and medical evidence and FSL report, has successfully proved the cause of death and use of firearm by accused - The findings of trial court as affirmed by High Court that offences under s. 302 IPC and s.27 of the Arms Act have been made out against accused are concurred with - However, sentence of death is converted into one of imprisonment for 20 years without remission, over the period already undergone.

SENTENCE/SENTENCING:

Death sentence awarded by courts below - Based on criminal antecedents of accused - Held: Death was caused in retaliation to not meeting the demand of accused - It is not a rarest of rare case warranting capital punishment - Prior conviction will be a relevant factor, but in the instant case, accused has only been charge-sheeted and not convicted and, therefore, it is not a relevant factor for applying the RR test so as to award capital punishment - However, it may be relevant factor for awarding a sentence - In the instant case, when there are more than two dozen cases against accused of which three relate to offence of murder and two to attempt

to murder, it may have an impact on the sentencing policy, since the presence of accused could be a continuing threat to society and calls for longer period of incarceration - This is a fit case where 20 years of rigorous imprisonment, without remission, to the appellant, over the period which he has already undergone, would be an adequate sentence and will render substantial justice - Criminal law - Motive.

EVIDENCE:

Evidence of hostile witness - Held: Cannot be discarded as a whole and relevant parts thereof, which are admissible in law, can be used, either by prosecution or defence.

CODE OF CRIMINAL PROCEDURE, 1973:

s.235(2) - Hearing on question of sentence - Held: In awarding sentence, in appropriate cases, while hearing the accused u/s 235(2) Cr.P.C., courts can also call for a report from the Probation Officer and examine whether accused is likely to indulge in commission of any crime or there is any probability of accused being reformed and rehabilitated - Probation of Offenders Act, 1958.

The appellant-accused was prosecuted for committing the murder of a child aged one year who was in the arms of his grand-father (PW-1), on the allegation that the appellant demanded Rs.100/- from PW-1 to purchase liquor and on refusal, he took over a country made pistol and fired a shot which hit the child, resulting into his death. The trial court convicted the accused and keeping the fact in view that he had 24 criminal cases pending against him out of which 3 were murder cases and 2 were of attempt to murder cases, sentenced him to death. The High Court confirmed the conviction and the death sentence. It took the view that there was no probability that the accused would not commit criminal acts of violence and it would constitute a continuing

threat to the society and there would be no probability that the accused could be reformed or rehabilitated.

Disposing of the appeals, the Court

HELD: 1.1 PWs 1 to 4 and 7 fully and completely supported the case of the prosecution. Their version is consistent and highly reliable. Eye witnesses' version is fully corroborated with post-mortem and FSL reports. PW6, of course, has been declared as hostile, but the evidence of a hostile witness cannot be discarded as a whole and the relevant parts thereof, which are admissible in law, can be used, either by the prosecution or the defence. [para 9] [1055-F-H; 1056-A]

Muniappan and Others v. State of Tamil Nadu **2010 (10) SCR 262 = (2010) 9 SCC 567 - relied on.**

1.2 Motive for committing the murder was evidently for getting the money to consume liquor for which, unfortunately, a child of one year became the casualty. PW10, the Doctor opined that the wound was caused by firearm and the deceased died within 24 hours of post-mortem examination. The prosecution has successfully proved the cause of death and the use of the firearm by the accused and this Court fully concurs with the findings of the trial court, affirmed by the High Court that offences under s. 302 IPC and s.27 of the Arms Act, 1959, have been made out. [para 10] [1056-D-F]

Shankar Kisnrao Khade v. State of Maharashtra **(2013) 5 SCC 546 - referred to.**

2.1 One of the factors which weighed with the High Court to affirm the death sentence was that the accused was charge-sheeted for commissioning of 24 criminal cases, out of which three were for offences punishable u/s 302 IPC and two were u/s 307 IPC. It is pertinent to

note that the accused has only been charge-sheeted and not convicted and, therefore, that factor is not a relevant factor to be taken note of while applying the R-R test so as to award capital punishment. May be, in a given case, the pendency of large number of criminal cases against the accused person might be a factor which could be taken note of in awarding a sentence but, in any case, not a relevant factor for awarding capital punishment. True, when there are more than two dozen cases, of which three relate to the offence of murder, the usual plea of false implication by the defence has to be put on the back seat, and may have an impact on the sentencing policy, since the presence of the accused could be a continuing threat to the society and calls for longer period of incarceration. [para 14-15] [1059-B, F-H; 1060-A]

2.2 While laying down various criteria in determining the aggravating circumstances, two aspects, often seen referred to are: (1) the offences relating to the commission of heinous crime like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal conviction; and (2) the offence was committed while the offender was engaged in the commission of another serious offence. First criteria may be a relevant factor while applying the R-R test, provided the offences relating to heinous crimes like murder, rape, dacoity etc. have ended in conviction. Prior record of the conviction will be a relevant factor, but that conviction should have attained finality so as to treat it as aggravating circumstance for awarding death sentence. The second aspect deals with a situation where an offence was committed, while the offender was engaged in the commission of another serious offence. This is a situation where the accused is engaged in the commission of another serious offence which has not

ended in conviction and attained finality. [para 16-17] [1060-B-G]

Bachan Singh v. State of Punjab **(1980) 2 SCC 684,** *Machhi Singh and others v. State of Punjab* **1983 (3) SCR 413 = (1983) 3 SCC 470 and** *Rajendra Pralhadrao Wasnik v. State of Maharashtra* **2012 (2) SCR 225 = (2012) 4 SCC 37 - referred to.**

2.3 In awarding sentence, in appropriate cases, while hearing the accused u/s 235(2) Cr.P.C., courts can also call for a report from the Probation Officer, while applying the Crime Test guideline No.3, as laid down in Shankar Kisanrao Khade's case. Court can then examine whether the accused is likely to indulge in commission of any crime or there is any probability of his being reformed and rehabilitated. [para 18] [1061-E-F]

2.4 In the instant case, the accused had full knowledge, if he fires the shot on the temporal area, it would result in death of the child of one year who was in the arms of PW1. The accused, of course, demanded Rs.100/- from PW1, which he refused and then he took out the pistol and fired at the right temporal area of the child, as retaliation of not meeting his demand and there is nothing to show that, at the time of the incident, he was under the influence of liquor. Consequently, while affirming the conviction, it cannot be said that it is a rarest of rare case, warranting capital punishment. Therefore the death sentence awarded by the trial court and confirmed by the High Court is set aside and the same is converted to imprisonment for life. [para 19] [1061-G-H; 1062-A-B]

2.5 However, this is a fit case to be placed under the third category of cases in which court can, while awarding the sentence for imprisonment of life, fix a term

of imprisonment of 14 or 20 years (with or without remission) instead of death penalty and can, in appropriate cases, order that the sentences would run consecutively and not concurrently. This a case where the accused is involved in twenty four criminal cases, of which three are for the offence of murder and two are for attempt to murder. In such circumstances, if the appellant is given a lesser punishment and let free, he would be a menace to the society. This is a fit case where 20 years of rigorous imprisonment, without remission, to the appellant, over the period which he has already undergone, would be an adequate sentence and will render substantial justice. Ordered accordingly. [para 20-21] [1062-B-F]

Swami Shraddanand (2) alias Murli Manohar Sharma v. State of Karnataka **2008 (11) SCR 93 = (2008) 13 SCC 767;** *Gurvail Singh v. State of Punjab* **(2013) 10 SCC 63- relied on.**

Case Law Reference:

2010 (10) SCR 262	**relied on**	**para 9**
(2013) 5 SCC 546	**referred to**	**para 12**
(1980) 2 SCC 684	**referred to**	**para 16**
1983 (3) SCR 413	**referred to**	**para 16**
2012 (2) SCR 225	**referred to**	**para 16**
2008 (11) SCR 93	**relied on**	**para 20**
(2013) 10 SCC 63	**relied on**	**para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1352-1353 of 2012.

From the Judgment and order dated 28.06.2010 of the

High Court of Madhya Pradesh Bench at Indore in Crl. Death Ref. No. 1 of 2010 and Crl. Appeal No. 187 of 2010.

Rana Ranjit Singh for the Appellant.

C.D. Singh, Anshuman Shrivastava for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. We are, in this case, concerned with the killing of a child aged one year who was in the arms of PW1, the grand-father, for which the accused was awarded death sentence by the trial court, which was affirmed by the High Court and these appeals have been preferred by the accused against the judgment of conviction and sentence awarded to him for the offences under Section 302 of the Indian Penal Code, read with Section 27 of the Arms Act, 1959.

2. The prosecution case, in short, is as follows:

PW1, the complainant was standing at the grocery shop of Kamal Bansal (PW2) on 13.12.2009 at about 8.15 PM for purchasing some goods. He was holding his grandson, Arman, aged one year in his arms. PW4, Jagdish, was also standing in front of the said shop. The accused-Birju, resident of the same locality, known as Rustam Ka Bagicha, came out there on a motorcycle. After parking the motorcycle, he went to Babulal and questioned him as to why he was standing there. Babulal replied that he had come to purchase some kirana. While so, the accused-appellant demanded Rs.100/- for consuming liquor. Babulal expressed his inability to give the money, on which, the accused abused him in the name of his mother and took out a country made pistol from his pocket and shot, which hit on the right temporal area of infant-Arman. Persons of the locality, which included Rakhi, daughter of the complainant, her aunt-in-law Sharda Bai and few other inhabitants of the area, reached the spot after hearing the sound. Son-in-law of the complainant, Jeevan, took Arman to

the hospital and PW1 immediately reached the police station and lodged the first information report.

3. PW 12, the Station House Officer, reached the spot and prepared a spot map (Ext.P/2) and seized the blood stained shirt of complainant Babulal vide seizure memo (Ext.P/3). Empty cartridge, motorcycle and used bullet were seized from the spot vide seizure memo (Ext.P/6). Inquest report (Ext.P/8) was prepared on the dead body, which was then sent for post-mortem examination. PW10 Dr. A.K. Langewar conducted the post-mortem examination.

4. The accused was later nabbed and from his possession pistol was recovered and seized articles were sent for examination to the Forensic Science Laboratory, Tamil Nadu vide Ext.P/18-A. The investigation officer recorded the statements of witnesses and completed the investigation and the accused was charge-sheeted under Sections 302, 327 and 398 of the IPC and Sections 25 and 27 of the Arms Act, 1959.

5. The prosecution examined 12 witnesses and produced 19 documents and none was examined on the side of the defence.

6. As already indicated, after appreciating the oral and documentary evidence, the trial court found the accused guilty and held that the case of the accused falls under "rarest of rare" category and awarded capital punishment, which was affirmed by the High Court. The accused was also convicted under Section 27 of the Arms Act and was sentenced to rigorous imprisonment for three years and a fine of Rs.1000/-, which was also affirmed by the High Court.

7. Mr. Rana Ranjit Singh, learned counsel appearing for the appellant, submitted that the case on hand is not the one which falls in the category of "rarest of rare" warranting capital punishment. Learned counsel pointed out that even if the entire prosecution case is accepted, the offence would be covered

under Section 304 Part II IPC. Learned counsel also pointed out that the accused had no intention to kill either PW1 or the child. The accused, at best, was under extreme mental or emotional disturbance and there will be no occasion for him to indulge in similar offence in future, and the possibility of accused being reformed could not be ruled out. Learned counsel also submitted that the trial court and the High Court have committed an error in awarding the death sentence on the ground that the accused was involved in various other criminal cases which, according to the counsel, cannot be an aggravating factor to be taken into consideration for the purpose of awarding the death sentence.

8. Mr. C.D. Singh, learned counsel appearing for the State, on the other hand, pointed out that the prosecution has proved the case beyond reasonable doubt. Learned counsel referred to the evidence of PW4 and PW7 and stated that they were eye-witnesses to the incident and there is no reason to discard their oral evidence. Learned counsel submitted that the murder was committed in cold blooded manner and evidence on record clearly shows that the accused has absolutely no regard for the life or limb of others. Learned counsel also submitted that there is no probability of reformation or rehabilitation of the accused. Learned counsel also submitted that, in the instant case, crime test, criminal test and R-R test have been fully satisfied and there is no reason to interfere with the death sentence awarded by the trial court and affirmed by the High Court.

9. PWs 1 to 4 and 7 fully and completely supported the case of the prosecution. PW1, the grand-father of the child, PWs 2, 3, 4 and 7 have depicted an eye-to-eye picture of what transpired on the fateful day. Their version is consistent and highly reliable. Eye witnesses' version is fully corroborated with post-mortem and FSL reports. PW6, of course, has been declared as hostile, but the evidence of a hostile witness cannot be discarded as a whole and the relevant parts thereof, which are admissible in law, can be used, either by the prosecution

or the defence. Reference may be made to the judgment of this Court in *C. Muniappan and Others v. State of Tamil Nadu* (2010) 9 SCC 567. PW6, in his statement under Section 164 Cr.P.C. has stated that, on the date of the incident, he heard PW1 shouting "goli mar di", "goli mar di", which indicates that, to that extent, the statement supports the prosecution. The incident, as already stated, happened in front of a grocery shop at about 8.15 PM on 13.12.2009 when PW1 was standing in front of the grocery shop of PW2. Accused, at that time, reached the spot and demanded Rs.100/-, which PW1 refused to pay and, for that sole reason, he took out the pistol from his pocket and shot, which hit the temporal region of Arman, aged one year and he died.

10. Motive for committing the murder was evidently for getting the money to consume liquor for which, unfortunately, a child of one year became the casualty. The country made pistol used for committing the offence was subsequently recovered. PW10, who conducted the post-mortem on the dead body of the child, noticed various injuries and reiterated that the bullet had pierced through the meningeal membranes and both the lobes of the brain. PW10 Doctor opined that the wound was caused by firearm and the deceased died within 24 hours of post-mortem examination. The prosecution has successfully proved the cause of death and the use of the firearm by the accused and we fully concur with the findings of the trial court, affirmed by the High Court that offences under Section 302 IPC and Section 27 of the Arms Act, 1959, have been made out.

11. We are now concerned with the question whether the case falls under the category of "rarest of rare", warranting the death sentence.

12. We have held in *Shankar Kisnrao Khade v. State of Maharashtra* (2013) 5 SCC 546 that even if the crime test and criminal test have been fully satisfied, to award the death sentence, the prosecution has to satisfy the R-R Test. We have

noticed that one of the factors which weighed with the trial court as well as the High Court to award death sentence to the accused was his criminal antecedents. The High Court while dealing with the criminal antecedents of the accused stated as follows:

> "14. The appellant is having criminal antecedent, which is clear from the statement of investigating officer (PW-12) Mohan Singh in paragraph 12, wherein he has deposed that the appellant is a notified bully in the concerned police station and as many as 24 criminal cases were registered against him by the police, out of which three cases of murder and two were attempt to commit murder. In all these cases, after investigation, appellant was charge sheeted for trial before the court of law. In cross-examination, this statement has been challenged by the defence. In paragraph 13 only question was put to this witness that along with the charge sheet list of criminal cases were not filed, on which witness replied that same is available in the case diary. After this answer, counsel for the appellant did not ask the Court to verify this fact and also no suggestion was given to this witness that appellant was not facing prosecution in all the above mentioned criminal cases. These facts are sufficient to hold that appellant was fully aware about the use and consequence of the deadly weapon like pistol, and when his demand was not satisfied; he used the same intentionally to commit murder of child, Arman. The injuries show that pistol was fired very accurately and bullet pierced through and through at the vital part of the body i.e. skull. When appellant was using firearm for causing injury to infant Arman, he must be knowing the consequence that because of use of such deadly weapon, there would be no chance for survival of a child aged one year."

13. Further, the High Court also, after referring to the various cases, where this Court had awarded death sentence,

considered the present case as rarest of rare one and stated as follows:

> "26. In the light of aforesaid legal position for considering whether the instant case falls within the category of rarest in rare case, we visualize the following circumstances :-
>
> i) The offence was not committed under the influence of extreme mental or emotional disturbance.
>
> ii) Appellant is a quite matured person aged about 45 years. He is neither young nor old.
>
> iii) Looking to his criminal antecedent i.e. he was charge sheeted for commission of 24 criminal cases, out of which 3 were under Section 302 of "the IPC" and 2 were under Section 307 of "the IPC", therefore, there is no probability that the accused would not commit acts of violence in future and his presence in society would be a continuing threat to society.
>
> iv) `There is no probability or possibility of reformation or rehabilitation of the appellant.
>
> v) In the facts and circumstances of the present case, accused/appellant cannot morally justify the commission of murder of child aged one year by him.
>
> vi) There is no direct or indirect evidence available to say that accused acted under the duress or domination of another person.
>
> vii) The condition of appellant/accused was not such, which may show that he was mentally defective and the said defect impaired his capacity to appreciate the criminality of his conduct.

viii) It is purely a cold blooded murder and evidence on record clearly showing the fact that appellant has absolutely no regard for life and limb of others."

14. One of the factors which weighed with the High Court to affirm the death sentence was that the accused was charge-sheeted for commissioning of 24 criminal cases, out of which three were under Section 302 IPC and two were under Section 307 IPC, consequently, the Court held that there was no probability that the accused would not commit the act of violence in future and his presence would be a continuing threat to the society. The Court also took the view that there was no possibility or probability of reformation or rehabilitation of the accused.

15. We have in *Shankar Kisanrao Khade's* case (supra) dealt with the question as to whether the previous criminal record of the accused would be an aggravating circumstance to be taken note of while awarding death sentence and held that the mere pendency of few criminal cases, as such, is not an aggravating circumstance to be taken note of while awarding death sentence, since the accused is not found guilty and convicted in those cases. In the instant case, it was stated, that the accused was involved in 24 criminal cases, out of which three were registered against the accused for murder and two cases of attempting to commit murder and, in all those cases, the accused was charge-sheeted for trial before the court of law. No materials have been produced before us to show that the accused stood convicted in any of those cases. Accused has only been charge-sheeted and not convicted, hence, that factor is not a relevant factor to be taken note of while applying the R-R test so as to award capital punishment. May be, in a given case, the pendency of large number of criminal cases against the accused person might be a factor which could be taken note of in awarding a sentence but, in any case, not a relevant factor for awarding capital punishment. True, when there are more than two dozen cases, of which three relate to the offence of murder, the usual plea of false implication by the

defence has to be put on the back seat, and may have an impact on the sentencing policy, since the presence of the accused could be a continuing threat to the society and hence calls for longer period of incarceration.

16. We also notice, while laying down various criteria in determining the aggravating circumstances, two aspects, often seen referred to in *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, *Machhi Singh and others v. State of Punjab* (1983) 3 SCC 470 and *Rajendra Pralhadrao Wasnik v. State of Maharashtra* (2012) 4 SCC 37, are (1) the offences relating to the commission of heinous crime like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal conviction; and (2) the offence was committed while the offender was engaged in the commission of another serious offence. First criteria may be a relevant factor while applying the R-R test, provided the offences relating to heinous crimes like murder, rape, dacoity etc. have ended in conviction.

17. We may first examine whether "substantial history of serious assaults and criminal conviction" is an aggravating circumstance when the court is dealing with the offences relating to the heinous crimes like murder, rape, armed docoity etc. Prior record of the conviction, in our view, will be a relevant factor, but that conviction should have attained finality so as to treat it as aggravating circumstance for awarding death sentence. The second aspect deals with a situation where an offence was committed, while the offender was engaged in the commission of another serious offence. This is a situation where the accused is engaged in the commission of another serious offence which has not ended in conviction and attained finality.

18. In the instant case, the Court took the view that there was no probability that the accused would not commit criminal acts of violence and would constitute a continuing threat to the

society and there would be no probability that the accused could be reformed or rehabilitated. In *Shankar Kisanrao Khade's* case (supra), while dealing with the criminal test (mitigating circumstances), this Court noticed one of the circumstances to be considered by the trial Court, while applying the test, is with regard to the chances of the accused not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated. We find, in several cases, the trial Court while applying the criminal test, without any material on hand, either will hold that there would be no possibility of the accused indulging in commission of crime or that he would indulge in such offences in future and, therefore, it would not be possible to reform or rehabilitate him. Courts used to apply reformative theory in certain minor offences and while convicting persons, the Courts sometimes release the accused on probation in terms of Section 360 Cr.P.C. and Sections 3 and 4 of the Probation of Offenders Act, 1958. Sections 13 and 14 of the Act provide for appointment of Probation Officers and the nature of duties to be performed. Courts also, while exercising power under Section 4, call for a report from the Probation Officer. In our view, while awarding sentence, in appropriate cases, while hearing the accused under Section 235(2) Cr.P.C., Courts can also call for a report from the Probation Officer, while applying the Crime Test guideline No.3, as laid down in *Shankar Kisanrao Khade's* case (supra). Court can then examine whether the accused is likely to indulge in commission of any crime or there is any probability of the accused being reformed and rehabilitated.

19. We have no doubt in our mind that the accused had the full knowledge, if he fires the shot on the temporal area, that is between the forehead and the ear, it would result in death of the child of one year who was in the arms of PW1. Appellant, of course, demanded Rs.100/- from PW1, which he refused and then he took out the pistol and fired at the right temporal area of the child, as retaliation of not meeting his demand and there is nothing to show that, at the time of the incident, he was under

the influence of liquor. Consequently, while affirming the conviction, we are not prepared to say that it is a rarest of rare case, warranting capital punishment. We, therefore, set aside the death sentence awarded by the trial Court and affirmed by the High Court, and convert the same to imprisonment for life.

20. We are, however, of the view that this is a fit case where we can apply the principle laid down in *Swami Shraddanand (2) alias Murli Manohar Sharma v. State of Karnataka* (2008) 13 SCC 767. In that case, this Court took the view that there is a third category of cases in which Court can, while awarding the sentence for imprisonment of life, fix a term of imprisonment of 14 or 20 years (with or without remission) instead of death penalty and can, in appropriate cases, order that the sentences would run consecutively and not concurrently. Above sentencing policy has been adopted by this Court in several cases, since then, the latest being *Gurvail Singh v. State of Punjab* (2013) 10 SCC 631. We have indicated that this a case where the accused is involved in twenty four criminal cases, of which three are for the offence of murder and two are for attempting to commit murder. In such circumstances, if the appellant is given a lesser punishment and let free, he would be a menace to the society.

21. We are of the view that this is a fit case where 20 years of rigorous imprisonment, without remission, to the appellant, over the period which he has already undergone, would be an adequate sentence and will render substantial justice. Ordered accordingly.

22. The appeals stand disposed of as above.

R.P. Appeals disposed of.

V.K. VERMA
v.
CBI
(Criminal Appeal No. 404 of 2014)

FEBRUARY 14, 2014

[SUDHANSU JYOTI MUKHOPADHAYA AND KURIAN JOSEPH, JJ.]

SENTENCE/SENTENCING:

Reducing of sentence to a period less than the minimum prescribed -- Conviction u/ss. 5(1) (d) r/w s. 5(2) of 1947 Act and s. 161, IPC - Conviction and sentence of one and half years with fine - Held: Thirty years long delay in the proceedings, three months incarceration, age of accused with ailments and the petty amount of bribe would be special reasons for reducing the substantive sentence -- Accordingly, sentence of imprisonment is reduced to the period already undergone and fine enhanced to Rs.50,000/- -- Prevention of Corruption Act, 1947 -- u/ss. 5(1) (d) r/w s. 5(2) - Penal Code, 1860 - s. 161.

The appellant was prosecuted for offences punishable us 161, IPC and s. 5(1)(d) read with s. 5(2) of the Prevention of Corruption Act, 1947 on the ground that he demanded and accepted a bribe of Rs.265/- from a contractor on 21.12.1984. The trial court convicted him of the offences charged and sentenced him to undergo RI for one and a half years with a fine of Rs.5,000/- under each of the two counts. The High Court declined to interfere.

Partly allowing the appeal, the Court

HELD: 1.1. As far as punishment under old s. 161 of

IPC is concerned, there is no mandatory minimum punishment. Under s. 5(2) of the Prevention of Corruption Act, 1947, there is a mandatory minimum punishment of one year. It may extend to seven years. However, under the proviso, the court may, for special reasons, impose a sentence of imprisonment of less than one year. [para 9] [1066-G-H; 1067-A]

1.2 The long delay before the courts in taking a final decision with regard to the guilt or otherwise of the accused, is one of the mitigating factors to decide on the quantum of sentence. In the instant case, it is a litigation of almost three decades in a simple trap case and that too involving a petty amount. It took 10 years for the matter to be registered as a sessions case. The trial also took almost 10 years. The matter took further 10 years before the High Court. The appellant has already undergone physical incarceration for three months and mental incarceration for about thirty years. Further, he is aged 76 and also has cardio vascular problems. This Court is of the view that the facts of the case would certainly be special reasons for reducing the substantive sentence. Accordingly, the substantive sentence of imprisonment is reduced to the period already undergone. However, fine is enhanced to Rs.50,000/-. [para 4,11, 15 and 16] [1065-H; 1066-A; 1067-C-F]]

Ashok Kumar v. State (Delhi Administration) **1980 (2) SCR 863 = (1980) 2 SCC 282;** *Sharvan Kumar v. State of Uttar Pradesh,* **(1985) 3 SCC 658; and** *Ajab and others v. State of Maharashtra,* **1989 Supp (1) SCC 601 - relied on.**

Case Law Reference:

1980 (2) SCR 863	**relied on**	**para 12**
(1985) 3 SCC 658	**relied on**	**para 13**

1989 Supp (1) SCC 601 relied on para 14

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 404 of 2014.

From the Judgment and Order dated 22.07.2013 of the High Court of Delhi at New Delhi in Crl. A. No. 293 of 2003.

M. Yogesh Kanna, A. Santha Kumaran, Vanita C. Giri for the Appellant.

P.P. Malhotra, ASG, P.K. Dey, Shadman Ali, B.V. Balram Das for the Respondent.

The Judgment of the Court was delivered by

KURIAN, J. 1. Leave granted.

2. Appellant is the accused in C.C. No. 205 of 1994 on the file of the Special Judge, Delhi. He was tried for offences under Section 161 of the Indian Penal Code (45 of 1860) (hereinafter referred to as 'IPC') and Section 5(1)(d) read with Section 5(2) of the Prevention of Corruption Act, 1947. The charge was that the appellant demanded and accepted bribe of Rs.265/- from a contractor by name Sanjeev Kumar Sawhney on 21.12.1984. According to the appellant, the said contractor had an axe to grind since the appellant did not budge to his demand for improper measurement of the work done by him and he was actually trapped at his instance. FIR was registered on 21.12.1984. The sessions court convicted him of the charges and sentenced him to undergo rigorous imprisonment for a period of one and a half years with a fine of Rs.5,000/- each under the charged Sections, as per Judgment dated 10.04.2003.

3. The High Court declined to interfere with the conviction and sentence and dismissed the appeal as per Judgment dated 22.07.2013 and, hence, the appeal.

4. One wonders as to how it took ten years for the matter to be registered as sessions case and stranger is it to see that the trial also took almost ten years and still stranger is that the

matter took ten years in the High Court.

5. Pursuant to dismissal of the appeal before the High Court, the appellant surrendered before the Special Judge on 03.10.2003 and he was sent to custody. On 28.10.2013, this Court issued notice limited to the quantum of sentence. Thereafter, by Order dated 16.12.2013, the appellant was enlarged on bail.

6. Learned counsel for the appellant submits that the incident is of the year 1984, the appellant is now aged 76 and he is sickly. Heard also the counsel for the CBI who has strongly opposed even any lenient approach by this Court.

7. Section 5 of the Prevention of Corruption Act, 1947 deals with criminal misconduct. Section 5(2) deals with punishment, which reads as under:

"5. Criminal misconduct.

(2) Any public servant who commits criminal misconduct shall be punishable with imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to fine :

Provided that the court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year."

8. Section 161 of IPC was omitted by the introduction of the Prevention of Corruption Act, 1988. The pre-amended proviso dealt with the offence of public servant taking gratification other than legal remuneration in respect of an official act. The punishment was:

"… imprisonment of either description for a term which may extend to three years, or with fine or with both"

9. Thus, as far as punishment under the old Section 161 of IPC is concerned, there is no mandatory minimum punishment. The question is whether the sentence could be reduced for any special reason. Under the old Prevention of

Corruption Act, 1947, there is a mandatory minimum punishment of one year. It may extend to seven years. However, under the proviso, the court may, for special reasons, impose a sentence of imprisonment of less than one year.

10. In imposing a punishment, the concern of the court is with the nature of the act viewed as a crime or breach of the law. The maximum sentence or fine provided in law is an indicator on the gravity of the act. Having regard to the nature and mode of commission of an offence by a person and the mitigating factors, if any, the court has to take a decision as to whether the charge established falls short of the maximum gravity indicated in the statute, and if so, to what extent.

11. The long delay before the courts in taking a final decision with regard to the guilt or otherwise of the accused is one of the mitigating factors for the superior courts to take into consideration while taking a decision on the quantum of sentence. As we have noted above, the FIR was registered by the CBI in 1984. The matter came before the sessions court only in 1994. The sessions court took almost ten years to conclude the trial and pronounce the judgment. Before the High Court, it took another ten years. Thus, it is a litigation of almost three decades in a simple trap case and that too involving a petty amount.

12. In *Ashok Kumar v. State (Delhi Administration)*[1], the commission of offence of theft was in 1971 and the Judgment of this Court was delivered in 1980. The conviction was under Section 411 of IPC. This Court having regard to the purpose of punishment and "the long protracted litigation", reduced the sentence to the period already undergone by the convict.

13. In *Sharvan Kumar v. State of Uttar Pradesh*[2], the commission of offence was in 1968 and the judgment was delivered in 1985. The conviction was under Sections 467 and 471 of IPC. In that case also, the long delay in the litigation

1. (1980) 2 SCC 282.
2. (1985) 3 SCC 658.

process was one of the factors taken into consideration by this Court in reducing the sentence to the period already undergone.

14. In *Ajab and others v. State of Maharashtra*[3] also, this Court had an occasion to examine the similar situation. The offence was committed in 1972 and this Court delivered the Judgment in 1989. The conviction was under Section 224 read with Section 395 of IPC. In that case also "passage of time was reckoned as a factor for reducing the sentence to the period already undergone". This Court in that case, while reducing the substantive sentence, increased the fine holding that the same would meet the ends of justice.

15. The appellant is now aged 76. We are informed that he is otherwise not keeping in good health, having had also cardio vascular problems. The offence is of the year 1984. It is almost three decades now. The accused has already undergone physical incarceration for three months and mental incarceration for about thirty years. Whether at this age and stage, it would not be economically wasteful, and a liability to the State to keep the appellant in prison, is the question we have to address. Having given thoughtful consideration to all the aspects of the matter, we are of the view that the facts mentioned above would certainly be special reasons for reducing the substantive sentence but enhancing the fine, while maintaining the conviction.

16. Accordingly, the appeal is partly allowed. The substantive sentence of imprisonment is reduced to the period already undergone. However, an amount of Rs.50,000/- is imposed as fine. The appellant shall deposit the fine within three months and, if not, he shall undergo imprisonment for a period of six months. On payment of fine, his bail bond will stand cancelled.

R.P. Appeal partly allowed.

3. 1989 Supp (1) SCC 601.

UNION OF INDIA
v.
M/S PAM DEVELOPMENT PVT. LTD.
(Civil Appeal No. 5618 of 2006)

FEBRUARY 18, 2014.

[SURINDER SINGH NIJJAR AND RANJANA PRAKASH DESAI, JJ.]

Arbitration and Conciliation Act, 1996: s.11(6) - Jurisdiction of arbitrator to entertain the dispute - Agreement for construction of Loco shed - Termination of contract - Arbitration application u/s.11(6) by respondent - Appointment of former judge as arbitrator - Full participation of appellant - Award by arbitrator - s.34 application by appellant for setting aside of award - Dismissed by High Court - On appeal, held: Although in the instant case, arbitration agreement provided for appointment of two arbitrators and an Umpire, however, in view of repeal of Arbitration Act, 1940 by Arbitration Act, 1996, the provision in the arbitration agreement for appointment of two arbitrators and an Umpire had become redundant - Appointment of former judge as arbitrator was not challenged by the appellant and, therefore, the same became final and binding - This apart, appellant failed to raise objection regarding lack of jurisdiction of the Arbitral Tribunal before the arbitrator - Appellant not only filed the statement of defence but also raised a counter claim against the respondent and, therefore, objection is deemed to have been waived in view of the provisions contained in s.4 r/w s.16 of the Arbitration Act, 1996 - s.16 provides that the Arbitral Tribunal may rule on its own jurisdiction and clearly recognizes the principle of kompetenz-kompetenz - s.16(2) mandates that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence - s.4

provides that a party who knows that any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay shall be deemed to have waived his right to so object - High Court rightly held that the appellant having failed to raise the plea of jurisdiction before the Arbitral Tribunal cannot be permitted to raise the plea before it for the first time - Doctrine/Principle - Principle of kompetenz-kompetenz.

Bharat Sanchar Nigam Limited and another versus Motorola India Private Limited **(2009) 2 SCC 337: 2008 (13) SCR 445 - relied on.**

Case Law Reference:

2008 (13) SCR 445	**Relied on** **Para 18**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5618 of 2006.

From the Judgment and Order dated 15.06.2005 of the High Court of Calcutta in APOT No. 643 of 2003.

P.P. Malhotra, ASG, Syed Tanweer Ahmad, Sonia Malhotra, Shreekant N. Terdal, Yasir Rauf for the Appellant.

Pranab Kumar Mullick, Soma Mullick for the Respondent.

The following Order of the Court was delivered

ORDER

1. This appeal has been filed by the Union of India challenging the judgment and order of the Calcutta High Court dated 15th June, 2005 rendered in APOT NO.643 of 2003.

2. We may notice here the bare essential facts, which would have a bearing on the legal controversy involved in the appeal.

3. On 19th October, 1992, the appellant entered into an agreement with the respondent for construction of Industrial Covered Electrical Loco Shed. Subsequently, according to the appellant, the agreement was terminated in terms of clause 64 of the General Conditions of Contract by which the agreement between the parties was governed. The twin reasons for termination of the contract were that the respondent initially delayed the commencement of the work and subsequently executed the work which was of inferior quality. Therefore, the appellant had to get the balance work completed from another contractor.

4. On 24th July, 1996, the respondent raised certain claims against the appellant.

5. On 30th September, 1996, the respondent demanded that the disputes be referred to arbitration.

6. Since the disputes were not referred to arbitration, the respondent approached the High Court of Calcutta under Section 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act, 1996") for the appointment of a sole arbitrator. The High Court by its order dated 10th July, 1998 appointed Mr. Justice Satyabrat Mitra as the sole arbitrator. The learned arbitrator duly commenced the arbitration proceedings, in which the appellant fully participated. The appellant filed statement of defence. Upon completion of the arbitration proceedings, the learned arbitrator made the award on 25th January, 2002. The claims of the respondent were accepted and the award was rendered in favour of the contractor in the sum of Rs.1,29,89,768/-.

7. Aggrieved by the aforesaid award, the appellant filed an application under Section 34 of the Arbitration Act, 1996 before the High Court for setting aside the award. The learned single judge of the High court dismissed the aforesaid application of the appellant on 28th October, 2003.

8. Aggrieved by the aforesaid order, the appellant filed Intra-Court appeal before the Division Bench of the High court, which has also been dismissed by the impugned judgment dated 15th June, 2005.

9. The present appeal arises out of Special Leave Petition (Civil) No.20316 of 2005.

10. We have heard the learned counsel for the parties at length.

11. Mr. P.P. Malhotra, learned Additional Solicitor General, appearing for the Union of India, submitted that the High Court committed an error of jurisdiction by appointing a former judge of the High court as the sole arbitrator. The appointment of the sole arbitrator was against the contractual conditions which cannot be ignored. Therefore, the reference was before a Arbitral Tribunal which had not been properly constituted. He also submitted that the arbitrator had no jurisdiction to entertain the claims with regard to certain excepted matters.

12. On the other hand, the learned counsel for the respondent has submitted that the appellant having participated in the proceedings before the learned arbitrator without any demur or objection cannot now be permitted to raise the objection with regard to the jurisdiction of the arbitrator at this belated stage. Learned counsel further submitted that in view of express provision contained in Section 16 of the Arbitration Act, 1996, the Arbitral Tribunal is competent to rule on its own jurisdiction. He submits that pleas with regard to lack of jurisdiction of the learned arbitrator ought to have been raised not later than the submission of the statement of defence. Learned counsel pointed out that no plea of lack of jurisdiction of the learned arbitrator was taken by the appellant in the statement of defence. Furthermore, the appellant also led evidence in defence. He also pointed out that the appellant, in fact, categorically accepted the jurisdiction of the learned arbitrator by filing a counter claim in the proceedings. He

submits that, in such circumstances, the appellant had clearly waived its right to object to the constitution of the Arbitral Tribunal. Similarly, the plea of excepted matters was also never raised by the appellant during the entire arbitration proceedings. All claims have been decided on merits.

13. We have considered the submissions made by the learned counsel for the parties.

14. The arbitration agreement contained in clause 64 of the General Conditions of Contract is as under:

"64(3)(a) ARBITRATION: Matters in question, dispute or difference to be arbitrated upon shall be referred for decision to

3(a)(i) A Sole Arbitrator who shall be the General Manager or a Gazetted Railway Officer nominated by him in that behalf in cases where the claim in question is below Rs.5,00,000/- (Rupees five lakhs) and in cases where the issues involved are not of complicated nature. The General Manager shall be the sole Judge to decide whether or not the issues involved are of a complicated nature.

3(a)(ii) Two Arbitrators who shall be Gazetted Railway Officers of equal status to be appointed in the manner laid in Clause 64(3)(b) or all claims of Rs.5,00,000/- (Rupees five Lakhs) and above, and for all claims irrespective of the amount of value of such claims if the issues involved are of a complicated nature the General Manager shall be the sole Judge to decide whether the issues involved are of a complicated nature or not. In the event of the two Arbitrators being divided in their opinions the matter under disputes will be referred to an Umpire to be appointed in the manner laid down in Clause 3(b) for his decision.

3(a)(iii) It is a term of this contract that no person other than a Gazetted Railway Officer, should act as an Arbitrator/

Umpire and if for any reason, that is no possible, the matter is not to be referred to Arbitration at all. 3(a)(iv) In cases where the claim is up to Rs.5,00,000/- (Rupees five lakh), the Arbitrator(s) compare so appointed, as the case may be, shall give the award on all matters referred to arbitration indicating therein break-up of the sums awarded separately on each individual item of disputes. In cases where the claim is more than Rs.5,00,000/- (Rupees five lakh), the Arbitrator(s)/Umpire so appointed, as the case may be, shall give intelligible award (i.e. the reasoning leading to the award should be stated) with the sums awarded separately on each individual item of dispute referred to arbitration.

3(b) For the purpose of appointing two arbitrators as referred to in sub-clause (a)(ii) above, the Railway will send a panel of more than three names of Gazetted Railway Officers of one of more departments of the Railway to the contractor who will be asked to suggest to the General Manager one name out the list for appointment as the contractor's nominee. The General Manager, while so appointment the contractor's nominee, will also appoint a second arbitrator as the Railway's nominee either from the panel or from outside the panel, ensuring that one the two arbitrators so nominated is invariably from the Accounts Department. Before entering upon the reference the two arbitrators shall nominate an Umpire who shall be a Gazetted Railway Officer to whom the case will be referred to in the event of any difference between the two arbitrators Officers of the Junior Administrative grade of the Accounts Department of the Railways shall be considered as of equal status to the Officers in the intermediate administrative grade of other departments of the Railway for the purpose of appointment as arbitrators."

15. A persual of clause 64 would show that in case of claims which are below Rs.5,00,000/- (Rupees five lakh), the

General Manager or a Gazetted Railway Officer nominated by him shall be the sole arbitrator. In case of claims of Rs.5,00,000/- (Rupees five lakh) and above, the Arbitral Tribunal shall consist of three arbitrators to be appointed in terms of clause 64(3)(b). Under clause 64(3)(b), the Railways will send a panel of more than three names of Gazetted Railway Officers from whom the contractor will be asked to suggest one name. The General Manager will appoint the second arbitrator on behalf of the Railways. The clause also provided that two arbitrators shall nominate an Umpire who shall be a Gazetted Railway Officer.

16. Since the Arbitration Act, 1940 had been repealed by the Arbitration Act, 1996 the provision in the arbitration agreement for appointment of two arbitrators and an Umpire had become redundant. Accordingly, the respondent requested the Railways to appoint the sole arbitrator. Since the Railways failed to appoint the arbitrator within 30 days of the receipt of the letter dated 30th September, 1996, the respondent moved the application under Section 11(6) of the Arbitration Act, 1996 for appointment of a sole arbitrator on 3rd January, 1997 before the High Court. As noticed above, by order dated 10th July, 1998, the High Court appointed Mr. Justice Satyabrata Mitra as the sole arbitrator. It is important to notice that this order dated 10th July, 1998 was not challenged by the appellant and, therefore, the same became final and binding. This apart, the appellant failed to raise any objection to the lack of jurisdiction of the Arbitral Tribunal before the learned arbitrator. As noticed above, the appellant not only filed the statement of defence but also rasied a counter claim against the respondent. Since the appellant has not raised the objection with regard to competence/jurisdiction of the Arbitral Tribunal before the learned arbitrator, the same is deemed to have been waived in view of the provisions contained in Section 4 read with Section 16 of the Arbitration Act, 1996.

17. Section 16 of the Arbitration Act, 1996 provides that the Arbitral Tribunal may rule on its own jurisdiction. Section 16

clearly recognizes the principle of kompetenz-kompetenz. Section 16(2) mandates that a plea that the Arbitral Tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. Section 4 provides that a party who knows that any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay shall be deemed to have waived his right to so object.

18. In our opinion, the High Court has correctly come to the conclusion that the appellant having failed to raise the plea of jurisdiction before the Arbitral Tribunal cannot be permitted to raise for the first time in the Court. Earlier also, this Court had occasion to consider a similar objection in *Bharat Sanchar Nigam Limited and another versus Motorola India Private Limited* [(2009) 2 SCC 337]. Upon consideration of the provisions contained in Section 4 of the Arbitration Act, 1996, it has been held as follows:

> 39. Pursuant to section 4 of the Arbitration and Conciliation Act, 1996, a party which knows that a requirement under the arbitration agreement has not been complied with and still proceeds with the arbitration without raising an objection, as soon as possible, waives their right to object. The High Court had appointed an arbitrator in response to the petition filed by the appellants (sic respondent). At this point, the matter was closed unless further objections were to be raised. If further objections were to be made after this order, they should have been made prior to the first arbitration hearing. But the appellants had not raised any such objections. The appellants therefore had clearly failed to meet the stated requirement to object to arbitration without delay. As such their right to object is deemed to be waived.

19. In our opinion, the obligations are fully applicable to the

facts of this case. The appellant is deemed to have waived the right to object with regard to the lack of the jurisdiction of the Arbitral Tribunal.

20. We, therefore, see no merit in the appeal and the same is hereby dismissed.

No costs.

D.G. Appeal dismissed.

VIJAY KUMAR
v.
STATE OF RAJASTHAN
(Criminal Appeal No. 441 of 2009)

FEBRUARY 18, 2014

[T.S. THAKUR AND C. NAGAPPAN, JJ.]

PENAL CODE, 1860:

ss. 302 r/w 120-B, 460 and 382 - Circumstantial evidence - Conviction by courts below - Held: Witness has made material improvements while deposing in court and such evidence cannot be safe to rely upon -- Evidence adduced by prosecution to prove second and third circumstances does not pass the test of credibility and is liable for rejection - The recoveries made indicate that the articles recovered were not in exclusive possession of the appellants - Further, none of the precaution that ought to have been taken to ensure fair identification of the articles recovered was ever taken and no weight can be attached to the evidence of identification of property -- Both the courts below fell in error in coming to the conclusion that prosecution has established its case based on circumstantial evidence beyond all reasonable doubt -- Benefit of doubt given to both the appellants -- Conviction and sentences imposed on them by courts below are set aside and they are acquitted of the charges - Evidence - Circumstantial evidence - Identification - Identification of articles.

The appellants-accused A-1 and A-3 were prosecuted for committing offences punishable u/ss 120B, 302, 460 and 382 IPC. Besides, three other accused were tried along with them for offence punishable u/s 411 I.P.C. The prosecution case was that the deceased, a midwife, was residing in the Hospital where A-1, a doctor

and his brother-in-law, A-3, were also residing; that the deceased used to give loan on interest on the mortgage of gold and silver ornaments; that A-1 and A-3 conspired and murdered the deceased and stolen the ornaments/ articles possessed by her. However, the case was registered on the written report forwarded by A-1 about the death of the said midwife. During the investigation A-1 and A-3 were arrested and on their disclosure, certain ornaments/articles were said to have been recovered. The other three accused were also arrested. Since nobody had witnessed the occurrence and the case was based on circumstantial evidence, the trial court mainly relied on the following circumstances:

(i) The deceased died of homicidal violence.

(ii) A-1 had threatened the deceased of possible income-tax raid and seizure of ornaments possessed by her and persuaded her to shift her residence from village to hospital premise with her belongings.

(iii) Accused no. 5 used to demand the ornaments for wearing from the deceased; and

(iv) On the information furnished by A-1 and A-3 upon their arrest, the ornaments pledged by various persons with the deceased, got recovered from their possession.

The trial court found all the accused guilty of the offences charged. A-1 and A-3 were convicted sentenced to imprisonment for life and to pay a fine of Rs.5000/- each u/s 302 read with s. 120B IPC. Both were further convicted and sentenced to RI for eight years and to pay a fine of Rs.1000/- each for each of the offences u/s 460 IPC and u/s 382 IPC. Accused nos.2, 4 and 5 were convicted and sentenced to RI for two years and to pay a fine of Rs.500 each u/s 411 IPC. On appeal, the High Court acquitted accused nos. 2, 4 and 5 but, maintained

the conviction and the sentences of the appellants.

Allowing the appeals, the Court

HELD: 1.1 In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. [para 6] [1086-A-B]

1.2 In the instant case, from the medical evidence, it is clear that death of the deceased was homicidal in nature and the circumstance (i) stood established. [para 8] [1087-D]

1.3 As regards circumstances (ii) and (iii), PW 10, the brother-in-law of the deceased, in his examination-in-chief stated that the deceased had kept her ornaments in the locker of a bank and A-1 told her that the income-tax people could raid the bank and seize her ornaments and, therefore, she took the ornaments with her. PW 10 has further stated that the deceased used to tell him that accused no. 5 demanded ornaments from her for wearing and would dance after wearing the same. In the cross-examination PW 10 has stated that he did not tell these facts to the police during investigation. This witness has made material improvement while deposing in the court and such evidence cannot be safe to rely upon. Thus, the evidence adduced by the prosecution to prove circumstances (ii) and (iii) does not pass the test of credibility and is liable for rejection. [para 10] [1087-F-H; 1088-C]

Khalil Khan vs. State of M.P. **(2003) 11 SCC 19 - relied on.**

1.4 As regards the last circumstance pertaining to the recoveries made pursuant to the disclosure made by the appellants, the said recoveries have been made from the respective houses of the accused/appellants where their families were residing. In fact A-3 obtained the key from his father for opening the lock. In such circumstances, it cannot be said that the said articles were in the exclusive possession of the accused/appellants and they came to be recovered only on the information furnished by them. [para 11-12] [1088-D; 1089-C-D]

1.5 The identification proceedings of articles was conducted by PW 83 Tahsildar in Tehsil and he has claimed to have prepared 72 identification reports. In the cross-examination he has admitted that there were policemen present at the time of identification and he did not know the articles brought to him were in sealed packets or in open condition and he did not remember whether seal used on the packets was official seal since 12 years have already passed. Further, none of the precaution that ought to have been taken to ensure fair identification was ever taken and no weight can be attached to the evidence of identification of property. Though the trial court has observed in the judgment about the lack of proper identification of the articles, it erroneously proceeded further to accept the same. Besides, recovery of weapons namely knife and screw-driver claimed to have been made on the information given by A-1 is also doubtful. [para 14] [1091-B-D, E-F]

Wakkar vs. State of U.P. **(2011) 3 SCC 306 - relied on.**

State of Vindhya Pradesh vs. Sarua Munni Dhimar and others **AIR 1954 V.P. (Vol.41 CN 15) - referred to.**

1.6 Both the courts below fell in error in coming to the conclusion that the prosecution has established its case based on circumstantial evidence beyond all reasonable doubt. Benefit of doubt will have to be given to both the appellants. Therefore, conviction and sentences imposed on the appellants by the courts below are set aside and they are acquitted of the charges. [para 15-16] [1091-G-H; 1092-A-B]

Case Law Reference:

(2003) 11 SCC 19	**relied on**	**para 10**
AIR 1954 V.P. (Vol.41 CN 15)	**referred to**	**para 12**
(2011) 3 SCC 306	**relied on**	**para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 441 of 2009.

From the Judgment and Order dated 02.05.2007 of the High Court of Judicature for Rajasthan at Jaipur Bench in D.B. criminal Appeal No. 664 of 2001.

WITH

Criminal Appeal No. 1363 of 2009.

Nitin Bhardwaj, Rajiv Kumar Sinha, Mridula Ray Bhardwaj for the Appellant.

Milind Kumar, Ruchi Kohli for the Respondent.

The Judgment of the Court was delivered by

C. NAGAPPAN, J. 1. These two appeals are preferred against the judgment of the High Court of Judicature of Rajasthan at Jaipur Bench in DB Criminal Appeal No.664 of 2001.

2. The appellant Dr. Atma Ram in Criminal Appeal No.1363 of 2009 is the accused No.1 and the appellant Vijay Kumar in Criminal Appeal No.441 of 2009 is accused No.3 in the Sessions Case No.28 of 2001 (38/1986) on the file of Additional Sessions Judge (Fast Track) Jhunjhunu, Rajasthan and they were tried for the alleged offences under Section 120B, 302, 460 and 382 IPC. Three other accused namely A-2 Kailash Chand, A-4 Gyanchand and A-5 Radha Devi were also tried in the same case for the alleged offence under Section 411 IPC. The Sessions Court found accused Nos. 1 and 3/ appellants guilty of the charges framed and sentenced them each to suffer imprisonment for life and to pay a fine of Rs.5000/- each in default to undergo rigorous imprisonment for six months each for the offence under Section 302 read with Section 120B IPC and further sentenced them each to undergo rigorous imprisonment for eight years and to pay a fine of Rs.1000/- each and in default to undergo rigorous imprisonment for six months each for the offence under Section 460 IPC and also sentenced them each to undergo rigorous imprisonment for eight years and to pay a fine of Rs.1000/- each and in default to undergo rigorous imprisonment for six months each for the offence under Section 382 IPC and ordered the sentences to run concurrently. The Sessions Court also found accused Nos.2, 4 and 5 guilty of the offence under Section 411 IPC and sentenced them each to undergo rigorous imprisonment for two years and each to pay a fine of Rs.500 and in default each to undergo rigorous imprisonment for three months.

3. Aggrieved by the conviction and sentence accused Nos.1 to 5 preferred appeal in Criminal Appeal No.664 of 2001 and the High Court by judgment dated 2.5.2007 dismissed the appeal preferred by the accused No.1 Atma Ram and accused No.3 Vijay Kumar/appellants herein and at the same time allowed the appeal pertaining to accused No.2 Kailash Chand, A-4 Gyan Chand and Accused No.5 Radha Devi and acquitted them of charge under Section 411 IPC. Challenging their

conviction and sentence accused No.1 Atma Ram and accused No.3 Vijay Kumar have preferred the present appeals.

4. Briefly the case of the prosecution is as follows:

Accused No.1 Atma Ram was working as a Doctor in the Government Hospital in village Chhapoli and Keshar Bai was posted as a mid-wife in the same hospital and a month prior to occurrence she started residing in a room on the ground floor under the stair-case of the hospital. She used to give loan on interest on the mortgage of gold and silver ornaments. PW 17 Sweeper Basanti Lal was also residing in a corner room on the ground floor of the hospital. A-1 Atma Ram was residing on the first floor of the same hospital. Accused No.3 Vijay Kumar was his brother-in-law and he was also residing with him. On 11.11.1985 PW 17 Basanti Lal noticed Kesar Bai sitting outside in the hospital and also noticed return of Atma Ram to Hospital. Dr.Atma Ram forwarded a written report on November 12, 1985 through Peon Nand Lal to Udaipurbati Police Station (Jhunjhunu) informing about the murder of Keshar Bai. In the report A-1 Atma Ram stated that in the preceding night around 12.30 a.m. he suddenly woke-up hearing voice of sweeper Basanti Lal who was asking to open the door of his room which was bolted from outside. Atma Ram then got up and proceeded towards the room of Basanti Lal but the door of Atma Ram's staircase was also bolted from outside, therefore he could not go out and awoke Vijay Kumar, who was residing with him. Vijay Kumar then scaled the roof and unbolted the room of Basanti Lal. Thereafter all the three went down through the staircase and went towards Nohra. They found the room of Keshar Bai open. They called Keshar Bai, but she did not respond. Therefore they entered inside the room and saw Keshar Bai lying dead in naked condition in a pool of blood. Her mouth was tied with saree. On her legs a box was lying open. Based on the report a case under Exh.P.13 First Information Report came to be registered under Section 302 and 460 IPC and the investigation commenced. After some

time the investigation was transferred to CID (CB) Jaipur. PW 85 Investigation Officer Shiv Prasad Sharma arrested A-1 Atma Ram on 9.4.1986 and on inquiry A-1 Atma Ram gave Exh.P105 information leading to recovery of ornaments under Exh.P8 list. Pursuant to his further information given under Exh. P106 one knife and screw driver came to be recovered under Exh.P.30. PW 85 Investigation Officer Shiv Prasad Sharma arrested A-3 Vijay Kumar on 26.4.1986 and on inquiry A-3 Vijay Kumar gave Exh.P.111 information leading to recovery of ornaments/articles under Exh. P5 Memo. The Investigation Officer arrested the other three accused and during investigation examined the witnesses and recorded statements. PW 83 Tahsildar Durga Prasad Sharma conducted identification proceedings of the recovered articles and prepared 72 identification reports. After completion of the investigation the charge-sheet came to be filed against the accused persons. During the trial the prosecution examined 86 witnesses and marked the relevant documents in support of its case. A-1 Atma Ram examined himself as a defence witness, besides 4 other witnesses were examined on the side of defence. The trial Court found accused guilty of the charges and sentenced them as narrated above, on appeal the conviction and sentences imposed on A-1 Atma Ram and A-3 Vijay Kumar were confirmed and the other accused were acquitted. A-1 Atma Ram and A-3 Vijay Kumar have challenged the same in these appeals.

5. We heard Mrs. Mridul Aggarwal the learned amicus curie appearing on behalf of the appellant Atma Ram and Mr. Bhagwati Prasad the learned senior counsel appearing for the appellant Vijay Kumar and also learned Additional Advocate General appearing for the respondent-State.

6. The prosecution case is that the appellants A-1 Atma Ram and A-3 Vijay Kumar conspired and murdered Keshar Bai and stolen the ornaments/articles possessed by her. Nobody has witnessed the occurrence and the case rests on

circumstantial evidence. In a case based on circumstantial evidence the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

7. The prosecution in order to prove its case mainly relied on the following circumstances:

i) Keshar Bai died of homicidal violence.

ii) A-1 Atma Ram, threatened Keshar Bai of possible income-tax raid and seizure of ornaments possessed by her and persuaded her to shift her residence from village to hospital premise with her belongings.

iii) Accused Radha used to demand the ornaments for wearing from Keshar Bai.

iv) On the information furnished by A-1 Atma Ram and A-3 Vijay Kumar, upon their arrest, the ornaments pledged by various persons with Keshar Bai, got recovered from their possession.

8. PW 14 Dr. Dinesh Singh Choudhary conducted post-mortem on the body of Keshar Bai and found the following ante mortem injuries :

i) Incised wound 1"x1" x 1.5" towards right of neck below jaw till trachea

ii) Three Incised wounds on Lt. Side neck till trachea each measuring as 1¼" x ½" x 1", in the middle 1" x ½" x 1 of below ½" x ¼" x ¼"

iii) Incised wound 2" x ½" x ½" above Rt. Breast

iv) Incised wound 2" x ½" x ½" above Lt. Breast

v) Three incised wounds below Right Breast ½" x ¼" x ¼" IInd 1" x ½" x ¼" IIIrd ½" x ¼" x ¼"

vi) Incised wound Lt. hand from behind 1" x ½" x ½"

vii) Incised wound Rt. hand from behind 1" x ½" x ½"

According to him the cause of death was hemorrhage due to cut of neck vessels. Exh. P24 is the post mortem report issued by him. From the medical evidence it is clear that death of Keshar Bai was homicidal in nature and the first circumstance stood established.

9. Circumstances No.2 and 3 are taken up for discussion together. PW7 Kishore Singh is a resident of village Chhapoli and he has testified that Keshar Bai was a nurse in the hospital and was residing as a tenant in his house on rent of Rs.10 per month for more than a decade and she used to lend loan on interest on mortgage of ornaments and she used to keep the ornaments in a box in the house and a month prior to the occurrence she shifted her residence from his house to the hospital with all her belongings.

10. PW 10 Jaswant Singh is the brother-in-law of Keshar Bai and in his examination-in-chief he has stated that Keshar Bai kept her ornaments in the locker of a bank and A-1 Atma Ram told her that the income-tax people could raid the bank and seize her ornaments and hence Keshar Bai took the ornaments with her. PW 10 has further stated that Keshar Bai used to tell him that accused Radha demanded ornaments from her for wearing and would dance after wearing the same. In the cross examination PW 10 Jaswant Singh has stated that he did not tell in his statement to the police during investigation about the threat made by A1-Atma Ram to Keshar Bai regarding the possibility of an income-tax raid and seizure of

ornaments and also the demand of ornaments made by accused Radha to Keshar Bai and her wearing the same. This Court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence. This witness PW 10 Jaswant Singh was admittedly examined by Investigation Officer during investigation and in that statement he has not stated the facts which he now for the first time stated before the Trial Court. This raises a serious doubt as to the veracity of the said facts [See *Khalil Khan vs. State of M.P.* (2003) 11 SCC 19]. In other words this witness has made material improvement while deposing in the Court and such evidence cannot be safe to rely upon. Thus the evidence adduced by the prosecution to prove the circumstances 2 and 3 does not pass the test of credibility and is liable for rejection.

11. The remaining last circumstance pertains to the recoveries made pursuant to the disclosure made by the appellants. The investigation officer PW 85 Shiv Prasad Sharma has claimed that he arrested A-1 Atma Ram on 9.4.1986 and on inquiry he gave Exh. 105 information which led to the recovery of ornaments mentioned in Exh.P8 list in the presence of witnesses. PW 5 Santbax Singh and PW6 Madanlal Bhavaria are the witnesses to the said recovery. Both of them have testified that accused No.1 Atma Ram took them and the police to his house and entered a room in the court-yard and opened an almirah and took out a plastic bag and handed it over, which contained ornaments of gold and silver and the same was recovered by Memo under Exh. P8 list. The further testimony of the investigation officer is that he arrested A-3 Vijay Kumar on 26.4.1986 and on inquiry he gave Exh.P 111 information which led to the recovery of ornaments under Exh.P5 Memo in the presence of witnesses. PW4 Tota Ram is the witness for the said recovery and according to him A-3 Vijay Kumar took him and the police to his house and produced silver and gold articles and they were recovered under Exh.P5 Memo, which he attested. The relevant portion of Exh.P5 Memo reads as follows:

"Accused Vijay asked for key of lock of Baithak (room) from father through his brother's wife of Kailash, and opened lock and then entered towards right side of Baithak. Where in a Almirah a box (old) was found and opened it, and found a cloth bag (Potali) which was tied up. Accused told that the potali contains ornaments. When potali was opened found the following ornaments of gold and silver and a wrist watch…."

12. Both the above said recoveries have been made from the respective houses of the accused/appellants where their families were residing. In fact A-3 Vijay Kumar obtained the key from his father for opening the lock. In such circumstances it cannot be said that the said articles were in the exclusive possession of the accused/appellants and they came to be recovered only on the information furnished by them. The learned senior counsel and the amicus curie appearing for the appellants strenuously contended that there was no fair identification proceedings of property conducted by Tahsildar and firstly it was conducted belatedly and secondly the witnesses were already shown the articles and thirdly there is no proof that those articles were kept with deceased Keshar Bai and the recovery and identification are unreliable shaky and fake. In this regard reliance was placed on the following decision in *State of Vindhya Pradesh vs. Sarua Munni Dhimar and others* [AIR 1954 V.P. (Vol.41 CN 15)]. The relevant portion reads thus :

"Further as has been observed in connection with identification of accused persons no presumption attaches to identification proceedings of property. It is for the prosecution to establish affirmatively that every necessary precaution was taken to ensure fair identification. The most essential requirement is that the witnesses should not have had an opportunity of seeing the property after its recovery and before its identification before the Magistrate. For that purpose it is necessary to seal the property as soon as it

is recovered and to keep it in a sealed condition till it is produced before the Magistrate. The police officers who take the sealed bundles to the thana after recovery and who take it to the Magistrate for identification proceedings should be examined to prove that the sealed bundles were not tampered with in any way. The sealed bundles should be opened in the presence of the Magistrate conducting the identification proceedings and he should depose about it. The property to be mixed with the property to be identified should also be sealed some days before witnesses are called and the bundle containing it should also be opened in the presence of the Magistrate who should testify about it in court. Further as has been observed in the case of identification proceedings of persons the result of identification as well as the fact whether the property mixed was similar to the property identified should be entered in the memorandum by the Magistrate in his own hand."

13. In the present case about 131 articles of gold and silver were recovered. About 60 witnesses have testified the pledging of their articles with Keshar Bai. The ornaments like 'Gorla', 'Chain of gold', 'madalia'' 'ring', 'Bitti', `Karia', 'Pahunchi', 'hasli' etc. are of same kind lookwise having no special marks on them. Learned senior counsel appearing for A-3 Vijay Kumar brought to our notice that one Pahunchi as per Exh.P5 recovery Memo, which contained 59 Mania (Moti) was recovered along with 6 silver ornaments mentioned therein, whereas in Exh.P.68 a copy of Malkhana register the six silver articles alone are found mentioned and there is no mention of the gold ornament 'pahunchi' as having kept safely in the Malkhana and it is not known as to where it was kept and produced. On a perusal of the said documents, this contention cannot be easily brushed aside. It is the further submission of the learned senior counsel that as per the prosecution case PW 28 Smt. Raj Kanwar has pledged above said 'pahunchi' with Keshar Bai and she has stated in her testimony that her 'pahunchi' was of 40 Mania

(Moti). If it is so the recovered 'pahunchi' is not that of PW 28 Smt. Raj Kanwar. It is doubtful as to whether this recovery claimed by the prosecution is established.

14. It is also the contention of the learned senior counsel that four witnesses examined claimed one ornament as theirs. The identification proceedings of articles was conducted by PW 83 Tahsildar Durga Prasad Sharma in Tehsil and he has claimed to have prepared 72 identification reports. In the cross-examination he has admitted that there were policemen present at the time of identification and he did not know the articles brought to him were in sealed packets or in open condition and he did not remember whether seal used on the packets was official seal since 12 years have already passed. Even he did not know as to who has arranged for articles having similarity to the seized articles for the purpose of identification and identification proceedings were completed in a single day. The Tahsildar even after looking at the Memo was unable to say how many articles of each kind were mixed up with articles to be identified and whether similar articles were new or old, used or unused etc. None of the precaution that ought to have been taken to ensure fair identification was ever taken and no weight can be attached to the evidence of identification of property. Though the trial court has observed in the judgment about the lack of proper identification of the articles, it erroneously proceeded further to accept the same. Recovery of weapons namely knife and screw-driver claimed to have been made on the information given by A-1 Atma Ram is also doubtful. Even assuming to be true that recovery of certain incriminating articles were made at the instance of the accused under Section 27 of the Evidence Act, that by itself cannot form the basis of conviction [See *Wakkar vs. State of U.P.* (2011) 3 SCC 306].

15. In this background we are of the considered opinion that both the Courts below fell in error in coming to the conclusion that the prosecution has established its case based

on circumstantial evidence beyond all reasonable doubt. Benefit of doubt will have to be given to both the appellants.

16. In the result both the appeals are allowed and the conviction and sentence imposed on the appellants by the courts below are set aside and they are acquitted of the charges. They are directed to be released from the custody forthwith unless required otherwise.

R.P. Appeals allowed.

V. SRIHARAN @ MURUGAN
v.
UNION OF INDIA & ORS.
(Transferred Case (Criminal) No. 1 of 2012)

FEBRUARY 18, 2014

[P. SATHASIVAM, CJI, RANJAN GOGOI AND SHIVA KIRTI SINGH, JJ.]

Constitution of India, 1950:

Art. 21 r/w Art. 72/161- Delay in execution of death sentence - Delay of 11 years in decision of mercy petition under Art.72 - Held: Exorbitant delay in disposal of mercy petition renders the process of execution of death sentence arbitrary, whimsical and capricious and, therefore, inexecutable -- Furthermore, such imprisonment, occasioned by inordinate delay in disposal of mercy petitions, is beyond the sentence accorded by the court and to that extent is extra-legal and excessive -- The unreasonable delay caused qualifies as the supervening circumstance, which warrants for commutation of sentence of death into life imprisonment - Death sentence of three petitioners commuted into imprisonment for life - Life imprisonment means end of one's life, subject o remission - Sentence/Sentencing.

Art. 21 - Commutation of death sentence due to delay in its execution- Held: Prolonged delay in execution of death sentence, by itself, gives rise to mental suffering and agony which renders the subsequent execution of death sentence inhuman and barbaric - There is no obligation on the convict to demonstrate specific ill effects of suffering and agony on his mind and body as a prerequisite for commutation of sentence of death.

Arts. 72/161 - Delay in disposal of mercy petition - Held:

Clemency procedure under Art. 72/161 provides a ray of hope to the condemned prisoner and his family members for commutation of death sentence into life imprisonment and, therefore, the executive should step up and exercise clemency power within a reasonable time - Another criteria may be added to the existing yardsticks so as to require consideration of the delay that may have occurred in disposal of a mercy petition.

Art.32 and Art. 72/161 - Writ petition for commutation of death sentence due to delay in decision of many petition - Scope of - Held: relief sought for under these kind of petitions is not per se review of the order passed under Art. 72/161 on merits but on the ground of violation of fundamental rights guaranteed under the Constitution to all the citizens including the death row convicts.

The petitioners filed writ petitions before the High Court seeking a writ of declaration that the execution of sentence of death pursuant to the letter No. F.No.14/1/ 1999-Judicial Cell dated 12.08.2011 issued by the Union of India, was unconstitutional, and prayed for commutation of the sentence of death to imprisonment for life. The writ petitions raised vital issues pertaining to violation of fundamental rights of death row convicts ensuing from inordinate delay caused at the hands of executive in deciding the mercy petitions filed under Art. 72/161 of the Constitution of India, 1950. The writ petitions were transferred to and heard by the Supreme Court of India.

Allowing the petitions, the Court

HELD: 1.1 In Shatrughan Chauhan* this Court has held that unexplained delay in execution of sentence of death on the accused notwithstanding the existence of supervening circumstances, is in violation of Art. 21 of the Constitution. One of the supervening circumstances

sanctioned by this Court for commutation of death sentence into life imprisonment is the undue, inordinate and unreasonable delay in execution of death sentence as it attributes to torture. The two principles stipulated in the judgment for commutation of death sentence into life imprisonment on the ground of delay as the supervening circumstance are: firstly, that the delay occurred must be inordinate and secondly, that the delay must not be caused at the instance of the accused. [para 2-3] [1099-E-G; 1100-E-F]

Shatrughan Chauhan & Anr. vs. Union of India & Ors.* **(2014) 1 SCR 609 - relied on.

1.2 In the instant case, the mercy petitions were rejected by the Governor of Tamil Nadu on 25.04.2000. Consequently, the mercy petitions were forwarded to the President of India on 26.04.2000 for consideration under Art. 72 of the Constitution. The President, on 12.08.2011, rejected these mercy petitions after a delay of more than 11 years. It is, therefore, indisputable that the delay ensued in the given petitions is inordinate and unreasonable and the same was not caused at the instance of the petitioners. Accordingly, the unreasonable delay caused qualifies as the supervening circumstance, which warrants for commutation of sentence of death into life imprisonment as stipulated in Shatrughan Chauhan. [para 5-6 and 15] [1101-C-D; 1103-H; 1104-A-B]

Triveniben vs. State of Gujarat **(1988) 4 SCC 574,** *Sher Singh and Ors. vs. State of Punjab* **(1983) 2 SCC 344 and** *T.V. Vatheeswaran vs. State of Tamil Nadu* **1983 (2) SCR 348 = (1983) 2 SCC 68 - referred to.**

1.3 Exorbitant delay in disposal of mercy petition renders the process of execution of death sentence arbitrary, whimsical and capricious and, therefore, inexecutable. Furthermore, such imprisonment,

occasioned by inordinate delay in disposal of mercy petitions, is beyond the sentence accorded by the court and to that extent is extra-legal and excessive. Therefore, the apex constitutional authorities must exercise the power under Art. 72/161 within the bounds of constitutional discipline and should dispose of the mercy petitions filed before them in an expeditious manner. [para 16] [1104-C-E]

1.4 Delay violates the requirement of a fair, just and reasonable procedure. Regardless and independent of the suffering it causes, delay makes the process of execution of death sentence unfair, unreasonable, arbitrary and capricious and thereby, violates procedural due process guaranteed under Art. 21 of the Constitution and the dehumanizing effect is presumed in such cases. It is in this context, this Court, in past, has recognized that incarceration, in addition to the reasonable time necessary for adjudication of mercy petitions and preparation for execution, flouts the due process guaranteed to the convict under Art. 21 which inheres in every prisoner till his last breath. [para 18] [1105-A-B]

2.1 This Court has consistently held that prolonged delay in execution of death sentence, by itself, gives rise to mental suffering and agony which renders the subsequent execution of death sentence inhuman and barbaric. [para 19] [1105-C]

2.2 There is no requirement in Indian law as well as in international judgments for a death-row convict to prove actual harm occasioned by the delay. There is no obligation on the convict to demonstrate specific ill effects of suffering and agony on his mind and body as a prerequisite for commutation of sentence of death. In the instant case, in the writ petitions all the petitioners highlighted that the delay caused unendurable torture to

them and they repeatedly requested the authorities to forthwith decide their mercy petitions. [para 20-21] [1106-H; 1107-C-D]

3.1 The relief sought for under these kind of petitions is not per se review of the order passed under Art. 72/161 of the Constitution on merits but on the ground of violation of fundamental rights guaranteed under the Constitution to all the citizens including the death row convicts. [para 27] [1110-E-F]

3.2 The clemency procedure under Art. 72/161 provides a ray of hope to the condemned prisoner and his family members for commutation of death sentence into life imprisonment and, therefore, the executive should step up and exercise its time-honored tradition of clemency power guaranteed in the Constitution one-way or the other within a reasonable time. [Para 28] [1110-F-G]

3.3 The mercy petitions filed under Art. 72/161 can be disposed of at a much faster pace, if the due procedure prescribed by law is followed in verbatim. The fact that no time limit is prescribed to the President/Governor for disposal of the mercy petition should compel the government to work in a more systematized manner to repose the confidence of the people in the institution of democracy. This Court implores upon the government to render its advice to the President within a reasonable time so that the President is in a position to arrive at a decision at the earliest. [para 29] [1111-A-C]

3.4 It has been stated that the Union Government, considering the nature of the power under Art. 72/161, has set out certain criteria in the form of circular for deciding the mercy petitions. This Court, therefore, recommends that in view of the recent jurisprudential development with regard to delay in execution, another criteria may be added to the existing yardsticks so as to

require consideration of the delay that may have occurred in disposal of a mercy petition. [para 30] [1111-D-E]

3.5 The death sentence of the three petitioners is commuted into imprisonment for life. Life imprisonment means end of one's life, subject to any remission granted by the appropriate Government u/s 432 of the Code of Criminal Procedure, 1973 which, in turn, is subject to the procedural checks mentioned in the said provision and further substantive check in s. 433-A of the Code. [para 31] [1111-F-G]

Case Law Reference:

(2014) 1 SCR 609	**relied on**	**para 2**
(1988) 4 SCC 574	**referred to**	**para 15**
(1983) 2 SCC 344	**referred to**	**para 15**
1983 (2) SCR 348	**referred to**	**para 15**

CRIMINAL ORIGINAL JURISDICTION : Transferred Case (Criminal) No. 1 of 2012.

Under Article 139 of the Constitution of India.

WITH

T.C. (Crl.) No. 2 of 2012.

T.C. (Crl.) No. 3 of 2012.

Goolam E. Vahanvati, AG, Sidharth Luthra, ASG, Ram Jethmalani, Yug Mohit Chaudhary, Lata Krishnamurti, P.R. Mala, Karan Kalia, Pranav Diesh, Sureshan P., N. Chandrasekaran, Sidhartha Sharma, Jayanth Muthuraj, S. Prabhu Ramasubrmanian, Paarivendhan, Sethu Mahandran, Arnina Pal, Sureshan P., S. Gowthaman, Siddhartha Dave, Ranjana Narayan, N. Pasha, Supriya Juneja, B.K. Prasad,

Shreekant N. Terdal, Subramonium Prasad, M. Yogesh Kanna, A. Santha Kumaran, Vanita C. Giri for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, CJI. 1. The above transferred cases which were borne out of the writ petitions filed by V. Sriharan @ Murugan, T. Suthendraraja @ Santhan and A.G. Perarivalan @ Arivu in the Madras High Court and which got transferred to this Court under Article 139A of the Constitution of India raise vital issues pertaining to violation of fundamental rights of death row convicts ensuing from inordinate delay caused at the hands of executive in deciding the mercy petitions filed under Article 72/161 of the Constitution. In all the writ petitions, the petitioners prayed for a writ of declaration declaring that the execution of the sentence of death, pursuant to the letter No. F.No.14/1/1999-Judicial Cell dated 12.08.2011 issued by the Union of India, is unconstitutional and thus sought for commutation of the sentence of death to imprisonment for life.

2. Akin to this issue was decided by us in a recent judgment viz., *Shatrughan Chauhan & Anr. vs. Union of India & Ors.* [Writ Petition (Criminal) No. 55 of 2013 etc.] decided on 21.01.2014 wherein this Court held that execution of sentence of death on the accused notwithstanding the existence of supervening circumstances, is in violation of Article 21 of the Constitution. One of the supervening circumstances sanctioned by this Court for commutation of death sentence into life imprisonment is the undue, inordinate and unreasonable delay in execution of death sentence as it attributes to torture. However, this Court, cogently clarified in its verdict that the nature of delay i.e. whether it is undue or unreasonable must be appreciated based on facts of individual cases and no exhaustive guidelines can be framed in this regard. The relevant portion of *Shatrughan Chauhan* (supra), is as under:-

> "42) Accordingly, if there is undue, unexplained and inordinate delay in execution due to pendency of mercy petitions or the executive as well as the constitutional authorities have failed to take note of/consider the relevant aspects, this Court is well within its powers under Article 32 to hear the grievance of the convict and commute the death sentence into life imprisonment on this ground alone however, only after satisfying that the delay was not caused at the instance of the accused himself…"
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> "54) … Therefore, in the light of the aforesaid elaborate discussion, we are of the cogent view that undue, inordinate and unreasonable delay in execution of death sentence does certainly attribute to torture which indeed is in violation of Article 21 and thereby entails as the ground for commutation of sentence. However, the nature of delay i.e. whether it is undue or unreasonable must be appreciated based on the facts of individual cases and no exhaustive guidelines can be framed in this regard."

3. Accordingly, the case at hand has to be decided under the guidance of this judgment. The two principles stipulated in the judgment for commutation of death sentence into life imprisonment on the ground of delay as the supervening circumstance are firstly, that the delay occurred must be inordinate and secondly, that the delay must not be caused at the instance of the accused. Let us assess the facts of the given case in the light of established principles in *Shatrughan Chauhan* (supra).

Factual Background:

4. In these petitions, we are concerned only with the rejection of the mercy petitions of the petitioners by the President of India under Article 72 of the Constitution after the confirmation of death sentence by this Court, thus there is no need to traverse the factual details leading up to the imposition of death sentence.

5. Initially, the mercy petitions were filed before the Governor of Tamil Nadu on 17.10.1999 and the Governor, on 27.10.1999, rejected the same. Subsequently, the said rejection was challenged before the Madras High Court in W.P. Nos. 17655-17658 of 1999 on the ground that the mercy petitions were decided without consulting the Council of Ministers, which is unsustainable in law. Accordingly, by order dated 25.11.1999, the Madras High Court set aside the order of rejection of mercy petitions by the Governor and directed to reconsider the mercy petitions afresh. Thereafter, on 25.04.2000, the Governor again rejected the mercy petitions.

6. Consequently, the mercy petitions were forwarded to the President on 26.04.2000 for consideration under Article 72 of the Constitution. The President, on 12.08.2011, rejected these mercy petitions after a delay of more than 11 years. The rejection of the aforesaid petitions was communicated to the petitioners on 25.08.2011. Subsequently, the said rejection was also challenged in W.P. Nos. 20287-20289 of 2011 before the Madras High Court on 29.08.2011. Later, by order dated 01.05.2012, in Transfer Petition (Criminal) Nos. 383-385 of 2011 and 462-464 of 2011, this Court transferred all the three writ petitions to this Court in the interest of justice. Pursuant to the aforesaid order, the Madras High Court transmitted the original records to this Court, which have been registered as Transferred Case (Criminal) Nos. 1-3 of 2012. All the petitioners are currently lodged in the Central Prison, Vellore, Tamil Nadu and they are in incarceration since 1991, i.e., for more than two decades.

7. Heard Mr. Ram Jethmalani, learned senior counsel, Mr. Yug Mohit Chaudhary, learned counsel for the petitioners and Mr. Goolam E. Vahanvati, learned Attorney General and Mr. Sidharth Luthra, learned Additional Solicitor General for the Union of India.

Contentions:

8. The only contention, as projected by Mr. Ram Jethmalani, learned senior counsel and Mr. Yug Mohit Chaudhary, learned counsel for the petitioners is that in view of inordinate delay of more than 11 years in disposal of mercy petitions, the sentence of death imposed upon the petitioners herein is liable to be commuted to life imprisonment as it is violative of Article 21 of the Constitution in addition to various International Conventions, Universal Declarations, to which India is a signatory. In support of their contention, they heavily relied on **Shatrughan Chauhan** (supra).

9. On the other hand, Mr. Goolam E. Vahanvati, learned Attorney General, assisted by Mr. Sidharth Luthra, learned Additional Solicitor General, submitted that the delay caused was not at the instance of the head of the executive and is not unreasonable. They further submitted that even if there was inordinate delay in disposal of mercy petitions in the light of the principles enunciated in **Shatrughan Chauhan** (supra) and also from the information furnished by the petitioners in their affidavits filed before the High Court praying for commutation, the petitioners have not made out a case for passing similar order of commutation as ordered in *Shatrughan Chauhan* (supra).

Points for Consideration:

10. Firstly, as mentioned earlier, the question whether inordinate delay in disposing of mercy petitions is a supervening circumstance for commutation of sentence of death into life imprisonment is well settled in view of the recent verdict in *Shatrughan Chauhan* (supra). As a result, the task before this Court is confined only to finding out whether the nature of delay caused is reasonable or inordinate in the light of the circumstances of the given case and to verify whether the delay was caused at the instance of accused.

11. The second point for consideration before this Court is whether in *Shatrughan Chauhan* (supra), this Court, laid down for actually proving the dehumanizing effect on the accused or mere unreasonable and inordinate delay on face of it is sufficient for commutation of death sentence to life.

Discussion:

12. After having carefully analyzed all the materials and rival contentions, now let us venture to distinctively discuss on the aforesaid issues. At the outset, let us examine whether the delay of 11 years in disposing of mercy petitions is unreasonable and inordinate in the light of the facts of the given case.

13. Following the rejection of mercy petitions of the petitioners herein by the Governor on 25.04.2000, these petitions were forwarded to the Ministry of Home Affairs, Government of India on 04.05.2000. After an unreasonable delay of 5 years and 1 month, on 21.06.2005, the Ministry of Home Affairs submitted the petitioners' mercy petitions to the President for consideration. Thereafter, on 23.02.2011, the Ministry of Home Affairs recalled the petitioners' mercy petitions from the office of the President. Here also, there was a delay of 5 years and 8 months. Ultimately, the President, on 12.08.2011, rejected these mercy petitions after a delay of more than 11 years.

14. Across the bar, learned Attorney General, while explaining the delay ensued i.e., 5 years and 1 month submitted that shortly after the receipt of the mercy petitions in 2000, a note was prepared but thereafter the file was lying in the drawer of some officer of the Ministry of Home Affairs, and, hence, could not be processed. As regards delay of 5 years and 8 months, learned Attorney General fairly admitted that this delay couldn't be explained in any way.

15. It is, therefore, indisputable that the delay ensued in

the given petitions is inordinate and unreasonable and the same was not caused at the instance of the petitioners. Accordingly, the unreasonable delay caused qualifies as the supervening circumstance, which warrants for commutation of sentence of death into life imprisonment as stipulated in *Shatrughan Chauhan* (supra), inter alia, the judicial decisions in *Triveniben vs. State of Gujarat* (1988) 4 SCC 574, *Sher Singh and Ors. vs. State of Punjab* (1983) 2 SCC 344 and *T.V. Vatheeswaran vs. State of Tamil Nadu* (1983) 2 SCC 68.

16. Exorbitant delay in disposal of mercy petition renders the process of execution of death sentence arbitrary, whimsical and capricious and, therefore, inexecutable. Furthermore, such imprisonment, occasioned by inordinate delay in disposal of mercy petitions, is beyond the sentence accorded by the court and to that extent is extra-legal and excessive. Therefore, the apex constitutional authorities must exercise the power under Article 72/161 within the bounds of constitutional discipline and should dispose of the mercy petitions filed before them in an expeditious manner.

17. As regards the second contention, it was argued by learned Attorney General that the test laid down by this Court in cases involving delayed mercy petitions requires the petitioners to actively demonstrate the sufferings occasioned by the delay, and that in the present case, the petitioners have been having a good time in prison and they have not suffered at all. Hence, it is argued that the petitioners are not entitled to relief.

18. Before we advert to respond the aforesaid contention, it is relevant to comprehend the primary ground on the basis of which the relief was granted in cases of delayed disposal of the mercy petition and that is, such delay violates the requirement of a fair, just and reasonable procedure. Regardless and independent of the suffering it causes, delay makes the process of execution of death sentence unfair, unreasonable, arbitrary and capricious and thereby, violates

procedural due process guaranteed under Article 21 of the Constitution and the dehumanizing effect is presumed in such cases. It is in this context, this Court, in past, has recognized that incarceration, in addition to the reasonable time necessary for adjudication of mercy petitions and preparation for execution, flouts the due process guaranteed to the convict under Article 21 which inheres in every prisoner till his last breath.

19. This Court has consistently held that prolonged delay in execution of death sentence, by itself, gives rise to mental suffering and agony which renders the subsequent execution of death sentence inhuman and barbaric. In *Shatrughan Chauhan* (supra), this Court held as under:

> "33) This is not the first time when the question of such a nature is raised before this Court. In *Ediga Anamma vs. State of A.P.,* 1974(4) SCC 443 Krishna Iyer, J. spoke of the "brooding horror of haunting the prisoner in the condemned cell for years". Chinnappa Reddy, J. in *Vatheeswaran* (supra) said that prolonged delay in execution of a sentence of death had a dehumanizing effect and this had the constitutional implication of depriving a person of his life in an unjust, unfair and unreasonable way so as to offend the fundamental right under Article 21 of the Constitution. Chinnappa Reddy, J. quoted the Privy Council's observation in a case of such an inordinate delay in execution, viz., "The anguish of alternating hope and despair the agony of uncertainty and the consequences of such suffering on the mental, emotional and physical integrity and health of the individual has to be seen." …"
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> *** *** ***
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> "39) Keeping a convict in suspense while consideration of his mercy petition by the President for many years is certainly an agony for him/her. It creates adverse physical conditions and psychological stresses on the convict under

> sentence of death. Indisputably, this Court, while considering the rejection of the clemency petition by the President, under Article 32 read with Article 21 of the Constitution, cannot excuse the agonizing delay caused to the convict only on the basis of the gravity of the crime."
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> *** *** ***
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> "43) The procedure prescribed by law, which deprives a person of his life and liberty must be just, fair and reasonable and such procedure mandates humane conditions of detention preventive or punitive. In this line, although the petitioners were sentenced to death based on the procedure established by law, the inexplicable delay on account of executive is unexcusable. Since it is well established that Article 21 of the Constitution does not end with the pronouncement of sentence but extends to the stage of execution of that sentence, as already asserted, prolonged delay in execution of sentence of death has a dehumanizing effect on the accused. Delay caused by circumstances beyond the prisoners' control mandates commutation of death sentence. In fact, in *Vatheeswaran* (supra), particularly, in para 10, it was elaborated where amongst other authorities, the minority view of Lords Scarman and Brightman in the 1972 Privy Council case of *Noel Noel Riley vs. Attorney General,* (1982) Crl. Law Review 679 by quoting "sentence of death is one thing, sentence of death followed by lengthy imprisonment prior to execution is another"."

20. Thus, the argument that the petitioners are under a legal obligation to produce evidence of their sufferings and harm caused to them on account of prolonged delay is unknown to law and will be misinterpretation of *Shatrughan Chauhan* (supra). Such a prerequisite would render the fundamental rights guaranteed under Part III of the Constitution beyond the reach of death-row convicts and will make them nugatory and inaccessible for all intent and purposes. Besides, there is no

requirement in Indian law as well as in international judgments for a death-row convict to prove actual harm occasioned by the delay. There is no obligation on the convict to demonstrate specific ill effects of suffering and agony on his mind and body as a prerequisite for commutation of sentence of death.

21. In any case, the petitioners have extensively pleaded the nature of their sufferings both in the petitions as well as in the reminder letters which each of them repeatedly have sent to the President which remained unheeded. As regards the argument of learned Attorney General, viz., the petitioners were enjoying themselves in prison, a perusal of specific averments in their writ petitions filed before the High Court shows a different picture. All the petitioners highlighted that the delay caused unendurable torture to them and they repeatedly requested the authorities to forthwith decide their mercy petitions.

22. In Transferred Case (Crl.) No. 1 of 2012 (V. Sriharan @ Murugan), in Writ Petition No. 20287 of 2011 filed before the High Court, in para 5, the petitioner has expressed his grievance in the following manner:

> "I state that the extraordinary and unjustified delay in deciding my mercy petition is entirely caused by the office of the Hon'ble President of India. For each day after the sentence of death was confirmed by the Hon'ble Supreme Court, and while my mercy petition was pending before the Hon'ble President of India, my family and I have undergone a living hell not knowing whether I would live or die, and whether I would live to see another day or draw another breath, or whether that day and that breath would be my last. I state that I have been swinging between life and death for these past many years confined in a single cell. I state that I have suffered enough and that it would not be in the interests of justice to compound this suffering by executing me. I submit that the interests of justice would be served by converting the sentence of death to one of life imprisonment. I state that cases where the delay has been less than half of what it is in the present case have been held by the Hon'ble Supreme Court and this Hon'ble Court to be unconscionable and excessive and in breach of Article 21, warranting substitution of death sentence by a sentence of life."

In paragraph 22, the petitioner has stated as under:

> "I state that I have been in custody since 4.6.1991, i.e. for more than 20 years. I have been under sentence of death since the judgment of the trial court on 28.1.1998, i.e. for more than 13 years and 7 months. I further state that after the rejection of my review petition by the Supreme Court on 8.10.1999, i.e. for a period of about 11 years and 10 months, I have lived under the shadow of the hangman's noose. During this period, I have been kept in a single cell, with the threat of imminent death hanging over my head. My mercy petition was filed more than 11 years and 4 months ago (about 4100 days). During this long period, I have suffered excruciating mental agony and torture of a kind that is difficult to imagine or conceptualize. I have been swinging between life and death, believing every waking minute to be my last, not knowing whether I will be spared or not, and when the hangman's noose will close around my neck. Every person passing my prison cell is imagined to be the harbinger of news regarding the outcome of the mercy petition, or the date of my execution. Such torment is a punishment far worse than death."

23. In the year 2005, the petitioner-Sriharan @ Murugan sent a representation to the President of India reminding the pendency of his mercy petition. In that letter, apart from highlighting his pathetic position, he asserted that **"it has been 5 years since I had sent my petition requesting Justice. I live like a moving dead body with the rope tangling in front of my eyes always in solitary confinement. I request justice but not mercy."**

24. In another letter dated 17.06.2006, addressed to the President, he asserted to the sufferings of his family members in the following words:

> "For about 8 years, I have been serving sentence as death sentence convict. So, the sufferings of my parents, brothers, wife and daughter can not be described in words. I ask God daily why they should suffer due to me. No body knows how many times the convicts who are sentenced to death like me die and how many times they dream about their being hanged and no body knows about this truth. No one who loves consciousness, humanity and truth do not fear death. But with the aim of making sacrificial goat, after being sentenced to death, and justice is not done for years together and being harassed and under the circumstances, there is every change for a man to disintegrate. When one's life is unreasonably wasted, no human being can lead life without fear or suffering. This confusion and fear is very bad misery. I have been suffering this for many years. I request you to grant reduction of punishment and render justice at the earliest."

In the subsequent letter dated 10.03.2007, addressed to the President of India, the petitioner has stated:

> "Sir, 16 years have passed since I and my wife were imprisoned. The female child born to us in jail is suffering without security and education as a nomad. During this long time, the suffering undergone and undergoing now by our family members can not be said in words. Thinking of punishing me have punished my entire family. So, my life in jail has become a living death."

In the same way, he also made several subsequent letters to the President highlighting his pathetic position, torture, sufferings of his family, etc.

25. In Transferred Case (Crl.) No. 2 of 2012 (T. Suthendraja @ Santhan) in Writ Petition No. 20288 of 2011 filed before the High Court and Transferred Case (Crl.) No. 3 of 2012 (A.G. Perarivalan @ Arivu) in Writ Petition No. 20289 of 2011 filed before the High Court, both the petitioners/death convicts have expressed their grievance in similar terms like the co-convict Murugan. These petitioners also sent similar letters to the President highlighting their agony in the prison and prayed for earlier disposal of their mercy petitions. They also highlighted sufferings on account of solitary confinement, mental agony, etc.

26. Having perused all the averments specifically averred in the writ petitions as well as the copies of the communication addressed to the Ministry of Home Affairs and to the President of India and also in view of other information/materials available in the affidavit filed before the High Court in the year 2011, we are unable to accept the views expressed by learned Attorney General on this point.

Conclusion:

27. At the outset, we once again clarify that the relief sought for under these kind of petitions is not per se review of the order passed under Article 72/161 of the Constitution on merits but on the ground of violation of fundamental rights guaranteed under the Constitution to all the citizens including the death row convicts.

28. The clemency procedure under Article 72/161 provides a ray of hope to the condemned prisoners and his family members for commutation of death sentence into life imprisonment and, therefore, the executive should step up and exercise its time-honored tradition of clemency power guaranteed in the Constitution one-way or the other within a reasonable time. Profuse deliberation on the nature of power under Article 72/161 has already been said in *Shatrughan Chauhan* (supra) and we embrace the same in the given case as well.

29. We are confident that the mercy petitions filed under Article 72/161 can be disposed of at a much faster pace than what is adopted now, if the due procedure prescribed by law is followed in verbatim. The fact that no time limit is prescribed to the President/Governor for disposal of the mercy petition should compel the government to work in a more systematized manner to repose the confidence of the people in the institution of democracy. Besides, it is definitely not a pleasure for this Court to interfere in the constitutional power vested under Article 72/161 of the Constitution and, therefore, we implore upon the government to render its advice to the President within a reasonable time so that the President is in a position to arrive at a decision at the earliest.

30. Before we conclude, we would also like to stress on one more aspect. We have learnt that the Union Government, considering the nature of the power under Article 72/161, set out certain criteria in the form of circular for deciding the mercy petitions. We hereby recommend that in view of the recent jurisprudential development with regard to delay in execution, another criteria may be added to the existing yardsticks so as to require consideration of the delay that may have occurred in disposal of a mercy petition.

31. In the light of the above discussion and observations, in the cases of V. Sriharan @ Murugan, T. Suthendraraja @ Santhan and A.G. Perarivalan @ Arivu, we commute their death sentence into imprisonment for life. Life imprisonment means end of one's life, subject to any remission granted by the appropriate Government under Section 432 of the Code of Criminal Procedure, 1973 which, in turn, is subject to the procedural checks mentioned in the said provision and further substantive check in Section 433-A of the Code. All the writ petitions are allowed on the above terms and the transferred cases are, accordingly, disposed of.

R.P. Writ Petitions allowed & Transferred Cases disposed of.

RAMESHCHANDRA AMBALAL JOSHI
v.
THE STATE OF GUJARAT AND ANR.
(Criminal Appeal No. 434 of 2014)

FEBRUARY 18, 2014.

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

NEGOTIABLE INSTRUMENTS ACT, 1881:

s.138, proviso(a) - Dishonour of cheque - Presentation of cheque "within a period of six months from the date on which it is drawn" - Connotation of - Held: The word "month" has been defined u/s 3(35) of the General Clauses Act to mean a month reckoned according to the British calendar. Accordingly, the period of six months cannot be calculated on 30 days in a month basis -- Once the word 'from' is used for the purpose of commencement of time, in view of s. 9 of the General Clauses Act, the day on which the cheque is drawn has to be excluded - Cheque drawn on 31.12.2005 and presented on 30.6.2006 was presented within the period prescribed - Therefore, prosecution is not time barred - General Clauses Act, 1897 - ss.3(35) and 9.

WORDS AND PHRASES:

Words, 'from' and 'month' as occurring in s.138(a) of Negotiable Instrument Act, 1881 - Connotation of.

The instant appeal arose out of the criminal proceedings initiated u/s 138 of the Negotiable Instruments Act, 1881 for dishonour of a cheque drawn on 31.12.2005 and presented for payment on 30.6.2006. The accused-appellant filed before the trial court an application for discharge contending that as the period

of six months had lapsed between the date of drawl of the cheque and its presentation, the accused-appellant could not be prosecuted. The application was rejected. The criminal revision of the accused-appellant before the Court of Session and his petition u/s 4823 Cr.P.C. before the High Court were also dismissed.

Dismissing the appeal, the Court

HELD: 1.1 It is apparent from a plain reading of proviso (a) to s. 138 of the Negotiable Instruments Act, 1881 that the Section would apply only when the cheque is presented to the Bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier. [Para 7] [1117-E-F]

1.2 The word "month" has been defined u/s 3(35) of the General Clauses Act to mean a month reckoned according to the British calendar. Accordingly, the period of six months cannot be calculated on 30 days in a month basis. [para 15] [1121-D-E]

1.3 Proviso (a) to s. 138 of the Act uses the expression "six months from the date on which it is drawn". Once the word 'from' is used for the purpose of commencement of time, in view of s. 9 of the General Clauses Act, the day on which the cheque is drawn has to be excluded. Thus, six months would expire one day prior to the date in the corresponding month and in case no such day falls, the last day of the immediate previous month. Therefore, for all purposes, the date on which the cheque was drawn, i.e., 31.12.2005 will be excluded and the period of six months will be reckoned from the next day i.e. from 1.1.2006, as according to the British calendar, the period of six months will expire at the end of the 30th day of June, 2006. Since the cheque was presented on 30.6.2006, it was presented within the period prescribed. Therefore, the prosecution is not time barred and cannot

be scuttled at this stage on this ground. [para 21, 26 and 27] [1123-B-C; 1126-B-E]

Haru Das Gupta v. State of West Bengal, **1972 (3) SCR 329 = (1972) 1 SCC 639;** *Saketh India Ltd. V. India Securities Ltd.* **1999 (1) SCR 963 = (1999) 3 SCC 1;** *Sivakumar vs. Natarajan* **2009 (9) SCR 386 = (2009) 13 SCC 623;** *Econ Antri Ltd. Vs. Rom Industries Ltd. & Anr.* **AIR 2013 SC 3283 - relied on.**

K.V. Muhammed Kunhi vs. P. Janardhanan **[1998 CRL.L.J. 4330] - held in applicable.**

Halsbury's Law of England, **Vol. 37, 3rd Edn., Paragraph 143 at Pages 83-84 - referred to.**

Case Law Reference:

[1998 CRL.L.J. 4330]	**held in applicable**	**para 9**
2009 (9) SCR 386	**relied on**	**para 10**
1999 (1) SCR 963	**relied on**	**para 23**
AIR 2013 SC 3283	**relied on**	**para 24**
1972 (3) SCR 329	**relied on**	**para 27**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 434 of 2014.

From the Judgment and Order dated 20.08.2010 of the High Court of Gujarat at Ahmedabad in Criminal Application No. 2226 of 2009.

V. Giri (A.C.), Huzefa Ahmadi, Anunaya Mehta, Mohd. Sadique T.A., Ejaz Maqbool, Tanima Kishore, Mrigank Prabhakar, Rohan Sharma, Hemantika Wahi, Parul Kumari for the Appearing Parties.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. According to the complainant-respondent No. 2, the accused-petitioner, Rameshchandra Ambalal Joshi was his friend, who had taken a loan of Rs.1,00,000/- (Rupees one lac only) from the complainant. The petitioner issued a cheque dated 31st of December, 2005 towards repayment of the loan. The cheque presented for payment by the complainant on 30th of June, 2006 was dishonoured on the ground of insufficiency of funds on the same day. A registered notice dated 25th of July, 2006 was then sent by the complainant to which the petitioner replied. The complainant then filed Criminal Case No. 2146 of 2006 on 5th of September, 2006 alleging commission of offence under Section 138 of the Negotiable Instruments Act, 1881 (hereinafter referred to as 'the Act') in the Court of Judicial Magistrate, First Class, Borsad, who took cognizance of the offence and issued summons to the petitioner.

2. An application for discharge was filed by the petitioner before the trial court inter alia contending that as a period of six months had lapsed between the date of drawl of the cheque on 31st of December, 2005 and its presentation by the complainant on 30th of June, 2006 for payment, the petitioner cannot be prosecuted. The prayer of the petitioner was rejected by the trial court on its finding that the provisions of discharge were not applicable to the present proceeding, they being in the nature of summons trial.

3. A criminal revision application against the aforesaid order, filed by the petitioner before the Court of Sessions, Anand was rejected by an order dated 5th of May, 2009, which the petitioner assailed in a petition filed under Section 482 of the Code of Criminal Procedure before the High Court. The High Court by its order dated 20th of August, 2010 rejected the application of the petitioner, observing as under:

"7. Though the submission has been made by the learned

counsel, Mr. Hakim raising the contention with regard to the limitation, bare perusal of the provisions of Section 138 of the Negotiable Instrument Act, would make it clear that what law provides is presentation within a period of six months, meaning thereby, the Legislature has provided the period of six months by way of limitation. It is also clear that each month may not have same number of days and, therefore, wisely what has been provided in terms of months and not exact date or days, meaning thereby, 180 days. Therefore, cheque drawn on the last date of month of December would remain valid for a period of six months and the period of six months would expire after the last date of June i.e. 30th June, 2006. Therefore, in the facts and circumstances of the case, as the cheque has already been presented on 30th June, 2006, it cannot be said that it is barred by limitation. Therefore, the submission made by the learned counsel, Hakim cannot be readily accepted."

4. It is against this order that the petitioner has preferred this special leave petition.

5. Leave granted.

6. Mr. Huzefa Ahmadi, learned senior counsel draws our attention to proviso (a) of Section 138 of the Negotiable Instruments Act and contends that to attract its mischief the cheque is required to be presented in the Bank within six months from the date of its drawl. Otherwise, Section 138 of the Act would not apply. Section 138 of the Act, which is relevant for our purpose reads as follows:

> **"138. Dishonour of cheque for insufficiency, etc., of funds in the account.-** Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part,

of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:

Provided that nothing contained in this section shall apply unless-

(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;

xxx xxx xxx"

7. We are in agreement with Mr. Ahmadi and, in fact, it is apparent from a plain reading of proviso (a) aforesaid that Section 138 of the Act would apply only when the cheque is presented to the Bank within a period of six months from the date on which it is drawn or within period of its validity, whichever is earlier.

8. Mr. Ahmadi then points out that the cheque is valid from the date it is drawn and hence period of six months has to be calculated from the said date. On facts, he points out that the cheque was drawn on 31st of December, 2005 and presented on 30th of June, 2006, which is beyond the period of six months. He submits that cheque is valid from the date shown in it and therefore for calculation of six months, the date on which the cheque is drawn has to be included. He has suggested the following two modes of calculation:

"CALCULATION OF THE PERIOD OF 6 MONTHS AS PRESCRIBED UNDER SECTION 138 OF THE NEGOTIABLE INSTRUMENTS ACT, 1881.

DATE OF DRAWL OF CHEQUE - 31.12.2005

DATE OF PRESENTATION OF CHEQUE - 30.06.2006

No. of days in the relevant months	**Month-wise calculation**
January - 31 days	**1st Month** 31st December to 30th January
February - 28 days	**2nd Month** 30th January to 27th February
March - 31 days	**3rd Month** 27th February to 30th March
April - 30 days	**4th Month** 30th March to 29th April
May - 31 days	**5th Month** 29th April to 30th May
June - 30 days	**6th Month** 30th May to 29th June

OR

No. of days in the relevant months	**Month-wise calculation**
January - 31 days	**1st Month** 31st December to 30th January

February - 28 days	**2nd Month** 31ST January to 27th February
March - 31 days	**3rd Month** 28th February to 27th March
April - 30 days	**4th Month** 28th March to 27th April
May - 31 days	**5th Month** 28th April to 27th May
June - 30 days	**6th Month** 28th May to 27th June

9. To put the record straight, the modes suggested, in fact, do not reflect his submission. He, however, submits that whichever mode is adopted, the cheque was not presented within the period of six months. In support of the submission, he has placed reliance on a decision of the Kerala High Court in the case of *K.V. Muhammed Kunhi vs. P. Janardhanan* [1998 CRL.L.J. 4330] and our attention has been drawn to the following passage from the said judgment:

> "3. ……..A comparative study of both the Sections in the Act and the General Clauses Act significantly indicate that the period of limitation has to be reckoned from the date on which the cheque or instrument was drawn. The words 'from' and 'to' employed in Section 9 of the General Clauses Act are evidently clear that in cases where there is an ambiguity or suspicion with reference to the date of commencement of period of limitation in any Act or special enactment, the words 'from' and 'to' employed in Section 9 of the General Clauses Act can be pressed into service. But in the instant case before me, Section 138 proviso (a) is involved which is so clear (as extracted above) that the date of limitation will commence only from the date found in the cheque or the instrument."

10. Mr. Ahmadi submits that the aforesaid view has been approved by this Court in the case of *Sivakumar vs. Natarajan* (2009) 13 SCC 623 in the following words:

> "14. ……..A comparative study of both the Sections in the Act and the General Clauses Act significantly indicate that the period of limitation has to be reckoned from the date on which the cheque or instrument was drawn. The words 'from' and 'to' employed in Section 9 of the General Clauses Act are evidently clear that in cases where there is an ambiguity or suspicion with reference to the date of commencement of period of limitation in any Act or special enactment, the words 'from and 'to' employed in Section 9 of the General Clauses Act can be pressed into service.
>
> We are in agreement with the aforementioned view."

11. It may look like a repetition of the judgment but its relevance would be apparent from what we have observed in the subsequent paragraphs of this judgement.

12. Given the general importance of the question involved, we had requested Mr. V.Giri, learned Senior Counsel, to assist us as amicus curiae and he very generously agreed to do so. We have also heard Ms. Hemantika Wahi, learned counsel appearing on behalf of the respondents.

13. They contend that the period of six months had expired on 30th of June, 2006 i.e. the date on which the cheque was presented, which is within six months from the date it was drawn. They submit that as a general rule, in case of any ambiguity, Section 9 of the General Clauses Act, 1897 provides for exclusion of the first day and inclusion of the last day for the purpose of calculating commencement or termination of time. They submit that the date of issue of cheque, i.e. 31st of December,2005 is to be excluded and the last day, i.e. 30th

of June, 2006 is to be included for the purpose of calculating the period of six months under proviso (a) of Section 138 of the Act. According to the learned counsel, since the last day of the six months' period was 30th of June, 2006 and the cheque was presented on that very same day, the complaint under Section 138 of the Act is not time barred.

14. We have given our most anxious consideration to the submissions advanced and we do not find any substance in the submission of Mr. Ahmadi that the cheque was not presented to the Bank within a period of six months from the date on which it was drawn and the judgments relied on go against him instead of supporting his contention.

15. The first question which calls for our answer is the meaning of the expression "month": whether it would mean only a period of 30 days and, consequently, whether six months would mean a period of 180 days. The word "month" has been defined under Section 3(35) of the General Clauses Act to mean a month reckoned according to the British calendar. Therefore we cannot ignore or eschew the word 'British calendar' while construing "month" under the Act. Accordingly, we are of the opinion that the period of six months cannot be calculated on 30 days in a month basis. Therefore, both the modes of calculation suggested by Mr.Ahmadi do not deserve acceptance and are rejected accordingly.

16. The next question which calls for our answer is the date from which six months' period would commence. In case of ambiguity with reference to the date of commencement, Section 9 of the General Clauses Act can be pressed into service and the same reads as follows:

> **"9. Commencement and termination of time.**-(1) In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from", and, for the purpose of including the last in a series of days or any other period of time, to use the word "to".

17. From the judgment of this Court in the case of *Sivakaumar* (supra) and as quoted in the preceding paragraph of this judgment, it is evident that this Court recorded its agreement to a limited extent that "in cases where there is an ambiguity or suspicion with reference to the date of commencement of period of limitation" "Section 9 of the General Clauses Act can be pressed into service." We would hasten to add that this Court in *Sivakumar* (supra) did not give nod to the following proposition enunciated by the Kerala High Court in *K.V.Muhammed Kunhi* (supra).

> "3.……But in the instant case before me, Section 138 proviso (a) is involved which is so clear (as extracted above) that the date of limitation will commence only from the date found in the cheque or the instrument."

18. In the case of *K.V.Muhammed Kunhi* (supra) the cheque was dated 17.11.1994 and that was presented on 17.5.1995, and in this background the Court observed as follows:

> "5. …. When on the footing of the days covered by the British calendar month the period of limitation in the case on hand is calculated, the cheque ought to have been presented in the Bank for collection on or before 16-5-1995. But in this case, as pointed out above the cheque had been presented for collection only on 17-5-1995, which is clearly barred by limitation."

19. In this case, six months' period expired a day prior to the corresponding month. In the case in hand, no such day falls in the corresponding month and therefore the last day would be last date of the immediate previous month.

20. Mr. Ahmadi appeals to us that if we take the view that the cheque was presented to the Bank before the expiry of six

months, it would be in the teeth of the judgment of this Court in the case of *Sivakumar* (supra) and therefore the matter shall be required to be referred to a larger Bench. From what we have observed above, we have not taken a view different than what has been held in *Sivakumar* (supra) and therefore we do not find any necessity to refer the case to a larger Bench.

21. Proviso (a) to Section 138 of the Act uses the expression "six months from the date on which it is drawn". Once the word 'from' is used for the purpose of commencement of time, in view of Section 9 of the General Clauses Act, the day on which the cheque is drawn has to be excluded.

22. This Court, relying on several English decisions, dealt with the issue of computation of time for the purpose of limitation extensively in *Haru Das Gupta v. State of West Bengal,* (1972) 1 SCC 639 wherein Paragraph 5 states as follows:

> "5. These decisions show that courts have drawn a distinction between a term created within which an act may be done and a time limited for the doing of an act. The rule is well established that where a particular time is given from a certain date within which an act is to be done, the day on that date is to be excluded, (see *Goldsmiths Company v. The West Metropolitan Railway Co.* (1904 KB 1 at 5). This rule was followed in *Cartwright v. Maccormack* (1963) 1 All E.R. 11, where the expression "fifteen days from the date of commencement of the policy" in a cover note issued by an insurance company was construed as excluding the first date and the cover note to commence at midnight of that day, and also in Marren v. Dawson Bentley and Co. Ltd., (1961) 2 QB 135, a case for compensation for injuries received in the course of employment, where for purposes of computing the period of limitation the date of the accident, being the date of the cause of action, was excluded. (See also *Stewart v. Chadman* [1951] 2 KB 792 and In re North, Ex parte

> Wasluck [1895] 2 QB 264.) Thus, as a general rule the effect of defining a period from such a day until such a day within which an act is to be done is to exclude the first day and to include the last day. [See Halsbury's Laws of England (3rd ed.) Vol.37, pp.92 and 95.] There is no reason why the aforesaid rule of construction followed consistently and for so long should not also be applied here."
>
> (underlining ours)

23. This decision was quoted with approval in *Saketh India Ltd. v. India Securities Ltd.,* (1999) 3 SCC 1 in the following words:

> "7. The aforesaid principle of excluding the day from which the period is to be reckoned is incorporated in Section 12(1) and (2) of the Limitation Act, 1963. Section 12(1) specifically provides that in computing the period of limitation for any suit, appeal or application, the day from which such period is to be reckoned, shall be excluded. Similar provision is made in sub-section (2) for appeal, revision or review. The same principle is also incorporated in Section 9 of the General Clauses Act, 1897 which, inter alia, provides that in any Central Act made after the commencement of the General Clauses Act, it shall be sufficient, for the purpose of excluding the first in a series of days or any other period of time, to use the word "from" and for the purpose of including the last in a series of days or any other period of time, to use the word "to".
>
> 8. Hence, there is no reason for not adopting the rule enunciated in the aforesaid case which is consistently followed and which is adopted in the General Clauses Act and the Limitation Act……."

24. The correctness of this judgment came up for consideration before a three-Judge Bench of this Court in *Econ*

Antri Ltd. vs. Rom Industries Ltd. & Anr., AIR 2013 SC 3283 which approved the reasoning of this Court given in *Saketh* (supra) and *Haru Das Gupta* (supra) and held as under:

> "16. We have extensively referred to Saketh. The reasoning of this Court in Saketh based on the above English decisions and decision of this Court in Haru Das Gupta which aptly lay down and explain the principle that where a particular time is given from a certain date within which an act has to be done, the day of the date is to be excluded, commends itself to us as against the reasoning of this Court in SIL Import USA where there is no reference to the said decisions.
>
> xxx xxx xxx
>
> 22. In view of the above, it is not possible to hold that the word 'of' occurring in Section 138(a) and 142(b) of the N.I.Act is to be interpreted differently as against the word 'from' occurring in Section 138(a) of the N.I.Act; and that for the purposes of Section 142(b), which prescribes that the complaint is to be filed within 30 days of the date on which the cause of action arises, the starting day on which the cause of action arises should be included for computing the period of 30 days. As held in Ex parte Fallon (1793) 5 Term Rep 283 the words 'of', 'from' and 'after' may, in a given case, mean really the same thing. As stated in Stroud's Judicial Dictionary, Vol. 3 1953 Edition, Note (5), the word 'of' is sometimes equivalent of 'after'.

25. At this stage, we would also like to refer to *Halsbury's Law of England, Vol. 37, 3rd Edn., Paragraph 143 at Pages 83-84* which provides for calculation of a calendar month:

> "143. Calendar month running from arbitrary date. When the period prescribed is a calendar month running from any arbitrary date the period expires with the day in the succeeding month immediately preceding the day corresponding to the date upon which the period starts; save that, if the period starts at the end of a calendar month which contains more days than the next succeeding month, the period expires at the end of the latter month."

26. Drawing a conclusion from the above mentioned authorities, we are of the opinion that the use of word "from" in Section 138(a) requires exclusion of the first day on which the cheque was drawn and inclusion of the last day within which such act needs to be done. In other words, six months would expire one day prior to the date in the corresponding month and in case no such day falls, the last day of the immediate previous month. Hence, for all purposes, the date on which the cheque was drawn, i.e., 31.12.2005 will be excluded and the period of six months will be reckoned from the next day i.e. from 1.1.2006; meaning thereby that according to the British calendar, the period of six months will expire at the end of the 30th day of June, 2006. Since the cheque was presented on 30.6.2006, we are of the view that it was presented within the period prescribed.

27. Viewed from any angle, the prosecution is not time barred and therefore, cannot be scuttled at this stage on this ground. As the matter is pending since long, the learned Magistrate in seisin of the trial shall make endeavour to conclude it within six months from the date the appellant next appears in the case. We direct the appellant to appear before the trial Judge on 3rd of March, 2014 and no notice is to be issued to him for his appearance.

28. In the result, we do not find any merit in the appeal and it is dismissed accordingly.

R.P. Appeal dismissed.

POLAMRASETTI MANIKYAM & ANR.
v.
TEEGALA VENKATA RAMAYYA & ANR.
(Civil Appeal Nos. 2456-2457 of 2014)

FEBRUARY 19, 2014

[K.S. RADHAKRISHNAN AND VIKRAMAJIT SEN, JJ.]

ANDHRA PRADESH COURT FEES AND SUITS VALUATION ACT, 1956:

s.37 - Computation of court fee in a suit for cancellation of sale deed - For the purpose of court fee and jurisdiction - Held: s.37 contains a special rule for valuing the property for the purpose of court fee and jurisdiction and there is no reason to substitute the expression "value of the property" used in s. 37 with the expression "market value of the property".

In a suit for cancellation of a sale deed, the question for consideration before the trial court was whether s. 37 of the Andhra Pradesh Court Fees and Suits Valuation Act, 1956 authorized the valuation of the suit on the basis of the sale consideration mentioned in the sale deed or on the basis of the market value of the property as on the date of presentation of the plaint for the purpose of court fee and jurisdiction. The Civil Judge took the view that the court fee was to be calculated as per the market value on the date of presentation of the plaint and not as per the value shown on the document. Consequently, it was held that the court had no pecuniary jurisdiction to entertain the suit and the plaint was returned under O. 7, r. 10 CPC for presentation before the proper court. The view was affirmed by the appellate court as also the single Judge of the High Court.

Allowing the appeals, the Court

HELD: 1.1 Section 37 of the Andhra Pradesh Court Fees Act, 1956, which deals with the suits for cancellation of decrees etc., is not governed by other Sections of the Court Fees Act, such as s. 7 and other related provisions. If s. 37 is interpreted in the light of the expression "save as otherwise provided" used in s. 7, it becomes clear that the rule enshrined therein is a clear departure from the one contained in s. 7 read with ss. 24, 26, 28, 29, 34, 35, 42 and 45, which provide for payment of court fee on the market value of the property. In that context, s. 37 is a stand alone provision, wherein the legislature has designedly not used the expression "market value of the property". Section 37, therefore, contains a special rule for valuing the property for the purpose of court fee and jurisdiction and there is no reason to substitute the expression "value of the property" used in s. 37 with the expression "market value of the property". [para 16] [1137-E-H; 1138-A]

Satheedevi v. Prasanna and another **2010 (6) SCR 657 = (2010) 5 SCC 622 - relied on.**

Kolachala Kutumba Sastri v. Lakkaraju Bala Tripura Sundaramma & Ors. **AIR 1939 Mad. 462,** *Lakshminagar Housing Welfare Association v. Syed Sami @ Syed Samiuddin & Ors.* **(2010) 5 ALT 96,** *T.S. Rajam Ammal v. V.N. Swaminathan & Ors.* **AIR 1954 Mad. 152 - disapproved.**

Krishnan Damodaran v. Padmanabhan Parvathy **1972 KLT 774,** P.K. Vasudeva Rao v. K.C. Hari Menon **AIR 1982 Ker 35,** *Pachayammal v. Dwaraswamy Pillai* **2006 (3) KLT 527** *Appikunju Meerasayu v. Meeran* **1964 KLT 895 and** *Uma Antherjanam v. Govindaru Namboodiripad* **1966 KLT 1046,** *Allam Venkateswara Reddy v. Golla Venkatanarayana* **AIR 1975 AP 122;** *Venkata Narasimha Raju v. Chaandrayya* **AIR 1927 Mad 825;** *Navaraja v. Kaliappa Gounder* **(1967) 80 Mad LW 19 (SN) and** *Arunachalathammal v. Sudalaimuthu Pillai* **(1968) 83 Mad LW 789 - stood approved.**

1.2 In the circumstances, the judgment of the High Court is set aside. Consequently, the orders passed by the appellate court as well as the trial court would stand quashed. The trial court is directed to proceed with the suit in accordance with law and the declaration made by this Court. [para 17] [1138-B-C]

Case Law Reference:

AIR 1939 Mad. 462	**disapproved**	**para 3**
(2010) 5 ALT 96	**disapproved**	**para 3**
AIR 1954 Mad. 152	**disapproved**	**para 5**
2010 (6) SCR 657	**relied on**	**para 8**
1972 KLT 774	**stood approved**	**para 10**
AIR 1982 Ker 35	**stood approved**	**para 10**
2006 (3) KLT 527	**stood approved**	**para 10**
1964 KLT 895	**stood approved**	**para 10**
1966 KLT 1046	**stood approved**	**para 10**
AIR 1975 AP 122	**stood approved**	**para 13**
(1967) 80 Mad LW 19 (SN)	**stood approved**	**para 13**
AIR 1927 Mad 825	**stood approved**	**para 13**
(1968) 83 Mad LW 789	**stood approved**	**para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2456-2457 of 2014.

From the judgment and order dated 20.08.2010 in CRP No. 2539 of 2010 and dated 19.01.2011 in CRP 6557 of 2010 of the High Court of A.P. at Hyderabad.

V. Sridhar Reddy (for V.N. Raghupathy) for the Appellants.

Y. Raja Gopala Rao for the Respondents.

The Judgment of the Court was delivered by

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

2. We are, in this case, concerned with the interpretation of Section 37 of the Andhra Pradesh Court Fees and Suits Valuation Act, 1956 (for short "the Court Fees Act") as to whether it authorizes the valuation of the suit on the basis of the sale consideration mentioned in the sale deed or to be valued on the basis of the market value of the property as on the date of presentation of the plaint for the purpose of Court Fee and jurisdiction.

3. Learned Single Judge of the Andhra Pradesh High Court in the impugned judgment placing reliance on the Full Bench judgment of the Madras High Court in *Kolachala Kutumba Sastri v. Lakkaraju Bala Tripura Sundaramma & Ors.* AIR 1939 Mad. 462, and the Division Bench Judgment of the Andhra Pradesh High Court in *Lakshminagar Housing Welfare Association v. Syed Sami @ Syed Samiuddin & Ors.* (2010) 5 ALT 96, held that in a suit for cancellation of sale deed, Court Fee has to be determined on the market value of the property as on the date of presentation of the plaint and not the value shown in the registered sale deed, the legality of which is under challenge in these appeals.

4. The Appellants/Plaintiffs filed O.S. No.114 of 2008 on 21.7.2008 before the Court of Junior Civil Judge, Kothavalasa, seeking, inter alia, the following reliefs :-

"(a) to cancel the alleged sale deed dated 2.8.2002 which was got registered as No.2496/05 by the Sub-Registrar, Kothavalasa on dt. 30 July, 2005 as the orders of District Registrar dt. 26.07.2005 as it was obtained fraudulently;

(b) direct the defendants to pay the cost of the suit."

5. Value of the suit for the purposes of Court Fee and jurisdiction was shown as the value of the deed to be cancelled i.e. Rs.1 lakh. Court Fee of Rs.3,426/- was paid under Section 37 of the Court Fees Act, deposited vide Challan No.4239075 dated 29.7.2008. The Appellants/Plaintiffs filed I.A. No.374 of 2008 under Order IX Rule 1 and 2 CPC for grant of temporary injunction restraining the Respondents therein from interfering with peaceful possession and enjoyment of the property and also filed I.A. No.375 of 2008 and sought an order restraining the Respondents from operating the sale deed until the disposal of the suit. During enquiry in I.A. No.375 of 2008, the Appellants/Plaintiffs got market value certificate dated 4.10.2002 as Exh.A-6 showing the market value of the property as Rs.19,36,000/- by the year 2002 and contended that the alleged sale for Rs.1 lakh was a fraudulent transaction. The Respondents raised an objection that the Civil Judge has no jurisdiction to entertain the suit since the Plaintiff's case is that the market value of the property is more than Rs.1 lakh. It was contended that for cancellation of sale deed, Court Fee has to be calculated on the current market value, but not as per value shown on the document. Reliance was placed on the judgment of the Madras High Court in *Kolachala Kutumba Sastri* (supra) and *T.S. Rajam Ammal v. V.N. Swaminathan & Ors.* AIR 1954 Mad. 152, wherein it was held that in a suit for cancellation of sale deed, Court Fee payable is on the market value of the property involved as on the date of the plaint and not on the consideration recited in it.

6. Learned Civil Judge vide his order dated 25.11.2008 took the view that the Court Fee has to be calculated as per the market value on the date of presentation of the plaint and not as per the value shown on the document. Consequently, it was held that the Court has no pecuniary jurisdiction to entertain the suit and the plaint was returned under Order 7 Rule 10 CPC for presentation before the proper Court.

7. The Appellants/Plaintiffs, aggrieved by the said order, filed C.M.A. No.2 of 2009 in the Court of the Judge, Family Court-cum-District and Sessions Judge, Vizianagaram. The appellate Court dismissed the appeal vide its order dated 29.10.2009 holding that the Court below has no jurisdiction to entertain the suit and the plaint was correctly returned for presentation before the appropriate Court holding that the Court Fee has to be calculated as per the market value of the property as on the date of presentation of the plaint and not on the value shown in the registered sale deed.

8. The Appellant, aggrieved by the said order, filed Civil Revision Petition No.2539 of 2010 before the High Court of Andhra Pradesh, Hyderabad. The learned Single Judge of the Andhra Pradesh High Court, as already stated, placing reliance on the judgment of the Madras High Court in *T.S. Rajam Ammal* (supra) and also the Full Bench decision of the Madras High Court in *Kolachala Kutumba Sastri* (supra) and also a Division Bench judgment of the Andhra Pradesh High Court in *Lakshminagar Housing Welfare Association* (supra), took the view that under Section 37 of the Court Fees Act, for cancellation of the sale deed the suit has to be valued on the basis of the market value of the property governed by the sale deed on the date of presentation of the plaint for the purposes of Court Fee and jurisdiction and not on the basis of sale consideration mentioned in the sale deed. The appellants then filed a review petition being Review CRP No.6557 of 2010 seeking review of the judgment based on the Judgment of this Court in *Satheedevi v. Prasanna and another* (2010) 5 SCC 622. The review petition was, however, dismissed on 19.1.2011. Aggrieved by the same, these appeals have been preferred.

9. We are, in this case, concerned with the interpretation of Section 37 of the Court Fees Act, which reads as follows :-

"37. Suits for cancellation of decrees, etc. - (1) In a suit for cancellation of a decree for money or other property having a money value, or other document which purports

or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest in money, movable or immovable property, fee shall be computed on the value of the subject matter of the suit, and such value shall be deemed to be :-

(a) If the whole decree or other document is sought to be cancelled, the amount or value of the property for which the decree was passed or other document was executed;

(b) If a part of the decree or other document is sought to be cancelled, such part of the amount or of the value of the property.

(2) If the decree or other document is such that the liability under it cannot be split up and the relief claimed relates only to a particular item of property belonging to the plaintiff or to the plaintiff's share in any such property, fee shall be computed on the value of such property, or share or on the amount of the decree, whichever is less.

Explanation : A suit to set aside an award shall be deemed to be a suit for cancellation of a decree within the meaning of this section."

10. When the matter came up for hearing, the learned counsel for either side brought to our knowledge a judgment of this Court in *Satheedevi* (supra) and submitted that a similar issue came up for consideration in the above-mentioned case while interpreting Section 40 of the Kerala Court Fees and Suit Valuation Act, 1959, which is pari materia with Section 37 of the Andhra Pradesh Court Fees and Suits Valuation Act, 1956. While interpreting the scope of Section 40 of the Kerala Act, this Court had occasion to examine the ratio laid down by Full Bench of the Madras High Court in Kolachala *Kutumba Sastri* (supra) and took the view that in the said the interpretation of Section 7(iv-a) of the Court Fee Act, as case, the Madras High

Court was primarily concerned with amended by the Madras Act, which refers to the value of the property simplicitor and the Court interpreted the same as market value. It was pointed out that the Full Bench was not called upon to interpret a provision like Section 40 of the Act. Consequently, it was held that the ratio of that judgment cannot be relied upon for the purpose of interpretation of Section 40 of the Act. While doing so, the Court also opined that the Division Bench judgment of the Kerala High Court in *Krishnan Damodaran v. Padmanabhan Parvathy* 1972 KLT 774, *P.K. Vasudeva Rao v. K.C. Hari Menon* AIR 1982 Ker 35, *Pachayammal v. Dwaraswamy Pillai* 2006 (3) KLT 527 and the learned Single Judge judgments in *Appikunju Meerasayu v. Meeran* 1964 KLT 895 and *Uma Antherjanam v. Govindaru Namboodiripad* 1966 KLT 1046 do not lay down the correct law since the High Court had failed to appreciate that the legislature has designedly used a different language in Section 40 of the Act and the term "market value" has not been used therein.

11. We have already indicated that Section 40 of the Kerala Act and Section 37 of the Court Fees Act are pari materia provisions. Consequently, the reasoning of this Court in *Satheedevi* (supra) could be safely applied when we interpret Section 37 of the Court Fees Act.

12. In *Satheedevi* (supra), this Court while interpreting Section 40 of the Kerala Act held as follows :-

"17. Section 40 deals with suits for cancellation of decrees, etc. which are not covered by other sections. If this section is interpreted in the light of the expression "save as otherwise provided" used in Section 7(1), it becomes clear that the rule enshrined therein is a clear departure from the one contained in Section 7 read with Sections 25, 27, 29, 30, 37, 38, 45 and 48 which provide for payment of court fee on the market value of the property. In that sense, Section 40 contains a special rule.

18. Section 40(1) lays down that in a suit for cancellation of a decree for money or other property having a money value, or other document which purports or operates to create, declare, assign, limit or extinguish, whether in the present or in future, any right, title or interest in money, movable or immovable property, fee shall be computed on the value of the subject-matter of the suit and further lays down that such value shall be deemed to be, if the whole decree or other document sought to be cancelled, the amount or value of the property for which the decree was passed or other document was executed. If a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property constitute the basis for fixation of court fee. Sub-section (2) lays down that if the decree or other document is such that the liability under it cannot be split up and the relief claimed relates only to a particular item of the property belonging to the plaintiff or the plaintiff's share in such property, fee shall be computed on the value of such property, or share or on the amount of the decree, whichever is less.

19. The deeming clause contained in the substantive part of Section 40(1) makes it clear that in a suit filed for cancellation of a document which creates any right, title or interest in immovable property, the court fee is required to be computed on the value of the property for which the document was executed. To put it differently, the value of the property for which the document was executed and not its market value is relevant for the purpose of court fee. If the expression "value of the subject-matter of the suit" was not followed by the deeming clause, it could possibly be argued that the word "value" means the market value, but by employing the deeming clause, the legislature has made it clear that if the document is sought to be cancelled, the amount of court fee shall be computed on the value of the property for which the document was executed and not the market value of the property. The

words "for which" appearing between the words "property" and "other documents" clearly indicate that the court fee is required to be paid on the value of the property mentioned in the document, which is the subject-matter of challenge.

20. If the legislature intended that fee should be payable on the market value of the subject-matter of the suit filed for cancellation of a document which purports or operates to create, declare, assign, limit or extinguish any present or future right, title and interest, then it would have, instead of incorporating the requirement of payment of fees on the value of subject-matter, specifically provided for payment of court fee on the market value of the subject-matter of the suit as has been done in respect of other types of suits mentioned in Sections 25, 27, 29, 30, 37, 38, 45 and 48. The legislature may have also, instead of using the expression "value of the property for which the document was executed", used the expression "value of the property in respect of which the document was executed". However, the fact of the matter is that in Section 40(1) the legislature has designedly not used the expression "market value of the property".

13. Applying the above reasoning, this Court in *Satheedevi* (supra) upheld the view expressed by learned Single Judge of the Andhra Pradesh High Court in *Allam Venkateswara Reddy v. Golla Venkatanarayana* AIR 1975 AP 122 and the Division Bench judgment of the Madras High Court in *Venkata Narasimha Raju v. Chaandrayya* AIR 1927 Mad 825, *Navaraja v. Kaliappa Gounder* (1967) 80 Mad LW 19 (SN) and *Arunachalathammal v. Sudalaimuthu Pillai* (1968) 83 Mad LW 789 and ruled that those judgments have laid down the correct law.

14. This Court in *Satheedevi* (supra), therefore, gave its seal of approval to the judgment of learned Single Judge of the

Andhra Pradesh High Court in *Allam Venkateswara Reddy* (supra), wherein learned Single Judge took the view that in a suit for cancellation of sale deed which was executed for a specified amount, the Court Fee has to be paid on that amount and not on the basis of the market value of the property at the presentation of the plaint.

15. The Andhra Pradesh High Court in the impugned judgment, while interpreting Section 37 of the Court Fees Act, placed reliance on the Division Bench judgment in *Lakshminagar Housing Welfare Association* (supra), wherein the Bench, as already indicated, placed reliance on the Full Bench judgment of the Madras High Court in Kolachala Kutumba Sastri (supra), though a reference was made to the learned Single Judge Bench judgment in *Allam Venkateswara Reddy* (supra). Since we are in agreement with the reasoning in *Satheedevi* (supra), which has given its seal of approval to the reasoning of the learned Single Judge judgment of the Andhra Pradesh High Court in *Allam Venkateswara Reddy* (supra), the judgment of the Division Bench in *Lakshminagar Housing Welfare Association* (supra) is no more good law.

16. We are of the view, Section 37 of the Court Fees Act, which deals with the suits for cancellation of decrees etc. is not governed by other Sections of the Court Fees Act, such as Section 7 and other related provisions. If Section 37 of the Court Fees Act is interpreted in the light of the expression "save as otherwise provided" used in Section 7 of the Court Fees Act, it becomes clear that the rule enshrined therein is a clear departure from the one contained in Section 7 read with Sections 24, 26, 28, 29, 34, 35, 42 and 45, which provide for payment of Court Fee on the market value of the property. In that context, we are also of the view that Section 37 is stand alone provision, wherein the legislature has designedly not used the expression "market value of the property". Section 37 of the Court Fees Act, therefore, contains a special rule for valuing the property for the purpose of Court Fee and jurisdiction and

we do not see any reason why the expression "value of the property" used in Section 37 be substituted with the expression "market value of the property".

17. In such circumstances, we are inclined to set aside the judgment of the High Court and allow these appeals. Consequently, the orders passed by the appellate Court as well as the High Court would stand quashed. The trial Court is directed to proceed with the suit in accordance with law and the declaration made by this Court.

18. The Appeals are, accordingly, allowed. However, there will be no order as to costs.

R.P. Appeals allowed.

PASUPULETI SIVA RAMAKRISHNA RAO
v.
STATE OF A. P. & ORS.
(Criminal Appeal No. 466 of 2014)

FEBRUARY 20, 2014

[H. L. DATTU AND S. A. BOBDE, JJ.]

PENAL CODE, 1860: s.307 r/w s.34, s.452; s.324 - Attempt to murder - Attack on victim when he was sitting in worker union office - Accused entered the office and attacked victim with cold drink bottles lying there and strangulated him with telephone wire and hit him iron rod - Trial court found them guilty u/s.307 r/w s.34 and s.452 - High Court modified conviction u/s.307 r/w s.34 to s.324 holding that accused had not come to the place of incident with dangerous weapons nor caused injuries on the vital part of the body and set aside conviction u/s.452 on the ground that the victim was sitting at the Union Office and not at any private place - On appeal by complainant, held: The plea that the act of strangulating a person by the throat by a telephone wire and pulling it from both sides would not attract s.307 cannot be accepted - The first part of s.307 makes any act committed with the intention or knowledge that it would amount to murder if the act caused death punishable with imprisonment up to ten years, the second part makes such an act punishable with imprisonment for life if hurt is caused thereby - Thus, even if act does not cause any injury it is punishable with imprisonment up to 10 years - If it does cause an injury and therefore hurt, it is punishable with imprisonment for life - s.307 does not require that the hurt should be grievous or of any particular degree - The intention to cause death is clearly attributable to the accused since the victim was strangulated after throwing a telephone wire around his neck and telling him that he should die - Further, the law protects any house from trespass and

further protects persons within the house from being assaulted or even put in fear of hurt or wrongful restraint within their own house - There is nothing in s.452 to suggest that the use to which the house is put makes any difference - The accused were not entitled to be acquitted for the offences u/s.452 r/w s.34 - The judgment of the High Court is set aside and the judgment of the trial court is restored.

The prosecution case was that PW-1 was the President of workers union. The accused were annoyed with PW-1 as he had collected donation for marriage of driver's daughter from their locality. On the fateful day, when PW-1 was sitting in Union Office, the accused persons entered the Office and attacked PW-1. A-1 picked up a cold drink bottle from there and hit PW-1 on head and thereafter along with A-2 and A-3 tied telephone wire around his neck and pulled it from both sides to strangulate him. A-4 then attacked him with iron rod. PW-1 was somehow rescued. Charges were framed against the accused persons under Sections 307 and 452 IPC r/w Section 34 IPC and trial court convicted them under the charged offences. On appeal, the High Court accepted that the accused tied a telephone wire around the neck of P.W. 1 and pulled it from both sides but observed that this act may not actually amount to being dangerous. Further observing that no intention could be attributed to the accused to cause the death of P.W. 1 since the accused had not come to the scene with dangerous weapon or caused injuries on the vital part of the body, the High Court modified the conviction under Section 307 IPC r/w Section 34 IPC to Section 324 IPC. As regards the charge under Section 452 IPC, the High Court observed that the incident occurred when P.W. 1 was in the Union Office and not at any private place and, therefore, ipso facto set aside the conviction and sentence under Section 452 IPC r/w Section 34 IPC. Aggrieved, the complainant filed the instant appeal.

Allowing the appeal, the Court

HELD: 1. It is not possible to accept the contention in the circumstances of the case that the act of strangulating a person by the throat by a telephone wire and pulling it from both sides does not amount to the commission of the offence of attempt to commit murder under Section 307 IPC. The first part of Section 307 IPC makes any act committed with the intention or knowledge that it would amount to murder if the act caused death punishable with imprisonment up to ten years. The second part makes such an act punishable with imprisonment for life if hurt is caused thereby. Thus even if the act does not cause any injury it is punishable with imprisonment up to 10 years. If it does cause an injury and therefore hurt, it is punishable with imprisonment for life. [Para 16] [1149-B-D]

2. There is no merit in the contention that the statement of Medical Officer that there is no danger to life unless there is dislocation or rupture of the thyroid bone due to strangulation means that the accused did not intend, or have the knowledge, that their act would cause death. The circumstances of this case clearly attract the second part of Section 307 since the act resulted in injury No.5 which is a ligature mark of 34 cm x 0.5 cm. Section 307 IPC provides for imprisonment for life if the act causes 'hurt'. It does not require that the hurt should be grievous or of any particular degree. The intention to cause death is clearly attributable to the accused since the victim was strangulated after throwing a telephone wire around his neck and telling him he should die. Also, there is no merit in the contention on behalf of the appellant that there was no intention to cause death because the victim admitted that the accused were not armed with weapons. Very few persons would normally describe the Thums-up bottle and a telephone wire used as weapons. That the victim honestly admitted that the accused did not have any weapons cannot be held against him and in favour of the accused. [para 17] [1150-F-H; 1151-A-B]

3. This is a clear case of intention to commit the murder of P.W. 1 the appellant and the accused acted in concert and committed an offence under Section 307 IPC. As regards the setting aside of the conviction by the High Court under Section 452 IPC, the reasoning is completely unacceptable and untenable. The High Court simply set aside the conviction of the accused under Section 452 IPC r/w Section 34 IPC only on the ground that the victim was sitting at the Union Office and not at any private place. There is no doubt that the trespass was into a house and that the appellant entered the office having prepared to assault the victim and in any case for putting him in fear of hurt or of assault. There is nothing in Section 452 IPC to suggest that the use to which the house is put makes any difference. It is not the requirement of Section 452 IPC that for a trespass to be an offence the house must be a private place and not an office. The law protects any house from trespass, vide Section 448 IPC and further protects persons within the house from being assaulted or even put in fear of hurt or wrongful restraint within their own house. The accused were not entitled to be acquitted for the offences under Section 452 IPC read with Section 34 IPC. The judgment of the High Court is set aside and the Judgment of the trial court is restored. [Paras 18, 19, 20, 21] [1151-B-D, F-H; 1152-A-B]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 466 of 2014.

From the Judgment and order dated 01.02.2007 of the High Court of A.P. at Hyderabad in CRLA No. 719 of 2003.

A.T.M. Rangaramanujam, Altaf Ahmed, Annam D.N. Rao, A. Venkatesh, Neelam Jain, Sudipto Sircar, D. Mahesh Babu, Suchitra Hrangkhawl, Amjid Maqbool, Amit K. Nain, Aditya Jain, Ramakrishna Rao, D. Bharathi Reddy, G. Pramod Kumar, Guntur Prabhakar for the Appearing Parties.

The Judgment of the Court was delivered by

S.A. BOBDE, J. 1. Leave granted.

2. The appellant/defacto complainant has filed this appeal against the judgment dated 1st February, 2007 passed by the learned Single Judge of the High Court of Judicature at Andhra Pradesh. The High Court allowed the appeal in part, and acquitted the accused for the offences under Section 452 read with Section 34 of the Indian Penal Code [hereinafter referred to as "IPC"]. The High Court further modified the conviction and sentence under Section 307 read with Section 34 IPC to one under Section 324 IPC and accordingly reduced the sentence of 10 years to rigorous imprisonment for two months each and also to fine of Rs. 2,000/- each, in default to suffer simple imprisonment for a period of six months. Further, an amount of Rs. 4,000/- is directed to be paid by each of the accused collectively as compensation to P.W. 1 (Pasupuleti Siva Ramakrishna Rao) - the victim. Earlier, the Trial Court convicted the accused as follows:

A-1 to A-4 under Section 452 read with Section 34 IPC for rigorous imprisonment for 7 years and fine of Rs. 100/- each, in default, to suffer simple imprisonment for a period of 3 months each and under Section 307 read with Section 34 IPC for rigorous imprisonment for 10 years and fine of Rs. 100/- each, in default, to suffer simple imprisonment for a period of 3 months each.

Aggrieved by the Judgment passed by the High Court, the present appeal is filed.

3. The prosecution case is that the victim P.W. 1

(Pasupuleti Siva Ramakrishna Rao) was the President of Bhimavaram Taluk Lorry Workers Union. A-1 - Chintha Srinivasa Rao @ Bandi Srinu and A-2 - Chintha Krishna @ Bandi are brothers. A-4 -Chintha Lakshmana Rao is their cousin. A-3 -Addla Umamaheswara Rao is the close associate of A-1, A-2 and A-4. They are all residents of Bhimavaram. About a fortnight prior to the date of incident - 20.04.1998, the victim P.W. 1 (Pasupuleti Siva Ramakrishna Rao) and some other Lorry Workers collected Rs. 10,000/- as donations to perform the marriage of the daughter of a poor lorry worker. That incensed the accused who believed that P.W. 1 (Pasupuleti Siva Ramakrishna Rao) ought not to have collected donations from their locality. On 20.04.1998 at about 8.00 pm when P.W. 1 (Pasupuleti Siva Ramakrishna Rao) was in the Lorry Workers Union Office near Anakoderu Canal in Undi Road, Bhimavaram, the accused armed with deadly weapons entered the office, abused P.W. 1 (Pasupuleti Siva Ramakrishna Rao) in filthy language and threatened him with death because he had collected donations from their area. They attacked him. A-1 - Chintha Srinivasa Rao hit him on his head with the cool drink bottle causing a grievous injury and instigated other accused to tie a telephone wire around his neck to kill him. He along with A-2 - Chintha Krishna and A-3 - Addla Umamaheswara Rao tied the telephone wire around the neck of P.W. 1 (Pasupuleti Siva Ramakrishna Rao) and pulled it from both sides to strangulate him with the intention to kill him. A-4 - Chintha Lakshmana Rao beat him on his right cheek with an iron rod. A-2 - Chintha Krishna beat him on the forehead and A-3 - Addla Umamaheswara Rao and A-4 - Chintha Lakshmana Rao beat him on the left eye and on the cheek. On making a hue and cry, P.W. 1 (Pasupuleti Siva Ramakrishna Rao) was rescued by others, who were present. On a complaint, Crime No. 85/98 under Sections 307 and 452 IPC read with Section 34 IPC was registered, investigated and a charge sheet was filed against all the accused. Charges were framed and read over to the accused. They did not plead guilty.

4. P.Ws. 1 to 11 were examined and Exhibits P1 to P17 were marked apart from M.Os. 1 to 5 on behalf of the prosecution. No oral evidence was adduced on behalf of the accused.

5. The learned trial Judge convicted and sentenced the accused as indicated above.

6. P.W. 3 (Kotipalli Srinivas) and P.W. 5 (Sunkara Sreenivasa Rao) eye witnesses were declared hostile. P.W. 7 (Marri Sambhasiva) is the circumstantial witness. P.W. 8 (Dirisala Murali) is the photographer. P.W. 9 (Grandhi Sree Rama Murthy) is the panch witness.

7. P.W. 10 (Dr. B. Swarajya Lakshmi, C.A.S.) is the medical officer, who examined P.W. 1 (Pasupuleti Siva Ramakrishna Rao) and found the following injuries:

"1. Irregular bleeding lacerated injury of 3 cm x ¼ cm x ¼ cm size present on the left parietal region of the scalp.

2. A contusion of 3 cm x size present lateral to the left eye with overlying abrasion of ¼ cm size red in colour.

3. A contusion of 2 cm x 1 cm size present on the left eye upper eye lid.

4. A contusion of 4 cm with abrasion of ¼ cm size present lateral on the right side of the fore head.

5. Ligature mark of 34 cm x 0.5 cm size present below the thyroid cartilage on the front, right side and left side of the neck, red in colour.

6. A contusion of 2 cm x 1 cm size present on the right temple.

7. A contusion of 2 cm x 2 cm size present on the right cheek.

8. An oblique abrasion of 10 cm x 5 cm size present on the ventral aspect of the left arm, red in colour."

8. The Medical Officer [MO] opined that Injury No. 5 endangered the life of P.W. 1 (Pasupuleti Siva Ramakrishna Rao). That the other injuries are simple in nature and could have been caused as alleged.

9. P.W. 1 (Pasupuleti Siva Ramakrishna Rao) deposed that he collected donations for performing the marriage of the daughter of Pasupuleti Satyanarayan, a driver and a poor man. The accused questioned and threatened him about the collection of contribution from their territory and warned him that they would take away his life. On 20.04.1998 at about 8.00 PM when he was in the Lorry Workers Union Office, the accused trespassed into the Union Office and abused him. They told him that he cannot become a leader of their territory and collect donations and they would not leave the Office unless they beat him. A-1 - Chintha Srinivasa Rao beat him on his head with a cool drink (Thums up) bottle and said he should die. He directed others to tie a telephone wire around his neck therefore A-2 - Chintha Krishna beat him on the forehead and A-3 - Addla Umamaheswara Rao tied a telephone wire around his neck and pulled wire. Then A-4 - Chintha Lakshmana Rao beat him with the rod on his right cheek along with abuses. A-2 - Chintha Krishna also beat him with the rod on his forehead and A-3 - Addla Umamaheswara Rao and A-4 - Chintha Lakshmana Rao beat him on the upper side of his eyebrow and his cheek. He named others who were present and intervened to rescue him stating that but for that he would have been killed. His shirt was stained with his blood. They left behind the broken Thums-up bottle, telephone wire and iron rod. He was hospitalized for about 20 days. In cross examination his version was not shaken. He accepted that the accused were not armed with any weapon and said that the Thums-up bottle broke on his head, because of the impact. The deposition of other witnesses support the version of the injured witness - P.W. 1 (Pasupuleti Siva

Ramakrishna Rao). We have not referred to the depositions of witnesses who have been declared hostile since such declaration is not of much consequences in this case. The other depositions are in tune with the deposition of PW1, the injured witness.

10. The Trial Court correctly appreciated the evidence and rejected the argument that the other witnesses were not reliable because they were interested witnesses. As regards charge under Section 34 IPC, the Trial Court relied on the settled position in law that it is not necessary that there should be a clear positive evidence about the meeting of mind before the occurrence and that if there are more than one accused a common intention to kill can be inferred from the circumstances of the case. The prosecution need not prove the overt act of the accused. As regards the charge under Section 452 IPC the Trial Court held that there was clear intention of accused here and that it was clearly established that the accused went to the office of P.W. 1 (Pasupuleti Siva Ramakrishna Rao) in a car and the other circumstances clearly establish that there was preparation for committing the offence. As noticed earlier, the Trial Court convicted and sentenced accused under Section 452 IPC for 7 years and under Section 307 IPC for 10 years read with Section 34 IPC.

11. The High Court in appeal, referred to the deposition of P.W. 1 (Pasupuleti Siva Ramakrishna Rao) where he had honestly admitted that accused did not come there armed with any weapon. The Appellate Court observed that the injuries were not only simple but were trivial. As regards Injury No. 5, it observed that though the Medical Officer stated that the injury was dangerous to life, it is not clear as to how the witness stated so, meaning thereby that there was no explanation for the medical opinion. Even though the High Court noticed that this injury is a ligature mark of 34 cm x 0.5 cm size around the neck. The High Court accepted that the accused tied a telephone wire around the neck of P.W. 1 (Pasupuleti Siva Ramakrishna Rao)

and pulled it from both sides but observed that this act may not actually amount to being dangerous. It was of the opinion that if a knife is used and only a grazing injury is caused but no actual stabbing is done on any vital part of the body, it cannot be said that the injury is dangerous. Further observing that no intention could be attributed to the accused to cause the death of P.W. 1 (Pasupuleti Siva Ramakrishna Rao) since the accused had not come to the scene with dangerous weapon or caused injuries on the vital part of the body, the High Court modified the conviction under Section 307 IPC read with Section 34 IPC to Section 324 IPC.

12. As regards the charge under Section 452 IPC, the High Court observed that the incident occurred when P.W. 1 (Pasupuleti Siva Ramakrishna Rao) was in the Lorry Workers Union Office and not at any private place and hence ipso facto set aside the conviction and sentence under Section 452 IPC read with Section 34 IPC.

13. During the pendency of this matter, respondent Nos. 4 & 5, namely, Addla Umamaheswara Rao (accused No. 3) and Chintha Lakshmana Rao (accused No. 4) expired. Hence the special leave petition insofar as those respondents has already abated, vide order dated 04.02.2014.

14. Shri Altaf Ahmed, senior advocate, appearing for respondents 2 to 5 vehemently supported the Judgment of the High Court to the extent that it has rightly held that Section 307 IPC is not attracted and neither was Section 452 IPC. He also opposed the conviction under Section 324 IPC on the ground that no dangerous weapon or means were used for causing the injury which according to the learned counsel was simple in nature.

15. As regards the act of the tying the telephone wire around the neck and pulling it on both sides and causing an injury thereby, the learned counsel for the accused, heavily relied on a statement in the cross examination of the Medical

Officer that the Injury No. 5 is simple in nature and the further statement that if the strangulation is of high nature the thyroid bone may be dislocated and ruptured and that there is no danger to life unless there is dislocation or rupture of the thyroid bone.

16. It is not possible to accept this contention in the circumstances of the case that the act of strangulating a person by the throat by a telephone wire and pulling it from both sides, which is proved here, does not amount to the commission of the offence of attempt to commit murder under Section 307 IPC. The first part makes any act committed with the intention or knowledge that it would amount to murder if the act caused death punishable with imprisonment up to ten years. The second part makes such an act punishable with imprisonment for life if hurt is caused thereby. Thus even if the act does not cause any injury it is punishable with imprisonment up to 10 years. If it does cause an injury and therefore hurt, it is punishable with imprisonment for life. The Section reads as under:

> **"307. Attempt to murder.**-- Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to [imprisonment for life], or to such punishment as is hereinbefore mentioned.
>
> **Attempts by life convicts.** - When any person offending under this section is under sentence of [imprisonment for life], he may, if hurt is caused, be punished with death.]
>
> Illustrations
>
> (a) A shoots at Z with intention to kill him, under such

> circumstances that, if death ensued A would be guilty of murder. A is liable to punishment under this section.
>
> (b) A, with the intention of causing the death of a child of tender years, exposes it in a desert place A has committed the offence defined by this section, though the death of the child does not ensue.
>
> (c) A, intending to murder Z, buys a gun and loads it. A has not yet committed the offence. A fires the gun at Z. He has committed the offence defined in this section, and, if by such firing he wounds Z, he is liable to the punishment provided by the latter part of [the first paragraph of] this section.
>
> (d) A, intending to murder Z by poison, purchases poison and mixes the same with food which remains in A' s keeping; A has not yet committed the offence in this section. A places the food on Z's table or delivers it to Z's servants to place it on Z's table. A has committed the offence defined in this section."

17. There is no merit in the contention that the statement of Medical Officer that there is no danger to life unless there is dislocation or rupture of the thyroid bone due to strangulation means that the accused did not intend, or have the knowledge, that their act would cause death. The circumstances of this case clearly attract the second part of this Section since the act resulted in injury No.5 which is a ligature mark of 34 cm x 0.5 cm. It must be noted that Section 307 IPC provides for imprisonment for life if the act causes 'hurt'. It does not require that the hurt should be grievous or of any particular degree. The intention to cause death is clearly attributable to the accused since the victim was strangulated after throwing a telephone wire around his neck and telling him he should die. We also do not find any merit in the contention on behalf of the appellant that there was no intention to cause death because the victim admitted that the accused were not armed with weapons. Very

few persons would normally describe the Thums-up bottle and a telephone wire used as weapons. That the victim honestly admitted that the accused did not have any weapons cannot be held against him and in favour of the accused.

18. We are thus of the view that this is a clear case of intention to commit the murder of P.W. 1 (Pasupuleti Siva Ramakrishna Rao) the appellant and the accused acted in concert and committed an offence under Section 307 IPC. As regards the setting aside of the conviction by the High Court under Section 452 IPC, we find the reasoning completely unacceptable and untenable. The High Court has simply set aside the conviction of the accused under Section 452 IPC read with Section 34 IPC only on the ground that the victim was sitting at the Lorry Workers Union Office and not at any private place. Section 452 of the IPC reads as follows:

> **"452. House-trespass after preparation for hurt, assault or wrongful restraint.**- Whoever commits house-trespass, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting and person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

19. There is no doubt that the trespass was into a house and that the appellant entered the office having prepared to assault the victim and in any case for putting him in fear of hurt or of assault. There is nothing in Section 452 IPC to suggest that the use to which the house is put makes any difference. It is not the requirement of Section 452 IPC that for a trespass to be an offence the house must be a private place and not an office. The law protects any house from trespass, vide Section 448 IPC and further protects persons within the house from being assaulted or even put in fear of hurt or wrongful restraint within their own house.

20. We thus find that the accused were not entitled to be acquitted for the offences under Section 452 IPC read with Section 34 IPC.

21. We accordingly set aside the judgment of the High Court and restore the Judgment of the Trial Court dated 31st July, 2003 passed by the learned Assistant Sessions Judge, Bhimavaram in Sessions Case No. 234 of 1999. The respondent Nos. 2 [A-1-Chintha Srinivasa Rao] and 3 [A-2-Chintha Krishna] are sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs. 100/- each, in default to suffer simple imprisonment for a period of three months each for the offence under Section 452 with Section 34 IPC. The respondent Nos. 2 [A-1-Chintha Srinivasa Rao] and 3 [A-2-Chintha Krishna] are also sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 100/- each, in default simple imprisonment for a period of three month each for the offence under Section 307 read with Section 34 IPC. Both the sentences shall run concurrently. Sentence already undergone, if any, shall be set off.

22. Accordingly this appeal is allowed. The respondent Nos. 2 [A-1-Chintha Srinivasa Rao] and 3 [A-2-Chintha Krishna] are directed to surrender before Judicial Magistrate/ Superintendent of Police concerned forthwith. In case, they failed to do so within one month, steps be taken, in accordance with law, to apprehend them.

D.G. Appeal allowed.